

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

JENNIFER DeCESARE,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	98-3851
	:	
NATIONAL RAILROAD	:	
PASSENGER CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM

R.F. KELLY, J.

MAY, 1999

In Count One of her Complaint, Jennifer DeCesare ("Plaintiff"), alleges that the National Railroad Passenger Corporation ("Defendant") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., in each of the following respects by (a) subjecting Plaintiff to sexual harassment and to a hostile working environment; and (b) by discriminating against Plaintiff in the terms, conditions and privileges of her employment on the basis of her sex.

In Count Two of her Complaint, Plaintiff alleges negligent/intentional infliction of emotional distress as a result of Defendant's foreman, Larry Platt's ("Platt") conduct. Defendant filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and Plaintiff responded. For the reasons that follow, the Defendant's Motion will be granted.

I. BACKGROUND.

Plaintiff was a coach cleaner employed by Defendant at its Bear, Delaware Maintenance Facility. Plaintiff currently works as a Car Repairman at that facility. For two brief periods in 1995 and 1996, Platt served as Plaintiff's foreman. Specifically, he oversaw her work for approximately two weeks in the fall of 1995, and for about a month-and-a-half in September and October of 1996. As a foreman for Defendants, Platt directed the work of subordinate employees, collected their time cards, and kept track of their attendance. However, Platt did not have the authority to hire, fire, discipline, transfer or write them up.

Plaintiff contends that during the brief periods that Platt was her foreman, he engaged in inappropriate conduct. Plaintiff contends that in the fall of 1995, one instance of this conduct took place. Plaintiff alleges, "[t]he one night I was - we have a cafeteria, and I was bending over the tables and he came up behind me and said, that's a dangerous position for a woman to be - for a woman like you to be in." (DeCesare Dep. 106). Plaintiff did not report Platt's comment to anyone in management, however, she did mention it to her union representative.¹

¹ Plaintiff's union representative did not take any further action at this time. Thus, Defendant was not notified of any offensive conduct allegations until a later date.

Plaintiff had no contact with Platt again until about a year later. From September through October, 1996, Platt again became Plaintiff's foreman. Plaintiff alleges that during this particular period, Platt carried out acts of offensive conduct in each of the following instances:

(a) Platt made a comment to Plaintiff that "those Barr boys are awful [sic] big, how do you handle all that."² (DeCesare Dep. 118.);

(b) Plaintiff felt that Platt while staring at her, would grunt or chew on a toothpick or straw and take his tongue and roll it across his lips;

(c) Platt, when Plaintiff asked what was around his neck, grabbed and rubbed his crotch area and said that it was his "extension" and started laughing.³

(d) Platt became critical of Plaintiff's work, became unpleasant toward her and gave her undesirable and additional job duties.

All of this conduct allegedly reached a crescendo on

² Platt apparently was referring to Plaintiff's fiancée, Bruce Barr, and his brother, both of whom also worked for Amtrak at the time.

³ Clearly, this is inappropriate sexual behavior, however, this Court is inclined to conclude that it is the only example of any conduct that might be "sexual" in nature. Plaintiff also stated that after the comment was made, he called it a snakelight as if he was "trying to cover up what he had said." (DeCesare Dep. 134-35.)

October 22, 1996, when Plaintiff was finally too apprehensive and too fearful to return to her work. She consulted with her family physician who declared her disabled due to the stress accompanying Platt's harassment of her. This diagnosis was later confirmed by Dr. Timothy Michals.

II. STANDARD.

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986). Defendant, as the moving party has the initial burden of 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, 325 (1986). Then, the non-moving party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). 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).

