

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

LORRAINE A. METZ,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION No. 98-4914
)
 FEDERAL EXPRESS CORP.,)
)
 Defendant.)

MEMORANDUM

Padova, J. October , 1999

This matter arises on the parties' cross-motions for summary judgment. For the reasons that follow, the Court will grant summary judgment in favor of Defendant on Count III, and deny the parties' motions for summary judgment on the remaining counts.

I. FACTS

Plaintiff was hired by Defendant as a courier at Defendant's Bristol facility in 1986. In February 1997, Plaintiff applied for a tractor-trailer driver position. She received this position, and began working at Defendant's Willow Grove facility. In order to work closer to her home, she bid for a position at Defendant's Allentown facility. Plaintiff transferred to the Allentown facility in April 1991, as a courier. Plaintiff later bid for and received for a tractor-trailer position at the Allentown facility. She did not have an assigned route, but worked as a "floater." Plaintiff was the only woman employed at the Allentown ramp.

Plaintiff testified that her male co-workers incorrectly loaded freight on her truck, and broke off the antenna to Plaintiff's radio. When asked how she was going to scan the packages in the front of the trailer, the drivers responded, "Fuck her." Plaintiff reported these incidents to her direct supervisor, Mike Wakely. On one occasion, Plaintiff was excluded from a staff meeting. When she

asked Mr. Wakely about the meeting, he informed her that she was intentionally left out of the meeting because “the other drivers did not want [her] there.” [Plf. Ex. A, Plf. Depo., p. 143].

In May 1994, Plaintiff was assigned a permanent route between Allentown and Newark. After six weeks, Mr. Wakely removed Plaintiff from this route, and gave the route to another driver, Al Himmelwright. Plaintiff asserts that this transfer was against Defendant's policy. In August 1994, Plaintiff received an assigned route to Baltimore. Before the route commenced, Defendant learned that Plaintiff was pregnant. Her doctor determined that she could not lift more than 75 pounds. Plaintiff claims that Defendant forced her to take a disability leave. The Baltimore run was reassigned to Mr. Himmelwright.

Following her pregnancy leave, Plaintiff returned to the Allentown facility. On two occasions, several drivers, traveling at high rates of speed surrounded her vehicle and almost forced her off the road. In addition, the male drivers talked about Plaintiff on CB channel 19. She was called “cunt,” “troll,” “bitch,” or “that bitch from Allentown.” Drivers further described taking Plaintiff to a local strip club for a “fish sandwich.”

Plaintiff brings five counts against Defendant. Count I asserts a hostile work environment claim under 42 U.S.C. §2000e, et seq. (“Title VII”). Count II brings the same claim under the Pennsylvania Human Rights Act (“PHRA”), 43 Penn. Cons. Stat. Ann. §955(a). In Count III, Plaintiff brings a common law intentional infliction of emotional distress claim. In Count IV, Plaintiff asserts a claim under the Americans with Disabilities Act, 42 U.S.C. §12112 et seq., based on her mental health. Similarly, in Count V, Plaintiff brings the same claim under the PHRA.¹

¹Neither party discusses Count IV or Count V in their briefing. Accordingly, the Court concludes that Plaintiff has withdrawn these two counts.

II. LEGAL STANDARD

The Court may grant a motion for summary judgment 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 judgment as a matter of law”. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome of the litigation will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

A moving party always bears the burden of informing the Court of the basis of its motion. Celotex, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the “mere existence of some alleged factual dispute”. Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleadings. Anderson, 477 U.S. at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in his favor. Id. at 255. The Court’s function is not to weigh the evidence, but to determine whether a genuine issue exists for trial. Id. at 249.

III. DISCUSSION

On June 30, 1999, both parties filed motions for summary judgment. The motions are fully briefed and ready for decision.

Defendant raises four arguments in support of summary judgment on Counts I and II. First, Defendant argues that Plaintiff's allegations concerning events prior to April 1996 are time-barred. Second, Defendant contends that Plaintiff has not established that the allegedly hostile work environment was "because of" her gender. Defendant further argues that Plaintiff has failed to establish that the conduct was severe and pervasive. Finally, Defendant argues that Plaintiff has not shown that Defendant, as Plaintiff's employer, is subject to respondeat superior liability.

