

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

LEVI DINGLE	:	CIVIL ACTION
	:	
v.	:	
	:	
CENTIMARK CORPORATION and	:	
KEVIN HOHENSTEIN	:	NO. 00-6418

MEMORANDUM AND ORDER

HUTTON, J.

June 3, 2002

Presently before this Court are Defendants Centimark Corporation and Kevin Hohenstein's Motion for Summary Judgment (Docket No. 9), Plaintiff Levi Dingle's Brief in Opposition to Defendants' Motion for Summary Judgment (Docket No. 10) and Defendants' Supplemental Motion for Summary Judgment (Docket No. 20). For the reasons discussed below, Defendants' Motion for Summary Judgment is **GRANTED IN PART; DENIED IN PART.**

**I. BACKGROUND**

On December 19, 2000, Plaintiff Levi Dingle ("Plaintiff") filed the above-captioned action against his former employer, Centimark Corporation ("Centimark"), and his former supervisor Kevin Hohenstein ("Hohenstein") (collectively, "Defendants"). Plaintiff, an African-American male, was employed as a roofer by Centimark on July 3, 1999 and was assigned to a crew under the supervision of Hohenstein. According to Plaintiff, Hohenstein

treated Plaintiff differently than the other members of the crew, all of whom were Caucasian and, on October 6, 1999, Hohenstein began using racial epithets. See Defs.' Mot. Summ. J., Ex. G ("Letter from Levi Dingle to Centimark," October 27, 1999). Plaintiff contends that he complained about Hohenstein's conduct to Area Manger Jim Schiffner on October 13, 1999 and was subsequently transferred to a different work crew. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. A (Aff. of Levi Dingle, Jan. 8., 2002, at ¶ 16-18). Plaintiff then missed work from October 17 through October 24, 2001, according to Plaintiff, to take care of his son who contracted a viral infection. See Defs.' Mot. Summ. J., Ex. G ("Letter from Levi Dingle to Centimark," October 27, 1999). Plaintiff was not called into work the following week and was subsequently terminated on November 5, 1999.

In his Complaint, Plaintiff maintains that Defendants Centimark and Hohenstein are liable for racial harassment and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") and the Pennsylvania Human Relations Act 43 Pa.C.S. § 951 et seq. ("PHRA"). See Pl.'s Compl., Counts I-IV. Plaintiff also sets forth an additional claim against Hohenstein for intentional infliction of emotional distress under Pennsylvania law. See id., Count V. Defendants now move for summary judgment on all counts.

## II. LEGAL 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 party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Moreover, a court may not consider

the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials or vague statements. Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001). Thus, the Court's inquiry at the summary judgment stage is only the "threshold inquiry of determining whether there is the need for a trial," that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250-52.

### **III. DISCUSSION**

In the instant motion, Defendants seek summary judgment on each count of Plaintiff's five-count Complaint. Specifically, Defendants contend that they are entitled to judgment as a matter of law with regards to Plaintiff's claims of hostile work environment racial discrimination and retaliation under Title VII and the Pennsylvania Human Relations Act ("PHRA"). See Defs.' Mot. Summ. J. at 8-16. Moreover, Defendant Hohenstein avers that summary judgment should be entered in his favor with regards to Plaintiff's claim for intentional infliction of emotional distress. See id. at 16-17. Plaintiff opposes Defendants'

motion and contends that triable issues of material fact exist on each count that require submission to a jury. See Pl.'s Resp. to Defs.' Mot. Summ. J. at 5-7. The Court will review each separate count in turn.

**A. Hostile Work Environment**

First, Defendants contend that they are entitled to judgment as a matter of law on Plaintiff's claim for hostile work environment racial discrimination. See Defs.' Mot. Summ. J. at 8-13. Title VII,<sup>1</sup> which makes 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," provides protection against a hostile work environment that is abusive to an employee on the basis of race. See Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001); West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995) (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993)). In order to set forth a successful claim for hostile work environment racial discrimination, an employee must establish that: (1) he or she suffered intentional

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<sup>1</sup> The analysis required for adjudicating Plaintiff's claim for hostile work environment racial discrimination under the PHRA is identical to a Title VII inquiry. See Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 317 n.3 (3d Cir. 2000). Therefore, the Court "does not need to separately address [Plaintiff's] claim under the PHRA." Id.

discrimination because of race; (2) the discrimination was "pervasive and regular;" (3) he or she was adversely affected by the discrimination; (4) the discrimination would adversely affect a reasonable person of the same race; and (5) that respondeat superior liability applies.<sup>2</sup> See Cardenas, 269 F.3d at 260; Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)); Abramson v. William Paterson Coll. of New Jersey, 260 F.3d 265, 276-77 (3d Cir. 2001). "In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive environment." Weston, 251 F.3d at 426. In determining whether an environment is hostile, a court must consider the entirety of the circumstances rather than isolated incidents. Cardenas, 269 F.3d at 260-61. Factors include "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 Court finds that Plaintiff has provided evidence sufficient to survive summary judgment on his hostile work

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<sup>2</sup> Race-based hostile work environment claims are evaluated under the same analysis used for gender-based claims. See West v. Philadelphia Electric Co., 45 F.3d 744, 753 n.7 (3d Cir. 1995).

environment racial discrimination claim. First, Plaintiff has presented evidence from which a reasonable jury could conclude that he suffered intentional discrimination because of his race and that this discrimination was pervasive and regular. In his affidavit, Plaintiff stated that while he was employed by Centimark, he was repeatedly referred to as "Nigger" by his supervisor. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. A (Aff. of Levi Dingle, Jan. 8., 2002, at ¶ 14). Specifically, Plaintiff contends that after Plaintiff made a suggestion to improve productivity on the job, "Hohenstein said, 'Nigger, please,' while rolling his eyes." Id. On a different occasion, when Plaintiff offered to buy beer for the crew upon completion of a roofing job, Hohenstein instructed him not to "get any Nigger beer." Id. Hohenstein also instructed Plaintiff to "keep his tool box closed so 'your kind' doesn't steel anything." Id. Viewing all facts in the light most favorable to the non-moving party, the Court finds that Plaintiff's allegations of Hohenstein's repeated use of racially-targeted offensive and abusive language is sufficient to establish a genuine issue of material fact as to the existence of intentional racial discrimination and "pervasive and regular" harassment. See Andrews, 895 F.2d at 1484 (finding that discrimination will be considered pervasive and regular where "'incidents of harassment'

occur either in concert or with regularity") (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987)).

Plaintiff has also presented sufficient evidence to create a genuine issue of material fact as to whether he was detrimentally affected by this discrimination. "Racially derogatory comments by a supervisor which are then repeated to the plaintiff can impact the work environment." Al-Salem v. Bucks Co. Water & Sewer Auth., Civ. A. No. 97-6843, 1999 WL 167729, at \*6 (E.D. Pa. March 25, 1999) (citing Schwapp v. Town of Avon, 118 F.3d 106, 110-11 (2d Cir. 1997)). Here, Plaintiff's supervisor allegedly directed racial slurs at Plaintiff while on the work cite. As a result of his supervisor's behavior, Plaintiff testified that he felt "angry" and experienced "distress and anguish" as a result of Hohenstein's remarks. See Defs.' Supp. Mot. Summ. J., Ex. B (Dep. of Levi Dingle, at 85, 89). Plaintiff further alleges that this treatment affected his ability to work with the crew, as well as his relations with his family. See id. at 87, 89. It is not incumbent upon Plaintiff to establish that he sustained psychological harm in order to prove that the discrimination had a detrimental impact. See Phillips v. Heydt, 197 F.Supp.2d 207 (E.D. Pa. 2002) (citing Harris, 510 U.S. at 21-22). Rather, an abusive work environment might detrimentally affect a plaintiff without "seriously affect[ing] employees' psychological

well-being." Harris, 510 U.S. at 22.

Furthermore, it is evident that the discrimination experienced by Plaintiff, particularly Hohenstein's use of racial epithets, would adversely affect a reasonable African American. It is also clear that respondeat superior liability applies in the instant case. "[E]mployers are subject to vicarious liability under Title VII for hostile work environments created by supervisory employees." Cardenas, 269 F.3d at 266. Here, Defendant Centimark employed Defendant Hohenstein in a supervisory capacity. Moreover, Defendants cannot assert an "affirmative defense limiting this liability" because Plaintiff has suffered a tangible adverse employment action, including the transfer to a remote work crew and termination. See id. (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998) ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.")). Thus, the Court concludes, after considering the totality of the circumstances and viewing the evidence in the light most favorable to the non-moving party, that Plaintiff has provided evidence of a hostile work environment sufficient to survive summary judgment at this stage of the litigation.

## **B. Retaliatory Discharge**

Next, Defendants seek the entry of summary judgment in their favor as to Plaintiff's claim for retaliation under Title VII and the PHRA.<sup>3</sup> See Defs.' Mot. Summ. J. at 13. Retaliation claims under Title VII and the PHRA are analyzed under the framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 318 (3d Cir. 2000). Under this burden-shifting analysis, the employee must first establish a prima facie case of retaliation. See Goosby, 228 F.3d at 318. Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. See id. at 319; Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999). The burden then shifts back to the employee to show by a preponderance of the evidence that the reasons offered by the employer were merely a pretext for discrimination. See id.; Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637-38 (3d Cir. 1993). Although the burden of production shifts, the ultimate burden of persuasion remains with the plaintiff at all times. See Barber

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<sup>3</sup> Again, the analysis required for adjudicating Plaintiff's claim for retaliation under the PHRA is identical to a Title VII inquiry and thus the Court need not perform a separate inquiry. See Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 317 n.3 (3d Cir. 2000).

v. CSX Distrib. Servs., 68 F.3d 694, 698 (3d Cir. 1995).

**1. Prima Facie Case of Retaliation**

To establish a prima facie case of retaliatory discharge under Title VII and the PHRA, an employee must demonstrate that: (1) he or she engaged in an activity protected by Title VII, (2) the employer took an adverse employment action after or contemporaneous with the protected activity, and (3) a causal link exists between the protected activity and the adverse employment action. See Abramson v. William Patterson Coll. of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001); Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001). In the instant case, Plaintiff has produced sufficient evidence which, if credited by a jury, would establish a prima facie case of retaliatory discharge under Title VII.

First, Plaintiff has produced evidence from which a reasonable fact finder could conclude that he engaged in a protected activity. It is 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. § 2000e-2(a)(1). Therefore, complaining about episodes of on-the-job discrimination is protected conduct. Plaintiff testified that he complained to the

Area Manager, Jim Schiffner about racial comments made by Hohenstein. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. A (Aff. of Levi Dingle, Jan. 8., 2002, at ¶ 16). In addition, Plaintiff wrote a letter on October 27, 1999 to Centimark complaining about the racial epithets used by Defendant Hohenstein in detail. See Defs.' Mot. Summ. J., Ex. G ("Letter from Levi Dingle to Centimark," October 27, 1999). Thus, the record contains a sufficient showing that Plaintiff engaged in a protected activity by complaining about disparate treatment based on race. See Abramson, 260 F.3d at 287-88.

Plaintiff has also presented evidence which establishes that he suffered an adverse employment action after he registered his complaints about the use of racial epithets by his supervisor. An adverse employment action requires serious tangible harm which alters an employees compensation, terms, conditions or privileges of employment. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 749, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) (defining tangible, adverse employment action as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits"). In this case, Plaintiff experienced first a reassignment and then termination. After he

complained to Area Manager Jim Schiffner about Hohenstein's alleged comments, Plaintiff was transferred to a remote work site, even though it was well known that Plaintiff depended on his former work crew members for transportation to the job site. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. A (Aff. of Levi Dingle, Jan. 8., 2002, at ¶ 16). Shortly thereafter, Plaintiff was terminated on November 5, 1999. Thus, Plaintiff has presented evidence that he has sustained an adverse employment action.

Moreover, Plaintiff has raised a genuine issue of material fact with regard to the causal connection between the alleged adverse employment actions and the protected activity. An employee may generally show a causal link by focusing on the temporal proximity between the protected activity and the adverse employment action sufficient to support an inference that the protected activity was the likely reason for the adverse employment action. Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997). The Third Circuit has recently explained that evidence probative of a causal link can also be inferred from evidence "gleaned from the record as a whole." Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000) ("temporal proximity or antagonism merely provides an evidentiary basis from which an inference can be drawn")

(citations and alterations omitted). Here, Plaintiff testified that he complained to Area Manger Jim Schiffner on October 13, 1999 about Hohenstein's conduct. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. A (Aff. of Levi Dingle, Jan. 8., 2002, at ¶ 16-18). On the next working day, Plaintiff was transferred to a different work crew whose job site was forty (40) miles from Plaintiff's home. See id. Then, Plaintiff wrote a letter on October 27, 1999 to Centimark complaining about the racial epithets used by Defendant Hohenstein. See Defs.' Mot. Summ. J., Ex. G ("Letter from Levi Dingle to Centimark," October 27, 1999). Plaintiff was then terminated on November 5, 1999. This evidence is sufficient to create a genuine issue of material fact as to the causal link between Plaintiff's complaints regarding Hohenstein's use of racial epithets and his reassignment to a remote work crew and eventual termination. Therefore, Plaintiff has set forth a prima facie case of retaliatory discharge.

## **2. Defendants' Legitimate Non-Discriminatory Reason**

Since Plaintiff has set forth a prima facie case of retaliation, the burden now shifts to Defendants to produce a legitimate non-discriminatory reason for Plaintiff's transfer to a remote work crew and his eventual termination.<sup>4</sup> Defendants

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<sup>4</sup> The Court notes that Defendants do not offer a explanation for Plaintiff's transfer to a remote work crew. Rather, Defendants' focus on the eventual termination of Plaintiff.

claim that Plaintiff was terminated due to job abandonment. See Defs.' Mot. Summ. J. at 15. According to Defendants, Plaintiff failed to notify Centimark of his absences the week of October 17, 2002 and, under Centimark policy, three unreported absences results in job termination. See id. Defendants, therefore, have succeeded in meeting their burden by articulating a legitimate, non-discriminatory reason for Plaintiff's termination. Thus, the burden now shifts back to Plaintiff to show that there is sufficient evidence from which a jury could conclude that the purported reasons for Defendants' adverse employment action was in actuality a pretext for intentional race discrimination.

### **3. Pretext**

Under this final portion of the analysis, a plaintiff may defeat a motion for summary judgment by pointing "to some evidence, direct or circumstantial, from which a factfinder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). A plaintiff also may survive summary judgment by pointing to evidence in the record which "allows the fact finder to infer that discrimination was more likely than not a motivating or determinative cause of the

adverse employment action." Id. at 764. For purposes of showing pretext, it is not necessary for the plaintiff to demonstrate that the illegitimate factor was the sole reason for the termination, but that it was "a determinative factor." See Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). Moreover, at the summary judgment stage, a plaintiff need not prove that the employer's purported reason for its actions was false, "but the plaintiff must criticize it effectively enough so as to raise a doubt as to whether it was the true reason for the action." Nosowad v. Villanova Univ., No. 97-5881, 1999 WL 322486, at \*5 (E.D. Pa. May 19, 1999).

Defendants assert that Plaintiff "voluntarily terminated" his position with Centimark when he failed to call out from work for more than three days in October of 1999. See Defs.' Mot. Summ. J. at 4-5. Plaintiff, however, has provided sufficient evidence to establish that there is a genuine issue of material fact with respect to the circumstances of his transfer to another work crew and termination. As discussed above, Plaintiff testified that he complained to the Area Manager, Jim Schiffner, on October 13, 1999 about racial comments made by Hohenstein. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. A (Aff. of Levi Dingle, Jan. 8., 2002, at ¶ 16). The next day he was transferred to a crew that worked forty (40)miles from Plaintiff home even

though it was well known that Plaintiff was dependent on crew members for transportation to the job site. See id. at ¶¶ 17-20. Plaintiff informed Schiffner that he had "no way to get to the new job site." Id. at ¶ 20. Plaintiff then missed work the week of October 17 through October 24, 2001 in order to take care of his sick son. See id. at ¶ 23. Plaintiff testified that he called in every day he was unable to work (see id. at ¶ 25), but Defendants claim they never received any word from Plaintiff regarding his absences. See Defs.' Mot. Summ. J. at 12. Plaintiff then wrote a letter on October 27, 1999 to Centimark complaining about the racial epithets used by Defendant Hohenstein in detail. See id., Ex. G ("Letter from Levi Dingle to Centimark," October 27, 1999). Plaintiff was terminated a few days later.

Based on this evidence, a fact finder could reasonably infer that Defendants' proffered reason was pretextual with respect to Plaintiff's discharge. Moreover, the Court notes that the Third Circuit urges special caution in granting summary judgment to an employer when its intent is at issue, particularly in discrimination and retaliation cases. See Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 321 (3d Cir. 2000). Thus, Plaintiff's showing is sufficient to demonstrate that on the issue of pretext, there are genuine issues of material fact that

warrant denial of Defendants' motion for summary judgment.

**C. Intentional Infliction of Emotional Distress**

Next, Defendants seek the entry of summary judgment on Count V of Plaintiff's complaint for intentional infliction of emotional distress. See Defs.' Mot. Summ. J. at 16. To establish a claim of intentional infliction of emotional distress under Pennsylvania law, Plaintiff must show that Defendant Hohenstein's conduct was: (1) extreme and outrageous; (2) intentional or reckless; and (3) caused severe emotional distress. Wisniewski v. Johns Manville Corp., 812 F.2d 81, 85 (3d Cir. 1987). Liability under this tort has been found only when the conduct "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 754 (Pa. 1998) (citations omitted). Generally, it is insufficient "that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation that would have entitled a plaintiff to punitive damages for another tort." Id. (citing Rest. (2d) Torts § 46, cmt. d). Moreover, physical injury is generally required in order to recover for emotional distress. See Zieber v.

