

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

BARBARA HITCHENS	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF MONTGOMERY, <u>et al.</u>	:	NO. 01-2564

MEMORANDUM AND ORDER

HUTTON, J.

February 11, 2002

Currently before the Court are Defendants Montgomery County, the Montgomery County Correctional Facility, Ed Echavarria, and Julio Algarin Motion's Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 4), and Plaintiff's Reply to Defendants' Motion to Dismiss (Docket No. 5). For the reasons discussed below, Defendants' Motion is **GRANTED IN PART AND DENIED IN PART.**

**I. BACKGROUND**

Plaintiff Barbara Hitchens ("Plaintiff") brought the current civil rights action against Montgomery County, Montgomery County Correctional Facility, Ed Echavarria, and Julio Algarin (collectively, the "Defendants") on May 24, 2001.<sup>1</sup> For nineteen years, Plaintiff worked as a correctional officer at the Montgomery County Correctional Facility (the "Correctional Facility"). According to Plaintiff, her supervisor, Ed Echavarria, began to

---

<sup>1</sup> Consistent with the standard applicable to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the alleged facts are viewed in the light most favorable to Plaintiff.

sexually harass her in March of 2000 by making unwanted sexual advances and comments. Plaintiff informed Echavarria that his actions were inappropriate, but failed to complain to his superior, Deputy Warden Julio Algarin, who was Echavarria's stepfather.

According to Plaintiff, Echavarria made no further sexual comments or advances after May of 2000. After Plaintiff filed an EEOC complaint against the Correctional Facility and Echavarria, Echavarria was reassigned in September of 2000. Plaintiff received her first disciplinary action in her nineteen years at the Correctional Facility in March of 2001. In addition to her gender, Plaintiff believes that the treatment she received was in part motivated by race. Plaintiff is white and her supervisors, Algarin and Echavarria, are Hispanic. Furthermore, Plaintiff contends that she was being retaliated against because her son and fellow employee at the Correctional Facility was engaged in unionizing activities.

In May of 2001, Plaintiff filed the instant four-count Complaint against the Defendants. In Count I, Plaintiff asserts a claim for sexual harassment, race discrimination and retaliation in violation of Plaintiff's constitutional rights pursuant to 42 U.S.C. § 1981, 1982, 1983, 1985(1-3), and 1986. Plaintiff also alleges a violation of Title VII of the Civil Rights Act of 1964. Count II asserts a state law claim for intentional infliction of emotional distress against all Defendants, while Counts III and IV

set forth claims for negligent retention and negligent supervision against the Correctional Facility. Defendants now move for dismissal of Plaintiff's Complaint.

## II. LEGAL STANDARD

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint.<sup>2</sup> Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993). In considering a Rule 12(b)(6) motion, the court must accept as true all of the factual allegations contained in the complaint, as well as the reasonable inferences that can be drawn from them. See e.g., Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001); Lake v. Arnold, 232 F.3d 360, 365 (3d Cir. 2000). Dismissal of claims under 12(b)(6) should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); see also Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). The fact that a court must assume as true all facts alleged, however, does not mean that the court must accept as true "unsupported conclusions and unwarranted inferences." Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997). Rather, "courts have an obligation in matters before them to view

---

<sup>2</sup> Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable." City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 (3d Cir. 1998).

### III. DISCUSSION

In her Complaint, Plaintiff alleges that Defendants violated her civil rights on a variety of grounds. Plaintiff also makes supplemental state law claims for intentional infliction of emotional distress, negligent supervision and negligent retention.<sup>3</sup> Accordingly, the Court will address Defendants' objections to each of Plaintiff's claims in turn.

#### A. Title VII

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise 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).<sup>4</sup> Defendants move

---

<sup>3</sup> The Court notes that Plaintiff's Complaint is not the model of clarity or specificity. Her claims under Title VII and sections 1981, 1982, 1983, 1985 and 1986 are conglomerated into Count I of the Complaint, entitled "Sexual Harassment," without any differentiation as to the factual basis for each claim or as to the particular Defendants the claims are asserted against. See Pl.'s Compl. at § IV. The Court has gleaned from the Complaint and Plaintiff's response to the instant motion that Plaintiff attempts to assert claims under the sections listed above based on sex and race discrimination, as well as retaliation.

