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

MARY G. NOWOSAD	:	CIVIL ACTION
	:	
v.	:	
	:	
VILLANOVA UNIVERSITY	:	NO. 97-5881

MEMORANDUM AND ORDER

HUTTON, J. September 22, 1999

Presently before the Court are Defendant's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 (Docket No. 17) and Plaintiff's response thereto (Docket No. 18). For the reasons stated below, the Defendant's motion is **GRANTED in part and DENIED in part**.[1]

I. BACKGROUND

This Court now considers the claims of negligent infliction of emotional distress under Pennsylvania law (Count Five) and loss of consortium under Pennsylvania law (Count Six). Defendant, Villanova University ("Villanova"), seeks to dismiss these claims under Federal Rules of Civil Procedure 56.

Taken in the light most favorable to the nonmoving party, the facts are as follows. The Plaintiff, Mary Nowosad ("Nowosad"), was hired by Villanova on January 7, 1987 in the telecommunications

[1] In its Memorandum and Order dated May 19, 1999, this Court dismissed Plaintiff's PHRA and Intentional Infliction of Emotional Distress claims while maintaining Plaintiff's Title VII and Breach of Contract claims.

department. Nowosad was hired as the assistant manager of voice processing systems. Between 1987 and 1993, Nowosad's voice was the only voice used at Villanova on its mail system.

Nowosad claims that almost from the beginning she was subjected to sexual harassment by her supervisor, Donald Hoover. The alleged harassing behavior not only included conduct of an inappropriate sexual nature directed toward Nowosad, but also included an incident of improper physical contact by Hoover on Nowosad's daughter, who was visiting the work place. In the summer of 1993, Hoover informed Nowosad that her voice was no longer to be used in the voice mail system. Believing that the decision to remove Nowosad's voice was Hoover's response to Nowosad's refusal of Hoover's alleged improper sexual advances, Nowosad filed a complaint of sexual harassment with the Villanova sexual harassment officer, Kathleen Burns, in August of 1993.

Villanova's complaint officer, Burns, concluded that no sexual harassment had occurred as defined by Villanova's policy on sexual harassment. Nowosad filed an appeal to a three (3) member panel review board at Villanova ("Board") which, although concluding that they did not find a violation of Villanova's policy on sexual harassment, nonetheless made the following statements:

> The Board is unanimous in its conclusion that Mr. Hoover repeatedly engaged in unprofessional behavior of a sexual nature. Specifically, the Board cites his advances toward Ms. Nowosad; his inappropriate behavior toward her daughter; his physical familiarity with female vendors in the office; his involvement of the office in his sexual

> alliance with Ms. McGinnis; and behavior that suggested to the Telecommunications staff that he had sexual alliances with other women outside the office. These instances represent examples of inappropriate behavior, and cumulatively, created a setting in which Mr. Hoover's sexual activities had a negative impact on the office.

After receipt of the Board's decision, Nowosad filed a Complaint with the Equal Employment Opportunity Commission ("EEOC") alleging sexual harassment by Hoover. In June of 1994, with the assistance of the EEOC, the Plaintiff executed a Settlement Agreement and Release ("Agreement"), resolving the claims then pending against Villanova and its staff. The Settlement Agreement, dated June 22, 1994, includes a specific provision that Villanova would not retaliate against Nowosad for filing the harassment charges. Two (2) days after the execution of the settlement agreement, Hoover was fired.

In the fall of 1994, Karen Steinbrenner, Executive Director for Villanova, attempted to remove Nowosad's voice from the voice mail system. Steinbrenner stated that she was removing Nowosad's voice from the voice mail system based on Hoover's decision to do so. In the fall of 1996, Timothy Ay, Assistant Director of Networking and Communication Services, and Robert Mays, Assistant Director Telecommunications, informed Nowosad that her voice would be removed from the voice mail system. Other than from Hoover, there were no complaints regarding the quality of Nowosad's voice on the voice mail system. Steinbrenner testified that she received no other complaints regarding Nowosad's voice, besides

those from Hoover.

Thomas Bull, Director of Personnel at Villanova, testified that his only conversation regarding a complaint about Nowosad's voice, was with Hoover. Bull testified that he had no problem with Nowosad's voice. Mays testified that he could recall having two or three complaints about Nowosad's voice on the voice mail system, and that Ay and Steinbrenner were two of those complaints. No written complaints regarding Nowosad's voice were made. Mays testified that he personally found Nowosad's voice acceptable on the voice mail system and did not initiate the idea to remove her voice from the voice mail system. Ay testified that he did not personally perceive any problem with Nowosad's voice on the voice mail system. Further, Ay had no personal knowledge of any complaints about her voice and testified that the instigation to remove her voice from the voice mail system came from Hoover.

