

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

MICHAEL WESTON and : CIVIL ACTION
DEBORAH WESTON :
 :
v. :
 :
COMMONWEALTH OF :
PENNSYLVANIA, DEP'T OF :
CORRECTIONS : NO. 98-3899

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

November 20, 2001

Presently before the court is the Commonwealth of Pennsylvania Department of Correction's (the "PDOC") Motion for Summary Judgment. (Document No. 53.) Plaintiffs have filed a response and memorandum of law in opposition to the Motion. (Document No. 59.) For the reasons stated herein, the PDOC's Motion for Summary Judgment is **GRANTED**.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Procedural History

Plaintiff, Michael Weston, a male corrections officer working at S.C.I. Graterford, filed this sexual harassment action against his employer, the PDOC, and Dolores Merithew, a co-worker. Plaintiff alleged violations of Title VII, the Pennsylvania Human Relations Act ("PHRA"), and Pennsylvania common law.¹ Plaintiff's Title VII claim was premised on a hostile work environment theory. Specifically, plaintiff asserted that he was subjected to a hostile work

¹ As against defendant Merithew only, plaintiff and co-plaintiff, Deborah Weston, his wife, alleged state law claims of assault and battery, intentional and negligent infliction of emotional distress, and loss of consortium.

environment as a result of the PDOC's failure to discipline Merithew after she had physically touched him on two occasions, and as a consequence of the comments, jokes and jibes made by supervisors, co-workers and inmates who had learned of the incidents. In addition, plaintiff alleged that after he complained to the PDOC about the harassment, the PDOC retaliated against him by reprimanding him and transferring him to a less desirable position.

In a Memorandum and Order dated September 29, 1998, the Honorable James McGirr Kelly dismissed plaintiff's hostile work environment claims as well as his state common law claims against the PDOC for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). (Document No. 8.) In a Memorandum of Decision dated May 18, 1999, this court granted summary judgment to the PDOC on plaintiff's retaliation claim, and granted summary judgment to Merithew on the state law claims of assault, and intentional and negligent infliction of emotional distress. (Document No. 29.) This court held a bench trial on June 1, 1999, and found that Merithew had committed a battery under state law. On June 3, 1999, this court entered judgment in favor of plaintiff and against Merithew, and awarded compensatory damages in the amount of \$1,250.00. (Document No. 42.)

Plaintiff appealed to the Third Circuit Court of Appeals challenging the disposition of the hostile work environment claims and the retaliation claim. With respect to the hostile work environment claims, plaintiff asserted that the District Court erred when it dismissed those claims because, in light of the liberal notice pleading requirements of Fed. R. Civ. P. 8, the allegations in the complaint were sufficient to state such claims. The Court of Appeals concluded that plaintiff's allegations concerning the PDOC's disciplining of Merithew after the two incidents of physical contact were insufficient to state a Title VII hostile work

environment claim, and affirmed the District Court's dismissal of that portion of plaintiff's complaint.²

However, the Court of Appeals also concluded that plaintiff's allegations as to a hostile work environment created as a result of the comments, jokes, and jibes made by supervisors and co-workers, met the liberal pleadings requirements, and reversed the District Court's dismissal of that component of plaintiff's complaint, and remanded for further discovery and proceedings.

In regard to plaintiff's allegations as to a hostile work environment claim created as a result of verbal harassment by various inmates, the Court of Appeals agreed with the District Court that those allegations, as set forth in plaintiff's complaint, were insufficient to state a Title VII claim, but reversed the District Court's dismissal of that portion of plaintiff's complaint, and remanded with instructions to allow plaintiff to amend and "amplify" that portion of his complaint.³

² The Third Circuit Court of Appeals concluded that when the source of the complained of harassment is a co-worker, a plaintiff, in order to prevail, must demonstrate that the employer failed to provide a reasonable avenue of complaint, or, if the employer was aware of the alleged harassment, that it failed to take appropriate remedial action. Weston, 251 F.3d at 427 (citations omitted). "[A]n effective grievance procedure – one that is known to the victim and that timely stops the harassment – shields the employer from Title VII liability for hostile environment." Weston, 251 F.3d at 427 (quoting Bouton v. BMW of N. America, Inc., 29 F.3d 103, 110 (3d Cir. 1994)). Additionally, there can be no employer liability under Title VII when the employer's response to the complaints of harassment stops the harassment. Id. (citing Kunin, 175 F.3d at 294). In this particular matter, after plaintiff officially complained about Merithew's conduct, she received a written reprimand for violating the PDOC's policies against sexual harassment. The Court of Appeals found that plaintiff clearly knew about the PDOC's grievance procedure because he filed a complaint against Merithew, and it was effective since plaintiff acknowledged that the harassment stopped after he complained. Id.

³ With respect to the retaliation claim, plaintiff averred that the court erred by granting summary judgment because he alleged a genuine issue as to the material fact of whether

B. Factual Background

At the time of the two incidents at issue, plaintiff, Michael Weston, worked in the Food Services Department at S.C.I. Graterford as a trainer. His duties included supervising inmates who worked in the prison's kitchens. At that same time, Merithew was also a correction's officer and held a similar position in the kitchen. On February 11, 1997, Merithew rubbed plaintiff's back in the presence of inmates. Plaintiff found this physical contact to be offensive and told Merithew never to touch him again. Merithew laughed in response, but removed her hands from plaintiff.