<sup>4</sup> To the extent that Plaintiff sets forth causes of action under Title VII for racial discrimination and retaliation, Defendants neglect to address such claims in their Motion to Dismiss Plaintiff's Title VII claim. Therefore, the Court will not review the sufficiency of such claims sua sponte.

for dismissal of Plaintiff's Title VII claim on two grounds. First, Defendants seek dismissal of the Title VII claim as it pertains to the individual defendants. Second, Defendants seek to dismiss the Title VII claim for a hostile work environment.

**1. Claims Against the Individual Defendants**

"The law in this Circuit . . . clearly holds that individual employees cannot be held liable under Title VII." Jones v. School Dist. of Philadelphia, 19 F.Supp.2d 414, 417 n.1 (E.D. Pa. 1998) aff'd 198 F.3d 403 (3d Cir. 1999); see also Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996) cert. denied 521 U.S. 1129, 138 L.Ed.2d 1031, 117 S.Ct. 2532 (1997). As the United States Court of Appeals for the Third Circuit explained, "Congress did not contemplate that [Title VII] damages would be assessed against individuals who are not themselves the employing entity." Sheridan, 100 F.3d at 1077. Accepting as true all of the factual allegations contained in the Complaint, Plaintiff is unable to maintain a claim under Title VII against the individual defendants. These claims, therefore, are dismissed with prejudice.

**2. Hostile Working Environment Title VII Claim**

Defendants next seek to dismiss Plaintiff's Title VII hostile work environment claim against the remaining Defendants. According to Defendants, Plaintiff is unable to state a claim under Title VII because Plaintiff failed to complain about the alleged harassment to management level employees. See Defs.' Mot. Dismiss at 5.

Moreover, Defendants contend that the harassment complained of by Plaintiff was not "so pervasive and open" that Defendants must have been aware of the alleged activity. See id.

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. Weston v. Commw. of Pennsylvania, 251 F.3d 420, 425-26 (3d Cir. 2001). To prevail on a hostile work environment claim under Title VII, Plaintiff must demonstrate five elements: (1) the employee suffered discrimination because of sex; (2) this discrimination was "pervasive and regular;" (3) some negative impact resulted from the discrimination; (4) the conduct would effect a reasonable person in a similar situation; and (5) the employer's respondeat superior liability. See e.g., Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001); Kunin v. Sears Roebuck and Co., 175 F.3d 289, 293 (3d Cir. 1999) (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)).

In the instant case, Plaintiff's Complaint sets forth a prima facie case of hostile work environment sexual harassment under Title VII. First, accepting as true all of the factual allegations stated therein, Plaintiff's Complaint supports a determination that she experienced intentional discrimination because she is a woman. See Pl.'s Compl. at ¶¶ 22-33. "All that is required is a showing

that [gender] is a substantial factor in the harassment, and that if the plaintiff had been [male] she would not have been treated in the same manner." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996). Echavarria's suggestive comments, unwelcome sexual advances, touching and grabbing, as plead in Plaintiff's Complaint, easily satisfy the intentional, sex-based discrimination element.

Plaintiff has also sufficiently pled facts that the harassment was "pervasive and regular," subjectively offensive to the Plaintiff, and objectively offensive to a reasonable person in a similar situation. Whether the alleged harassment is "pervasive and regular" is determined based on the totality of the circumstances, including the frequency and severity of the discriminatory conduct, its nature as physically threatening or humiliating as opposed to a mere offensive utterance, and whether it interferes with an employee's work performance. Faraqher v. City of Boca Raton, 524 U.S. 775, 787-88, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Plaintiff contends that the harassment went on for a period of two months and escalated from inappropriate comments, to sexual propositions and physical molestation in confined areas. It is clear from Plaintiff's Complaint that she subjectively perceived the environment to be abusive and that Echavarria's sexual advances were unwelcome to Plaintiff. Moreover, a reasonable person in Plaintiff's situation would likely

find the unwelcome sexual advances, requests sexual favors, and other verbal and physical contact offensive.