Conversely, Plaintiff contends that she is entitled to summary judgment on these counts. First, Plaintiff asserts that the continuing violation theory permits her to rely on discriminatory conduct that occurred before April 1996. Additionally, Plaintiff submits that she has shown that while some of the discriminatory treatment was facially neutral, the mistreatment was nonetheless based on her gender. Finally, Plaintiff argues that Defendant failed to take prompt and adequate remedial measures.

Additionally, Defendant contends that it is entitled to summary judgment on Plaintiff's intentional infliction of emotional distress claim. Defendant argues that (1) Plaintiff's claim is precluded by the Pennsylvania Workers' Compensation Act ("WCA"), 77 Pa. Cons. Stat. Ann. §481 *et seq.*; and (2) even assuming the claims are not barred by the WCA, Plaintiff has not produced sufficient evidence of extreme and outrageous conduct in the employment context. In response, Plaintiff contends that Defendant is precluded from raising the WCA as a defense because Defendant failed to raise this ground as an affirmative defense. Furthermore, Plaintiff argues that the WCA does not bar her intentional infliction of emotional distress claim because her claim falls under the personal animus exception. Finally, Plaintiff asserts that her claim establishes the requisite level of outrageous conduct.

A. HOSTILE WORK ENVIRONMENT

Plaintiff brings claims for hostile work environment pursuant to 42 U.S.C. §2000e et seq. (“Title VII), and the Pennsylvania Human Relations Act, 43 Penn. Stat. Ann. §955(a). Because courts have uniformly interpreted the PHRA consistent with Title VII, LaRose v. Philadelphia Newspapers, Inc., 21 F.Supp.2d. 492, 497 (E.D. Pa. 1998), the Court will address Counts I and II as one claim.

1. Conduct Prior to April 1996

Under Title VII, the plaintiff must file a charge of employment discrimination with the Equal Employment Opportunity Commission (“EEOC”) within 300 days of the alleged unlawful practice, when as here the plaintiff initially files a charge with the appropriate state agency. 42 U.S.C. §2000e-5(e); see Rush v. Scott Specialty Gases, Inc., 113 F.3d 467, 480 (3d Cir. 1997). Plaintiff filed her requisite EEOC claim on October 18, 1996. Consequently, the 300-day retrospective limitations period began to run on December 23, 1995², and would bar evidence of earlier events unless Plaintiff can establish a continuing violation.

Under the continuing violation theory, “the plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing period if [she] can demonstrate that the act is

²Defendant argues that Plaintiff may not present evidence of sexual harassment occurring prior to rely on discriminatory conduct that occurred prior to April 1996. Defendant argues that April 1996 is a relevant date because “there are no allegations in [Plaintiff’s] charge pre-dating April 1996.” [Def. Mem. S.J., p. 17]. Defendant misstates the relevant date; the relevant date for the Court’s analysis is the date Plaintiff filed her EEOC charge.

Plaintiff claims that she filed an initial EEOC charge on April 21, 1995, but that the EEOC misplaced her paperwork. Plaintiff submits an affidavit from Barbara D. Rahke, U.A.W. organizer, who states that she accompanied Plaintiff to the EEOC offices, and witnessed the filing of this charge. [Plf. Sur-reply, Ex. 2]. Plaintiff further claims that the nature of that charge is memorialized in a letter dated March 30, 1995, to Defendant from the UAW. [Plf. Ex. H]. Because the Court concludes that Plaintiff may proceed under a continuing violation theory using the October 1996 filing date, the Court does not need to address this allegedly earlier date.

part of an ongoing practice or pattern of discrimination of the defendant.” West v. Philadelphia Electric Co., 45 F.3d 744, 754 (3d Cir. 1995). In order to establish that her claim falls within this theory, Plaintiff must: (1) demonstrate that at least one act occurred within the filing period; and, (2) must establish that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination. Id. at 754-755. “The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern”. Id.

