

II. LEGAL STANDARD

Summary judgment is appropriate "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" 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). A factual dispute is "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, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). That is,

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." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Under Rule 56, the Court must view the evidence presented in the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor.").

III. DISCUSSION

Plaintiffs' Complaint contains the following causes of action: (1) hostile work environment sexual harassment (under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.A. §§ 2000e et seq. (West 1994 & Supp. 1998)); (2) hostile work environment sexual harassment (under the Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (West Supp. 1998), and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution); (3) negligent retention and supervision (under Pennsylvania law); (4) intentional infliction of emotional distress (under Pennsylvania law); and (5) loss of consortium (under Pennsylvania law).

The first four claims are brought by Merritt, a Controls

Technician who began his employment with DRPA on May 12, 1981 and is assigned to the Walt Whitman Bridge. His claims against DRPA are based on allegations that he was sexually harassed by John Pilla ("Pilla"), a DRPA custodian also assigned to the Walt Whitman Bridge.¹ The fifth claim is brought by Moira Ann Merritt and is based on the alleged loss of consortium suffered by her because of DRPA's conduct and the resulting injury to her husband.

A. Merritt's Title VII and Section 1983 Claims for Hostile Work Environment Sexual Harassment

In his Title VII and Section 1983 claims, Merritt alleges that he was subjected to unwelcome sexual conduct by Pilla over a nine month period, that he reported Pilla's conduct to his supervisors at DRPA on several occasions, and that his supervisors responded by laughing at him, ignoring his complaints, and acting affirmatively to cover up Pilla's conduct by asking Merritt to keep quiet and to "cooperate with them" because if the information concerning Pilla's conduct "ever got out . . . we could all be fired or sued." (Pls.' Exs. Ex. 4, Merritt Dep.)

Merritt claims that the sexual harassment at DRPA was so

¹In its Motion, DRPA describes Pilla as "a mentally-challenged individual." (Deft.'s Mot. at 1.)

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, 23, 114 S. Ct. 367, 371 (1993). Merritt's Title VII and Section 1983 claims are analyzed under the burden shifting framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973) and refined in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093-94 (1981). Under the McDonnell Douglas formula, Merritt must first establish a prima facie case of employment discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Burdine, 450 U.S. at 252-53, 101 S. Ct. at 1093.

There are five elements of a hostile work environment claim: (1) the employee suffered intentional discrimination because of sex; (2) the discrimination was pervasive and regular; (3) the discrimination had a detrimental effect on 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).² DRPA argues that it is entitled to summary judgment on Merritt's sexual harassment claims because genuine issues of material fact do not exist with respect to the first and fifth elements of the prima facie case: that Merritt was discriminated against "because of" his sex and that DRPA is liable for Pilla's actions under the doctrine of respondeat superior.

1. Discrimination "Because of" Sex

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1). In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998 (1998), the Supreme Court recognized a cause of action for same-sex harassment under Title VII. As with all sexual harassment claims, the critical

²Following the Supreme Court's decision in Harris, the United States Court of Appeals for the Third Circuit ("Third Circuit") has reaffirmed the five-part test announced in Andrews. Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997); Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994).

issue with respect to a same-sex harassment claim "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id., 118 S. Ct. at 1002.

In Oncale, the Supreme Court discussed three different evidentiary routes available to a plaintiff to establish sexual harassment in a same-sex context.

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. 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 "discrimina[tion] ... because of ... sex."

Id. In this case, Merritt seeks to establish his claims of sexual harassment by using the first and third evidentiary routes outlined in Oncale: by offering evidence that Pilla is homosexual and by offering comparative evidence about Pilla's treatment of

members of both sexes in the DRPA workplace. (Pls.' Opp. at 63.)

The Court finds that, based on the Rule 56 submissions, genuine issues of material fact exist as to whether Pilla is homosexual. Without reciting details from the Rule 56 submissions, the Court finds that disputed facts exist to suggest that Pilla might be sexually oriented towards men and to support the inference that Pilla harassed Merritt because Merritt is a man. Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999).

