

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

|                                 |   |                     |
|---------------------------------|---|---------------------|
| <b>KENNETH PIROLI,</b>          | : | <b>CIVIL ACTION</b> |
|                                 | : |                     |
| <b>Plaintiff,</b>               | : |                     |
|                                 | : |                     |
| <b>v.</b>                       | : |                     |
|                                 | : |                     |
| <b>WORLD FLAVORS, INC., and</b> | : |                     |
| <b>EDWARD SELSER,</b>           | : |                     |
|                                 | : |                     |
| <b>Defendants.</b>              | : | <b>NO. 98-3596</b>  |

**M E M O R A N D U M**

**Reed, S.J.**

**November 23, 1999**

Now before this Court is the joint motion of defendants World Flavors, Inc., and Edward Selser for summary judgment (Document No. 22).<sup>1</sup> Upon consideration of defendants' motion, plaintiff's response (Document No. 24), and defendants' reply (Document No. 27) pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants' motion will be granted.

**I. BACKGROUND**

Plaintiff Kenneth Pirolli was employed by defendant World Flavors, Inc., ("World Flavors") from May 1994 to September 1996. Pirolli was hired through the Bucks County Association for Retarded Citizens Production Services, Inc. ("BARC"). His duties at World Flavors were those of an "all around person," and included weighing products; packing, sealing, and stacking boxes for shipment; sweeping and scrubbing the plant floors; and picking up trash.

In his Amended Complaint (Document No. 11) (filed September 2, 1998) Pirolli alleges

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<sup>1</sup> While the motion is presented on behalf of World Flavors, the motion also advances arguments on behalf of Edward Selser, and counsel of record for World Flavors and Selser are one and the same. Therefore, I will treat the motion as a joint motion for the purpose of disposition.

that his co-workers twice attempted to forcibly sodomize him, stuffed him into a garbage can, physically beat him, placed him in headlocks, threw materials at him, posed vulgar and sexual questions and propositions, made embarrassing and humiliating statements to him about his mental disability, and poked fun at the way he walked, ate, drank, and sat. See Amended Complaint, at ¶ 11-20. Pirolli allegedly reported these incidents to his supervisor, defendant Edward Selser (“Selser”), but the conduct continued. On September 13, 1996, Pirolli’s employment with World Flavors was terminated.

Pirolli filed suit against World Flavors and Selser under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., the Pennsylvania Human Relations Act, 43 Pa. C.S.A. §§ 951 et seq. (1991 & Supp. 1998), and the common law of Pennsylvania.

## **II. SUMMARY JUDGMENT STANDARD**

Under Rule 56 of the Federal Rules of Civil Procedure, a court may grant judgment only 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.”

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, see Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986), and the “inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962)). If the moving party meets its burden, the nonmoving

party must then “set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e) Fed. R. Civ. P. See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986).

The question before the court at the summary judgment stage is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” See Liberty Lobby, 477 U.S. at 251-52, 106 S. Ct. at 2512. A judge’s role at summary judgment is not to weigh the evidence, but to determine whether there is a genuine issue for trial; that is, an issue upon which a reasonable jury could return a verdict in the non-moving party’s favor. See id. at 249, 106 S. Ct. at 2511. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” Matsushita, 475 U.S. at 586, 106 S. Ct. at 1356, and must produce more than a “mere scintilla” of evidence to demonstrate a genuine issue of material fact and avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1991)

### **III. ANALYSIS**

Because plaintiff asserts claims that arise under federal law, this Court has subject matter jurisdiction over his federal law questions pursuant to 28 U.S.C. § 1331, and pendent jurisdiction over his claims under Pennsylvania law.

The memoranda submitted by both parties on the instant motion are of little help to the Court in that they fail to present the established legal analyses of the different claims asserted by the plaintiff and fail to identify the evidence in support of each claim in the proper analytical context. Instead, the parties chose to simply argue whether there is sufficient factual support for

the allegations in the complaint. Because it is my duty to identify and follow the established law in deciding this motion, I will conduct the proper analyses in considering the evidence in support of each claim.<sup>2</sup>

**A. Hostile Work Environment/Harassment**

As a preliminary but fundamental matter, it would appear that World Flavors is an “employer” and therefore a proper defendant under both Title VII and the ADA. See 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111 (5)(A).<sup>3</sup> Defendants argue, however, that Selser is not a proper defendant under Title VII or the ADA because only employers are liable under the ADA and Selser was merely a supervisory employee of World Flavors.