Defendants argue, however, that Plaintiff is unable to meet the fifth and final element for a successful hostile working environment Title VII claim -- respondeat superior liability. An employer's vicarious liability for a hostile work environment depends upon whether the alleged offender is the plaintiff's "supervisor with immediate (or successively higher) authority over the employee." Faragher, 524 U.S. at 807. If the supervisor took "tangible employment action" against the employee, such as discharge, demotion, or undesirable reassignment, the employer is ultimately liable. See id.; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998). However, if the supervisor took no tangible employment action, the employer may raise the affirmative defense that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer . . ." Durham Life Ins. Co. v. Evans, 166 F.3d 139, 150 (3d Cir. 1999)(quoting Ellerth, 118 S.Ct. at 2270).

In her Complaint, Plaintiff alleges that Echavarria "was at all times a supervisory officer at the Montgomery County Correctional Facility . . . acting as an agent, servant and employee of the defendant Montgomery County." Pl.'s Compl. at ¶ 11. Plaintiff further alleges that, as a result of Echavarria's

conduct, Plaintiff modified her work schedule and work habits when Echavarria entered her work area. Id. at ¶ 49. It is uncontested that the Correctional Facility had a sexual harassment policy in place and that Plaintiff failed to complain to Echavarria's supervisors. Plaintiff's failure to complain to higher management, however, does not sound the death knell for her Title VII claim. See e.g., Faragher, 524 U.S. at 782; Ellerth, 524 U.S. at 748-49. Moreover, Plaintiff's Complaint contains sufficient facts from which a jury could conclude that her failure to report Echavarria's actions to his supervisor, Algarin, was reasonable since Algarin is Echavarria's stepfather. See e.g., Hare v. H & R Indus., Inc., Civ. A. No. 00-4533, 2001 WL 1382504, at \*3 (E.D. Pa. Nov. 7, 2001). Therefore, Defendants' Motion to Dismiss Plaintiff's Title VII claim for hostile work environment is denied.

**B. Plaintiff's Section 1983 Sexual Harassment Claim - Municipal Liability**

Defendants next move to dismiss Plaintiff's Complaint to the extent it states a cause of action under section 1983 for sexual harassment against Montgomery County.<sup>5</sup> See Defs.' Mot. Dismiss at 6. According to Defendants, "Plaintiff's Complaint fails to allege that [Echavarria's alleged actions] were part of a custom, policy or practice of Montgomery County . . . " Id.

---

<sup>5</sup> Again, Defendants do not move to dismiss Plaintiff's section 1983 claim as to the individual defendants acting under color of state law, nor do they contest Plaintiff's ability to set forth a prima facie case under section 1983 for race or sex discrimination, or for retaliation.

In Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court determined that municipalities cannot be held directly liable under section 1983 for the unconstitutional actions of their employees under a theory of respondeat superior. 436 U.S. at 694. However, the Court found that when the constitutional deprivation was the result of some government policy or custom, the government entity may be held liable under section 1983. See id. Accordingly, in order to hold Montgomery County accountable for a section 1983 violation, Plaintiff must show that Montgomery County caused Echavarria to violate her constitutional rights through the implementation of a municipal policy or custom.<sup>6</sup> See id. at 690-95; Colburn v. Upper Darby Township, 946 F.2d 1017, 1027 (3d Cir. 1991).

Courts have recognized three ways for plaintiffs to establish municipal liability under section 1983. See Simril v. Township of Warwick, Civ. A. No. 00-5668, 2001 WL 910947, at \*3 (E.D. Pa. Aug. 10, 2001). "First, a municipal employee can be found to have acted pursuant to a formal government policy. . . . Second, liability attaches to the municipality where the accused has final policymaking authority, thus rendering the behavior an official

---

<sup>6</sup> The Court's analysis of municipal liability under section 1983 applies equally to Plaintiff's claims against Montgomery County under section 1981. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 702, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989)("A municipality may not be held liable for its employees' violations of [section] 1981 under a respondeat superior theory.").

government act. . . . Third, an official with policymaking authority can ratify the unconstitutional actions of an employee, rendering the behavior official for liability purposes." DeFranks v. Court of Common Pleas, Civ. A. No. 95-327, 1995 WL 606800, at \*3 (W.D. Pa. Aug. 17, 1995) (internal citations omitted).

