

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

LINDA M. PORCHIA, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
 :
WILLIAM S. COHEN, :
SECRETARY OF DEFENSE, and :
RAYMOND RYMARCZICK, :
Defendants. : NO. 98-3643

M E M O R A N D U M

Padova, J.

June , 1999

Plaintiff Linda M. Porchia brings this action against Defendants William S. Cohen, Ms. Porchia's former employer, and Raymond Rymarczick, a former co-worker, for sexual harassment, constructive discharge, and retaliation pursuant to Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C.A. § 2000e-1 - 2000e-17 (West 1994) and the Pennsylvania Human Relations Act ("PHRA"), 43 PA. Stat. §§ 951-963 (West 1991 & Supp. 1998). Plaintiff also asserts claims for negligent supervision, sexual assault and battery, and intentional infliction of emotional distress. Presently before the Court is Defendant William S. Cohen's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c), and Defendant Raymond Rymarczick's Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Court will grant both of the Defendants' Motions.

I. FACTUAL BACKGROUND

Plaintiff was hired on November 26, 1991 as a file clerk with the Defense Finance and Accounting Service ("DFAS" or "the Agency"), a component of the Defense Logistics Agency ("DLA") within the Department of Defense. (Defendant Cohen's Mem. of Law in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Mem.") Ex. 1, DFAS 1998 Final Agency Decision ("DFAS 1998 FAD") at 1.)¹ Plaintiff was hired on a temporary appointment not to exceed one year. (Id.) According to Plaintiff's affidavit, shortly after she began at the Agency, she became acquainted with her co-worker Defendant Raymond Rymarczick ("Rymarczick"), who was employed as a procurement clerk. (Def.'s Mem. Ex. 2, Pl.'s 1993 Aff. at ¶ 3.) During her first two months at the Agency, Plaintiff and Rymarczick developed a casual friendship, occasionally talking and having lunch together. (Id.) Toward the end of December, 1991, Rymarczick began giving Plaintiff a series of inexpensive gifts. In December, he gave Plaintiff two cassette tapes, one of which contained popular music and the other of which contained sermon type preaching on it having something to do with

¹ The facts set forth herein are essentially uncontradicted. All references in the Factual Background to Defendant's exhibits relate to Defendant Cohen's Motion. The record, for the purposes of Rule 56, consists of the filings made by the parties, the exhibits attached to Defendant Cohen's Memorandum of Law, and the exhibits attached to Plaintiff's Response. The majority of the exhibits attached to the parties' Memoranda are duplicative.

relationships. In January 1992, Rymarczick gave Plaintiff an inexpensive watch and a birthday card. (Id. at ¶¶ 4-5.)

On Saturday, January 25, 1992, both Plaintiff and Rymarczick were working overtime. (Id. at ¶ 6.) Rymarczick told Plaintiff that there was a couch in the warehouse where employees would go to have sex. (Id.) Plaintiff thought that he was kidding. (Id.) Rymarczick told her he would show her the couch, and Plaintiff went to the warehouse with Rymarczick to see it. (Id. at ¶ 7.) Once there, the two sat on the couch and Rymarczick began to kiss Plaintiff, who resisted and told him to stop. (Id.) He did not stop, but instead became forceful with Plaintiff and raped her against her will. (Id.)

After the assault, Plaintiff tried to stay away from Rymarczick and had problems concentrating on her work. (Id. at ¶ 8.) On or around February 14, 1992, Plaintiff received a Valentine's Day card and roses from Rymarczick. (Id. at ¶ 10.) Plaintiff was visibly upset by the card and flowers. (Pl.'s Mem. Ex. A, Equal Employment Opportunity Commission ("EEOC") Counselor's Worksheet ("Worksheet") Attach. C.) After Rymarczick gave Plaintiff the Valentine's Day presents, Ms. Grace McCall, File Clerk Supervisor at the Agency and Plaintiff's first line supervisor, confronted Rymarczick, questioning him about Plaintiff's knowledge of his marital status and telling him that he was creating a monster. (Pl.'s Mem. Ex. G, Grace McCall

("McCall") Aff.) Ms. Sharon Estes, the Branch Chief at the Agency and Plaintiff's second-line supervisor, also confronted Rymarczick about his relationship with Plaintiff. (Pl.'s Mem. Ex. F, Sharon Estes ("Estes") Aff.) Rymarczick told Ms. Estes that he and Plaintiff had a mutual friendship. (Estes Aff.) According to Ms. McCall, Plaintiff never complained to her that Rymarczick's attention bothered her. (McCall Aff.)