It is well established that individuals cannot be held liable under Title VII or the ADA; only persons who are “employers,” “labor organizations,” or “employment agencies” may be liable. See Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996) (citations omitted). Plaintiff does not respond to defendants’ assertion that Selser is not a proper defendant under Title VII or the ADA, nor does he present any evidence that Selser meets the definition of an employer. Therefore, I conclude that Selser is not a proper defendant under Title

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<sup>2</sup> The Court of Appeals for the Third Circuit has interpreted the Pennsylvania Human Relations Act (“PHRA”) to be consistent with Title VII and the ADA. See Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996). Thus, I will analyze the motion for summary judgment only under Title VII and the ADA, though my analysis and conclusions will apply with equal force to the PHRA. See James v. Teleflex, Inc., No. 97-1206, 1998 U.S. Dist. LEXIS 20400, at \*18-19 (E.D. Pa. December 23, 1998).

<sup>3</sup> An “employer” is defined as a person having 15 or more employees under Title VII, and 25 or more under the ADA. While there is no evidence before the Court of the number of individuals employed by World Flavors, World Flavors does not claim that it is not an “employer” and thus the Court will assume for the purpose of analysis that World Flavors meets the definition of an employer under both statutes.

VII or the ADA, and will grant summary judgment in favor of Selser as to Counts I, II, III and IV.

Moving to the merits, World Flavors contends that it is entitled to summary judgment on the ground that a reasonable jury could not find from the evidence now before the Court that plaintiff was subjected to a hostile work environment because of his sex or disability. Plaintiff argues that the evidence is sufficient to create a genuine issue of material of fact on this question.

### **1. Sexual Harassment**

A plaintiff seeking to establish employer liability for a sexually hostile work environment must establish the following essential elements:

(1) the employee[ ] suffered intentional discrimination because of [his] 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 & Co., 175 F.3d 289, 293 (3d Cir. 1999) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). The subjective and objective prongs of the inquiry are intended strike a balance between providing substantial recourse to individuals who have suffered harassment and protecting employers against frivolous claims or hypersensitivity among certain employees. See Andrews, 895 F.2d at 1483.

The first prong poses the greatest difficulty for the plaintiff. Pirolli alleges that he was discriminated against because of his sex by members of his same sex, and the Supreme Court has held that Title VII does not bar such a claim. See Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79, 118 S. Ct. 998 (1998). However, the Court requires specific proof that harassment took place *because of* the sex of the plaintiff. See id. at 81, 118 S. Ct. at 1003. While proof of overt

sexual harassment is not required to establish a sexually hostile work environment claim, a plaintiff must show that gender was a “substantial factor” in the discrimination. See Andrews, 895 F.2d at 1485. As the Supreme Court noted in Oncale, “Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination ... because of ... sex.’” Id. at 81, 118 S. Ct. at 1003.

In Oncale, the Supreme Court set forth the following examples of evidence from which a court could infer that the harassment took place because of an individual’s sex: proposals of sexual activity, harassment based on a general hostility to the presence of a particular sex in the workplace, and comparative evidence of how the alleged harasser treats members of the opposite sex. See id. at 80, 118 S. Ct. at 1002.

I conclude that the evidence presented by plaintiff in support of his sexually hostile work environment claim does not provide a basis upon which a reasonable jury could find that he was harassed because of his sex. The most persuasive evidence offered by plaintiff is his testimony concerning an episode in the locker room at the World Flavors plant. Plaintiff characterizes this incident as “the rape,” and the complaint describes it as an attempt at forcible sodomy. However, in light of the plaintiff’s own testimony, these characterizations are greatly exaggerated.

According to Pirolli’s deposition testimony, a co-worker attempted to prevent him from leaving the locker room by holding him around the waist from behind and another turned the lights in the room off briefly while he and his co-workers were in various stages of undress. (Plaintiff Kenneth Pirolli’s Response to Defendants’ Motion for Summary Judgment, Exhibit B, Pirolli Deposition, at 49) (“Pirolli Deposition”). During the scuffle, plaintiff claims to have seen the

penis of one of his co-workers. (Id.) Despite the fact that his co-workers' behavior may have been inappropriate, it is clear from plaintiff's description that the incident was far from a rape or even an attempted rape.