Plaintiff does not allege that Defendants acted pursuant to any formal government policy or standard. Nor does it appear from the pleadings that Echavarria possessed final policy making authority for the Correctional Facility. Rather, the Court interprets Plaintiff's Complaint to allege that Defendants ratified Echavarria's unconstitutional actions, thus rendering his behavior and official policy. See Pl.'s Compl. at ¶ 56 ("By failing to take any steps to correct or stop Defendant Echavarria's sexually aggressive behavior, Defendant [Correctional Facility] condoned, ratified, authorized, and perpetuated the continuation of said conduct.").

It is not clear from the face of the Complaint that Plaintiff will be unable to show either knowledge or inaction by officers in the chain of command at the Correctional Facility. Therefore, dismissal of this claim under Rule 12(b)(6) is inappropriate. See Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). The "insistence that [Plaintiff] must identify

a particular policy and attribute it to a policymaker at the pleading stage, without benefit of discovery, is unduly harsh." Carter v. City of Philadelphia, 181 F.3d 339, 357-58 (3d Cir. 1999). Accordingly, based on the liberal notice pleading requirement of the Federal Rules of Civil Procedure, the Court concludes that there exists a potential set of facts upon which relief may be granted against the municipal entities under section

1983. Defendants' Motion to Dismiss Plaintiff's section 1983 claim as it pertains to Montgomery County is, therefore, denied.

**C. Plaintiff's Section 1981 Claim for Intentional Racial Discrimination**

To sustain a section 1981 discrimination claim,<sup>7</sup> Plaintiff must show that Defendants intentionally discriminated against her "because of race in the making, performance, enforcement or termination of a contract or for such reason denied her the enjoyment of the benefits, terms or conditions of the contractual relationship." McBride v. Hosp. of the Univ. of Pa., Civ. A. No. 99-6501, 2001 WL 1132404, at \*3 (E.D. Pa. Sept. 21, 2001); see also Brown v. Philip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001). Race discrimination claims brought under Title VII and section 1981 are analyzed under the identical framework set forth in McDonnell

---

<sup>7</sup> To the extent Plaintiff's Complaint attempts to state a claim under section 1981 based on sex discrimination, such a claim is dismissed with prejudice. Section 1981 does not apply to sex-based claims. See Angelino v. New York Times, 200 F.3d 73, 98 (3d Cir. 1999).

Douglas Corp. v. Green, 411 U.S. 792 (1973). See Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 499 (3d Cir. 1999). Under the traditional McDonnell Douglas framework, the plaintiff bears the initial burden of establishing a prima facie case of employment discrimination by showing that she (1) was a member of a protected group, (2) was qualified for her position, (3) suffered an adverse employment action, and 4) that similarly situated employees, who are not members of the protected group, were treated more favorably. See Ezold v. Wolf, Block, Schorr and Solis Cohen, 983 F.2d 509, 522 (3d Cir. 1993).

In the instant case, Plaintiff is not a member of a racial minority. The Third Circuit Court of Appeals has recognized that suits by white plaintiffs asserting "'reverse discrimination' are viable even though the plaintiff is not a member of a racial minority." Kondrat v. Ashcroft, 167 F.Supp.2d 831, 835 (E.D. Pa. 2001). However, in order to make such a claim, the plaintiff must set forth sufficient "evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon . . . race . . ." Id. at 835-36 (citing Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999)).

Defendants argue that Plaintiff's section 1981 claim of racial discrimination should be dismissed because the Complaint "is devoid of any allegations that her claims are in any way related to her race, which is white." Defs.' Mot. to Dismiss at 7. Contrary to

Defendants' assertion, Plaintiff does allege in her Complaint that race was a factor in the occurrences at the Correctional Facility. Specifically, the Complaint states that "Plaintiff believes and therefore avers that defendants have done nothing with regard to the conduct and comments of defendant Echavarria because he is Hispanic and related to the deputy warden and she is a white female." Pl.'s Compl. at ¶ 43. Nevertheless, even after accepting as true all factual allegations in the Complaint, and drawing all reasonable inferences therefrom, Plaintiff fails to assert a cause of action under section 1981 for intentional race discrimination.