After she received the Valentine's Day gifts, Plaintiff went on extended sick leave (about one month) complaining of headaches. (Estes Aff.; McCall Aff.) Plaintiff had apparently complained about headaches before the Valentine's Day incident. (Id.) Due to Plaintiff's temporary status and her extended leave, the Agency proposed to terminate her employment. (Estes Aff.) However, at the request of Plaintiff's uncle, a DLA employee, the Agency agreed to allow Plaintiff to resign, which she did on March 12, 1992. (Id.)²

Plaintiff first reported that she had been sexually assaulted to the DLA's Equal Employment Opportunity Commission ("EEOC") office on October 30, 1992. (Def.'s Mem. Ex. 7, Pl.'s 1997 Aff. at ¶ 12; Ex. 8, EEOC Counselor's Worksheet at ¶¶ 17, 19.) After Plaintiff reported the incident, the matter was

²Due to Plaintiff's temporary status, if she had been terminated she would have been ineligible for future employment within the Agency. Allowing Plaintiff to resign made it possible for her to re-apply for work within the Agency at a later time. (Pl.'s Mem. Ex. Q, Pl.'s 1997 Aff. at ¶ 1.)

referred to the Agency's Criminal Investigations Activity for investigation. (Def.'s Mem. Ex. 5, Criminal Report of Investigation ("Criminal ROI") at 3.) The criminal investigation began in the first week of November 1992 and concluded December 23, 1996. (DFAS 1998 FAD at 4-5.) The investigation could neither substantiate nor refute Plaintiff's allegations of sexual assault against Rymarczick. (Criminal ROI at 3.)

Concurrently, the Agency investigated Plaintiff's EEOC complaint, which was formally filed on February 10, 1993. (Pl.'s Mem. Ex. B.) In her complaint, Plaintiff alleges that she was sexually harassed and sexually assaulted by a co-worker. (Id.) She requested compensation for not being eligible to work and a permanent job at the Agency as corrective measures. (Id.) The initial EEOC investigation was conducted from September 14-17, 1993. (DFAS 1998 FAD at 2.)

The initial EEOC investigator concluded that the level of interaction between Plaintiff and Rymarczick was "abnormal." (Pl.'s Mem. Ex. H, EEOC Report of Investigation ("EEOC ROI") at 5.) The investigator further found that the gifts and cards given by Rymarczick had "an overtone beyond platonic friendship;" that the attention Rymarczick showed Plaintiff was noted by Plaintiff's supervisors; that Rymarczick was spoken to about the relationship; and that the Valentine's Day gifts triggered an emotional strain on Plaintiff. (Id.)

On June 15, 1994, Plaintiff's counsel requested a Final Agency Decision ("FAD"). (Pl.'s Mem Ex. J.) On March 20, 1996, DFAS issued its FAD dismissing the complaint for untimeliness pursuant to 29 C.F.R. § 1614.107(b). (Id.) Plaintiff appealed the FAD, on the grounds that the 45 day statutory time limit for filing an EEOC action should have been tolled due to Plaintiff's inability to function as a result of the rape. The EEOC reversed and remanded the Agency decision, requiring it to conduct a further investigation to determine if there was sufficient medical and psychiatric evidence to support extending the 45 day time limit set forth in 29 C.F.R. § 1614.107(b). (Id.)