III. DISCUSSION.

A. Title VII

Plaintiff contends that, beginning in or about October,

1995, and continuing until October, 1996, she was sexually harassed, intimidated and discriminated against by Platt. Allegedly, Platt made several degrading and offensive remarks and gestures to Plaintiff and subjected her to harassment of a sexual nature. The crux of Plaintiff's argument is that Platt's behavior resulted in a hostile work environment.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual "with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e2(a)(1). "It is well settled that sexual harassment in the workplace can take one of two forms: (1) harassment in which a supervisor demands sexual consideration in exchange for job benefits, or 'quid pro quo,' and (2) harassment which creates a hostile or offensive working environment."⁴ Cook v. Applied Data Research, Inc., No.CIV.A.88-2894, 1989 WL 85068, at *15 (D.N.J. July 20, 1989); citing Meritor Sav. Bank v. Vinson, 477 U.S. at 64-66; Rabidue v. Osceola Ref. Co., 805 F.2d at 618; Henson v. City of Dundee, 682 F.2d at 901. Thus, sexual harassment that creates an "intimidating, hostile, or offensive working

⁴ This Court finds that, although Defendant does argue against quid pro quo harassment, such argument was unnecessary, in that, nowhere in the Plaintiff's pleadings is it alleged that Platt sought sexual consideration in exchange for job benefits.

environment" is protected under Title VII regardless of whether or not it is linked to a tangible economic injury. Id.

However, not all offensive conduct is considered harassment for Title VII purposes. Meritor, 477 U.S. at 67. In order to be actionable under the hostile work environment theory, sexual harassment must be sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment. Id. A hostile environment claim requires five elements: (1) the employee suffered intentional discrimination because of her sex; (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) the existence of respondeat superior liability. Kunin v. Sears Roebuck and Co., No.CIV.A.98-1481, 1999 WL 250768, at *4 (3d Cir. April 28, 1999); see Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). The existence of a hostile environment is determined by examining the totality of the circumstances. Id. These circumstances may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

I. Severe and Pervasive Conduct

"Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VI's purview." Id. at 21.

This Court has previously noted that "a single act of harassment because of sex may be sufficient to sustain a hostile work environment claim if it is of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work." Bedford v. Southeastern Pa. Transp. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994). But the Court went on to note that in virtually all reported cases in which courts have sustained hostile environment claims, "the plaintiff was subject to repeated if not persistent acts of harassment in the environs in which she performed her duties." Id. (citations omitted). The Third Circuit has indicated, when comparing the hostile environment theory with continuing violations, that "isolated or single incidents of harassment are insufficient to constitute a hostile environment." Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 482 (3d Cir. 1997) (citations omitted).

Plaintiff's claim is based on five instances of alleged

misconduct on Platt's part.⁵ The conduct at issue occurred between October, 1995 and October, 1996.⁶ However, several courts have found that a hostile work environment did not exist based upon conduct far more egregious than that alleged here. See, e.g., Koelsch v. Beltone Electronics Corp., 46 F.3d 705, 708 (7th Cir. 1995) (finding no hostile environment existed where the company president rubbed the plaintiff's leg, grabbed her buttocks, and asked her for dates); Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534-35 (7th Cir. 1993) (finding that there was no hostile environment where the plaintiff's supervisor put his hand on the plaintiff's leg and kissed her until she pushed him away, and on another occasion the supervisor lurched at the plaintiff and tried to grab her); Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333, 337 (7th Cir. 1993) (holding that there was no hostile work environment where supervisor asked the plaintiff for dates, called her a "dumb blond," put his hand on

⁵ This Court finds that only one of Platt's actions carries sexual connotations. With the exception of the alleged "snakelight" incident, Platt made no other remarks of a sexual nature.