The Third Circuit has clearly stated that "all that should be required to establish a prima facie case in the context of 'reverse discrimination' is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII." Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999). Plaintiff's Complaint is devoid of any allegations that similarly situated employees were treated differently from her, or that correctional officers similarly situated to Echavarria were treated differently from him, based upon race. It is not enough to complain generally about unfair treatment or to argue that Echavarria was never disciplined for his harassing conduct. Rather, Plaintiff must at least allege some facts that the

Correctional Facility, Algarin or Echavarria treated her differently than others similarly situated individuals because she is white.

Moreover, Plaintiff's claim that Defendants actions may result in "the potential loss of salary, bonuses, benefits and other compensation . . . which is based upon work performance evaluations . . ." is insufficient to withstand a motion to dismiss. See Pl.'s Compl. at ¶ 50 (emphasis added). "A claim under Section 1981 must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities." McCrea v. Saks, Inc., Civ. A. No. 00-1936, 2000 WL 1912726, at \*3 (E.D. Pa. Dec. 22, 2000) (emphasis added). Accordingly, even after taking all factual allegations as true, Plaintiff's Complaint fails to set forth a prima facie case for reverse racial discrimination under section 1981 action. However, Plaintiff's section 1981 claim will be dismissed without prejudice so that Plaintiff may amend her Complaint to cure the deficiency if the facts permit.

**D. Plaintiff's Section 1982 Claim**

Section 1982 prohibits racial discrimination in transactions relating to real and personal property.<sup>8</sup> In order to bring an action under section 1982, a plaintiff "must allege impairment of

---

<sup>8</sup> Section 1982 provides:  
All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.  
42 U.S.C. § 1982.

a property interest of the type protected by the statutory language." Ocasio v. Lehigh Valley Family Health Cntr., Civ. A. No. 99-4091, 2000 WL 1660153, at \*2 (E.D. Pa. Nov. 6, 2000). Courts in this District have consistently held that employment claims do not fall under the protection of section 1982 because the interest implicated in such cases is neither real nor personal property. See Ocasio, 2000 WL 1660153, at \*2 (citing Altieri v. Pa. State Police, No. 98-5495, 2000 U.S. Dist. LEXIS 5041, at \*44-45 (E.D. Pa. Apr. 19, 2000); Schirmer v. Eastman Kodak, No. 86-3533, 1987 U.S. Dist. LEXIS 2800, \*12-13 (E.D. Pa. Apr. 9, 1987)). Since Plaintiff has not alleged any set of facts that would allow a fact finder to conclude that Defendants interfered with her real or personal property,<sup>9</sup> Plaintiff's claim under section 1982 is dismissed with prejudice.

#### **E. Plaintiff's Sections 1985 and 1986 Claims**

##### **1. Section 1985(1)-(2)**

Section 1985(1) "governs interference with the duties of federal officials only . . . ." Robison v. Canterbury Village, Inc., 848 F.2d 424, 430 n.5 (3d Cir. 1988). Accordingly, to make a claim under section 1985(1), Plaintiff would have to allege she is a federal officer and that Defendants interfered with her

---

<sup>9</sup> In fact, there is no allegation in the Complaint that Plaintiff's employment was terminated, or that she suffered a demotion. Rather, from the face of the Complaint, the adverse employment action at issue appears to be a disciplinary write-up after Defendants received Plaintiff's EEOC complaint, and Plaintiff's self-imposed modification of her work schedule. See Pl.'s Compl. at ¶¶ 20, 49.

official federal duties. See Indus. Design Serv. Co. v. Upper Gwynedd Township, Civ. A. No. 91-7621, 1993 WL 19756, at \*4 (E.D. Pa. Jan. 27, 1993) ("Section 1985(1) prohibits interference with federal officials in the performance of their duties. . . . Since plaintiffs have not alleged any facts involving . . . a federal officer . . . they fail to state a cause of action under [this] provision[]." ). Here, plaintiff makes no allegations of that sort and therefore the Court will dismiss her section 1985(1) claim with prejudice.

Section 1985(2) targets the obstruction of justice in federal and state courts. See Indus. Design, 1993 WL 19756, at \*4. Plaintiff has not alleged any facts involving a federal officer, a federal court, or a state court. Accordingly, she fails to state a cause of action under this provisions and these claims, as well, will be dismissed with prejudice.