A second EEO investigation was authorized in August 1997, and was begun in September 1997. (Id. at 4; Def.'s Mem. Exs. 14-17.) Further information was obtained in the supplemental EEO investigation from Plaintiff's therapist Angela M. Sandone, M.ED. (Id. at 2.) Ms. Sandone reported by sworn interrogatory that she began seeing Plaintiff on March 2, 1992. (Pl.'s Mem. Ex. S, Sandone Interrog. at ¶ 5.) Ms. Sandone explained that when she began seeing Plaintiff, Plaintiff spoke about the assault in a confused and elliptical manner. (Id. at ¶ 9.) According to Ms. Sandone, it was not until sometime in May 1992 that Plaintiff was able to describe the assault in enough detail for Ms. Sandone to conclude that Plaintiff had been raped. (Id.) Ms. Sandone stated that in her opinion Plaintiff was severely traumatized by

the assault and had no capacity to function on a day to day basis. (Id. at ¶ 12.) The second EEO investigation was concluded December 9, 1997. (Def.'s Mem. Ex. 17, DFAS ROI at 1.)

In its 1998 final decision, DFAS reaffirmed its initial 1996 decision to dismiss Plaintiff's EEO Complaint in accordance with 29 C.F.R. 1614.107(g). (DFAS 1998 FAD at 18.) The Agency noted that while Ms. Sandone asserted that Plaintiff was totally incapacitated from pursuing normal activities during the period of time following the alleged assault, other people interviewed had normal interactions with Plaintiff during that period. (Id.) The Agency further noted that Plaintiff was apparently able to work from January 25, 1992, until February 14, 1992 and explained that Plaintiff was able to return to work to resign on March 16, 1992. (Id.) Finally, although the Agency decided to dismiss Plaintiff's complaint due to her failure to file within the 45 day statutory period, it went on to discuss the merits of Plaintiff's complaint finding, inter alia, that based on inconsistencies in the evidence of record and the fact that Plaintiff never informed management that she was bothered by Rymarczick's attention or of the alleged assault, the evidence was insufficient to support a finding of discrimination. (Id.)³

³The DFAS 1998 FAD indicates that throughout the initial investigation, the criminal investigation and the subsequent EEO investigation, delays were experienced due to a non-responsiveness on the part of Plaintiff's counsel. (DFAS FAD at 2-4.)

Plaintiff then brought the current action in this Court.

II. DEFENDANT COHEN'S MOTION FOR SUMMARY JUDGMENT

A. STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-

moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

B. DISCUSSION

(i) Plaintiff's Title VII and PHRA Claims

Plaintiff has asserted three claims against Defendant Cohen pursuant to Title VII and the PHRA : (1) hostile work environment sexual harassment (under Section 703 of Title VII, 42 U.S.C.A. §§ 2000e-e-17, and 43 PA. Stat. §§ 951-963); (2) constructive discharge (also under Title VII and PHRA); and (3) retaliation (under Section 704 of Title VII, 42 U.S.C.A. § 2000e-3, and the PHRA, 43 PA. Stat. § 955).⁴

⁴Employer liability for sexual harassment under the PHRA follows the standards set out for employer liability under Title VII. Hoy v. Angelone, 691 A.2d 476, 480 (Pa. Super. Ct. 1997) aff'd, 720 A.2d 745 (Pa. 1998); West Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995) (applying Title VII standards in case involving PHRA hostile work environment claim).

(a) Hostile Work Environment

Plaintiff asserts that Rymarczick's excessive attention, questionable gift giving, and eventual sexual assault constitute unwelcome sexual behavior so pervasive that it had the effect of creating an intimidating, hostile, or offensive work environment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66, 106 S. Ct. 2399, 2405 (1986). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These 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 Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 371 (1993). An employee's psychological well-being need not be affected in order to maintain an actionable hostile environment claim. Id.

There are five elements of a hostile work environment claim under Title VII: (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.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).⁵ Defendant argues that summary judgment is appropriate in this case because Plaintiff cannot establish respondeat superior liability.

An employer is not strictly liable for hostile environments. Meritor Sav. Bank v. Vinson, 477 U.S. at 72-73, 114 S. Ct. at 2408. Under Andrews, "liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action." 895 F.2d at 1486. With respect to a hostile workplace claim, an employer faces liability for its own negligence or recklessness, typically its negligent failure to discipline or fire or its negligent failure to take remedial action upon notice of the harassment. Knabe v. Boury Corp., 114 F.3d at 411. "Under negligence principles, prompt and effective action by the employer will relieve it of liability." Bouton v. BMW of North America, Inc., 29 F.3d 103, 107 (3d Cir. 1994). Remedial action is considered adequate if it was reasonably calculated to prevent further harassment. Knabe, 114 F.3d at 412.⁶

⁵In a number of cases following the Supreme Court's decision in Harris, the Third Circuit has reaffirmed the five-part test announced in Andrews. Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1304, n. 19 (3d Cir. 1997); Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994).