Plaintiff also alleges in his Amended Complaint that a co-worker attempted to insert a broomstick up plaintiff's anus while another co-worker looked on. However, an examination of the evidence demonstrates that this allegation, too, fails to live up to its billing in the complaint. The only support for this claim is a report by plaintiff's psychologist, Dr. Fred Dorfman, which states,

On another occasion [sic] one of [Pirolli's] co-workers, Harley Strauss, attempted to push a broom pole into [Pirolli's] behind as other staff watched. (It should, however, be noted that Mr. Pirolli was wearing his work clothes at the time of the incident).

(See Defendants' Motion for Summary Judgment, Exhibit C, Dorfman Report).<sup>4</sup> While certainly inappropriate, the behavior described in Dorfman's report seems far less offensive than the complaint allegations suggest, and these facts were not supported by plaintiff at his deposition or by affidavit.

Dorfman's report also includes an alleged history that a co-worker, Samuel Gallagher, would rub his penis against Pirolli's behind when Pirolli bent over. This charge was not made in Pirolli's Amended Complaint, was not repeated in Pirolli's deposition testimony, and was denied by Gallagher in his deposition testimony. Thus, there is insufficient evidence of this historical

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<sup>4</sup> Dr. Dorfman's report is not in the form of an affidavit and the alleged history to him is not verified by an affidavit from plaintiff. The report alone in this form cannot be the basis for a factual dispute. Cf. 10A Charles Alan Wright, et al., Federal Practice and Procedure § 2722, at 58-60 (to be admissible, documents must be authenticated and attached to an affidavit that meets the requirements of Federal Rule of Civil Procedure 56(e)).

allegation in the record before this Court to create a genuine issue of material fact.

Plaintiff has produced evidence of other instances of harassment that are not overtly sexual in nature, such as being stuffed into a large plastic container by his co-workers, being squirted with a hose and placed in headlocks, and having materials such as balls of tape thrown at him. I can find no evidence in the record supporting Pirolli's claim in his Amended Complaint that his co-workers made vulgar comments and propositions to him.

The evidence before me does not provide any substantial support for Pirolli's claim that he was harassed because he was a male. Pirolli has introduced none of the kind of proof contemplated by the Supreme Court; no evidence of his harassers' view of his gender, no support for his allegation that his co-workers proposed sexual activity, no proof of a general hostility to the presence of men in the workplace (quite the contrary, in fact), and no evidence that his co-workers treated members of the opposite sex any differently. Pirolli may have produced sufficient evidence to show that in some instances, his co-workers' conduct had an offensive sexual connotation. I conclude, however, that plaintiff has not produced sufficient evidence upon which a reasonable jury could find he was discriminated against because of his sex.<sup>5</sup>

Pirolli's failure to prove the first element is fatal to his claim of a sexually hostile work

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<sup>5</sup> My conclusion is supported by the holding of the Court of Appeals for the Seventh Circuit in Johnson v. Hondo, 125 F.3d 408 (7<sup>th</sup> Cir. 1997). There, the male plaintiff produced evidence that he was subjected to offensive conduct by a male co-worker that included physical touching in the workplace, vulgar threats, and references to forcing the plaintiff and plaintiff's girlfriend to perform sex acts. The court concluded at summary judgment that plaintiff had failed to raise a triable issue as to whether the harassment took place because of plaintiff's gender. Pirolli has produced even less evidence that his co-workers harassed him or singled him out because of his sex, and thus, I am completely unable to find that Pirolli's co-workers' harassment was "inseparable from [Pirolli's] gender" or "inescapably and irrevocably linked to [Pirolli's] gender," Johnson, 125 F.3d at 414 (quoting Doe v. City of Belleville, Ill., 119 F.3d 563, 579 (7<sup>th</sup> Cir. 1997)).

environment. However, I will consider the other elements as well. As to the second element, Pirolli has produced sufficient evidence to show that the conduct complained of was regular and pervasive; the conduct at issue in this case took place on a frequent basis throughout many facets of his work. Plaintiff also has produced evidence, in the form of the fact of Dr. Dorfman's treatment, which is undisputed, and plaintiff's own deposition testimony, showing that he was detrimentally affected by the conduct, thus the third element is satisfied.

Under the fourth element, which requires proof that a reasonable person of the plaintiff's sex would be detrimentally affected by the same conduct, a court should consider the totality of the circumstances, not merely discrete incidents, and should focus not only on sexual advances, innuendo, or contact, but on all the alleged conduct and the evidence in support of it. See Andrews, 895 F.2d at 1484. The Supreme Court has held that in assessing the objective severity of the harassment, careful attention must be paid to the context in which same-sex harassment takes place, and distinctions must be drawn between "simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." See Oncale, 523 U.S. at 82, 118 S. Ct. at 1003. The Court observed that courts must accept the concept that behavior which may be appropriate in the context of one workplace would not be appropriate in another. See id.