Three days later, on February 14, 1997, plaintiff tore a hole in the seat of his pants while at work. While his back was turned, and in the presence of inmates, Merithew placed her finger in the hole, touching plaintiff's buttocks. Weston reacted angrily, and told Merithew to leave him alone.

Plaintiff complained to his supervisors about Merithew's actions, and she was given a written reprimand. Plaintiff claims that as a result of Merithew's actions, he has been subjected to offensive comments, jibes, and jokes made by supervisors, co-workers, and inmates.

the PDOC took adverse action against him, in the form of two written reprimands and two suspensions without pay, as a result of his harassment complaints. The Third Circuit Court of Appeals concluded that, under the circumstances present in plaintiff's case, the written reprimands did not constitute adverse employment actions. The Court of Appeals further held that the plaintiff failed to present sufficient evidence to establish the requisite causal connection between the two suspensions and his complaints of harassment. Accordingly, the Third Circuit affirmed the grant of summary judgment on plaintiff's retaliation claim.

C. Claims Before This Court

Two portions of plaintiff's Title VII hostile work environment claim remain before this court, and are the subject of the PDOC's motion for summary judgment: (1) allegations of a hostile work environment created as a result of the comments, jokes and jibes made by supervisors and co-workers; and (2) allegations of a hostile work environment created as a result of verbal harassment by inmates. As to the latter claim, the Court of Appeals found that the allegations in plaintiff's complaint were insufficient to state a Title VII claim, but remanded to the District Court with instructions to allow plaintiff to amend and amplify that portion of his complaint.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has ruled that Rule 56(c) requires "the threshold inquiry of determining whether there is a need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The moving party has the initial burden of proving "that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The movant must inform the court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 325. An issue is genuine only if there is a sufficient evidentiary basis

on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 248. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. See also Lozada v. The Reading Hosp. and Med. Ctr., No. 00-CV-4081, 2001 WL 438418, at *2 (E.D. Pa. Apr. 27, 2001) (same). In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, and all inferences must be drawn in that party's favor. Celotex, 477 U.S. at 322.

If the moving party sustains his burden, the burden shifts to the non-moving party who must then “make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file.” Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992). However, to defeat summary judgment, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The “non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact,” Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994), or replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. Rather, the non-moving party must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The non-moving party bears the burden of producing evidence to establish, prima facie, each element of his claim. Celotex, 477 U.S. at 322-23. “If the evidence [offered by the non-moving party] is merely colorable or is not significantly probative, summary judgment may be granted.” Anderson, 477 U.S. at 249-50. On the other hand, “if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact,” summary

judgment should not be granted. Burkett v. The Equitable Life Assurance Society of the United States, No. 99-CV-1, 2001 WL 283156, at *3 (E.D. Pa. Mar. 20, 2001).

III. DISCUSSION

A. Hostile Work Environment Claims

Title VII of the Civil Rights Act of 1964 and the PHRA make it unlawful 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. §2000e-2(a)(1).⁴ Hostile work environment sexual harassment occurs when unwelcome sexual conduct unreasonably interferes with a person’s performance or creates an intimidating, hostile, or offensive working environment. Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 67 (1986); Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 425-26 (3d Cir. 2001)(citing Meritor Sav. Bank). In the case of sexual harassment, the plaintiff must prove that the harassing conduct at issue was not merely tinged with offensive sexual connotations, but must actually constitute discrimination because of sex. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

In order to be actionable, however, the harassment must be so severe or pervasive that it alters the conditions of the victim’s employment and creates an abusive environment. Meritor Sav. Bank, 477 U.S. at 67; Weston, 251 F.3d at 426; Spain v. Gallegos, 26 F.3d 439, 446-47 (3d Cir. 1994). The “mere utterance of an . . . epithet which engenders offensive feelings

⁴ The analysis and considerations under Title VII and PHRA are identical. See Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 425 n.3 (3d Cir. 2001). See also Smith v. Pathmark Stores, Inc., No. 97-1561, 1998 WL 309916, at *3 (E.D. Pa. June 11, 1996) (interpreting the two statutes concurrently in sexual harassment cases and stating that the “[c]ourts have uniformly interpreted the PHA consistent with Title VII”).

in an employee,” Meritor Sav. Bank, 477 U.S. at 67 (quotation omitted), does not sufficiently affect the conditions of employment to implicate Title VII. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). The Supreme Court has stated that the conduct in question must be severe and pervasive enough to create an “objectively hostile or abusive work environment – an environment that a reasonable person would find offensive – and an environment that the victim-employee subjectively perceives as abusive or hostile.” Harris, 510 U.S. at 21-22. See also Oncale, 523 U.S. at 78 (“When the workplace is permeated with discriminatory intent, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.”) (quoting Harris, 510 U.S. at 21) (citations and internal quotation marks omitted).

To determine whether the environment is hostile or abusive, the court looks to numerous factors, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee’s work performance.” Harris, 510 U.S. at 23. The Third Circuit Court of Appeals has developed a framework for evaluating a hostile work environment claim arising from the actions of a co-worker:

Five constituents must converge to bring a successful claim for a sexually hostile work environment under Title VII: (1) the employee suffered intentional discrimination because of their sex, (2) the discrimination was pervasive and regular, (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (footnote and citations omitted); accord Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999).