⁶"[T]he liability of an employer is not automatic even if the sexually hostile work environment is created by a supervisory

Here, Plaintiff attempts to impute liability to the Agency for Rymarczick's actions on the grounds that the Agency knew or should have known that Rymarczick was harassing Plaintiff and failed to take prompt remedial action. Plaintiff alleges that this failure to take remedial action constituted a condonation and approval of Rymarczick's actions and lead foreseeably to the rape of Plaintiff. Finally, Plaintiff argues that after she complained of the sexual assault, the Agency failed to conduct a prompt, fair and unbiased investigation.

For the purposes of this decision, the Court will assume, as it must, that the sexual assault actually occurred as Plaintiff described on January 25, 1992. However, even viewing the facts in the light most favorable to Plaintiff, Plaintiff cannot establish respondeat superior liability with regard to the assault because the Agency had no actual notice of the assault until Plaintiff told the initial EEO counselor that she had been raped. Plaintiff admits that she did not report the sexual assault to anyone at the Agency until she brought her initial EEO complaint in October 1992, nearly six months after she had

employee." Knabe, 114 F.3d at 411. To determine if respondeat superior liability exists, principles of agency law must be used. Meritor Sav. Bank, 477 U.S. at 72, 106 S. Ct. at 2408. In addition, employer liability attaches if the harassing employee relied upon apparent authority or was aided by the agency relationship. Id. Under a theory of apparent authority, an employer may be liable where the agency relationship aids the harasser "by giving the harasser power over the victim." Bouton, 29 F.3d at 108.

resigned. (Pl.'s 1997 Aff. at ¶ 12.) Furthermore, there is no evidence that the Agency had actual notice that Rymarczick was harassing Plaintiff. Therefore in order to establish her prima facie case, Plaintiff must establish that the agency had constructive notice that Rymarczick's actions preceding the assault were unwelcome.

The Third Circuit has recently held that an employer can be liable in a hostile workplace context under a doctrine of constructive notice in two situations:

where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

Kunin v. Sears Roebuck and Co., No. 98-1418, 1999 WL 250768, at *5 (3d Cir. April 28, 1999).

Plaintiff seems to argue that because her supervisors were aware of the interaction between Plaintiff and Rymarczick, the Agency had constructive notice of a hostile work environment and therefore had a responsibility to take remedial action. The Court disagrees. In her affidavit, Plaintiff states that she had developed a friendship with Rymarczick; they would talk and occasionally eat lunch together. Both Ms. Estes and Ms. McCall

stated that they noticed a relationship developing between the two. However, while it is true that the Agency was aware of the attention Rymarczick paid Plaintiff, there is no evidence to suggest that it knew or should have known that his attention was harassing or unwelcome by Plaintiff.⁷

"The prohibition of harassment on the basis of sex . . . forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment . . . [and] ordinary socializing in the workplace--such as . . . intersexual flirtation," should not be mistaken for discriminatory conditions of employment. Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1003 (1998). A consensual relationship developing between employees necessarily falls outside of Title VII's purview. See Alvey v. Rayovac Corp., 922 F. Supp. 1315, 1329-30 (W.D. Wis. 1996) ("The laws are not designed to . . . prevent consensual sexual relationships between employees"); Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995) (internal citation omitted) ("Although the behavior creating the hostile working environment need not be overtly sexual in nature, it must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable

⁷ Furthermore, the Court notes that there is no evidence to suggest that the Agency should have been aware that Rymarczick had any dangerous propensity toward violence, which may have given rise to a duty to intercede on the part of the Agency.

or offensive"). Holding otherwise would place too heavy a burden on the employer to police its workplace. Kunin, No. 98-1418, 1999 WL 250768, at *5. Because the record fails to establish constructive notice to the Agency of anything other than a mutual friendship between co-workers, Plaintiff cannot carry her burden of establishing respondeat superior liability.