It appears to me that the context in which the alleged harassment took place in this case is one in which the employees engaged in physical horseplay and roughhousing, as well as occasionally offensive banter, as a matter of course. Plaintiff's own deposition testimony reveals that co-workers frequently punched and "wrestle[d] around" with one another and with him, squirted water at one another and him, and threw balls of discarded tape at one another and

him. (Pirolli Deposition, at 18-20). This characterization is supported by the deposition testimony of his co-workers and his supervisor. Plaintiff's evidence shows that he was treated no differently than his co-workers were. In light of the rowdy context of plaintiff's workplace, I cannot conclude that a reasonable jury could find that the conduct for which plaintiff has produced evidentiary support rose to a level of severity, offensiveness, or abusiveness that altered the conditions of the workplace. See Oncale, 523 U.S. at 82, 118 S. Ct. at 1003.

Finally, plaintiff must establish *respondeat superior* liability, based on agency principles. The Court of Appeals for the Third Circuit has recognized three potential bases for holding employers liable for harassment committed by their employees: (1) when torts were committed by employees in the scope of their employment; (2) when the employer itself was negligent or reckless in failing to discipline, hire, fire, or take remedial action; (3) when the harassing employee "relied upon apparent authority or was aided by the agency relationship." Knabe v. Boury Corp., 114 F.3d 407, 411 (3d Cir. 1997) (quoting Bouton v. BMW of North America, Inc., 29 F.3d 103, 106 (3d Cir. 1994)). The first and third forms of liability do not apply to these facts.<sup>6</sup>

Under the second theory of liability, a plaintiff must show that "management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action ... ." Andrews, 895 F.2d at 1486 (citation omitted). While Pirolli has produced evidence that he complained to his

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<sup>6</sup> The first alternative is "inapposite in hostile environment cases," and therefore irrelevant to the present case. See Knabe, 114 F.3d at 411. Nor is the third form of liability applicable here; there is no indication that Pirolli's co-workers relied on any authority they had over him in their conduct toward him, nor is there any evidence suggesting that their conduct was aided by World Flavors or Selser.

supervisor, Selser, about certain incidents, Pirolli has not produced evidence that Selser or World Flavors were reckless or negligent in failing to responding to those requests.<sup>7</sup> World Flavors has produced evidence that it had an established system of disciplinary action, and that Selser disciplined at least one of Pirolli's co-workers pursuant to that system in response to a complaint by Pirolli. (Defendant's Motion for Summary Judgment, Exhibit G, Selser Deposition, at 17-18). Furthermore, Selser testified that he had instructed workers not to engage in the activities of which Pirolli complained, including throwing things at one another. (Selser Deposition, at 62). I conclude that plaintiff has not produced sufficient evidence based upon which a reasonable jury could find that World Flavors was negligent or reckless in failing to take remedial action in response to his complaints, and thus the fifth element is not satisfied.

Because I have concluded that Pirolli lacks sufficient evidence upon which a reasonable jury could find that he meets all the requisites of a sexually hostile work environment claim, summary judgment will be granted in favor of the defendant on Pirolli's claim of sexual harassment under Count III.

## **2. Hostile Work Environment Under the ADA**

The Court of Appeals for the Third Circuit has not determined whether a cause of action for hostile work environment or harassment exists under the ADA. In a recent consideration of the matter, the Court of Appeals stopped short of confirming that such a claim is legally viable. See Walton v. Mental Health Ass'n, 168 F.3d 661 (3d Cir. 1999). Assuming the existence of a

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<sup>7</sup> Plaintiff appears to assert that because his co-workers did not cease their behavior after he complained to Selser, this Court must find World Flavors liable. However, the Court of Appeals for the Third Circuit has determined that even where an employer's remedial efforts are not effective in ending the harassment, a court may still conclude that the action was adequate as a matter of law. See Knabe, 114 F.2d at 412 n.8. I so conclude here.

legal basis for such a claim for the purpose of analysis, the court in Walton held that a plaintiff seeking to state a claim for harassment under the ADA must make the following showing: (1) the plaintiff is a qualified individual with a disability under the ADA; (2) plaintiff was subject to unwelcome harassment; (3) the harassment was based on the plaintiff's disability or a request for an accommodation; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) that defendants knew or should have known of the harassment and failed to take prompt, effective remedial action. See id. at 667.