B. Harassment Because of Sex

While the Supreme Court has stated that Title VII grants employees “the right to work in an environment free from discriminatory intimidation, ridicule and insult,” Meritor Sav. Bank, 477 U.S. at 65, it has also emphasized that not all conduct in the workplace that has sexual overtones can be characterized as conduct forbidden by Title VII. Id. at 67. See also Weston, 251 F.3d at 428 (same). The Supreme Court more recently instructed that a plaintiff must allege that the harassing conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted gender discrimination. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79 (1998).⁵ See also Oncale, 523 U.S. at 82 (concurring “because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination ‘because of . . . sex.’”) (Thomas, J., concurring). In Oncale, the Supreme Court identified a number of ways in which the inference of sex discrimination can be drawn in the harassment 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-

⁵ The instant matter primarily involves allegations of sexual harassment between males. In Oncale, the Supreme Court concluded that “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII,” Oncale, 523 U.S. at 82, rejecting an argument that “recognizing liability for same-sex sexual harassment will transform Title VII into a general civility code for the American workplace.” Id. at 80. The Court found that this risk is “adequately met by careful attention to the requirements of the statute,” including that the complained of discrimination is “because of . . . sex.” Id.

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.”

Oncale, 523 U.S. at 80-81 (emphasis in original).⁶ The Third Circuit Court of Appeals recently noted that another way by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex, was if the harasser was acting to punish the victim’s noncompliance with gender stereotypes. Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001).⁷ The Supreme Court summarized that “[w]hatever evidentiary route the plaintiff chooses to follow, the plaintiff must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.” Oncale, 523 U.S. at 81. The “critical issue” is “whether members of one sex are exposed to disadvantageous terms or conditions of

⁶ Nothing in the Supreme Court’s decision indicates that the examples it provided were meant to be exhaustive rather than instructive. The Court’s focus was on what the plaintiff must ultimately prove rather than the methods for doing so. The Court has previously made clear that the means for proving discrimination cannot be reduced to rigid formulae. See O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311-13 (1996). See also Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (same).

⁷ Generally, courts have rejected claims of discrimination based on sexual orientation because they were not based on gender, see, e.g., Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264-65 (3d Cir. 2001); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001), Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000), but have found that claims of discrimination based on sexual stereotypes do state claims of discrimination because of sex. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Bibby, 260 F.3d at 262-64; Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864 (9th Cir. 2001).

employment to which members of the other sex are not exposed.” Id. at 80 (quoting Harris, 510 U.S. at 25) (Ginsburg, J., concurring)).

The Supreme Court emphasized that there is another requirement which prevents Title VII from expanding into a general civility code for the workplace: “it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.” Id. at 81. And see supra n.5. The Court stated that it has “always regarded this requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory ‘conditions of employment.’” Oncale, 523 U.S. at 81. The Court admonished that “the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” Id.

In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish 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.

Id. at 81-82.

Courts have recently been called upon to determine when sex harassment is “because of sex” and, thus, actionable under Title VII. The recent Second Circuit Court of Appeals decision in Brown v. Henderson, 257 F.3d 246 (2d Cir. 2001) is instructive. In that

case, a female employee of the Postal Service alleged Title VII sexual harassment by co-workers because of her gender. The Second Circuit Court of Appeals affirmed the district court's entry of summary judgment in favor of the Postal Service, agreeing with the district court, though on narrower grounds, that, inter alia, the alleged conduct was not "because of sex." The plaintiff in Brown, claimed that she was subjected to sex harassment that originated in a hotly contested union election. Id. at 249. Plaintiff's chief antagonist, Mr. Nelson, ousted plaintiff from her union position and, according to plaintiff, after the election continued a "campaign of rumors and slander." Id. In particular, the harassing employees made hostile and angry non-sexually harassing statements about the union, called plaintiff a "slob," mocked her for being overweight, and publicly hypothesized that plaintiff and another co-worker, Mr. Parrett, were having an affair. Id. Three incidents were graphically sexual in nature: (1) a picture of a naked, obese woman performing a lewd act was posted near Mr. Parrett's route; (2) a picture showing two elephants mating was posted over the names of plaintiff and Mr. Parrett; and (3) a sexually explicit cartoon of plaintiff was drawn in a men's bathroom. Id. at 250. Up until the defendant moved for summary judgment, plaintiff alleged that the harassment related to her time as shop steward. After the motion was filed, plaintiff filed an affidavit alleging for the first time that the harassment was because of her gender. Id. at 250-51.

The Court of Appeals concluded that plaintiff had not carried her burden of showing that the harassment was because of her sex. The court explained as follows:

The bulk of the behavior she cites, though often highly cruel and vulgar, related either to her union-related conflict with Nelson or to her purported affair with Parrett. Most importantly, both in the statements she made in support of her EEOC complaint and in her deposition, plaintiff repeatedly explained that Nelson and the others were harassing her as an outgrowth of their dispute over the union

election. And she never suggested that their antagonism toward her was related to her being a woman. Instead, until her affidavit in opposition to summary judgment, [plaintiff] gave every indication that, in her view, what made her tormentors' conduct "sexual harassment" was the fact that the behavior touched on matters of sexuality, i.e. her purported sexual relationship with Parrett, and not that it was a form of sexual discrimination.