Defendant Cohen has met his burden under Celotex by pointing out a deficiency in the evidence needed for Plaintiff to establish her prima facie case. Therefore, it was incumbent upon Plaintiff to come forward with evidence sufficient to establish a genuine issue of material fact with respect to respondeat superior liability. Plaintiff has failed to present such evidence, and summary judgment is therefore appropriate against her and will be entered in favor of Defendant Cohen.⁸

⁸ In response to Plaintiff's argument that the Agency's investigations were inadequate and biased, the Court notes the following. The Court has held that the Agency had no constructive notice of harassment in this case. Therefore, the Agency had no obligation to investigate or otherwise respond to Plaintiff's allegations of sexual assault until it had actual notice of the assault which occurred when Plaintiff reported the incident to the EEO counselor in October 1992. (Pl.'s 1997 Aff. at ¶ 12.). See Knabe, 114 F.3d at 414. An employer is required to undertake an investigation once it has notice of any harassment and can be held liable when "a faulty investigation renders its subsequent remedial actions inadequate." Knabe, 114 F.3d at 414. Here, Defendant Cohen has presented evidence that a prompt criminal and EEOC investigation of the incident occurred once the incident had been reported. The fact that the investigations failed to substantiate Plaintiff's allegations of rape is not evidence that the investigations were inadequate. Furthermore, without proof of any wrongdoing the Agency had no obligation to discipline Rymarczick. See Id.

(b) Constructive Discharge

In order for the constructive discharge doctrine to apply in a Title VII context, a court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. Goss v. Exxon Office Systems Company, 747 F.2d 885, 888 (3d Cir. 1984). Because the Court has decided that the Agency was unaware of the sexual assault and had no notice of any sexual harassment by Rymarczick, summary judgment is appropriate on Plaintiff's constructive discharge claim, as Plaintiff cannot establish that the Agency knowingly permitted a discriminatory environment to exist.

(c) Retaliation

In general, before a federal employee may file a suit in federal court under Title VII, she must exhaust all applicable administrative remedies by filing a charge of discrimination with the EEOC. Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). The limits of the federal court action are "defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996). "[W]here a claim is not specifically presented in the administrative charge of discrimination, the test for whether that claim can be presented

to the district court is 'whether the acts alleged in the subsequent suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.'" Holness v. Penn State University, No. 98-2484, 1999 WL 270388, at *3 (E.D. Pa. May 5, 1999)(citing Antol, 82 F.3d at 1295).

Here, Defendant Cohen argues that Plaintiff failed to exhaust her administrative remedies with regard to her retaliation claim because she failed to raise such a claim in her EEOC complaint. Plaintiff, relying on Waiters v. Parsons, argues her need to file a second administrative complaint alleging retaliation was obviated because she had already filed an administrative complaint alleging sexual discrimination with the EEOC. Plaintiff contends that her retaliation claim falls within the scope of her original discrimination claim because she requested a permanent job with the agency as a corrective action in her formal complaint. Plaintiff further claims that the Agency had notice of her retaliation claim because she raised a claim of retaliation in her letter to the EEOC appealing the Agency's 1996 FAD.⁹ The Court disagrees.

⁹ In her letter dated April 5, 1996, Plaintiff, through counsel, stated: "[T]he agency's dismissal for untimeliness fails to even consider Ms. Porchia's claim that she was discriminated against when, after undergoing necessary medical and psychiatric treatment, she attempted to return to work in a position where she would not be subject to contact with her assailant. At that time, Ms. Porchia finally felt she was ready to re-enter society and earn a living, but the agency refused to grant her request and would not reinstate her to her former position or any other position. Ms. Porchia did seek EEO counseling on this issue

In Robinson v. Dalton, 107 F.3d 1018, 1024 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit ("Third Circuit"), reaffirmed its decision in Walters v. Parsons, and explained that "the mere fact that a complainant has pending a complaint of discrimination does not mean that the requirements of administrative exhaustion are necessarily excused."¹⁰ Under Third Circuit precedent, this Court must carefully review Plaintiff's EEOC complaint and her allegedly unexhausted claim of retaliation in order to determine whether a second complaint of retaliation ought to have been filed. Id.