Defendant does not dispute that at least one act occurred within the filing period. Rather, Defendant argues that the 1994 allegations involved different actors, and because different actors were involved in the alleged acts, the harassment was not ongoing.

As the Court of Appeals has explained, there is a “natural affinity” between the theory underlying hostile work environment claims, and the continuing violation theory. West, 45 F.3d at 755.

In the arena of sexual . . . harassment, particularly that which is based on the existence of a hostile environment, it is reasonable to expect that violations are continuing in nature: a hostile environment results from acts of sexual . . . harassment which are pervasive and continue over time, whereas isolated or single incidents of harassment are insufficient to constitute a hostile environment. Accordingly, claims based on hostile environment sexual . . . harassment often straddle both sides of an artificial statutory cut-off date.

Id. at 755 (citations and internal quotations omitted). In determining whether the prior incidents of discrimination constitute a continuing course of discrimination or whether they are discrete unrelated acts, the Court considers the subject matter, the frequency, and permanence of the discrimination. Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 482 (3d Cir. 1997).

The Court concludes that Plaintiff’s hostile work environment claim constitutes a continuing violation. Plaintiff testified that the hostile treatment by her male co-workers began as soon as she started at the Allentown facility. [Plaintiff’s Deposition, Vol. I, p. 121, l. 16]. She testified that her

male co-workers would load her truck incorrectly, making it impossible for her to run her route. [Id. at 119, 122]. When asked how she was going to scan the packages in the front of the trailer, the drivers responded, “Fuck her.” [Id. at 122]. Plaintiff was excluded from staff meetings. [Id. at 143]. Plaintiff also testified that another driver broke off the antenna to her radio, and hid her CB mike. [Id. at 140, Vol. II, at 184-85]. She testified that in violation of Defendant's internal policies, she was “bumped” from an assigned route, and reassigned as a floater, a less desirable position. [Id. at 163].

The events subsequently escalated. Plaintiff states that she overheard, Tom Cavella, a fellow driver, say that he would “like to spend the night on top of her, [he'd] show her a good time.” [Plf. Depo, Vol. II at 198]. Mr. Cavella further referred to Plaintiff as “that bitch from Allentown.” [Id.]. Another driver, Randy Miller, commented that he thought Plaintiff wanted to take him to a strip club and give him a “fish sandwich.” [Plf. Ex. B]. Her male co-workers referred to her as “cunt,” “troll,” and “that Bitch from Allentown.” [Plf. Ex. Q, Miller Depo., p. 67]. Plaintiff states that on two occasions in April and May of 1996, Mr. Miller, and Mr. Cavella surrounded her on the road, while driving at very high rates of speed, and almost forced her vehicle off the road. [Plf. Depo, Vol. II at 209-212].

These facts support application of the continuous violation theory. First, all of the incidents alleged by Plaintiff involve sexual harassment. The record indicates that the incidents occurred consistently over a period since 1994, with increased frequency and severity in 1996. “The harassment did not consist of unrelated, isolated incidents, but constituted a continuous pattern of derogatory remarks, rude behavior and discriminatory conduct.” Rush, 113 F.3d at 483. Finally, the harassment did not cause a discrete event, and thus did not trigger a duty of Plaintiff to assert her rights under Title VII.

Defendant relies on the fact that the earlier harassment involved drivers from Defendant's Allentown facility whereas the later incidents involved drivers from Harrisburg and Newark. The Court finds this distinction irrelevant. “Nowhere in the case law establishing [Title VII] standards is there a requirement that the discriminatory conduct of each co-worker, who participated in creating the hostile work environment, be pervasive and/or on-going.” West, 45 F.3d at 756. In West, the Court of Appeals specifically rejected Defendant's suggested “different actor” approach. Accordingly, the Court finds that Plaintiff may rely on evidence of discrimination which occurred before December 23, 1995.