The only basis for linking the harassers' conduct to [plaintiff's] sex is the fact that the bathroom cartoon and one of the pictures posted near Parrett's mail route both relied for their effect upon a depiction of a naked female body. . . . Here, however, there is overwhelming evidence that the hostility toward [plaintiff] was grounded in workplace dynamics unrelated to her sex and that even these pictures did not reflect an attack on [plaintiff] *as a woman*.

Id. at 255-56 (footnote and citations omitted) (emphasis in original). Accordingly, the Second Circuit Court of Appeals agreed with the district court's conclusion that, as a matter of law, plaintiff could not show that she suffered harassment because of her sex.

Similarly, in Lack v. Wal-Mart Stores, Inc., 240 F.3d 255 (4th Cir 2001), a male employee alleged that his male supervisor had sexually harassed him by making inappropriate and demeaning statements of a sexual nature and regularly telling vulgar jokes in front of the plaintiff and others. Id. at 257. Following a jury verdict in favor of the plaintiff, the district court denied defendants' motion for judgment as a matter of law. The Fourth Circuit reversed, and concluded that the defendants were entitled to judgment as a matter of law because the supervisor's remarks to the male employee were not based on the plaintiff's gender. Id. at 260. Considering the illustrative examples cited by the Supreme Court in Oncale, the court found that the plaintiff offered no evidence that his male supervisor was a homosexual or actually solicited sexual contact. Id. at 261. The evidence showed that the harasser directed his crude and lewd comments at both male and female employees. Id. at 262. While the female employees' complaints did not, as a matter of law, preclude the plaintiff's claim, they did present an obstacle

to proving that the harassment was sex based. Id. Moreover, the plaintiff offered no comparative evidence about how the alleged harasser treated members of both sexes. Id. The Fourth Circuit Court of Appeals concluded that, “[i]n its totality, the evidence compels the conclusion that [the harasser] was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike.” Id.

Other courts have concluded, on the facts before them, that a genuine issue existed as to whether alleged sex harassment was because of the plaintiff’s sex. In Shepherd v. Slater Steel Corp., 168 F.3d 998 (7th Cir. 1999), a male employee brought a Title VII action against his former employer alleging that he was sexually harassed by a male co-worker and that he was discharged in retaliation for complaining about that harassment. The Court of Appeals found evidence in the record suggesting that the co-worker’s harassment of plaintiff “was borne of sexual attraction.” Id. at 1009.⁸ The court noted that although none of these incidents necessarily proved that the co-worker was gay, the connotations of sexual interest in plaintiff suggested that the co-worker might be sexually oriented toward members of the same sex. Id. at 1010. The court acknowledged that a jury might interpret the conduct differently and merely find that the co-worker was exceedingly vulgar, or was attempting to make plaintiff uncomfortable. However, the plaintiff had presented sufficient evidence to give rise to a genuine issue of

⁸ The alleged harassment began with the co-worker remarking a number of times that the plaintiff was a “handsome young man.” Subsequently, in one of the more graphic encounters between the two men, the co-worker “rubbed himself into an erection” while the plaintiff was laying on his stomach with cramps, and the co-worker urged the plaintiff to turn over lest he crawl on top of plaintiff and perform a sex act. The co-worker remarked to plaintiff another time that a man can be sexually satisfied by anal intercourse. On an occasion when the plaintiff came to work complaining of soreness, the co-worker offered to make him feel better by giving him “a nice hot shower.” Shepherd, 168 F.3d at 1009-10. The co-worker’s language was more graphic and crude than the court finds necessary to recite here.

material fact as to whether he was harassed because of his sex. Id. The Court of Appeals summarized its decision-making process as follows:

Where . . . it appears plain on the record as a whole that the statements or conduct in question were nothing other than vulgar provocations having no causal relationship to [the plaintiff's] gender as a male, the sexual content or connotations of those statements or conduct will not alone raise a question of fact as to the sex-based character of the harassment. On the other hand, when the context of the harassment leaves room for the inference that the sexual overlay was not incidental – that the harasser was genuinely soliciting sex from the plaintiff or was otherwise directing harassment at the plaintiff because of the plaintiff's sex – then the task of deciding whether the harassment amounts to sex discrimination will fall to the finder of fact.

Id. at 1010-11 (internal quotations and citations omitted).

In EEOC v. Harbert-Yeargin, Inc., Nos. 00-5150, 00-5232, 2001 WL 1104681 (6th Cir. Sept. 21, 2001), the EEOC brought a same-sex sexual harassment action against an employer on behalf of three male employees; a fourth male employee intervened. One of the male employees, Mr. Carlton, testified that when he was assigned to work with his supervisor, Mr. Davis, the supervisor immediately began bothering him by getting too close personally and frequently touching his upper thigh. Shortly thereafter, on two occasions, Mr. Davis grabbed Mr. Carlton's genital area. After complaining, Mr. Carlton was transferred to another work group. Id. at *1-*2. After the transfer, Mr. Davis continued to "stalk" Mr. Carlton, and co-workers taunted Mr. Carlton by grabbing and "hunch[ing]" on each other, and by mocking Mr. Carlton and saying that if he were a "real man," he would have handled the matter in a manner other than filing a sexual harassment complaint. Id. at *2. There was no dispute that the management knew about what they described as the "rampant horseplay" occurring at the facility, which included grabbing employees' buttocks, genitals and twisting nipples, all male on male. Id. at *3-*4.