## **2. Section 1985(3)**

"In general, the conspiracy provision of [section] 1985(3) provides a cause of action under rather limited circumstances against both private and state actors." Brown v. Philip Morris, Inc., 250 F.3d 789, 805 (3d Cir. 2001). For a section 1985(3) claim to survive a motion to dismiss a plaintiff must allege: "(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly,

any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). Moreover, a section 1985(3) plaintiff must also establish: "(a) that a racial or other class-based invidious discriminatory animus lay behind the coconspirators' actions, (b) that the coconspirators intended to deprive the victim of a right guaranteed by the Constitution against private impairment, and (c) that the right was consciously targeted and not just incidentally affected." Brown, 250 F.3d at 805 (quoting Spencer v. Casavilla, 44 F.3d 74, 77 (2d Cir. 1994)).

In the instant case, after combing through Plaintiff's Complaint, the Court finds that Plaintiff has failed to allege facts to support her allegation of a section 1985 violation. The only mention of a conspiracy in the Complaint itself is in the Introduction where Plaintiff states that "[t]he defendants engaged in an unlawful conspiracy and scheme causing wrongful, excessive and unjustified disciplining of Plaintiff . . ." Pl.'s Compl. at ¶ 2. This conclusory allegation is insufficient to withstand a motion to dismiss. See Moyer v. Borough of North Wales, Civ. A. No. 00-1092, 2000 WL 875704, at \*3 (E.D. Pa. June 22, 2000) ("A complaint cannot survive a motion to dismiss if it contains only conclusory allegations of conspiracy, but does not support those

allegations with averments of underlying facts.”). Rather, Plaintiff must support her averment with facts “bearing out the existence of the conspiracy and indicating its broad objectives and the role each defendant allegedly played in carrying out those objectives.” Id. at \*4.

Plaintiff neither alleges facts sufficient to state a claim under section 1985(3), nor does she assert any facts from which this Court can infer that a conspiratorial agreement existed. See O’Hare v. Colonial Sch. Dist., Civ. A. No. 99-0399, 1999 WL 773506, at \*7 (E.D. Pa. Sept. 29, 1999). Moreover, Plaintiff failed to contest Defendants’ motion to dismiss her sections 1985 and 1986 claims in her response to the motion. Accordingly, the Court grants Defendants’ Motion to Dismiss Plaintiff’s claims under both section 1985 and section 1986.<sup>10</sup> Again, these claims are dismissed without prejudice in order to give the Plaintiff an opportunity to correct the deficiency if the facts of her case so permit.

**F. Plaintiff’s State Law Claims**

Counts II through IV of Plaintiff’s Complaint set forth causes of action for intentional infliction of emotional distress, negligent retention and negligent supervision against Montgomery County and the Correctional Facility. Defendants move to dismiss all three state law claims.

---

<sup>10</sup> In order for a section 1986 claim to be valid, plaintiff must first establish a preexisting violation of section 1985. Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994).

**1. Negligent Retention and Negligent Supervision**

Defendants argue that Plaintiff's state law claims of negligent retention and negligent supervision are not actionable under Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. § 8542 (the "Tort Claims Act"). The Tort Claims Act immunizes "local agencies" from liability for "any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." *Id.* at § 8541. The Act provides eight exceptions to this grant of immunity for acts of negligence in the areas of (1) vehicle liability; (2) care, custody, or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. *Id.* at § 8542(b).

Defendants contend that the County and the Correctional Facility, as a local agency, are immune from liability for Plaintiff's claims of negligent retention and negligent supervision. As Plaintiff's claims do not fall into any of the enumerated exceptions to the Tort Claims Act, the claims are dismissed with prejudice.

**2. Intentional Infliction of Emotional Distress**

Defendants next argue that Plaintiff's claim for intentional infliction of emotional distress should be dismissed because Plaintiff fails to allege the additional retaliatory behavior

sufficient to impose liability. See Defs.' Mot. to Dismiss at 8. In order to sustain a claim for intentional infliction of emotional distress, the plaintiff must establish four elements: (1) the conduct of the defendant must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) the conduct must cause emotional distress; and (4) the distress must be severe. See Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979); Dee v. Marriott Intern., Inc., 1999 WL 975125, at \*5 (E.D. Pa. Oct. 6, 1999). The Third Circuit has recognized a claim for intentional infliction of emotional distress in the context of an employment relationship, where both sexual harassment and retaliation are involved. Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990)).