The Court of Appeals has not recognized the viability of the cause of action that Pirolli asserts, but even if such a claim did exist, plaintiff would not satisfy the elements set forth in Walton. Plaintiff probably meets the first and second elements: he is a mentally disabled person who was qualified for the job at World Flavors and he apparently was subjected to conduct that was unwelcome. However, Pirolli would fail the third element, because, as with his sexual harassment claim, he lacks evidence upon which a jury could find that he experienced discrimination or harassment *because of* his disability. Neither plaintiff's deposition testimony, nor those of his co-workers, Eugene Engasser, Samuel Gallagher, and Kenneth Silcox, supply any evidence of an awareness among his co-workers of Pirolli's mental disability or that their behavior stemmed from such an awareness.<sup>8</sup>

In addition, plaintiff would not satisfy the fourth element. To do so, he would have to show that severe or pervasive harassment altered the conditions of his employment and created

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<sup>8</sup> While Selser's deposition testimony reflects that he was aware of Pirolli's disability, Pirolli does not claim that Selser harassed him.

an abusive working environment from both a subjective and objective standpoint. See Presta v. SEPTA, No. 97-2338 1998 U.S. Dist. LEXIS 8630, at \*40-41 (E.D. Pa. June 11, 1998). While plaintiff might be able to satisfy the subjective aspect of this test, he would fail the objective aspect, because, as discussed above, he has failed to produce sufficient evidence to demonstrate a genuine issue of material fact as to whether his co-workers created a work environment that would be viewed as severe and abusive by a reasonable person.<sup>9</sup>

Finally, as discussed above, Pirolli has failed to produce sufficient evidence from which a reasonably jury could find *respondeat superior* liability. There is no indication in the record that World Flavors or Selser were negligent or reckless in failing to take remedial action or that the conduct of his co-workers was facilitated by World Flavors.

Pirolli has failed to meet his burden of producing evidence upon which a reasonable jury could find that he was harassed because of his disability. For this reason, summary judgment will be granted as to his Count I claim of a hostile work environment under the ADA.

## **B. Disparate Treatment**

While the parties make oblique references to plaintiff's claims of harassment and

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<sup>9</sup> Plaintiff argues that the proper test to apply in this case is that of a reasonable person with the same disability as Pirolli (mental retardation). However, the direct application of plaintiff's suggested objective standard to disability cases is problematic, particularly when a mental disability is involved. Unlike gender or race, a mental disability can have such a decisive influence over a plaintiff's perception that even the most innocent of conduct could be found to be objectively abusive or hostile to a reasonable person with a particular mental disorder. If courts were to modify the objective test to account for each particular mental disability suffered by every plaintiff, the objective test could lose its objectivity.

I believe that the objective analysis under the ADA when a plaintiff is mental disabled is no different from a typical objective inquiry under Title VII. See Morgan v. City & County of San Francisco, No. 96-3573, 1998 U.S. Dist. LEXIS 349, at \*22 (N.D. Cal. January 13, 1998). (while schizophrenic plaintiff may have subjectively considered her work environment hostile, "[n]o objective observer would find this environment objectively abusive").

intentional torts, both fail to specifically address plaintiff's claims of disparate treatment under Title VII and the ADA. Nevertheless, defendants sufficiently point to a lack of evidence as to all claims, including disparate treatment, and thus plaintiff bears the burden at this stage of the proceedings of showing he can produce evidence at trial upon which a reasonable jury could find in his favor on his claim of disparate treatment. Plaintiff does not argue this issue at all in his papers, however, in the interests of justice, I will consider the evidentiary record on the issues raised by his claims of discrimination on the basis of sex and disability.

Pirolli does not show that he can present direct evidence of discrimination, and therefore, in order to establish an employment discrimination claim under Title VII or the ADA, he must proceed on a "mixed motive" theory, under which plaintiff must show that an illegal consideration (e.g., sex or disability) was a "substantial factor in the decision." See Price Waterhouse v. Hopkins, 490 U.S. 228, 272, 109 S. Ct. 1775, 1802 (1989). Under the Supreme Court's burden-shifting framework, set forth in McDonnell Douglas Corp. v. Green, plaintiff must first prove a prima facie case of discrimination. See 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973).