The Court also finds that, based on the Rule 56 submissions, genuine issues of material fact exist as to Pilla's treatment of members of both sexes in the DRPA workplace. With respect to this evidentiary route, DRPA attempts to avail itself of the so-called "equal opportunity harasser" defense. Under this theory, there is no Title VII liability when the alleged harasser harasses men and women equally because such a harasser does not treat men and women differently, and thus, there is no discrimination against members of one sex as compared to members of the other sex. Holman v. State of Indiana, 24 F. Supp.2d 909, 912 (N.D. Ind. 1998)(Title VII does not apply in the context of an "equal opportunity harasser").

Plaintiffs appear to concede that the "equal opportunity harasser" defense is available to DRPA. They maintain, however, and the Court agrees, that genuine issues of material fact exist

as to whether Pilla treated men and women differently in the DRPA workplace. (Pls.' Opp. at 57-58.) The Court acknowledges that there is evidence in the Rule 56 submissions that Pilla engaged in inappropriate conduct of a sexual nature in the workplace that was directed towards Merritt, other male DRPA employees, and female DRPA employees. Nevertheless, reading the Rule 56 record in the light most favorable to Plaintiffs, the Court concludes that an inference of sex-based harassment can be drawn from the facts via this evidentiary route. Shepherd, 168 F.3d at 1011-12.

In conclusion, the Court finds that DRPA is not entitled to summary judgment on the grounds that Merritt was not discriminated against "because of" his sex.

2. Respondeat Superior Liability

DRPA also argues that, as a matter of law, DRPA is not liable for Pilla's actions directed towards Merritt. 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. "[T]he liability of an employer is not automatic even if the sexually hostile work environment is created by a supervisory employee." Knabe v. Boury Corp., 114 F.3d at 411. To determine if respondeat superior liability exists, principles of agency law must be used. Meritor Sav. Bank v. Vinson, 477 U.S. at 72, 106 S. Ct. at 2408. 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 411.³ Here, Merritt attempts to impute liability to DRPA for Pilla's actions on the grounds that DRPA was negligent or reckless in failing to train, discipline, fire or take remedial action upon notice of harassment. (Pls.' Opp. at 63-64, citing Bonenberger v. Plymouth Township, 132 F.3d 20, 26 (3d Cir. 1997).)

DRPA asserts that the remedial action it took was adequate as a matter of law. In particular, DRPA maintains that the remedial action it took was reasonably designed to end the alleged harassment. (Defts.' Mot. at 16.). In defining the type of remedial action that will be deemed "adequate," the Third Circuit has held that an ineffective remedial action may be adequate as a matter of law if it is found to be "reasonably calculated to prevent future harassment." Knabe v. Boury Corp., 114 F.3d at 412 n.8. The inquiry made with respect to remedial action is not whether it was effective in stopping the unlawful

³In addition, employer liability attaches if the harassing employee relied upon apparent authority or was aided by the agency relationship. Knabe v. Boury Corp., 114 F.3d at 411. 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 v. BMW of North America, Inc., 29 F.3d 103, 108 (3d Cir. 1994). In this case, Plaintiffs do not maintain that Pilla had apparent authority to engage in acts of alleged sexual harassment.

conduct of the harasser. Instead, the question is whether the remedial action was prompt and adequate.

The Court finds that genuine issues of fact exist as to whether the remedial action was taken promptly by DRPA and was reasonably calculated to prevent future harassment. For example, Merritt makes the argument, supported by his Rule 56 submissions, that on numerous occasions over a nine month period he reported Pilla's conduct to his foreman and other supervisors, in accordance with DRPA's sex harassment policy. His supervisors responded to his complaints with laughter, inaction, and affirmative efforts to hide Pilla's conduct. In Bonenberger, the Third Circuit reversed the district court's grant of summary judgment as to the employer's respondeat superior liability because, inter alia, the district court had disregarded "evidence suggesting 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." Bonenberger, 132 F.3d at 26. The existence of disputed facts in this case precludes the granting of summary judgment on respondeat superior grounds.

In conclusion, because the parties' submissions raise genuine issues of material fact, DRPA is not entitled to summary judgment on Merritt's Title VII or Section 1983 claims.