Supervisors for the employer testified that female employees were not subjected to the same conduct. Id. at *6.

The Sixth Circuit Court of Appeals concluded that the EEOC presented sufficient evidence for a rational trier of fact to conclude that the sexual harassment was because of sex. In particular, the EEOC presented evidence that the male employees were exposed to disadvantageous conditions of employment to which females were not exposed. Mr. Davis and another supervisor admitted to touching male employees on the nipples, buttocks and genitals, but stated that they would never do so to the female employees with whom they had daily contact. Id. at *6-*7. Drawing all inferences in favor of the non-moving parties, the court believed that a “reasonable jury could conclude that the dramatically different experiences of the male and female employees . . . established that the employees were being grabbed or poked in the genitals received this treatment in a discriminatory manner because of their male gender.” Id. at *7.

The court further explained its conclusions by stating that it viewed the conduct in question as involving far more than mere “towel snapping in the locker room.” Id. at 8 (citation omitted). The court summarized that, on more than one occasion, Mr. Carlton was subjected to invasive physical contact to his genital area. Mr. Davis stalked Mr. Carlton, even after he was transferred, and other employees were allowed to taunt Mr. Carlton by calling him names and subjecting him to obscene physical gestures. Id. The court concluded that all of this evidence was such that a reasonable jury could find that the conditions at the employer created an “objectively hostile or abusive work environment.” Id.

With this legal framework in mind, the court now consider's plaintiff's two Title VII claims.

C. **Plaintiff's Claim – Comments, Jokes and Jibes by Supervisors and Co-Workers**

1. **Harassment Because of Sex.** The Third Circuit Court of Appeals noted that plaintiff's complaint contained little details about the offensive comments, jokes, and jibes; failed to allege that he was targeted because of his gender; and contained no allegations that the conduct altered the conditions of his employment or created an abusive work environment. Weston, 251 F.3d at 428. In particular, the Court of Appeals emphasized that plaintiff stated, “[b]y his own admission, [that] the comments, jokes, and jibes were not directed at his gender,” but “were the result of Merithew’s actions, and were made in retaliation for his filing a grievance against her.” Id. However, the Court of Appeals concluded that plaintiff had “satisfied the extremely lenient requirement of notice pleading,” and reversed dismissal of this claim and remanded with instructions to permit further discovery. Id. at 430.

In his Amended Complaint, plaintiff averred that supervisors, managers and co-workers made the following comments to him: (1) “Don’t wash your asshole, we gotta get fingerprints” – comment by Mr. Walker, a manager, on February 17, 1997 (Amended Complaint ¶ 17a; Weston Dep.⁹ at 9); (2) “Did it feel good when she put her finger up your ass?” – comment by Mr. Richardson, a manager, on February 18, 1997 (Amended Complaint ¶ 17b; Weston Dep. at 12); and (3) reference to a manager being in a barber shop and “the barber wanted to stick his

⁹ References to “Weston Dep.” in this Memorandum of Decision refer to the transcript from a deposition of plaintiff Michael Weston which took place on September 5, 2001. A copy of the transcript is attached as Exhibit 1 to defendant’s Memorandum of Law in Support of its Motion for Summary Judgment.

finger up my ass” and laughing at plaintiff telling him “I did think it was funny” – comment by Mr. Oldt, a manager, on February 18, 1997 (Amended Complaint ¶ 17e; Weston Dep. at 14-15). Other than the three comments detailed above, plaintiff could attribute only one other comment since the incidents with Merithew to a staff member. At his deposition, plaintiff stated that in the summer of 2000, a new female correctional officer, whose name plaintiff could not remember, made the following comment when he told her his name: “Oh, you the one that got the finger stuck up your ass?” (Weston Dep. at 20-21.) Additionally, plaintiff alleges that Randall J. HENZES, Esquire, Office of the Attorney General, counsel to defendant, made the following comment in the year 2000 in front of inmates and plaintiff’s management and co-workers, as plaintiff was leaving the prison: “Hey Mike, you got a hole in your pants.” (Amended Complaint ¶ 17; Weston Dep. at 18.) Plaintiff acknowledged at his deposition that none of these comments prevented him from performing his job, or caused him to lose time from work. (Weston Dep. at 23-24, 30.)

In his Amended Complaint, plaintiff alleges that “Despite these measures [referring to measures described in paragraphs 14 and 15 of the Amended Complaint], Mr. Weston has been subjected to unnecessary sexually offensive comments, jokes, and jibes by fellow co-workers, managers, and even inmates, as a result of the actions of Dolores Merithew, and in retaliation for his complaints about Dolores Merithew.” (Amended Complaint ¶ 16 (emphasis added).) In paragraph 19 of the Amended Complaint, plaintiff alleges that he suffered “gender discrimination.” (Amended Complaint ¶ 19.) In paragraphs 20 and 22 of the Amended Complaint, plaintiff alleges that:

20. Defendant Graterford denied Mr. Weston’s request for relief from Dolores Merithew’s harassment because of his sex in violation of Title VII of the Civil Rights Act . . . and the Pennsylvania Human Relations Act
22. Defendant has unlawfully discriminated against Plaintiff, Michael Weston, based on his sex in violation of Title VII . . . and the Pennsylvania Human Relations Act

(Amended Complaint ¶¶ 20, 22.)