In order to establish a prima facie case of discrimination, a plaintiff must show that (1) he is a member of a protected class; (2) he is qualified for the position; (3) he was either not hired or fired from the position; (4) the circumstances give rise to an inference of unlawful discrimination (e.g., the position is ultimately filled by a person not a member protected class). See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1066 n.5 (3d Cir. 1996).

Plaintiff satisfies the first three elements of a prima facie case. As a man and a disabled person, plaintiff was a member of two protected classes. Furthermore, as discussed above, he

was qualified for his position. He was terminated by World Flavors on September 13, 1996.

The key question here, as with plaintiff's hostile work environment claims, is whether plaintiff has adduced the availability of evidence sufficient to give rise to an inference that his termination was motivated by a discriminatory purpose. I conclude that plaintiff has not produced sufficient evidence upon which a reasonable jury could find this element satisfied. I find no evidence on the record suggesting that a female or a non-disabled person was hired to replace Pirolli. Selser, in his deposition testimony at page 21, states that he did not recall whether Pirolli was replaced at all.<sup>10</sup> Neither plaintiff's deposition testimony nor any other evidence shows proof of discrimination against him by decisionmakers at World Flavors on the basis of his gender or his mental disability. There were presented no derogatory statements concerning plaintiff's sex or disability, no evidence of ill treatment by decisionmakers on the basis of sex or disability, and no evidence of deep-seated animus toward men or mentally disabled individuals among World Flavor decisionmakers.<sup>11</sup> In fact, it appears from uncontested evidence in the record that Selser, as Pirolli's supervisor, worked closely with Pirolli to improve his performance, and displayed great patience with Pirolli's poor performance on the job.

Even from plaintiff's own deposition testimony, it appears that his termination stems directly from a near-violent argument in the parking lot of the World Flavors plant involving plaintiff, his brother, and plaintiff's co-workers. (Pirolli Deposition, at 36; Selser Deposition, at

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<sup>10</sup> However, as the Court of Appeals for the Third Circuit recently held, a plaintiff need not prove that he or she was replaced by a person outside the protected class to state a prima facie case of discrimination under Title VII. See Pivrotto v. Innovative Systems, Inc., 1999 U.S. App. LEXIS 21379 at \* 25, No. 98-3609 (3d Cir. September 7, 1999).

<sup>11</sup> Instead, Pirolli's allegations focus on the conduct of his co-workers, who were not responsible for making the decision to terminate him.

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Thus, even if Pirolli had attempted to argue that he had sufficient evidence to make out a prima facie case of employment discrimination against World Flavors, he would not have succeeded. I conclude that plaintiff has failed to establish a genuine issue of material fact as to his claims of discrimination on the basis of gender and disability, and summary judgment will therefore be granted as to Counts II, III and IV.

### **C. Common Law Tort Claims**

Plaintiff also asserts causes of action against World Flavors and Ed Selser for assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress.

Defendants argue that plaintiff's tort claims are time-barred pursuant to 42 Pa. C.S.A. §5524, which sets a two-year statute of limitations for such claims. Defendants argue that plaintiff has failed to produce evidence that any of the alleged torts took place within the two-year period before the claim was filed (July 10, 1996 – July 10, 1998). Plaintiff argues that the torts were continuing in nature, and thus fall within the statute of limitations, because they ended only when plaintiff was terminated from World Flavors on September 13, 1996.

It is acknowledged that plaintiff is imprecise as to the dates of certain occurrences. However, plaintiff describes in his deposition testimony conduct that occurred throughout his employment at World Flavors and states that his co-workers' conduct "kept going on ... way after" the locker room incident. (Pirolli Deposition, at 52). While not overwhelming in substance, these statements suffice to show that the conduct was continued throughout his employment at World Flavors, and because he was employed for two months after the statute of limitations began to run, the continuing conduct would have taken place within the statute of

limitations. Therefore, plaintiff has demonstrated a genuine issue of material fact on the issue of whether his tort claims are time-barred. See Carter v. Philadelphia Stock Exch. & Stock Clearing Co., No. 99-2455, 1999 U.S. Dist. LEXIS 13660 (E.D. Pa. August 25, 1999).

However, it remains to be determined whether there is sufficient evidence to sustain a verdict in Pirolli's favor on the substantive elements of his tort claims.