2. Merits of Plaintiff's Claim for Hostile Work Environment

“[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). To establish a hostile work environment claim, a plaintiff must show that (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. See West v. Philadelphia Electric Co., 45 F.3d 744, 753 (3d Cir. 1995)(citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir.1990)). In evaluating these elements, the Court employs a “totality of the circumstances” approach. Id. Thus, the Court considers the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with an employee's work performance. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

Viewing the facts in the light most favorable to Plaintiff, the record shows that (1) her male co-workers interfered with her job performance by loading her truck incorrectly, excluding her from

staff meetings, breaking off her antenna to her radio and hiding her CB mike; (2) she was denied an assigned route and reassigned as a “floater;” (3) male co-workers made sexually explicit comments about her; (4) male co-workers disparaged her by referring to her as a “cunt,” a “troll,” and “that bitch from Allentown” on a weekly basis; and (5) when they surrounded Plaintiff on the road, Messrs. Miller and Cavella threatened Plaintiff’s physical safety. Further, while Mr. Miller denies making the “fish sandwich” comments, he admits that the “fish sandwich” remark became a joke among the male drivers. [Miller Depo, p. 18, l. 4-7]. Plaintiff submits the testimony of Dr. Donald Jennings, a psychologist, who states that the work place harassment precipitated Plaintiff’s episodes of Post Traumatic Stress Disorder. [Plf. Ex. J].

Conversely, Plaintiff did not have regular personal contact with her alleged harassers, and did not attempt to avoid her alleged harassers. Rather, she applied for a regular driving assignment where she would come in regular contact with these men. [Plf. Depo, p. 187-88]. In addition, Plaintiff testified that she generally is not offended by vulgar language. [Plf. Depo, p. 221].

The Court’s function is not to weigh the evidence, but to determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249. Genuine issues of material fact preclude summary judgment in favor of either party. Accordingly, the Court will deny the parties’ Motions for Summary Judgment on this point.

3. Respondeat Superior Liability

An employer is not strictly liable for hostile environments. Meritor Sav. Bank v. Vinson, 477 U.S. at 72-73. Rather, “an employer is liable for an employee’s behavior. . . if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile work environment and failed to take prompt and remedial action.” Knabe v. Boury Corp., 114 F.3d 407, 411 (3d Cir. 1997). Here, Plaintiff attempts to impute liability to Defendant for the drivers’

actions on the grounds that Defendant failed to take prompt and adequate remedial action after receiving notice of Plaintiff's complaints. [Plf. Mem. S.J. at 23-24]. Defendant asserts that the remedial action it took was adequate as a matter of law. In particular, Defendant maintains that the remedial action it took "ended" the alleged harassment because Plaintiff does not complaint about any derogatory comments after her meeting with Ms. Talbot. [Def. Mem. at 23].

The Court finds that genuine issues of fact exist as to whether the remedial action was taken promptly by Defendant and was reasonably calculated to prevent future harassment. For example, Plaintiff makes the argument, supported by her Rule 56 submissions, that on numerous occasions over several month period, she reported the drivers' conduct to her direct supervisor, Mike Wakely, her manager Jim Hulik, and other management personnel. [Plf. Depo, Vol I, p. 122-23, 193, 278-80; Wakely Depo., ¶. 41-44]. Mr. Wakely initially responded to her complaints with inaction. Similarly, Plaintiff complained to Ms. Kathleen Talbot, a senior manager, about the ongoing harassment in July 1996. An investigation, however, was not initiated until two months later when Plaintiff completed a formal EEO compliant. [Plf. Ex. F, Talbot Deposition, p. 38-39].

Furthermore, Plaintiff alleges that her male co-workers continued to harass her until she finally left the Allentown facility in July 1997. She testified that in September 1996, Mr. Al Himmelwright backed his tractor into Plaintiff's trailer while she was standing in between the tires. [Plf. Ex. A, Metz Depo., p. 267-75]. Mr. Himmelwright admits that the accident occurred, but denies that it was intentional. [Plf. Ex. G, Himmelwright Depo, p. 41-42]. Plaintiff further alleges that in October 1996, her brake line was intentionally slit. [Metz Depo., p. 287-96].