At his deposition, the following exchange occurred:

- Q. [By Mr. HENZES, counsel for defendant]: For the last four and a half years people were making fun of you because of what Merithew did to you?
- A. [By Plaintiff Michael Weston]: Yes.
- Q. It has nothing to do with the fact that you’re a male?
-
- A. Yes, it does have to do with me being a male.
- Q. Well, would you agree with me that prior to the incident with Merithew they never made any comments to you?
- A. No, because nothing had happened at that time.
- Q. Would you agree with me that since the incident the only thing they make fun of you about is what Merithew did to you?
- A. Correct.
- Q. It is their poking fun at you because of what Merithew did to you?
- A. Yes.

(Weston Dep. at 38-39.)¹⁰

As stated above, the “critical issue,” the Supreme Court emphasized, 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.” Oncale, 523 U.S. at 80 (quoting Harris, 510 U.S. at 25) (Ginsburg, J., concurring)). The single question that this court must answer after Oncale is a straightforward one: Can it be reasonably inferred from the evidence before the court that the

¹⁰ See also Weston Dep. at 8 (Plaintiff agreed that it would be “fair to say” that the only offensive comments, jokes and jibes he received in the past three and one-half years are because of Merithew’s actions.).

harassment plaintiff complains of was discrimination because of his sex? See Shepherd, 168 F.3d at 1008-09.

Reviewing the record in its entirety and construing all inferences in plaintiff's favor, plaintiff has not alleged that he was discriminated against because he is a man, and none of the evidence suggests that plaintiff was discriminated against for that reason. It is clear from the evidence, including plaintiff's own admissions, that his supervisors and a co-worker teased plaintiff because of Merithew's actions, not because of his sex.

According to plaintiff's amended complaint and his deposition, plaintiff admitted that his supervisors and an unnamed female co-worker teased him because of Merithew's actions, not because he was male. In his recent deposition and in paragraphs 20 and 22 of his Amended Complaint, plaintiff claims that the teasing is related to his being male. However, the only connection to plaintiff's gender that this court can imagine may be that Merithew caressed his back and stuck her finger in a hole in the back of his pants because he was male; supposedly she would not have engaged in this conduct if plaintiff had been a female. The fact that the teasing and jokes may have had sexual overtones, however, does not give rise to a viable claim for sex harassment under Title VII. As the Supreme Court stated, "[w]e have never held that workplace harassment, even harassment between men and woman, is automatically discrimination because of sex merely because the words used have sexual content or connotations." Oncale, 523 U.S. at 80. The PDOC has sustained its burden by proving that there is an absence of evidence to support plaintiff's case.

As stated above, the Supreme Court in Oncale described three potential ways in which the inference of sex harassment may be drawn in the harassment context. Oncale, 523

U.S. at 80-81. See supra pp.9-10. Plaintiff has not proven or alleged that any of his harassers were homosexuals. Nor has he pointed to evidence that shows that his harassers were motivated by a general hostility to men in the workplace. In fact, the three supervisors who teased plaintiff were all male and no evidence shows that the supervisors were hostile to men in general in the workplace. Finally, the Supreme Court suggested that a same-sex harassment plaintiff may offer direct comparative evidence about how the harassers treated members of both sexes in a mixed-sex workplace. S.C.I. Graterford is a mixed-sex workplace. Plaintiff has offered no evidence, relating to the teasing and joking by supervisors and a co-worker, that shows that the male employees are exposed to disadvantageous terms or conditions of employment to which female employees are not.¹¹ Moreover, plaintiff has not offered evidence showing that he was harassed for noncompliance with sexual stereotypes. See Bibby, 260 F.3d at 264.

While the actions of his supervisors and/or the co-worker may be unprofessional and juvenile, especially when directed toward a gentleman who is obviously sensitive regarding the actions of Merithew and offended by the teasing, they do not give rise to a viable claim of sex harassment under Title VII. As the Supreme Court has emphasized, Title VII is not “a general civility code for the American workplace.” Oncale, 523 U.S. at 80. Consequently, the PDOC’s Motion for Summary Judgment is granted with respect to plaintiff’s Title VII claim regarding comments, jokes and jibes by supervisors and co-workers.

¹¹ The plaintiff had alleged that the PDOC accorded Merithew a lenient punishment after the incidents because she was a female, and that a male employee would have been subjected to harsher punishment. As stated supra pp.2-3, the Third Circuit Court of Appeals concluded that plaintiff’s allegations concerning the PDOC’s disciplining of Merithew after the incidents were insufficient to state a Title VII hostile work environment claim, and affirmed the District Court’s dismissal of that portion of plaintiff’s complaint.

2. Harassment Must Be Severe or Pervasive. In the alternative, if this court were to find that the harassment in question were because of plaintiff's sex, plaintiff's claim still would not survive summary judgment because the court finds that the conduct was not sufficiently severe or pervasive to create an objectively hostile or abusive work environment. As stated above, the Supreme Court has held that the harassing conduct in question must be sufficiently severe and pervasive to create an "objectively hostile or abusive environment – an environment that a reasonable person would find offensive – and an environment that the victim-employee subjectively perceives as abusive or hostile." Harris, 510 U.S. at 21-22. See also Meritor Sav. Bank, 477 U.S. at 67 (For the purposes of a hostile work environment claim, the discrimination complained of must be severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive work environment."). To determine whether the environment is hostile or abusive, the court looks to numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23. The objective severity of the harassment should be analyzed from the perspective of a reasonable person in plaintiff's position, considering "all the circumstances." Id.