Under Pennsylvania law, an employer may be found liable for an intentional tort committed by an employee if *respondeat superior* liability exists. See Fitzgerald v. McCutcheon, 270 Pa. Super. 102, 410 A.2d 1270 (1979). In the employment context, tort liability under *respondeat superior* depends on whether the torts were committed by employees in the scope of their employment. See Knabe v. Boury Corp., 114 F.3d 407, 411 (3d Cir. 1997) (citing Bouton v. BMW of North America, Inc., 29 F.3d 103 (3d Cir. 1994)). Conduct in the scope of employment is defined by the Restatement (Second) of Agency § 228:

- (1) Conduct of a servant is within the scope of employment if, but only if:
  - (a) it is of the kind he is employed to perform;
  - (b) it occurs substantially within the authorized time and space limits;
  - (c) it is actuated, at least in part, by a purpose to serve the master, and
  - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
  
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

As in Fitzgerald, the key question in the present case is whether the “servant[s]” (here, Pirolli's co-workers), in engaging in the complained-of conduct, were motivated by a purpose to serve the “master” (World Flavors). Pirolli has made no showing that his co-workers were acting in furtherance of World Flavors' business purpose in their conduct toward him. Rather, it

appears that his co-workers were “motivated by reasons personal to [themselves].” See Fitzgerald, 270 Pa. Super. at 107, 410 A.2d at 1272.

This conclusion is supported of a decision by the Court of Appeals for the Fourth Circuit. In an intentional tort case involving a sexual assault on a employee by a security guard employed by the defendant corporation, that court held that the corporation could not be held liable for the acts of its employee. See Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4<sup>th</sup> Cir. 1978). Addressing the “scope of employment” aspect of the *respondeat superior*, the court wrote,

The assault by Roberts was manifestly not in furtherance of Guardsmark’s business ... . The assault was to effect Roberts’ independent purpose and it was not within the scope of his employment. The mere fact that the tort was committed at a time that Roberts should have been about Guardsmark’s business and that it occurred at the place where Roberts was directed to perform Guardsmark’s business does not alter these conclusions.

Id. at 1279. As in Rabon, there is no evidence that Pirolli’s coworkers were acting on behalf of World Flavors by allegedly assaulting him, putting him in headlocks and otherwise roughhousing with him. That the conduct took place during work hours at the World Flavors plant is not dispositive. On the basis of the evidence now before me, I conclude that a reasonable factfinder could not determine that Pirolli’s co-workers, in engaging in the kind of horseplay and roughhousing alleged, were furthering the purpose of their employment.

Thus, I conclude that Pirolli has not produced any evidence that his co-workers were acting in the scope of their employment, and a jury therefore could not find *respondeat superior* liability against World Flavors. Accordingly, summary judgment will be granted as to Pirolli’s intentional tort claims against World Flavors under Counts V and VII.<sup>12</sup>

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<sup>12</sup> Pirolli’s claim of intentional infliction of emotional distress would not survive summary judgements on its merits, either. The Supreme Court of Pennsylvania has stated that

Furthermore, because Pirolli does not allege or produce evidence that Ed Selser was directly involved in any of the conduct complained of, and because Selser is not an employer and is thus not subject to *respondeat superior* liability, I conclude that Pirolli's claims of assault and battery and intentional infliction of emotional distress against Selser cannot survive summary judgment.

All that remains, then, is Pirolli's claim of negligent infliction of emotional distress against World Flavors and Selser, stated in Count VI. Negligent infliction of emotional distress is a valid tort under Pennsylvania law. See Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); see also Green v. Bryant, 887 F. Supp. 798 (E.D. Pa. 1995). The Superior Court of Pennsylvania has written that a cause of action for negligent infliction of emotional distress exists in only two circumstances: 1) where a close family member experience a contemporaneous sensory observance of physical injuries being inflicted on another family member or (2) where the plaintiff nearly experiences a physical impact in that he was in the zone of danger of the defendant's tortious conduct. See Hunger v. Grand Cent. Sanitation, 447 Pa. Super. 575, 585, 670 A.2d 173, 178 (1996). Neither of these circumstances is before us in the present case.