In the instant case, Defendants do not dispute that Plaintiff has pled facts sufficient to allege sexual harassment on the part of her supervisor, Echavarria. However, Plaintiff's Complaint also states that, after filing charges with the EEOC, Plaintiff received her first disciplinary action in her nineteen years of work at the Correctional Facility. See Pl.'s Compl. at ¶ 61. Plaintiff clearly alleges that the disciplinary action was in retaliation for filing the sexual harassment complaint against her supervisor. See id. Accordingly, under the liberal federal pleading standards, Plaintiff has pled a cause of action of intentional infliction of emotional distress sufficient to withstand a motion to dismiss.

See e.g. Regan v. Township of Lower Merion, 36 F.Supp.2d 245, 251 (E.D. Pa. 1999); McLaughlin v. Rose Tree Media Sch. Dist., 1 F.Supp.2d 476, 483 (E.D. Pa. 1998).

#### IV. CONCLUSION

In summary, with regards to Plaintiff's federal causes of action for a violation of civil rights, the Court grants Defendants' Motion to Dismiss Plaintiff's Title VII claim against the individual defendants, as well as Plaintiff's claims under sections 1982 and 1985(1)-(2). Accordingly, these claims are dismissed with prejudice. While the Court grants Defendants' Motion to Dismiss with regards to Plaintiff's claims under sections 1981, 1985(3) and 1986, these claims are dismissed without prejudice to afford Plaintiff the opportunity to correct the defects in the pleading if the facts of her case so permit. Furthermore, the Court denies Defendants' Motion to Dismiss Plaintiff's Title VII claim for a hostile work environment, and Plaintiff's section 1983 claim as it pertains to the municipal defendants. With regards to Plaintiff's pendant state law claims, Defendants' Motion to Dismiss Counts III and IV of Plaintiff's Complaint for negligent retention and negligent supervision is granted, and these claims are dismissed with prejudice. The Court, however, denies Defendants' Motion to Dismiss Count II of Plaintiff's Complaint for intentional infliction of emotional distress.

An appropriate Order follows.

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

BARBARA HITCHENS	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF MONTGOMERY, <u>et. al.</u>	:	NO. 01-2564

O R D E R

AND NOW, this 11<sup>th</sup> day of February, 2002, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 4), and Plaintiff's Reply to Defendants' Motion to Dismiss (Docket No. 5), IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that:

(1) Defendants' Motion to Dismiss Plaintiff's Title VII claim against the individual defendants is **GRANTED.**

Plaintiff's Title VII claim against the individual defendants is, therefore, **DISMISSED WITH PREJUDICE;**

(2) Defendants' Motion to Dismiss Plaintiff's Title VII claim for hostile work environment is **DENIED;**

(3) Defendants' Motion to Dismiss Plaintiff's section 1983 claim as it pertains to Montgomery County is **DENIED;**

(4) Defendants' Motion to Dismiss Plaintiff's section 1981 claim for intentional race discrimination is **GRANTED.**

Plaintiff's section 1981 claim is **DISMISSED WITHOUT PREJUDICE;**

(5) Defendants' Motion to Dismiss Plaintiff's section 1982 claim is **GRANTED.**

Plaintiff's Section 1982 claim is **DISMISSED WITH PREJUDICE;**

(6) Defendants' Motion to Dismiss Plaintiff's section 1985(1)-(2) claim is **GRANTED.**

Plaintiff's section 1985(1)-(2) claim is **DISMISSED WITH PREJUDICE;**

(7) Defendants' Motion to Dismiss Plaintiff's claims under sections 1985(3) and 1986 is **GRANTED.**

Plaintiff's claims under sections 1985(3) and 1986 are **DISMISSED WITHOUT PREJUDICE;**

(8) Defendants' Motion to Dismiss Counts III and IV of Plaintiff's Complaint for negligent retention and negligent supervision is **GRANTED.**

Counts III and IV of Plaintiff's Complaint are **DISMISSED WITH PREJUDICE; and**

(9) Defendants' Motion to Dismiss Count II of Plaintiff's Complaint for intentional infliction of emotional distress is **DENIED.**

BY THE COURT:

---

HERBERT J. HUTTON