The procedural history of the case at bar indicates that two EEOC investigations were conducted on Plaintiff's formal complaint. The scope of the first investigation was limited to Plaintiff's claim of sexual assault and harassment. There is no mention of any investigation into a potential retaliation claim in the EEOC investigator's report. The second investigation occurred after Plaintiff successfully appealed the first Agency decision denying Plaintiff's claims as time barred. The second investigation concerned whether the statutory time limit ought to

within 45 days of her request for re-employment, and her complaint of discrimination therefore cannot be considered untimely." (Pl.'s Mem. Ex. L.)

¹⁰The Third Circuit reaffirmed its decision in Walters whereby it declined to adopt the "per se rule" used in other Circuits, where all claims of retaliation against a discrimination victim based on the filing of an EEOC complaint are considered ancillary to the original complaint and therefore no further EEOC complaint need be filed.

have been tolled due to Plaintiff's inability to function as a result of the sexual assault. There is again no mention or investigation of any potential retaliation claim in the second report.

By contrast, in Waiters, the scope of the initial EEOC investigation included Waiters' claim of retaliatory discharge. There the plaintiff filed an informal complaint with the EEOC alleging sexual harassment, but withdrew the complaint after mediation resulted in her attaining a new position. She later filed a formal complaint alleging continuing discrimination in retaliation for her having filed the initial informal complaint. Thereafter she was fired for miscellaneous reasons. The district court dismissed her claim for retaliatory discharge for failure to exhaust administrative remedies. The Third Circuit reversed because Plaintiff alleged that her discharge was the product of the same retaliatory intent alleged in her formal complaint, and therefore the court concluded that while the acts and officials were different, "the core grievance -- retaliation -- [was] the same," and fell within the scope of the original EEOC investigation. Robinson, 107 F.3d at 1025 (quoting Waiters, 729 F.2d at 238).

A similar situation is not presented by the facts at bar. The allegations in Plaintiff's formal complaint cannot fairly be said to encompass a claim for retaliation, simply because

Plaintiff requested a permanent job as compensation.

Furthermore, the scope of the EEOC investigations arising out of her complaint focussed only on Plaintiff's claims of discrimination and sexual assault.

Finally, it is undisputed that Plaintiff has not filed a formal complaint of retaliation with the EEOC. "The purpose of the filing requirement is to initiate the statutory scheme for remedying discrimination. Once the EEOC receives a charge, it is required to give notice to the employer and to make an investigation to determine if there is reasonable cause to believe that the charge is true." Hicks v. ABT Associates, Inc., 572 F.2d 960, 963 (3d Cir. 1978). Even if the Court were to consider Plaintiff's allegations of retaliation in her letter to the EEOC the equivalent of her having filed a charge with the EEOC such that it was incumbent upon the EEOC to investigate a retaliation claim, Plaintiff herself specifically objected to and limited the scope of the second EEO investigation to whether or not Plaintiff "was mentally capable of making timely EEO contact after the rape," and declined to participate in "any other supplemental investigation." (Pl.'s Mem. Ex. P.) Plaintiff cannot now argue that the second investigation ought to have included an investigation into her retaliation claim, when she herself did not believe such investigation necessary or warranted.

For the forgoing reasons, Plaintiff's retaliation claim must be dismissed for failing to exhaust her administrative remedies.¹¹

(ii) Plaintiff's Tort Claims Against Defendant Cohen

As the Third Circuit noted in Antol v. Perry, 82 F.3d at 1296,

It is a well-settled principle that the federal government is immune from suit save as it consents to be sued. As an agency of the United States, sovereign immunity protects the Defense Logistics Agency of the Department of Defense. The federal government must unequivocally consent to be sued and the consent must be construed narrowly in favor of the government.

Id. (internal citations omitted). "The terms of its consent to be sued in any court define the court's jurisdiction to entertain suit." Bialowas v. United States, 443 F.2d 1047, 1048 (3d Cir. 1971). Under the Federal Tort Claims Act("FTCA"), 28 U.S.C.A. §§ 1326(b)(West 1993), 2671-2680(West 1994), the United States has consented to be sued for torts committed by its employees within the scope of their employment.