Nowosad was responsible for the design and development of voice mail applications and the coordination of all aspects of the voice messaging and voice processing systems. Responsibility for choosing the voice for the voice mail system was solely within Plaintiff's discretion. Having her voice on Villanova's voice mail system was important to her.

When Nowosad was told about the decision to remove her voice from the voice mail system in the fall of 1996, Nowosad objected on the grounds that the decision was made solely in

retaliation for Nowosad's prior complaints of sexual harassment against Hoover. Nowosad authored several memos protesting the decision to remove her voice from the voice mail system. Villanova, nevertheless, considered these objections to be meritless and insubordinate and ultimately terminated Nowosad's employment at Villanova.

On November 9, 1998, the Defendant filed its motion for summary judgment. The Plaintiff filed her response on December 28, 1998. Because the motion for summary judgment is ripe for review, the Court now considers the Defendant's motion for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A

genuine issue is one in which the evidence is such that a

reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Negligent Infliction of Emotional Distress

The Plaintiff asserts a claim for negligent infliction of emotional distress. Pennsylvania courts recognize the tort of negligent infliction of emotional distress but narrowly apply it in only three categories of cases. First, Pennsylvania courts recognize "bystander" cases, where the plaintiff directly perceives injury to a close relative and suffers foreseeable harm. See Sinn v. Burd, 404 A.2d 672 (Pa. 1979). Second, Pennsylvania allows "pre-existing duty" cases, where the defendant owes the plaintiff a pre-existing contractual or fiduciary duty. See Crivellaro v.

Pennsylvania Power & Light Co., 491 A.2d 207 (Pa. Super. 1985). Finally, in Brown v. Philadelphia College of Osteopathic Med., 449 Pa. Super. 667, 674 A.2d 1130, 1133-35 (Pa. Super. 1996), the court identified the impact rule as a third way to sustain a claim for negligent infliction of emotional distress. The Brown court described the impact rule as follows: "[W]here the plaintiff . . . sustains bodily injury, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages." Id.

As Plaintiff neither observed an emotionally distressing incident as a bystander nor alleges that Defendant owed her a pre-existing contractual or fiduciary duty, her only avenue of recovery lies with application of the impact rule. Plaintiff, does not allege, however, that she sustained a "bodily injury." Accordingly, summary judgment on Count VI, which alleges negligent infliction of emotional distress, is granted.

B. Loss of Consortium

Plaintiff's husband asserts a claim for loss of consortium. Loss of consortium is defined as a loss of services, society, and conjugal affection of one's spouse. Bedillion v. Frazee, 183 A.2d 341, 343 (Pa. 1962). A loss of consortium claim arises from the marital relationship and is premised on the loss of

a spouse's services after injury. Tiburzio-Kelly v. Montgomery, 681 A.2d 757, 772 (Pa. Super. Ct. 1996). One who suffered a loss of consortium did not sustain a physical injury but rather experienced an injury to marital expectations. Darr Constr. Co. v. Workmen's Compensation Appeal Bd., 715 A.2d 1075, 1079 (Pa. 1998). Any action for loss of consortium is derivative, however, and the viability of such a claim depends upon the substantive merit of the injured party's claims. Schroeder v. Ear, Nose & Throat Assoc. of Lehigh Valley, Inc., 557 A.2d 21, 22 (Pa. Super. Ct. 1989). While derivative of his or her spouse's substantive claims, a spouse's loss of consortium claim is considered a distinct cause of action. Manzitti v. Amsler, 550 A.2d 537, 538 (Pa. Super. Ct. 1988). Accordingly, where a spouse's substantive claim survives a motion for summary judgment, a loss of consortium claim, as a derivative cause of action, also survives. Therefore, because Plaintiff's Title VII and breach of contract claims survive Defendant's Motion for Summary Judgement and there remains genuine issues of material fact, Plaintiff's loss of consortium claim also survives. Defendant's Motion for Summary Judgment as to Plaintiff's loss of consortium claim is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 22nd day of September, 1999, upon consideration of Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Docket No. 17) and Plaintiff's response thereto (Docket No. 18), IT IS HEREBY ORDERED:

(1) Count Five of Plaintiff's Complaint (negligent infliction of emotional distress) is **DISMISSED**; and

(2) Count Six of Plaintiff's Complaint (loss of consortium) is **NOT DISMISSED**.

BY THE COURT:

HERBERT J. HUTTON, J.