⁶ Defendant argues that the October, 1995 incident is too remote in time and, as a result, is time-barred by Title VII's limitation period (actions occurring prior to the 300-day filing period are not actionable under Title VII absent evidence of a "continuing violation"). (Def.'s Mem. in Supp. of Mot. for Summ. J. at *17.) The 1995 incident clearly falls under the purview of this limitations period, however, this Court is not convinced that the alleged violations were not continuous. For purposes of this analysis, it is assumed that such violations were, in fact, continuous.

her shoulder several times, placed "I love you" signs in her work area, and attempted to kiss her); Cooper-Nicholas v. City of Chester, No. 95-6493, 1997 WL 799443 (E.D. Pa. Dec. 30, 1997) (supervisor's sexual comments over nineteen months were not frequent or sufficiently severe to create a hostile work environment). Evaluating the totality of the circumstances, this conduct is not frequent because Platt's sexual remarks occurred on only one occasion. This conduct, along with the other alleged conduct, is neither severe nor pervasive--nor is it frequent, repeated or persistent--and is therefore insufficient to create a hostile work environment.

ii. Respondeat Superior

Plaintiff contends that it is "unmistakably clear" that Defendant is vicariously liable to her for Platt's harassing conduct and Defendant has no defense to its liability because Plaintiff suffered tangible adverse employment consequences resulting from this harassment. Plaintiff alleges that as foreman, Platt had control over her work assignment and that after Plaintiff refused to reciprocate his "sexual innuendos," Platt began altering Plaintiff's work assignments.⁷ Plaintiff argues that this is "most assuredly" adverse employment action

⁷ In his deposition, Platt admitted that he does in fact have the authority to assign different jobs to the people in "his gang," that some jobs were easier than others, and that he did, in fact, begin to delegate the harder jobs to Plaintiff.

that should impose liability on Defendant.

In Farragher v. City of Boca Raton, 118 S.Ct. 2275 (1998), the United States Supreme Court concluded:

[W]e adopt the following holding in this case An Employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

Id. at 2293.

Plaintiff alleges that when Platt assigned her to a more difficult cabin assignment, he was making a supervisory decision which had the effect of tangible employment action. However, this Court does not agree. In Faragher, the City of Boca Raton was found vicariously liable for the harassment by two of its employees, one of which was the Chief of the Marine Safety Division, with the authority to hire new lifeguards. Id. at 2280. This is the difference between Faragher and the case at bar. As a preliminary matter to this analysis, this Court does not believe that Platt held any supervisory power beyond that of delegating cleaning duties. As previously stated, Platt did not have the power to hire or fire the employees that he oversaw, however, for the purposes of this analysis, I will treat Platt in the capacity of supervisor.

Plaintiff's allegation that Platt's assigning to her the job of cleaning a cabin wherein there were exposed wires does not rise to the level of "tangible employment action." In

Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2357 (1998), the United States Supreme Court discussed what constitutes "tangible employment action."

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflict direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury."⁸

Id. at 2269. Here, Burlington seems to suggest that the alleged actor must not necessarily be a supervisor, however the Court continued, "[a] co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct." Id. Most importantly, though, the Court concludes that "[t]he supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." Id. Following the Supreme Court's analysis in Burlington, it is clear that Platt was unable to make economic decisions affecting any employees, namely Plaintiff. Platt's decision to submit Plaintiff to more difficult work did not cause any direct economic harm to her. Therefore, no tangible employment action

⁸ This Court, while not viewing Platt as a "supervisor" for purposes of this analysis, believes that he is this "other person," as referenced in Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2269 (1998).

was taken.

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 118 S.Ct. at 2293; (citing Burlington, 118 S.Ct. at 2269).

Since no tangible employment action was taken by Platt, it is necessary to consider Defendant's argument against imputing Platt's conduct to Defendant. Although I have not found that Platt's conduct is actionable harassment, even if we assume it was, such conduct cannot be imputed to Defendant.