The Court interprets Plaintiff's tort claims against Defendant Cohen as claims brought under the FTCA, although she

¹¹The Court notes that, in the alternative, Plaintiff's retaliation claim could be dismissed under Celotex for her failure to present evidence that she actually re-applied for work within the Agency and that she was denied such employment. Defendant points out that there is no evidence in the record that Plaintiff formally applied for another position at DLA and Plaintiff has failed to come forward with such evidence.

has not specifically stated them as such in her Complaint.¹² The Third Circuit has explained that,

Cognizable claims under the FTCA include those that are

(1) against the United States, (2) for money damages, . . . (3) for injury or loss of property, . . . (4) caused by the negligent or wrongful act of any employees of the Government (5) while acting within the scope of his employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, ----, 114 S. Ct. 996, 1001 (1994) (claim against United States is cognizable under the FTCA if it alleges the six elements outlined above). Before commencing an action under the FTCA, a claimant must have first presented the claim, in writing and within two years after its accrual, to the appropriate federal agency, and the claim must have been denied. 28 U.S.C.A. §§ 2401(b), 2675(a). To be properly presented to the federal agency, the damages must be for a sum certain. 28 C.F.R. § 14.2(a) (1987). The requirements that a claimant timely present a claim, do so in writing, and request a sum certain are jurisdictional prerequisites to a suit under the FTCA.

Deutsch v. United States, 67 F.3d. 1080, 1091 (3d Cir. 1995).

Such jurisdiction requirements cannot be waived. Schwartzman v. Carmen, 995 F. Supp. 574, 576 (E.D. Pa. 1998).

¹²In his Motion for Summary Judgment, Defendant Cohen argues that the FTCA is the statute applicable to Plaintiff's tort claims against the Government. Plaintiff appears to agree with Defendant's assertion and argues that Plaintiff's tort claims fall within the scope of the FTCA. This Court will therefore analyze Plaintiff's claims under the standards set forth in the FTCA.

Plaintiff's claims under the FTCA must be dismissed for her failure to comply with the jurisdictional requirements of the statute. Plaintiff has not submitted a claim in writing to the Agency requesting a sum certain for injuries resulting from the assault of Rymarczick. Because Plaintiff failed to properly present her tort claims against the government to the Agency within two years after the claims accrued, her claims must be dismissed as this Court has no subject matter jurisdiction to hear her case.

For the forgoing reasons, the Court will grant Defendant Cohen's Motion with respect to all claims against him and judgment will be entered in his favor.

III. DEFENDANT RYMARCZICK'S MOTION TO DISMISS

A. STANDARD OF REVIEW

A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (holding that in deciding a motion to dismiss for failure to state a claim, the court must

"accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party").

B. DISCUSSION

Defendant Rymarczick argues in his Motion to Dismiss that the Title VII action must be dismissed against him individually because individuals are not considered employers under Title VII. The Court agrees. In Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077 (3d Cir. 1996), the Third Circuit held that "individual employees cannot be held liable under Title VII." Plaintiff does not dispute the applicability of Sheridan in her response to Rymarczick's Motion to Dismiss. Therefore, Plaintiff's claim pursuant to Title VII against Defendant Rymarczick will be dismissed.

Because the Court has dismissed all federal claims against Rymarczick, the only surviving claims against him are state law claims over which the court declines to exercise its supplemental jurisdiction. 28 U.S.C.A. § 1367(c)(3)(West 1993).

An appropriate Order follows.

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

LINDA M. PORCHIA,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
WILLIAM S. COHEN,	:	
SECRETARY OF DEFENSE, and	:	
RAYMOND RYMARCZICK,	:	
Defendants.	:	NO. 98-3643

O R D E R

AND NOW, this day of June, 1999, upon consideration of Defendant Raymond Rymarczick's Motion to Dismiss Plaintiff's Complaint (Doc. No. 11), Defendant William S. Cohen's Motion for Summary Judgment (Doc. No. 12), and Plaintiff's Responses thereto (Doc. Nos. 13 & 14), **IT IS HEREBY ORDERED** that:

1. Defendant Cohen's Motion for Summary Judgment is **GRANTED** and judgment is entered in favor of Defendant Cohen and against Plaintiff; and,
2. Defendant Rymarczick's Motion to Dismiss is **GRANTED**.

BY THE COURT:

John R. Padova, J.