In this case, plaintiff's hostile work environment claim with respect to jokes and comments by supervisors and a co-worker consists of three comments by three different supervisors in February, 1997, all within days of the incidents with Merithew, and one comment

in the summer of 2000, by an unnamed female co-worker.¹² The four specific incidents occurred over nearly three and one-half years, with more than three years between the first three comments and the fourth comment. Plaintiff has at best demonstrated sporadic and isolated incidents of harassment, not pervasive conduct.¹³ See, e.g., Saidu-Kamara v. Parkway Corp., 155 F. Supp. 2d 436, 439-40 (E.D. Pa. 2001) (four specific incidents over nearly one and one-half years not frequent enough to create hostile work environment); Bonora v. UGI Utilities, No. 99-5539, 2000 WL 1539077, at *3-*4 (E.D. Pa. Oct. 18, 2000) (supervisor's ten incidents of harassing conduct over two years not frequent enough to create hostile work environment); Cooper-Nicholas v. City of Chester, No. 95-6493, 1997 WL 799443, at *3 (E.D. Pa. Dec. 30, 1997) (supervisor's comments over 19 months not frequent enough to create hostile work environment). Compare EEOC v. R&R Ventures, 244 F.3d 334 (4th Cir. 2001) (manager's sexual comments, jokes and advances to two female employees, one aged fifteen, every time the manager and the employee(s) worked together, sufficiently pervasive and severe to create hostile work environment).

Moreover, considering all of the circumstances, none of the events were sufficiently severe to create a hostile work environment. See, e.g., Bowman v. Shawnee State Univ., 220 F.3d 456, 463-64 (6th Cir. 2000) (supervisor's rubbing employee's shoulders, grabbing employee's buttocks, and sexually suggestive comments not severe enough to create

¹² Plaintiff also alleges that Randall J. Henzes, Esquire, Office of the Attorney General, counsel to defendant, made an inappropriate comment to him during the year 2000. Mr. Henzes, however, is not a supervisor, manager, or co-worker of plaintiff, nor is he an employee of PDOC.

¹³ However, even a single episode of harassment, if sufficiently severe, can establish a hostile work environment. Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1024 n.5 (10th Cir. 2001); Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2nd Cir. 2000).

hostile work environment); Adusumilli v. City of Chicago, 164 F.3d 353, 361-62 (7th Cir. 1998) (four incidents of unwelcome contact with subordinate's arm, fingers, and buttocks along with repeated sexual jokes aimed at subordinate, not severe enough to create hostile work environment); Saidu-Kamara, 155 F. Supp. 2d at 440 (assistant manager's touching employee's breast and buttocks, propositioning employee and making other suggestive comments not severe enough to create hostile work environment); McGraw v. Wyeth-Ayerst Labs. Inc., No. 96-5780, 1997 WL 799437, at *6 (E.D. Pa. Dec. 30, 1997) (supervisor's repeated requests for date, kissing subordinate without her consent, and touching her face not severe enough to create hostile work environment). Compare EEOC v. Harbert-Yeargin, Inc., Nos. 00-5150, 00-5232, 2001 WL 1104681, at *9-*10 (6th Cir. Sept. 21, 2001) (jury could find that supervisor's attempting to get close to employee on a daily basis and touching him whenever they were talking, stalking employee two or three times a day after employee was transferred, grabbing employee's genitals, one time after isolating employee from others, constitutes severe, physically threatening, and humiliating discriminatory conduct); Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1023-24 (10th Cir. 2001) (supervisor's repeated sexual advances and comments, exposing himself to plaintiff, forcing plaintiff to masturbate him, intimately touching plaintiff, and attempting to undress plaintiff, sufficiently severe to create hostile work environment).

Plaintiff has not alleged that the supervisors or the co-worker physically touched him, or that the comments were physically threatening. Plaintiff testified at his deposition that

the comments by the supervisors and the co-worker did not prevent him from performing his job, or in any way cause him to miss work. (Weston Dep. at 23-24, 30.)¹⁴

Consequently, the comments and jokes were not sufficiently frequent, severe, or threatening, and did not unreasonably interfere with plaintiff's work performance, so as to create an objectively hostile work environment. For this alternative reason, plaintiff's Title VII claim regarding comments, jokes and jibes by supervisors and co-workers cannot survive summary judgment.

