

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

DEBRA A. KILLINGSWORTH, et al. : CIVIL ACTION  
: :  
v. : :  
: :  
JOHN E. POTTER, et al. : NO. 05-4271

MEMORANDUM

Bartle, C.J.

March 20, 2006

Plaintiffs Debra Killingsworth and her husband David Killingsworth have sued defendants John E. Potter, Postmaster General, United States Postal Service, and three postal employees, Louis Spadaro, Glenn Sullivan and Roland Ragsdale. Debra Killingsworth alleges she suffered discrimination on the basis of sex as well as retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. She has also brought state law claims asserting intentional infliction of emotional distress and assault and battery while her husband sues for loss of consortium.<sup>1</sup> Before the court is the motion of the defendants to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56.

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1. When we refer to the "plaintiff" we are speaking of Debra Killingsworth. The other plaintiff, David Killingsworth, is a plaintiff only as to the derivative state law claims.

I.

Under Rule 12(b)(6), a claim should be dismissed only where "it appears beyond doubt that plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." In re Rockefeller Ctr. Props., Inc. Sec. Litig. ("Rockefeller"), 311 F.3d 198, 215 (3d Cir. 2002). All well-pleaded allegations in the complaint must be accepted as true, and all reasonable inferences are drawn in favor of the non-moving party. Id. We may consider "the allegations contained in the complaint, exhibits attached thereto, and matters of public record." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d Cir. 1999); Pension Benefit Guar. Corp. v. White Consol. Indus. Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). In deciding a motion to dismiss, a court also may consider "document[s] *integral to or explicitly relied upon* in the complaint ... without converting the motion [to dismiss] into one for summary judgment." In re Burlington Coat Factory Sec. Litig. ("Burlington Coat Factory"), 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis in original) (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)). If, however, the court must look beyond the pleadings, a motion to dismiss may be converted into a motion for summary judgment under Rule 56.

Rule 56 of the Federal Rules of Civil Procedure permits us to grant summary judgment only "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 summary judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 254. We review all evidence and make all reasonable inferences from the evidence in the light most favorable to the non-movant. See In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004). The non-moving party may not rest upon mere allegations or denials of the moving party's pleadings but must set forth specific facts showing there is a genuine issue for trial. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990).

## II.

Individual defendants Louis Spadaro, Glenn Sullivan and Roland Ragsdale argue that the plaintiff's Title VII claims against them as individuals must be dismissed. For the last decade, our Court of Appeals has clearly and consistently stated that individual employees cannot be held liable under Title VII. See, e.g., Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996) (en banc). Therefore, we will dismiss the plaintiff's claims of sex discrimination against defendants Spadaro, Sullivan and Ragsdale.

The remaining defendants argue that the plaintiff's Title VII claims must be dismissed because she did not comply with regulations requiring her to contact a counselor within 45

days of the alleged acts of discrimination and because she failed to file her Complaint in this court within 90 days of the final agency decision. Plaintiff responds that on several occasions she complained of harassment to various postal employees and that we should deem those complaints a timely invocation of the administrative system. Failing that, the plaintiff maintains these complaints should toll the time required to initiate counseling. She also asserts that she did file her complaint within 90 days of the day she learned of the final agency action.

When a federal employee believes that he or she has suffered some form of discrimination in violation of federal law, he or she must "consult a Counselor prior to filing a complaint in order to resolve the matter." 29 C.F.R. § 1614.105(a). The employee "must initiate [such] contact ... within 45 days" of the alleged discriminatory act or the effective date of any personnel action. Id. § 1614.105(a)(1). Unless the employee agrees to a longer period of counseling or elects alternative means of dispute resolution, the counselor must inform the aggrieved employee in writing no less than 30 days after the initial interview of his or her right to file a discrimination complaint within 15 days of receiving such notice. Id. § 1614.105(d). If the employee does not comply with these time limits, an agency is required to dismiss the entire complaint. Id. § 1614.107(a)(2).

Title VII allows an aggrieved employee to bring a civil action in federal court only if the employee has first exhausted the required administrative remedies. 42 U.S.C. § 2000e-16(c).

The employee must bring suit within 90 days of receiving notice of "final action" taken by the administrative agency with regard to the charge of discrimination. Id. The exhaustion requirement and the 90-day time period in which to file a complaint are not jurisdictional but rather are defenses akin to statutes of limitations. See Zipes v. Trans World Airlines, Inc., 455 U.S. 386, 393 (1982); Anjelino v. New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999). Therefore, the defendants bear the burden to establish that the plaintiff failed to exhaust administrative remedies or did not comply with applicable time limits. See Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997). In addition, the time limitations may be tolled under appropriate circumstances. Anjelino, 200 F.3d at 87. The plaintiff bears the burden of showing the doctrine of equitable tolling should apply. See Courtney v. La Salle Univ., 124 F.3d 499, 505 (3d Cir. 1997).

Plaintiff alleges several acts of sexual harassment occurring primarily between April and July of 2004 but also extending into November of that year. She also contends she reported the harassing behavior to various other postal employees during the summer of 2004. The record reflects that in July, the plaintiff reported the offending conduct to Joseph Brown, Supervisor of Distribution Operations, and Ronald Lamb, the Employee Assistance Program Supervisor. On September 17, the plaintiff again spoke with Lamb in his office about her

allegations of harassment but during the meeting suffered a panic attack and was taken to a local hospital. After being released from the hospital the next day, she gave a statement to Cindy Davis, who is described as a "Sexual Harassment Coordinator." In her statement, the plaintiff described several instances of harassment that had taken place over the preceding months.

After September 18, the plaintiff did not report to work due to depression. In October, she was contacted at her home by Sheila Locus and Ray Ingram who identified themselves as postal investigators. They met with both plaintiffs at their home to discuss the allegations of harassment. According to plaintiff, Locus and Ingram said at this meeting that they would "take care" of her complaint and "get to the root" of the problem. At the end of October, the investigators again met with the plaintiffs, this time at Mr. Killingsworth's office.

On November 3, the plaintiff claims she attempted to return to work but could not get medical clearance to do so. While at the postal facility that day, defendant Louis Spadaro gave plaintiff his phone number, the final act of alleged discrimination during 2004. She returned to work on November 13 and she remained until March 3, 2005. In late January, 2005, the plaintiff asked Sheila Locus whether she worked in the Postal Service's Equal Employment Opportunity Office ("EEO Office"). Locus replied that she did not. Plaintiff initiated formal

counseling with the EEO Office on February 15, 2005. She filed her formal complaint that same day concerning the instances of discrimination she alleged took place between April and November, 2004.

On March 4, 2005, plaintiff initiated the administrative process a second time regarding purported retaliation of Micros Berry,<sup>2</sup> which is discussed below. The United States Postal Service Equal Employment Opportunity Office denied the plaintiff's first formal complaint as untimely on April 7, 2005. That same day the Post Office sent the dismissal of the formal complaint by certified mail to the plaintiffs' home address. Although the return receipt is signed "D. Killingsworth," it is not dated. Plaintiff contends that she did not receive notice of the dismissal until "around" May 15, when she picked up a copy at the Kingsessing Post Office in Philadelphia. Eighty-eight days later, on August 10, 2005, plaintiff filed the complaint in this action.

Whether plaintiff timely filed her complaint with the court must await trial. Moreover, there is a lack of clarity and disputes of fact in the present record to the timing and significance of events during the administrative phase of this

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2. The parties spell Mr. Berry's first name different ways in various documents. The complaint and the defendants spell Mr. Berry's first name "Micros" while the plaintiffs' briefs spell the name "Micos." We adopt the spelling used in the complaint.

matter. Again, summary judgment is not appropriate and must be denied.

We now turn to plaintiff's claim of retaliation under Title VII. To establish a prima facie case of retaliation, the plaintiff must show that "(1) he or she engaged in a protected employee activity; (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 action." Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); see also Slagle v. Cty. of Clarion, 435 F.3d 262, 265 (3d Cir. 2006).

As discussed above, the plaintiff alleges that on several occasions throughout 2004 she complained to Joseph Brown, Cindy Davis, Ronald Lamb, and two postal investigators, Ray Ingram and Sheila Locus, about the harassment she allegedly suffered. On or about the morning of January 21, 2005, the plaintiff was called to the office of Micros Berry, the Senior Plant Manager, to discuss her complaints of sexual harassment. Union representative Rita Nelson was also present at that meeting. Plaintiff maintains that at this meeting Berry called her a "flirt" and that in doing so he retaliated against her for complaining about sexual harassment. She does not point to any action taken by Berry or any other postal employee at that meeting or at any other time that altered her salary, position,

responsibilities, or other terms, conditions, and privileges of her employment. Further, she has not alleged that Berry changed her status as an employee or denied her other employment opportunities.

The parties do not dispute that when plaintiff complained about sexual harassment she engaged in activity protected under Title VII. The parties do dispute whether plaintiff has satisfied the second element of the prima facie case. In Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997), our Court of Appeals affirmed the district court's grant of judgment as a matter of law to the City on Robinson's Title VII retaliation claim because the alleged conduct did not give rise to a claim of retaliation. Speaking through then-Judge Alito, the Court of Appeals explained that "unsubstantiated oral reprimands and unnecessary derogatory comments ... do not rise to the level of what our cases have described as adverse employment action." Robinson, 120 F.3d at 1300 (internal punctuation omitted). Indeed, "not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Id. (internal citation omitted). The adverse employment action "element of a retaliation plaintiff's prima facie case incorporates the [] requirement that the retaliatory conduct rise

to the level of a violation of 42 U.S.C. § 2000e-2(a)(1) or (2)." Id. at 1300-01. Such conduct must be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Id. at 1300.

Plaintiff has not pleaded any facts in the Complaint or stated anything in her affidavit that suggests she suffered any "adverse employment action" or that any supervisory figure at the post office took any action against her after she complained about her harassment. Berry did nothing whatsoever to punish the plaintiff. Calling plaintiff a "flirt" might have been unprofessional, rude, or otherwise inappropriate, but it was not an adverse employment action as it did not alter the compensation, terms, conditions, or privileges of her employment. Accordingly, we will grant defendants' motion for summary judgment with respect to the retaliation claim.

### III.

The defendants maintain that the plaintiff's state law claims are preempted by the remedial regime in the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 2302, which addresses employee challenges to employment decisions in the federal workplace. As our Court of Appeals has not addressed the interplay between the CSRA and state tort remedies, the defendants primarily rely on Roth v. United States, 952 F.2d 611, 614-15 (1st Cir. 1991) and Saul v. United States, 928 F.2d 829, 840-43 (9th Cir. 1991).

Congress designed the CSRA to be a comprehensive, unified, and exclusive administrative framework for resolving disputes regarding adverse personnel actions taken against employees. Id. Therefore, if the state law tort actions brought in this case conflict with this objective, they are within the scope of the CSRA and are preempted. See id.; see also California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987). The CSRA states "[f]ederal personnel management should be implemented consistent with ... merit system principles." 5 U.S.C. § 2301(b). This requires that "any employee who has authority to take, recommend, or approve any 'personnel action' shall not" exercise that authority in a matter that discriminates on the basis of sex as prohibited by Title VII. Id. §§ 2302(b), (b)(1)(A). A "personnel action" is defined as:

(I) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency ...

Id. § 2302(a)(2)(A). The CSRA will only preempt the plaintiffs' state law claims if the harassing conduct is a "personnel action" as defined in § 2302(a)(2)(A), and the defendants are employees with "authority to take, recommend, or approve" the personnel action, and the specific type of abuse is listed in §§ 2302(b)(1)-(11). See Broughton v. Courtney, 861 F.2d 639, 644 (11th Cir. 1988).

The record before the court does not support the defendants' contention that the CSRA preempts the plaintiffs' state law claims. The conduct, either alleged in the complaint or further described by Ms. Killingsworth's affidavit, does not fall under any category of "personnel action." Even if § 2302(a)(2)(A)(xi) does cover the facts alleged here, two of the three defendants are not employees with "authority to take, recommend, or approve" any personnel action with regard to Debra Killingsworth. Id. § 2302(b). Roland Ragsdale was a co-worker and Glen Sullivan was not the plaintiff's supervisor. Finally, even if Spadaro, Sullivan or Ragsdale are proper defendants under § 2302(b), the facts underlying plaintiffs' tort claims are not at all related to any authority of the individual defendants to make personnel decisions regarding plaintiff's position, working conditions or responsibilities. See Kent v. Howard, 801 F. Supp. 329, 333 (S.D. Cal. 1992); Jense v. Runyon, 990 F. Supp. 1320, 1330 (D. Utah 1998). Therefore, the plaintiffs' state tort

claims do not fall within the scope of the CSRA and, thus, are not preempted.