Defendant contends that it did exercise reasonable care in preventing and correcting any offensive conduct on Platt's part. In July of 1996, Platt was formerly counseled about his conduct, read the sexual harassment policy and told that his conduct would have to conform to the standard. A grievance was filed in October of 1996, and upon receipt by Vince Nesci ("Nesci"),⁹ Defendant took action. Nesci spoke with Platt and

⁹ Nesci was the General Manager of the Bear Facility. He received notice of the alleged instances of harassment from James Riley, Plaintiff's Union Representative. This was the first time that one of Defendant's officers received any sort of notice of the alleged harassment.

advised him that he should behave professionally toward Plaintiff. Thereafter, Nesci conducted an investigation and instituted formal investigation charges against Platt. After the hearing on those charges, Platt was found guilty of the conduct and Nesci terminated Platt's employment.¹⁰ As Defendant argues, this action was sufficiently prompt.¹¹ Although Plaintiff was already on leave as a result of her doctor's recommendation, Nesci's investigation began on October 26, 1996, just one day after receiving written notice of Platt's conduct. Again, Plaintiff failed to provide any of Defendant's officials with

¹⁰ Subsequently, Plaintiff submitted a Charge of Discrimination with the Equal Employment Opportunity Commission, which after investigating the claims, issued a notice of dismissal, and concluded that the information obtained did not constitute a violation. The Public Law Board echoed this by concluding that Platt's conduct was not sufficiently severe to warrant his discharge. Platt was finally reinstated pursuant to this particular ruling.

¹¹ As the United States Court of Appeals for the Third Circuit explained in Knabe v. Boury Corp., 114 F.3d 407, 412, n. 8 (3d Cir. 1997), "a remedial action is adequate if it is reasonably calculated to prevent further harassment." The question I must answer is whether Defendant's remedial action (i.e., Platt's discharge) was "adequate." "A remedial action that effectively stops the harassment will be deemed adequate as a matter of law. On the other hand, it is possible that an action that proves to be ineffective in stopping the harassment may nevertheless be found reasonably calculated to prevent future harassment and therefore adequate. Thus, where an employer's prompt remedial action is not effective . . . , courts may still decide that the action was adequate as a matter of law." Id. Clearly, since there is no evidence that Plaintiff has suffered any harassment as of Platt's termination date, Defendant's remedial action was "adequate" as a matter of law.

notice of Platt's conduct until Riley notified Nesci.¹²

A victim has a "duty to use such means as are reasonable under the circumstances to avoid the damages" that result from violations of Title VII. Faragher, 118 S.Ct. at 2292, (citing Ford Motor Co. v. EEOC, 458 U.S. 219, 231, n. 15, (1982)). Plaintiff has failed to take reasonable means of providing notice to Defendant. Simply informing her Union representative was not enough in this case. It wasn't until she actually filed a grievance that any action was taken. This Court believes that her filing a grievance served as an appropriate means of notifying Defendant, and this is supported by Nesci's subsequent investigation. However, while filing the grievance was appropriate, Plaintiff should have taken such action much earlier.

As Defendant contends, and Plaintiff's deposition corroborates, Plaintiff chose to report the 1995 incident to her Union representative because she was more comfortable doing so. However, in her deposition, Plaintiff acknowledges that Defendant issued a paper to everybody regarding its sexual harassment

¹² Although Plaintiff did inform her Union representative, this is not sufficient notice to the Defendant for purposes of this analysis. Plaintiff argues that simply because Defendant is not fond of the channels that she used to give notice, this is not a sufficient reason to argue that she has not taken advantage of protective opportunities afforded her. I feel that Defendant's displeasure with Plaintiff's channels is irrelevant and that when notice was received, Defendant acted promptly.

policy. When Plaintiff was questioned as to whether or not she had attempted to go and look for any personnel manual or policies regarding sexual harassment that the company had, she responded, "No." (DeCesare Dep. at 97.) As a follow-up, when Plaintiff was asked whether she chose not to look for any such policy because she wanted, or preferred, to go to the union, she responded, "Yes." Id. Plaintiff admits that Defendant did have policies regarding sexual harassment, and those policies were easily accessible to all employees. It was her choice to go to the Union, while ignoring the company's sexual harassment policy that existed. Therefore, it is clear to this Court that Plaintiff failed to take advantage of any preventive or corrective opportunities provided by the employer.

Because the facts alleged in the Complaint, even if true, fail to support the claim, this action must be dismissed.

B. Emotional Distress

Count Two of the Plaintiff's Complaint alleges that the conduct of Platt, while serving as an agent, employee or servant of the Defendant caused Plaintiff to suffer serious and significant emotional distress for which she was obliged to receive medical treatment. Within this second Count, Plaintiff alleges both negligent and intentional infliction of emotional distress.

Under Pennsylvania law, to state a claim for the tort

of intentional infliction of emotional distress, a plaintiff must allege conduct "so outrageous in character, and so extreme in degree, 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). Additionally, a plaintiff must allege "physical injury, harm, or illness caused by the alleged outrageous conduct." Corbett v. Morgenstern, 934 F. Supp. 680, 684 (E.D. Pa. 1996). As the Supreme Court of Pennsylvania pointed out, "[c]ases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have had presented only the most egregious conduct." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970)(defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents).

The Pennsylvania Supreme Court went on to state that intentional infliction of emotional distress cases, in the employment context, are not common and that the conduct is rarely found to be extreme enough to rise to the level of outrageousness necessary to provide a basis for recovery for the tort. Hoy, 720 A.2d at 754; see Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir. 1988). Also, the United States Court of Appeals for the

Third Circuit has stated that "sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for the intentional infliction of emotional distress." Andrews, 895 F.2d at 1487. However, when the harassment is coupled with retaliation for turning down sexual propositions, the Third Circuit acknowledges a higher likelihood of recovery.¹³ Id. Plaintiff's allegations do not rise to the requisite level of atrocity, and it follows that in light of the fact that I have dismissed the sexual harassment claim, the claim for intentional infliction of emotional distress will also be dismissed.

As for Defendant's contention that Plaintiff has not stated a claim for the negligent infliction of emotional distress, I agree. Pennsylvania law permits a plaintiff to recover for any mental suffering that results from physical injury, however slight, if the defendant's negligence caused the physical injury. Davis v. Hoffman, 972 F. Supp. 308, 314 (E.D. Pa. 1997) See Murphy v. Abbott Labs., 930 F. Supp. 1083, 1086 (E.D. Pa. 1996); Tomikel v. Pennsylvania, 658 A.2d 861, 863 (Pa.Cmwlth. 1995) (citing Niederman v. Brodsky, 261 A.2d 84, 85 (1970)). Plaintiff alleges that, because of Platt's conduct, she suffered "significant mental anguish, emotional distress,

¹³ Plaintiff does make the retaliation argument, however, even if I found that Plaintiff was the victim of sexual harassment, I am unable to reach the conclusion that Platt's delegating a more difficult job to Plaintiff is sufficient to satisfy the retaliation prong of the above analysis.

humiliation, embarrassment, emotional pain and loss of status and reputation." (Pl.'s Compl. at 4.) However, nowhere in the Complaint does Plaintiff even infer that she has suffered any physical injuries. Thus, the factual allegations, as set forth in the Complaint, fail to establish that Plaintiff suffered any physical injury as a result of Defendant's alleged negligence. In light of this, Plaintiff's claim for negligent infliction of emotional distress is dismissed.

An appropriate Order follows.

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

JENNIFER DeCESARE, :
 : CIVIL ACTION
 :
 Plaintiff, :
 :
 v. : 98-3851
 :
 NATIONAL RAILROAD :
 PASSENGER CORPORATION, :
 :
 Defendant. :
 :
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ORDER

AND NOW, this day of May, 1999, upon consideration of Defendant's Motion for Summary Judgment and all responses thereto, it is hereby ORDERED that Defendant's Motion is GRANTED as to both Count One (Title VII) and Count Two (Intentional/Negligent Infliction of Emotional Distress) of

Plaintiff's Complaint.

BY THE COURT:

Robert F. Kelly, J.