D. Plaintiff's Claim – Comments, Jokes and Jibes By Inmates

The Third Circuit Court of Appeals noted that plaintiff's complaint indicated that he had been subjected to comments, jokes and jibes by unspecified inmates, but stated that "[a]bsent further amplification – for instance that prison officials encouraged the inmate's comments, or that prison officials knew of the harassing conduct but failed to remedy it – this mere allegation is insufficient to state a Title VII claim." Weston, 251 F.3d at 427-28. The Third Circuit concluded that plaintiff should be permitted to amend his complaint "to make allegations, if possible, as to prison officials' instigation and/or knowledge" of the inmates'

¹⁴ Plaintiff stated at his deposition that he missed work during the summer of 1997 because "I could not work knowing what this woman did to me and nothing happened to her. I told him I was stressed out. I told him that management was coming at me and union was coming at me. . . . I was stressed out." Mr. HENZES, on behalf of the PDOC, asked plaintiff whether with respect to his testimony that management and the union were "coming at" him, he meant in the sense of the comments, jokes and jibes. Plaintiff responded no, that he meant they were asking him why he was pursuing the matter, and telling him that he was stepping on "somebody's toes." (Weston Dep. at 53-54.) When asked what affected him the most, the comments and jokes, or his belief that Merithew did not receive the punishment that she deserved, plaintiff responded that the issue of Merithew's punishment affected him most. (Weston Dep. at 57.) Plaintiff testified very clearly that the comments and jokes by the supervisors, co-worker, and inmates did not cause him to miss any time from work, and did not prevent him from performing his work. (Weston Dep. at 23-24, 30.)

comments. Id. In his Amended Complaint, plaintiff attributes the following comments to inmates: (1) “Crazy lady stuck her finger up West’s ass.” (Amended Complaint ¶ 17b; Weston Dep. at 10); (2) “Did it hurt when she violated your ass?” (Amended Complaint ¶17c; Weston Dep. at 13-14); (3) “West was a virgin until Merithew broke him in.” (Amended Complaint ¶ 17f; Weston Dep. at 15-16); (4) “She stuck it in your ass because she wanted to give you some.” (Amended Complaint ¶ 17g; Weston Dep. at 16-17); and (5) “Let me stick my finger up your ass like Merithew did, see if it feels the same.” (Amended Complaint ¶ 17h; Weston Dep. at 17-18). In his deposition, plaintiff stated that he did not remember the names of the inmates who made these comments or the dates on which they were made. (Weston Dep. at 10-18.) Plaintiff emphasized at his deposition that these were not the only comments made by inmates, that the inmates made comments continuously, and that, if he wrote them all down, he would have a stack of paper over twelve inches high. (Weston Dep. at 10-11, 40-41, 59.) He stated that inmates continue to make comments to him regarding the Merithew incidents at least once a week, and sometimes two or three times a week. (Weston Dep. at 19-20.)

However, plaintiff fails to allege that prison officials instigated or had knowledge of the inmates’ comments. At his deposition, plaintiff admitted that none of his co-workers or managers encouraged the inmates to make these comments. (Weston Dep. at 10, 13-14, 15-16, 27.) Plaintiff specifically testified that he knew of no staff member who was “putting inmates up to” making comments to him regarding the Merithew incidents, and that when inmates made these comments he was usually the only staff member around. (Weston Dep. at 25-26, 36.) Moreover, plaintiff admitted that management never made a comment to him about the Merithew incidents when inmates were around. (Weston Dep. at 41.)

Additionally, plaintiff testified that, with regard to any of the comments by the inmates, he never complained to management nor filed a grievance. (Weston Dep. at 16, 17, 18, 20, 25.) Plaintiff further stated that he did not find these comments by the inmates to be physically threatening, they did not stop him from performing his job, and they did not cause him to lose time from work. (Weston Dep. at 23-24, 30.) Plaintiff was aware that he could have filed a complaint with the administration at the institution to try to stop the inmates' comments, but did not do so. (Weston Dep. at 33-34.) Plaintiff clearly testified that all of the comments and jokes by the inmates revolved around the incidents with Merithew. (Weston Dep. at 28.)

It appears that the comments, jokes and jibes by inmates, not the four comments by the supervisors and a co-worker, make up the overwhelming majority of the teasing to which plaintiff has been subjected. However, plaintiff has not offered any proof, or even alleged, that prison officials instigated or had knowledge of these comments. In fact, in his testimony at his deposition, plaintiff candidly admitted that none of his co-workers or supervisors instigated or encouraged inmates to make these comments, and that he did not report these comments to prison officials. As such, plaintiff has failed to correct the deficiencies in his claim identified by the Third Circuit Court of Appeals, and he has failed to state a claim under Title VII relating to comments, jokes, and jibes by inmates. For these reasons, PDOC's Motion for Summary

Judgment is granted with respect to plaintiff's remaining Title VII claim regarding comments, jokes, and jibes by inmates. An appropriate order follows.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

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

MICHAEL WESTON and : CIVIL ACTION
DEBORAH WESTON :
 :
v. :
 :
COMMONWEALTH OF :
PENNSYLVANIA, DEP'T OF :
CORRECTIONS : NO. 98-3899

ORDER

AND NOW, this 20th day of November, 2001, for the reasons stated in the accompanying Memorandum of Decision, it is hereby

ORDERED

1. Commonwealth of Pennsylvania Department of Correction's Motion for Summary Judgment (Document No. 53) is **GRANTED**.
2. Judgment will be entered in favor of defendant and against plaintiffs on the counts stated in plaintiffs' Amended Complaint.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

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

MICHAEL WESTON and : CIVIL ACTION
DEBORAH WESTON :
 :
 v. :
 :
 COMMONWEALTH OF :
 PENNSYLVANIA, DEP'T OF :
 CORRECTIONS : NO. 98-3899

JUDGMENT ORDER

AND NOW, this 20th day of November, 2001, for the reasons stated in the
accompanying Memorandum of Decision,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of
Commonwealth of Pennsylvania, Department of Corrections, defendant and against Michael and
Deborah Weston, plaintiffs.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge