

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

WILLIE H. DUNLAP,	:	
	:	
Plaintiff,	:	
v.	:	No. 03-CV-2111
	:	
BOEING HELICOPTER DIVISION, <i>PRODUCT SUPPORT DEPARTMENT,</i>	:	
	:	
Defendant.	:	

**MEMORANDUM**

**Green, S.J.**

**February 23, 2005**

Presently before the court is Defendant’s Motion for Summary Judgment and the responses thereto. For the reasons set forth below, Defendant’s Motion for Summary Judgment will be granted in part and denied in part.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Willie H. Dunlap (“Plaintiff” or “Dunlap”), an African-American man, brought this action against his former employer, Boeing Helicopter Division (“Defendant” or “Boeing”). Plaintiff is suing Defendant for federal claims of race discrimination, racial harassment, retaliation, and sexual harassment under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C.S. § 2000e et seq.; and disability discrimination and failure to accommodate under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12101 et seq. He also brings state claims of retaliation and race, sex, and disability discrimination under the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Con. Stat. § 951 et seq., and wrongful termination under Pennsylvania common law.

Boeing hired Dunlap in the Fall of 2000 as it prepared to deliver helicopters to the Greek Army. Plaintiff began working there as a contract technical writer on September 29, 2000. Defendant retained Dunlap for its Technical Publications Department through

Judge.com, a contract staffing firm. His duties included drafting technical manuals for the Greek Army project and other matters.

Kimpton Hemsarh ("Hemsarh") was a manager at this department and the person responsible for hiring Plaintiff. When Dunlap was hired, Hemsarh told him that although he had been hired to work on the Greek Army project, he would be assigned to work on a U.S. Army project until the Greek Army project got underway. In late-November or early-December 2000, Plaintiff and the other technical writers reporting to Hemsarh began working on the Greek Army project. Hemsarh assigned Plaintiff to work on the instrumentation chapter of the maintenance and trouble shooting technical manuals.

Plaintiff referred Ronald Crocker ("Crocker") for a job at Boeing. On November 13, 2000, Crocker began working in his department as a contract technical writer. Due to a space shortage, Plaintiff and Crocker shared a cubicle. Dunlap claims that throughout his time at Boeing, Crocker used racial slurs about blacks to him individually and in front of Mark Dutton ("Dutton"), a lead technical writer.

On January 4, 2001, Hemsarh fired Crocker. Hemsarh stated that his reason for firing Crocker was because Dutton informed him that Crocker had made derogatory remarks about African-Americans and Jews. Plaintiff claims that Crocker was actually fired because he had insulted Dutton's family that day. Plaintiff further contends that he complained to Hemsarh that it was unfair for Crocker to be fired for making inappropriate statements about Dutton's family but not for continually making racial slurs to Plaintiff. Plaintiff alleges that Hemsarh became upset upon hearing Plaintiff's complaint.

Plaintiff wears hearing aids in both ears. In the Fall of 2000, Plaintiff requested a telephone volume amplifier from Defendant because he was experiencing difficulty using the office telephone. Loraine Bridgeford ("Bridgeford"), an administrative assistant assigned to the Technical Publications Department ordered an amplification device. About a week later,

Bridgford presented the device to Plaintiff. Plaintiff, however, rejected it. Dunlap claims that he rejected the device because it was not hearing aid compatible. Defendant claims that Plaintiff stated that he no longer needed the amplifier. Plaintiff stated in his deposition that he could generally use the telephone effectively by simply asking the person with whom he was speaking to talk a little louder.

Plaintiff also alleges that throughout his time at Boeing, Mark Dutton and Kimpton Hemsarth made jokes about Crocker and Plaintiff being a gay couple. Plaintiff is a heterosexual.

In mid-January 2001, Plaintiff notified Hemsarth that he planned to take off January 20, 2001 through January 23, 2001. Hemsarth subsequently approved this leave based on Plaintiff's need. Plaintiff spent this time vacationing. When Plaintiff returned to work on January 24, 2001, Hemsarth fired him. Hemsarth claims that Plaintiff was fired for poor work performance and for lying about the reason for his leave. Plaintiff denies this and alleges that he was fired because of racial discrimination, retaliation, sexual harassment, and disability discrimination.

On April 22, 2003, Plaintiff filed a complaint against Boeing for: 1) Title VII-race discrimination and racial harassment; 2) Title VII-sexual harassment; 3) Title VII-retaliation; 4) ADA-disability discrimination and failure to accommodate; 5) Wrongful termination of employment contract under Pennsylvania common law; and 6) PHRA retaliation and sex, race, and disability discrimination.

## **II. LEGAL STANDARD**

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law.” Fed. R. Civ. P. 56(c). A genuine issue as to any material fact exists “if 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, 2510 (1986).

A party seeking summary judgment bears the initial responsibility of identifying the basis for its motion, along with evidence clearly demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catreet, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the moving party has satisfied this requirement, Rule 56(e) of the Federal Rules of Civil Procedure requires the nonmoving party to supply sufficient evidence, not mere allegations, for a reasonable jury to find in the nonmovant’s favor. See Oldson v. General Elec. Astropace, 101 F.3d 947, 951 (3d Cir. 1996). This evidence must be viewed in the light most favorable to the nonmoving party. See Anderson, 477 U.S. at 256.

### **III DISCUSSION**

In the instant matter, Defendant moves for summary judgment, arguing that: 1) Plaintiff’s Title VII and ADA claims are barred by statute of limitations; 2) Plaintiff cannot demonstrate that race was a motivating factor in his termination; 3) Plaintiff’s retaliation claims fail because he did not exhaust his remedies; 4) Plaintiff cannot establish a prima facie case of retaliation; 5) Plaintiff is not disabled within the meaning of the ADA or the PHRA; 6) Plaintiff’s sexual harassment claim is not cognizable under Title VII or the PHRA; 7) Plaintiff cannot establish a prima facie case of racial harassment; and 8) Plaintiff cannot establish a claim for wrongful termination.

#### **A. Plaintiff’s Title VII and ADA Claims Are Not Barred By Statute of Limitations**

Defendant’s contention that Plaintiff’s Title VII and ADA claims are time-barred is incorrect. Title VII of the Civil Rights Act of 1964 requires plaintiffs to file discrimination complaints within ninety days of receiving a right-to-sue letter from the Equal Employment

Opportunity Commission (“EEOC”). See Mosel v. Hills Dept. Store, 789 F.2d 251, 252 (3d Cir. 1986). This ninety-day statute of limitations period begins when the plaintiff or plaintiff’s counsel receives the right-to-sue letter, whichever is earlier. See Seitzinger v. The Reading Hospital and Medical Center, 165 F.3d 236, 239-40 (3d Cir. 1999).

Dunlap contends that he received his right-to-sue letter on January 2, 2003. Plaintiff stated this January 2, 2003 receipt date in his Complaint and his Declaration attached to his response brief. He also testified in his deposition that he kept a record of the day that he received his right-to-sue letter and that he used this day in his Complaint. The EEOC right-to-sue letter is dated December 23, 2002, ten days before Plaintiff claims to have received the letter. Plaintiff’s counsel postulates that this ten-day delay could have been caused by the 2002 holiday season and the fact that December 25<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup> 2002 and January 1, 2003 were non-mail days.

Defendant argues to this Court that the date of receipt was not more than 3 days after mailing for the purpose of deciding this motion. Defendant cites Federal Rule of Civil Procedure 6(e) for this contention.<sup>1</sup> However, the Third Circuit makes clear that Rule 6(e) is inapplicable and that the ninety-day statute of limitations period begins to run upon actual receipt. See Mosel, 789 F.2d at 253 (holding that Rule 6(e) was inapplicable to determining the actual receipt date of a EEOC right-to-sue letter). In the instant matter, Plaintiff has provided sufficient evidence to demonstrate that he received his right-to-sue letter on January 2, 2003. In any event, the date of receipt is a disputed fact and therefore cannot be a basis for summary judgment pursuant to Federal Rule of Civil Procedure 56(c).

**B. Plaintiff’s Racial Discrimination Claims Survive Summary Judgment**

<sup>1</sup> Fed. R. Civ. P. Rule 6(e) provides that “[w]henver a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.”

Plaintiff has made out Title VII and PHRA racial discrimination claims. To establish a prima facie case of discriminatory discharge under Title VII, a plaintiff must establish: (1) that he is a member of a protected class; (2) that he was qualified for the position, (3) that he was discharged, and (4) that others not in the protected class were treated more favorably. See Garcia v. Matthews, 2003 U.S. App. LEXIS 7967, at \*9 (3d Cir. April 10, 2003); Williams v. Seven Seventeen HB Philadelphia Corp., 51 F. Supp. 2d 637, 641 (E.D.Pa. 1999); see also Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 317 (3d Cir. 2000) (Title VII and PHRA discrimination analysis is identical). Plaintiff satisfies all four prongs. First, he is an African-American and therefore a member of a protected class under Title VII. Second, Plaintiff's twenty-five years of experience in the technical publication field is sufficient evidence that he is qualified. Third, it is undisputed that Plaintiff was fired. For the fourth prong, disparate treatment, Plaintiff contends that his non-African American co-workers were treated more favorably because: (1) he was forced to share a cubicle with Crocker and (2) Plaintiff had to suffer through Crocker's continual racial harassment. It is undisputed that Plaintiff had to share his cubicle and office equipment with Crocker. Defendant states that this sharing was necessary due to a shortage of office workspace. Plaintiff, however, has provided evidence through his affidavit that he was made to share his cubicle and office equipment even after other cubicles became free. Furthermore, although Hemsarth contends that Plaintiff was fired because his work performance was poor, Plaintiff has provided evidence from a co-worker that Plaintiff's work was well-regarded. Viewing the evidence in the light most favorable to the nonmoving party, Plaintiff has established that his work conditions were different. The inference as to whether this was due to racial discrimination should be determined by a factfinder. Accordingly, Plaintiff's racial discrimination claims survive summary judgment.

**C. Plaintiff Properly Exhausted His Administrative Remedies With Respect To His Retaliation Claims**

Defendant contends that Plaintiff's retaliation claims fail as a matter of law because he did not exhaust his administrative remedies with either the EEOC or the Pennsylvania Human Relations Commission ("PHRC") prior to filing suit. Under Title VII and the PHRA, discrimination claims must be filed with the EEOC or the PHRC prior to being filed in court. See Burgh v. Borough Council of the Borough of Montrose, 251 F.3d 465, 469-71 (3d Cir. 2001). Although Plaintiff did not allege retaliation in his initial complaint to the PHRC, Plaintiff clearly alleges retaliation in his June 26, 2001 and June 28, 2001 letters to the PHRC. In his June 26, 2001 letter, Plaintiff specifically states "[p]lease amend my complaint to include and/or retaliation...." In his June 28 letter, Plaintiff describes Boeing's alleged retaliatory activities. Plaintiff therefore filed his retaliation claims with the PHRC prior to filing them with this Court. Accordingly, Plaintiff has provided sufficient evidence that he exhausted his remedies at the administrative level. To survive summary judgment, however, Plaintiff still has to produce some evidence of a prima facie claim of retaliation.

**D. Plaintiff's Retaliatory Discharge Claims Survive Summary Judgment**

In order to make out a prima facie retaliatory discharge claim under Title VII and the PHRA, Plaintiff must demonstrate: (1) that he was engaged in a protected activity; (2) that he was discharged subsequent to or contemporaneously with such activity; and (3) that a casual link exists between the protected activity and the discharge. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). In his affidavit, Plaintiff stated that Hemsarth became upset after Plaintiff complained to him about not terminating Crocker for his past racial slurs. Hemsarth fired Dunlap shortly thereafter. This evidence satisfies the first two prongs of the retaliation standard. First, Plaintiff was engaged in protected activity, complaining about discriminatory practices. Second, Plaintiff was discharged subsequent to this protected activity. Third, there is evidence from which a factfinder could infer a casual link. Even though such

evidence is disputed, this evidence precludes granting of summary judgment. “The casual connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.” Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989) (citing Burrus v. United Telephone. Co., 683 F.2d 339, 343 (10<sup>th</sup> Cir. 1982)). In the instant matter, Plaintiff was fired within three weeks after an alleged complaint to Hemsarth. Accordingly, Plaintiff has satisfied all prongs of the retaliation standard and established a prima facie case of retaliatory discharge.

The burden now shifts to Defendant to give a nondiscriminatory reason for discharging Plaintiff. See Jalil, 873 F.2d at 708. Defendant has produced evidence in support of its position that Dunlap was terminated for poor performance. Consequently, Defendant has met its burden of giving a nondiscriminatory reason for discharging Plaintiff. However, to obtain summary judgment, Defendant has to demonstrate that Dunlap could not raise an issue of fact as to whether Defendant’s proffered explanation of poor performance was pretextual. See id. Plaintiff has introduced sufficient evidence to question Defendant’s motivation for discharging him, specifically, his complaint of discriminatory practices followed by his termination shortly thereafter. Also, Plaintiff has offered evidence that his work was well-regarded. Therefore, summary judgment on Plaintiff’s retaliation claims cannot be granted.

To make out a retaliation claim, Plaintiff does not have to prove the merits of his discrimination case. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996); see also Jalil, 873 F.2d at 709 (affirming summary judgment on discrimination claim but denying summary judgment on retaliation). Plaintiff only has to prove that he complained to management about what he believed constituted discriminatory practices. See Aman, 85 F.3d at 1085. A good faith complaint of discrimination, regardless of the merits, is protected conduct under Title VII. See id. Viewing the evidence in the light most favorable to Plaintiff, Dunlap demonstrated that he complained to Hemsarth about what he believed to be a discriminatory

practice, that he was terminated shortly afterwards, and that a casual link exists. Accordingly, summary judgment cannot be granted on Plaintiff's retaliation claims.

**E. Plaintiff's Disability Discrimination Claims Fail As A Matter Of Law**

Plaintiff's disability discrimination claims under the ADA and the PHRA fail as a matter of law. To make out a prima facie disability discrimination claim under these statutes, a plaintiff must prove: (1) that he has a disability; (2) that he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he suffered an adverse employment decision because of discrimination. See Taylor v. Phoenixville School District, 184 F.3d 296, 306 (3d Cir. 1999). Plaintiff does not have a disability within the meaning of the ADA and the PHRA and therefore cannot satisfy the first prong of the disability discrimination standard. Accordingly, Plaintiff's ADA and PHRA disability discrimination claims must fail.

The ADA and the PHRA provide that a person is disabled if he has a physical or mental impairment that substantially limits one or more major life activities, a record of impairment, or is regarded as having an impairment. See 42 U.S.C. § 12102(2); see also 43 P.S. §954(p). Not every physical impairment is a disability as contemplated by the law because not every impairment substantially limits a major life activity. See Penchisen v. Stroh Brewery Co., 932 F. Supp. 671, 674 (E.D. Pa. 1996) aff'd, 116 F.3d 469 (3d Cir. 1997) cert. denied, 118 S. Ct. 178 (1997). The Supreme Court has held that under the ADA, corrective and mitigating measures for a person's impairment should be considered to determine if the person is "substantially limited in a major life activity and thus disabled under the Act." Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

Here, Plaintiff is not disabled as defined in the ADA and PHRA. First, Dunlap's hearing aids mitigate his impairment so that he is not substantially limited in a major life activity.

In their PHRC affidavits, Drs. Heard and Ponkshe, Plaintiff's own doctors, confirm that Plaintiff's corrected hearing does not limit any major life activities. Moreover, although Plaintiff occasionally has problems hearing people on the telephone, he admits in deposition that this problem is corrected if the person speaks a little louder. Plaintiff has neither provided evidence that his hearing difficulty substantially limits a major life activity nor has he produced medical records that he is impaired. Furthermore, Plaintiff has not produce evidence demonstrating that Defendant regarded him as being hearing impaired. Plaintiff has not established any of the prongs of the disability test. Therefore, as a matter of law, summary judgment must be granted against Plaintiff on his ADA and PHRA discrimination claims. Additionally, Plaintiff's ADA and PHRA failure to accommodate claims must fail because proof of a disability is also required to survive summary judgment. See Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751, 771 (3d Cir. 2004).

**F. Plaintiff's Sexual Harassment Claims Fail As A Matter Of Law**

Plaintiff's sexual harassment claims must be dismissed because he did not exhaust his remedies with the EEOC or the PHRC prior to bringing a claim for sexual harassment. Title VII and the PHRA provide that a plaintiff must exhaust his administrative remedies before bringing a civil action. See Burgh v. Borough Council of Montrose, 251 F.3d 465, 469 (3d Cir. 2001); Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 921 (Pa. 1989) (holding that the intended forum for initially addressing PHRA claims is the PHRC). "The purpose of requiring exhaustion is to afford the EEOC the opportunity to settle disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court." Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996). Where a plaintiff fails to assert a claim for sexual harassment in his administrative charge, and there is no evidence of an agency investigation of a sexual harassment charge, he has failed to exhaust, and summary judgment is required. See

Antol, 82 F.3d at 1295-1296. In the instant matter, Plaintiff has not provided evidence that he alleged sexual harassment at the agency level. He also has not shown that the EEOC or PHRC investigated the alleged sexual harassment. Therefore, Plaintiff's sexual harassment claims under Title VII and the PHRA will be dismissed for failure to exhaust administrative remedies.

**G. Plaintiff Has Not Made Out A Hostile Work Environment Claim**

In order to make out a prima facie hostile work environment claim under Title VII and the PHRA, Plaintiff must demonstrate: (1) that he suffered intentional discrimination because of his race; (2) that the discrimination was pervasive or regular; (3) that the discrimination detrimentally affected him; (4) that the discrimination would detrimentally affect a reasonable person of the same race in the same position; and (5) the existence of respondeat superior liability. See Knabe v. The Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997). Viewing the evidence in the light most favorable to the non-moving party, Plaintiff fails to make out a hostile work environment cause of action.

Dunlap's racial harassment claims fail because he cannot satisfy the fifth prong of the hostile work environment standard - respondeat superior. In this case, Plaintiff alleges that his co-worker, Crocker, racially harassed him and his lead writer, Dutton, knew about it, thus imputing liability to Boeing. The Third Circuit has held that "an employer is liable for an employee's behavior under a negligence theory of agency 'if a plaintiff proves that management-level employees had actual or constructive knowledge'" of the hostile work environment and failed to take remedial action. Id. at 411. Here, Plaintiff's racial harassment claims fail because Dutton is not a management-level employee who would impute liability to Boeing and because Defendant took the remedial action of firing the offender.

Plaintiff's argument that Dutton was a management-level supervisor is incorrect. Plaintiff has not provided evidence that Dutton was anything more than a senior employee. Senior employees who direct junior employees but do not have the power to set work schedules, rate of pay or assignments, or take part in an employee's hiring or firing cannot impute liability. See Jackson v. T & N Van Service, 86 F. Supp.2d 497, 503 (E.D.Pa. 2000); see also VanZant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715-716 (2d Cir. 1997) ("for the knowledge of a supervisor to be imputed to the company, that supervisor must be at a sufficiently high level in the hierarchy of the company.").

Furthermore, Hemsarth's January 4, 2001 firing of Crocker stopped the alleged harassment of Plaintiff and precluded Title VII hostile work environment liability. The case law is clear that "when an employer's response stops harassment, there cannot be Title VII liability." Kunin v. Sears Roebuck, 175 F.3d 289, 294 (3d Cir. 1999). When Dutton informed Hemsarth of Crocker's derogatory statements, Hemsarth immediately took corrective measures. "An employer, in order to avoid liability for the discriminatory conduct of an employee, does not have to necessarily discipline or terminate the offending employee as long as the employer takes corrective action reasonably likely to prevent the offending conduct from reoccurring." Knabe, 114 F.3d at 414. In the instant matter, Defendant fired Crocker and prevented Plaintiff's continued harassment. Therefore, his racial harassment claims fail.

Accepting that there is evidence of racial statements and that these took place between a fellow employee and Plaintiff's supervisor, there is no evidence of respondeat superior responsibility because upon knowledge of the racially derogatory remarks, the employer terminated the harasser and the hostile remarks ceased. Although the employer may have terminated Crocker for a different reason, nevertheless Defendant did terminate Crocker and the hostile statements stopped.

**H. Plaintiff's Pennsylvania Wrongful Termination Claim Cannot Survive Summary Judgment**

Plaintiff's Pennsylvania law claim for wrongful termination must fail because he was an at-will employee. As a general rule, Pennsylvania does not recognize a common law cause of action for termination of an at-will employment relationship. See McLaughlin v. Gastrointestinal Specialities, Inc., 561 Pa. 307, 313-14 (Pa. 2000). Under Pennsylvania law, the statutory remedy provided by the Pennsylvania Human Relations Act, 43 Pa. Con. Stat. § 951 et seq., "precludes assertion of a common law tort action for wrongful discharge based upon discrimination." Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989). Exceptions to this rule are available in very limited circumstances, such as discharging an employee for serving on a jury. See id. In the instant case, Plaintiff is already bringing retaliation and race discrimination claims against Defendant under the PHRA. Under the PHRA, he is therefore precluded from bringing a wrongful termination claim under common law.

**IV. CONCLUSION**

For these reasons, Defendant's Motion for Summary Judgment will be granted in part and denied in part. Summary judgment will be granted as to Plaintiff's Title VII and PHRA hostile work environment, sex and disability discrimination claims. Also, summary judgment will be granted as to Plaintiff's wrongful termination claim under Pennsylvania common law. Plaintiff's Title VII and PHRA claims for retaliation and race discrimination, however, stand and summary judgment as to these claims will be denied.

BY THE COURT:

S/\_\_\_\_\_  
CLIFFORD SCOTT GREEN