Nevertheless, it could be argued that in the Superior Court of Pennsylvania recognizes a

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“it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.” Hoy v. Angelone, 554 Pa. 134, 152, 720 A.2d 745, 755 (1998) (quoting Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir. 1988)). Sexual harassment alone does not rise to the level of outrageousness required to sustain a claim of intentional infliction of emotional distress. See id. “[T]he only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee.” Id. Pirolli's evidence as to the conduct of his co-workers, Selser, and World Flavors does not even approach this standard of outrageousness.

claim for negligent infliction of emotional distress absent such circumstances. See Hunger, 447 Pa. Super. at 595, 670 A.2d at 183; Crivellaro v. Pennsylvania Power & Light Co., 341 Pa. Super. 173, 491 A.2d 207 (1985). In Hunger Judge Beck, in a concurring opinion, observed that recovery may be allowed on a claim of negligent infliction of emotional distress “in a situation where a separate, preexisting duty was owed by defendant to plaintiff and breach of that duty was the cause of the emotional distress alleged.” Id. (citing Armstrong v. Paoli Memorial Hosp., 430 Pa. Super. 36, 633 A.2d 605 (1993)) (Beck, J., concurring). The duty must exist, be breached, and cause severe emotion distress that leads to bodily harm. See id.

In Denton v. Silver Stream Nursing and Rehabilitation Ctr., 1999 Pa. Super. 251, 1999 Pa. Super. LEXIS 2934 (1999), the Superior Court of Pennsylvania applied this analysis to a negligent infliction of emotional distress claim flowing from the harassment of plaintiff by a co-worker. The plaintiff alleged that a fellow employee threatened him with physical violence and made a veiled threat of homicide, allegedly at the urging of the employer. Plaintiff claimed that the employer had a duty to protect plaintiff, its employee, from emotional distress. The court stated that it was “unaware of any authority establishing this duty between an employer and an employee.” Id. at \*22.

In the present case, Pirolli has not alleged that defendants owed him a duty to protect him from emotional distress, or any other such duty, and this Court is unaware of any conceivable duty described by Pennsylvania law that could withstand summary judgment. Furthermore, the circumstances of this case are far less egregious than those in Denton. If a Pennsylvania appellate court was reluctant to sustain a cause of action for negligent infliction of emotional distress under circumstances involving a credible threat of serious bodily injury or death, I am

even more reluctant to recognize such a claim here, where the allegations and evidence show only name-calling and horseplay. I conclude that plaintiff has not produced evidence upon which a reasonable jury could find that World Flavors or Edward Selser are liable for negligent infliction of emotional distress, and thus summary judgment will be granted as to his claim in Count VI for negligent infliction of emotional distress.

#### **IV. CONCLUSION**

The Court was shocked upon its first reading of plaintiff's Amended Complaint. However, after a thorough review of the evidence and the relevant case law, I have concluded that the more egregious allegations in the complaint are not substantiated even by the plaintiff himself.

What initially was alleged to be a serious case of workplace harassment now appears to have consisted of macho horseplay and adolescent roughhousing in a context where such behavior was the common and accepted mode of social interaction. While the Court might frown upon such conduct in its own chambers, what constitutes appropriate social conduct in chambers cannot form a reliable guide to workplace etiquette in a food plant, nor can it provide a legal basis for liability under federal or state law.

Based on the foregoing analysis, I conclude that plaintiff has failed to produce evidence sufficient to create a genuine issue of material fact as to his claims of disparate treatment and hostile work environment under the ADA and Title VII, and under Pennsylvania tort law. Therefore, summary judgment will be granted as to all counts in plaintiff's amended complaint.

An appropriate order follows.



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

|                                   |   |                     |
|-----------------------------------|---|---------------------|
| <b>KENNETH PIROLI,</b>            | : | <b>CIVIL ACTION</b> |
|                                   | : |                     |
| <b>Plaintiff,</b>                 | : |                     |
|                                   | : |                     |
| <b>v.</b>                         | : |                     |
|                                   | : |                     |
| <b>WORLD FLAVORS INC., et. al</b> | : |                     |
|                                   | : |                     |
| <b>Defendants.</b>                | : | <b>NO. 98-3596</b>  |

**O R D E R**

**AND NOW**, this 23rd day of November, 1999, upon consideration of the joint motion of defendants World Flavors, Inc., and Edward Selser for summary judgment (Document No. 22), plaintiff's response (Document No. 24), and defendants' reply (Document No. 27), having determined upon a thorough review of the memoranda in support of the motion and responses thereto and "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" pursuant to Rule 56 of the Federal Rules of Civil Procedure, and having found that there are no genuine issues of material fact and that the World Flavors and Edward Selser are entitled to a judgment as a matter of law, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the Motion is **GRANTED** on all counts and **JUDGMENT** is hereby **ENTERED** in favor of World Flavors and Edward Selser and against Kenneth Pirolli.

This is a final order.

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**LOWELL A. REED, JR., S.J.**