B. The State Law Claims

1. DRPA's Status as a Bi-State Agency

DRPA maintains that Merritt's claims under Pennsylvania law for negligent retention and supervision and intentional infliction of emotional distress cannot constitutionally be applied to the DRPA. (Defts.' Mot. at 25-33, 42.) This argument is based on DRPA's status as a "public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey." 36 Pa. Stat. Ann. § 3503, Art. I (West 1961 & Supp. 1998); N.J. Stat. Ann. § 32:3-2 (West 1990 & Supp. 1998). It was created by Compact between Pennsylvania and New Jersey, which was ratified by Congress. Peters v. Delaware River Port Authority of Pennsylvania and New Jersey, 785 F. Supp. 517, 519 (E.D. Pa. 1992), reversed in part on other grounds, 16 F.3d 1346 (3d Cir. 1994). According to DRPA, the laws of Pennsylvania and New Jersey as to claims for negligent retention and supervision and intentional infliction of emotional distress in a sexual harassment case are so different so as to run afoul of the Compact Clause of the United States Constitution.

The Court disagrees with DRPA's analysis. Pursuant to the Compact between Pennsylvania and New Jersey creating DRPA, DRPA has the power "to sue and be sued." 36 Pa. Stat. Ann. § 3503, Art. IV(b); N.J. Stat. Ann. § 32:3-5(B). Consistent with the sue or be sued clause of its Compact, DRPA has consented to the

worker's compensation laws of both Pennsylvania and New Jersey. DRPA admitted in its Motion that it has so consented. (Defts.' Mot. at 24 n.3.) In addition, at oral argument on DRPA's Motion for Summary Judgment, counsel for DRPA admitted that DRPA consents to the worker's compensation acts of both Pennsylvania and New Jersey.

Based on DRPA's consent to be sued under Pennsylvania's Worker's Compensation Act ("WCA"), 77 Pa. Stat. Ann. §§ 1-2626, and the undisputed fact that all of the conduct at issue in this case occurred on the Pennsylvania side of the Walt Whitman Bridge, the Court finds that Pennsylvania's WCA applies to Merritt's claims for negligent retention and supervision and intentional infliction of emotional distress.

2. Negligent Retention and Supervision

Merritt has alleged that DRPA is liable for the negligent retention and supervision of Pilla. The issue before the Court is whether he can maintain a claim against DRPA based on tortious acts allegedly committed by Pilla, or whether the claim is barred by the exclusivity provisions of the WCA. The general rule is that an employee's exclusive remedy for injuries arising in the course of employment is the WCA. 77 Pa. Stat. Ann. § 481(a) ("The liability of an employer under this act shall be exclusive and in place of any and all other liability to such

employees...."); Winterberg v. Transportation Ins. Co., 72 F.3d 318, 322 (3d Cir. 1995). Under the WCA, in exchange for the greater certainty of receiving benefits, employees relinquish the right to bring an action in tort against their employer. Poyser v. Newman & Co., Inc., 522 A.2d 548, 550 (Pa. 1987). As a consequence, in order to maintain a claim against DRPA for negligent retention and supervision, Merritt must avail himself of one of the exceptions to this general rule of exclusivity.

In this regard, Merritt argues that the so-called personal animus or third party attack exception applies to this claim. Under this exception, injuries "caused by an act of a third person intended to injure the employee because of reasons personal to him" are excluded from coverage. 77 Pa. Stat. Ann. § 411(1). The Pennsylvania Supreme Court has held that an employee may sue his employer for negligence in failing to maintain a safe workplace if that negligence allows a co-worker to injure him for purely personal reasons:

While we recognize the principles of exclusivity [in the WCA] upon which [defendant] bases this attack, this court has previously determined that the scope of such exclusivity does not preclude damage recoveries by an employee, based upon employer negligence in maintaining a safe workplace, if such negligence is associated with injuries inflicted by a co-worker for purely personal reasons.

* * *

[T]he spirit and intent of the [WCA] is not violated by permitting an employee injured by a co-worker for purely personal reasons to maintain a negligence action against his employer for any associated negligence in maintaining a safe workplace.

Kohler v. McCrory Stores, 615 A.2d 27, 30-31 (Pa. 1992). See also Lezotte v. Allegheny Health Education and Research Foundation, Civ.A.No. 97-4959, 1998 WL 218086, at *7-8 (E.D. Pa. May 1, 1998)(negligent supervision claim by plaintiff alleging injury through sexual harassment not barred by WCA); Sabo v. Lifeguard, Inc., Civ.A.No. 95-3757, 1996 WL 182812, at *2 (E.D. Pa. April 17, 1996)(negligent hiring claim by plaintiff alleging injury through sexual harassment not barred by WCA).⁴

The Court finds that because Merritt's claim for negligent retention and supervision rests on allegations of sexual harassment, it falls within the personal animus exception to the WCA. Therefore, the Court will deny DRPA's Motion as to Merritt's claim for negligent retention and supervision.