Defendant issued a written warning to Mr. Wakely, Plaintiff's manager, that he had failed to follow Defendant's corporate sexual harassment policy in investigating Plaintiff's complaints. [Def. Ex. B, Plf. Ex. 70]. Furthermore, Defendant ordered Mr. Wakely to attend an EEO-Guaranteed Fair

Treatment Program³. [Id.] In addition, Mr. Miller received a warning letter that his “fish sandwich” remarks were inappropriate. [Def. Ex. F, Miller Deposition, at 12-13]. While Defendant sanctioned the other drivers, the sanction related to their unsafe driving practices, and did not address the alleged sexual harassment.

To determine whether the remedial action was adequate, the Court considers whether the action was “reasonably calculated to prevent further harassment.” Knabe v. Boury Corp., 114 F.3d 407, 412 (3d Cir. 1997). The Court recognizes that to avoid liability for the discriminatory conduct of an employee, an employer does not have to necessarily discipline the offending employees. Id. at 414. Nevertheless, an employer must take corrective action reasonably likely to prevent the offending conduct from reoccurring. Id.

Material issues of fact, precluding summary judgment, exist as to whether Defendant's response to Plaintiff's sexual harassment claim was adequate. The Court cannot conclude on this record that Defendant's investigation and remedial actions were adequate as a matter of law. The totality of the circumstances render the determination of whether Defendant took prompt and effective remedial action a question for this jury.

In conclusion, because the parties' submissions raise genuine issues of material fact, neither party is entitled to summary judgment on Plaintiff's Title VII or PHRA claims.⁴

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

³The record does not reflect whether or not Mr. Wakely actually attended the program.

⁴To the extent Plaintiff raises a retaliation claim, the Court finds that genuine issues of material fact preclude summary judgment on this theory.

Defendant argues that Plaintiff has not produced evidence of conduct that is outrageous, intentional or reckless to support a claim for intentional infliction of emotional distress. Because the Court agrees with this position, the Court does not reach Defendant's other arguments regarding Count III.

To establish a claim for intentional infliction of emotional distress, a plaintiff must show that the conduct was “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.” Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 754 (Pa. 1998) (citations omitted). Furthermore, such a claim based on sexual harassment in the workplace is exceedingly difficult to maintain. Id. (citing Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir.1988) and Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir.1990)). Nevertheless, such a claim is not barred as a matter of law in the context of a sexual harassment case. In Hoy, the Pennsylvania Supreme Court recognized that in rare cases, where “the victim of sexual harassment is subjected to blatantly abhorrent conduct,” an intentional infliction of emotional distress claim based on sexual harassment is cognizable. Hoy v. Angelone, 720 A.2d at 754.

In Hoy, the sexual harassment included “sexual propositions, physical contact with the back of Appellant's knee, the telling of off-color jokes and the use of profanity on a regular basis, as well as the posting of a sexually suggestive picture.” Id. at 754-55. The Court held that this conduct, while unacceptable, “was not so extremely outrageous” to allow recovery under the limited tort of intentional infliction of emotional distress. Id. at 755.

The Court finds that the conduct at issue in this case falls squarely within the Hoy decision. The episodes of harassment alleged by Plaintiff do not rise to the level of intentional infliction of

emotional distress. Accordingly, the Court will grant Defendant's Motion for Summary Judgment on Count III.

An appropriate Order follows.

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 Defendant.)

ORDER

AND NOW, this day of October, 1999, upon consideration of the parties' cross motions for summary judgment, and briefing thereof, **IT IS HEREBY ORDERED** that

1. Plaintiff's Motion for Summary Judgment (docket no. 13) is **DENIED**;
2. Defendant's Motion for Summary Judgment (docket no. 14) is **GRANTED** in part and **DENIED** in part;
3. **JUDGMENT** is entered in favor of Defendant and against Plaintiff on Count III of Plaintiff's Complaint; and
4. Counts IV and V are **WITHDRAWN**, pursuant to the telephone conference held October 26, 1999.

BY THE COURT:

John R. Padova