#### IV.

We next address the defendants' argument under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., that the United States must be substituted as the defendant in place of Spadaro and Sullivan since the United States Attorney has certified that they were acting within the scope of their employment at all times relevant to the plaintiffs' state law claims.

Federal employees are immune from all state tort claims committed while acting within the scope of their employment. See 28 U.S.C. § 2679(b)(1). If a plaintiff files such claims against federal employees seeking money damages, the claim is deemed against the United States under the FTCA upon certification by the United States Attorney that the employees were acting within the scope of their employment. The United States must then be substituted as the defendant. See id. § 2679(d)(1); 28 C.F.R. § 5.3.

However, the scope-of-employment certification of a United States Attorney under 28 U.S.C. 2679(d)(1) is not the last word on the subject. It may be reviewed by the district court. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995). The certification should state the basis for its conclusion. This

conclusion may be challenged by a party who comes forward with competent evidence. Melo v. Hafer, 13 F.3d 736, 747 (3d Cir. 1994). If evidence is offered that supports a finding other than the one contained in the certification, the parties are entitled to an evidentiary hearing to determine whether a defendant was acting within the scope of his or her employment at the relevant times. Id. The district court must then resolve all questions of law or fact relevant to the certification and any motion to substitute parties. Id.

The United States Attorney for the Eastern District of Pennsylvania has certified that for purposes of plaintiffs' state tort claims defendants Louis Spadaro and Glenn Sullivan were at all times acting within the scope of their employment. He moves to substitute the United States as a defendant in place of Spadaro and Sullivan. The certification does not seek substitution for defendant Roland Ragsdale. The United States Attorney simply states that in reaching his conclusion "I have considered (1) the Complaint, (2) the representation of counsel for the United States Postal Service that Messr[s]. Spardo [sic] and Sullivan were acting within the scope of their employment by the United States Postal Service at the time of the events and occurrences in question." Plaintiffs' assert their state claims should not be dismissed because defendants' actions were not in furtherance of any official purpose and therefore not within the

scope of their employment. To support their contention, the plaintiffs provide an affidavit from Debra Killingsworth detailing the her accusations of improper kissing and touching against each of the individual defendants.

The plaintiffs have offered evidence supporting the allegations set forth in the Complaint. That evidence, if believed, calls into question the United States Attorney's certification that the individual defendants were acting within the scope of their employment. We must hold an evidentiary hearing as described by our Court of Appeals in Melo, after which this court will determine whether or not to substitute the United States for the individual defendants. Accordingly, the motion to dismiss the tort claims against defendants Spadaro and Sullivan and substitute the United States as defendant in their place will be denied without prejudice pending such a hearing.

V.

Finally, the individual defendants aver that they have not been served with process. If a plaintiff has not served a defendant with process within 120 days of the filing of the Complaint, Rule 4(m) of the Federal Rules of Civil Procedure states that the court "shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time." We will allow plaintiffs an additional thirty days to effectuate service of process on Louis Spadaro, Glenn

Sullivan and Roland Ragsdale. Failure to make service will result in the dismissal of the Complaint against the defendants.

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ORDER

AND NOW, this 20th day of March, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendants to dismiss and/or for summary judgment is GRANTED in part and DENIED in part:

(1) the motion of defendants Louis Spadaro, Glenn Sullivan and Roland Ragsdale to dismiss the plaintiff's claims against them under Title VII of the Civil Rights Action is GRANTED;

(2) the motion of defendants for summary judgment is GRANTED with respect to plaintiff's retaliation claim;

(3) judgment is entered in favor of defendants John E. Potter, Postmaster General, United States Postal Service and against plaintiffs David and Debra Killingsworth on their claim of retaliation;

(4) the motion of defendants is DENIED insofar as it seeks to preempt plaintiffs' state law claims under the Civil Service Reform Act;

(5) the motion of defendants is otherwise DENIED without prejudice; and

(6) plaintiffs shall effect service of process on defendants Louis Spadaro, Glenn Sullivan and Roland Ragsdale within thirty (30) days of the date of this Order. Failure to do so will result in the dismissal of all claims against said defendants.

BY THE COURT:

/s/ Harvey Bartle III  
C.J.