Bogert, 773 A.2d 758, 762 (Pa. 2001); Simmons v. Pacor, Inc., 674 A.2d 232, 238 (Pa. 1996) ("It is the general rule of this Commonwealth that there can be no recovery for damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress mental or emotional distress unless they are accompanied by physical injury or physical impact.").

This Court finds that Defendant Hohenstein is entitled to summary judgment on Plaintiff's claim for intentional infliction of emotional distress. Plaintiff is unable to prove that he actually suffered any severe distress. At his deposition, Plaintiff admitted that he never sought or received any kind of therapy or medical attention as a result of the incidents he alleged transpired between him and Hohenstein. See Defs.' Supp. Mot. for Summ. J., Ex. B (Dep. of Levi Dingle, at 85-97). In order to maintain a claim for intentional infliction of emotional distress, a plaintiff must either show that he obtained medical treatment for the distress, or provide expert medical testimony of the existence and severity of the alleged emotional distress. See Kazatsky v. King David Mem'l Park, Inc., 527 A.2d 988, 995 (Pa. 1987); Tuman v. Genesis Assocs., 935 F.Supp. 1375, 1393 (E.D. Pa. 1996). Plaintiff has advanced absolutely no medical evidence to sustain his claim. Nor has Plaintiff provided

sufficient evidence from which a reasonable jury could conclude that Defendants' behavior rose to the level of "extreme and outrageous" conduct necessary to recover under this tort. Accordingly, Plaintiff's claim fails and Defendants motion for summary judgment is granted as to this claim. See Kazatsky, 527 A.2d at 995.

**D. Punitive Damages**

Finally, Defendants seek the entry of summary judgment in their favor on Plaintiff's claim for punitive damages. According to Defendants, Plaintiff cannot maintain a cause of action for punitive damages under Title VII because "[t]here is no evidence in this case that rises to the level of intentional discrimination . . . ." Defs.' Mot. Summ. J. at 18. The Court first notes that the Supreme Court of Pennsylvania has found that punitive damages are not available under the PHRA. See Hoy v. Angelone, 720 A.2d 725, 751 (Pa. 1998). Therefore, Plaintiff may not seek punitive damages with regards to his PHRA claims. However, punitive damages are available in Title VII cases when the defendant employer engages in a discriminatory practice with "malice or reckless indifference to the federally protected rights of an individual." 42 U.S.C. § 1981a(b)(1); see also Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). The terms "malice" and "reckless" refer to

the employer's state of mind. See Kolstad, 527 U.S. at 535. Moreover, punitive damages liability can be imposed upon an employer for the discriminatory behavior of its agent when "an employee serving in a managerial capacity committed the wrong while acting in the scope of employment." Id. at 543.

The Court finds that summary judgment on Plaintiff's punitive damage claim under Title VII is inappropriate at this stage in the litigation because a genuine issue of material fact exists as to whether such damages are warranted. See Tupper v. Haymond & Lundy, Civ. A. No. 00-3550, 2001 WL 936650, at \* 7 (E.D. Pa. Aug. 16, 2001). Factual disputes abound as to Hohenstein's comments and remarks to Plaintiff and Centimark's reaction thereto. Thus, Defendants' motion for summary judgment as to the punitive damages claim must be denied.

An appropriate Order follows.

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

LEVI DINGLE	:	CIVIL ACTION
	:	
v.	:	
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CENTIMARK CORPORATION and	:	
KEVIN HOHENSTEIN	:	NO. 00-6418

O R D E R

AND NOW, this 3<sup>rd</sup> day of June, 2002, upon consideration of Defendants Centimark Corporation and Kevin Hohenstein's Motion for Summary Judgment (Docket No. 9), Plaintiff Levi Dingle's Brief in Opposition to Defendants' Motion for Summary Judgment (Docket No. 10) and Defendants' Supplemental Motion for Summary Judgment (Docket No. 20), IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is **GRANTED IN PART; DENIED IN PART.**

IT IS FURTHER ORDERED that:

(1) Defendants' Motion for Summary Judgment as to Counts I and II of Plaintiff's Complaint for racial discrimination and retaliation under Title VII and the PHRA is **DENIED;**

(2) Defendants' Motion for Summary Judgment as to Counts III and IV of Plaintiff's Complaint for retaliation is **DENIED;**

(3) Defendants' Motion for Summary Judgment as to Plaintiff's claim for punitive damages is **DENIED**; and

(4) Defendants' Motion for Summary Judgment as to Count V of Plaintiff's Complaint for Intentional Infliction of Emotional Distress is **GRANTED**.

IT IS FURTHER ORDERED that Count V of Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

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HERBERT J. HUTTON, J.