3. Intentional Infliction of Emotional Distress

DRPA also challenges the legal sufficiency of Merritt's claim for intentional infliction of emotional distress. A legally cognizable claim for intentional infliction of emotional distress must be based on conduct that 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

⁴The Court notes that DRPA concedes that Merritt's negligent retention and supervision claim is not barred by Pennsylvania's Worker's Compensation Act because it falls within the personal animus exception. (Deft.'s Mot. at 31-33; Deft.'s Reply at 19.)

intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998)(citations omitted). The Pennsylvania Supreme Court recognized that 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," such a 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 stands in stark contrast to the conduct in Hoy. Here, as set forth in Plaintiffs' Rule 56 submissions, Pilla repeatedly exposed himself to Merritt, touched Merritt's genitals on many

occasions, and engaged in masturbation while calling out Merritt's name.⁵ Pilla's conduct took place over a period of nine months. When Merritt reported Pilla's conduct to his supervisors, they reacted to his complaints with laughter, inaction, and efforts to hide Pilla's conduct by asking Merritt to keep quiet. For these reasons, the Court concludes that this may well be the rare case alluded to in Hoy where the conduct directed at Merritt that took place in the DRPA workplace is so outrageous that it offends all notions of decency and should be regarded as atrocious and utterly intolerable in a civilized society. Therefore, the Court will deny DRPA's Motion as to Merritt's claim for intentional infliction of emotional

⁵In their Opposition, Plaintiffs outline Pilla's conduct as follows: "Daily attempts to grab Merritt's genitals -- many successful. Daily touching of Merritt's arms, legs, shoulders. Daily verbal harassment including, but not limited to: 'I want to fuck you up the ass,' 'I want to stick my cock up your ass,' 'I want your cock in my mouth,' 'When you fuck your wife, do you think of me.' Daily simulation of masturbation while calling out Merritt's name. An incident of actual masturbation while calling out Merritt's name. Daily licking of his tongue in and out while looking at Merritt's genitals. Merritt recalls one such incident: 'He only did it once . . . I don't know if he licked my fly or bit my fly. I'm not real sure. He only did it once. It scared the hell out of me.' Frequent exposing of penis and buttocks. Merritt recalls one occasion: '[Pilla] backed out of the toilet stall with his pants down with his rear end up with feces hanging out It was ugly. [H]e was always doing that, exposing himself, his rear end.' Violent physical abuse of Merritt including, but not limited to, ramming a broom handle in Merritt's anus." (Pls.' Opp. at 58, record citations omitted, emphasis in the original.)

distress.⁶

4. Loss of Consortium

DRPA moves for summary judgment as to Moira Ann Merritt's loss of consortium claim on the grounds that this claim is derivative of her husband's substantive state claims and if Merritt's state claims fail, then his wife's derivative claim for loss of consortium also fails. Manzitti v. Amsler, 550 A.2d 537, 538 (Pa. Super. Ct. 1988). Conversely, if Merritt's substantive claims survive, then his wife's loss of consortium claim also survives. Accordingly, because Merritt's claims survive, DRPA is not entitled to summary judgment as to the loss of consortium claim.

IV. CONCLUSION

For the foregoing reasons, the Court will deny DRPA's Motion for Summary Judgment.

An appropriate Order follows.

⁶The Court also finds that the WCA does not bar Merritt's intentional infliction of emotional distress claim. Dunn v. Warhol, 778 F. Supp. 242, 244 (E.D. Pa. 1991) ("Where an employee is subjected to sexual harassment on the job by a fellow employee, courts understandably invoke the third party attack exception."); Lazar v. Brush Wellman, Inc., 857 F. Supp. 417, 423 (E.D. Pa. 1994) (intentional infliction of emotional distress claim due to sexual harassment is not barred by WCA); Schweitzer v. Rockwell Int'l, 586 A.2d 383 (Pa. Super. Ct. 1990) (WCA does not bar emotional distress claim grounded upon allegations of sexual harassment).

