

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

<b>MARVIN E. LEE,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 05-1781</b>
	:	
<b>COMHAR, Inc.</b>	:	
<b>Defendant</b>	:	

**MEMORANDUM AND ORDER**

Stengel, J.

May 18, 2006

**I. Factual Background**

Plaintiff Marvin E. Lee was an employee of defendant Comhar, Inc., a provider of residential health care. Mr. Lee was hired on November 2, 1994 as a “Residential Counselor I,” and worked at one of Comhar’s residential sites in Philadelphia. He was employed more or less continuously by defendant until October 4, 2002, when he was suspended pending an investigation to an alleged threat made towards a co-worker. Mr. Lee’s employment was eventually terminated as a result of that investigation.

The circumstances surrounding the instant Title VII claims began in August 2002, when Mr. Lee alleges he began to be sexually harassed by David Milbourne, a co-worker at the Pennway facility who Mr. Lee believes is gay.<sup>1</sup> Plaintiff alleges that on a number of occasions, Mr. Milbourne touched him on the arm while speaking to him. On one specific instance, Mr. Milbourne touched Mr. Lee’s hat and then his hand brushed against Mr. Lee’s shoulder. As a result of this incident, Mr. Lee told Mr. Milbourne never touch

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<sup>1</sup> Mr. Milbourne was neither a supervisor nor a decision-maker at Comhar.

him again, a request with which Mr. Milbourne complied. Subsequent to that incident, Mr. Lee complained about the touching to a supervisor because he thought it was sexual harassment.

The second alleged incident of sexual harassment also involved Mr. Milbourne. At a staff meeting in the late summer or early autumn, Mr. Lee was demonstrating a leg stretching technique to be used on clients of the residential facilities. The demonstration was performed on Mr. Milbourne. At the end of Mr. Lee's demonstration, Mr. Milbourne said "Oh, that feels good," with what Mr. Lee perceived to be a sexual connotation. Most of the people in the room laughed, however Mr. Lee alleges he made eye contact with his supervisor, Michelle Murrill, and she was not laughing.

Finally, on September 27, 2002, Mr. Lee's access to the door was blocked by Mr. Milbourne, who was standing with his back to Mr. Lee, talking to another co-worker. Mr. Lee testified that Mr. Milbourne was intentionally harassing him by blocking his way out of the facility. Mr. Lee said "let me get by here, boy," and Mr. Milbourne moved and let him by.

Subsequent to the September 27 incident, Mr. Lee met with Ms. Murrill to discuss Mr. Milbourne's allegedly harassing behavior. Mr. Lee told her that "this gay stuff is starting to get psychotic."<sup>2</sup> He further told Ms. Murrell that "I'd hate to write an incident report that somebody fell down around here and got hurt." It is undisputed that this statement, or some close variation thereof, was made at least two additional times. Mr.

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<sup>2</sup> Mr. Lee has vehemently asserted that he did not mean that all gay people are psychotic, but rather that he believed the harassment by Mr. Milbourne was becoming psychotic.

Lee vehemently asserts that the statement was made as a joke, and that the people to whom the comment was made understood it as a joke. Nonetheless, as a result of Mr. Lee's complaints, Comhar launched an investigation into the alleged harassment. The expedience of the investigation is in dispute, but the fact of the investigation is not. Concurrently, an investigation was initiated into whether Mr. Lee's statement in his meeting with Ms. Murrell constituted a threat against his co-worker. The latter investigation resulted in Mr. Lee's suspension from work.

While on suspension, Mr. Lee filed two incident reports, alleging client abuse. One report was filed with Sara Began, the client's case manager, and the other was filed with Mike Kennedy, with the Philadelphia Department of Mental Retardation Services. The reports were filed on November 18, 2002 and November 22, 2002, respectively, though the alleged abuse occurred on September 28, 2002.<sup>3</sup>

Mr. Lee has brought claims against Comhar under Title VII of the Civil Rights Act of 1984 for sexual harassment and unlawful dismissal/retaliation, as well as under the Pennsylvania Whistleblower Statute for unlawful dismissal. Mr. Lee further brought claims for intentional/negligent misrepresentation with regard to a settlement agreement that was proposed, but not executed, in an underlying Unemployment Payment dispute.

## **II. Legal Standard**

The court has subject matter jurisdiction based upon a question of federal law,

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<sup>3</sup> There is no evidence as to whether Ms. Began investigated the alleged abuse. Mr. Kennedy contacted Comhar in early December. Mr. Lee contends that that response was inadequate and filed a complaint about Mr. Kennedy with the Pennsylvania Office of Mental Retardation.

pursuant to 28 U.S.C. § 1331. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial *Celotex* burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” *Id.* at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. *Liberty Lobby*, 477 U.S. at 255.

The court must decide not whether the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Id.* at 252. If the non-moving party has exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

### **III. Discussion**

#### **A. Quid Pro Quo Sexual Harassment**

To prove a claim of quid pro quo sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, a plaintiff must show unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, and that (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. *See Iyer v. Everson*, 382 F. Supp. 2d 749, 758 (E.D. Pa. 2005) (citing *Bonenberger v. Plymouth Township*, 132 F.3d 20, 27 (3d Cir. 1997)).

I find that plaintiff has failed to prove quid pro quo sexual harassment. Even if it is assumed that the wrist-touching incidents, the hat-and-shoulder-touching incident and the door-blocking incident were of a sexual nature, there is absolutely no evidence that Mr. Lee's submission to those advances (setting aside what "submission" would entail)

was made a term of his employment. The record is similarly devoid of any evidence, other than plaintiff's conjecture, that Mr. Lee's rejection of Mr. Milbourne's advances in any way affected decisions made with regard to his employment. As a result, I will grant summary judgment in favor of defendant on the quid pro quo harassment claim.

#### B. Hostile Environment Sexual Harassment

In order to prove a claim for hostile environment sexual under Title VII, plaintiff must prove that: (1) he suffered intentional discrimination because of his sex; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected him; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability exists. *See Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir. 1999) *cert. denied*, 528 U.S. 964 (1999).

Mr. Lee's hostile environment claim fails for a number of reasons. First, Mr. Lee has failed to prove that he suffered any discrimination because of his sex. He has not offered any evidence, other than vague allegations of Mr. Milbourne's homosexuality, that he was treated differently than other employees on account of his gender. Second, even if it is assumed that the incidents rose to the level of discrimination, by no means was it severe or pervasive. To be cognizable, the behavior complained of must be pervasive and severe enough to alter the conditions of plaintiff's employment and create an abusive work environment. *See Velez v. QVC*, 227 F. Supp. 2d 384, 409 (E.D. Pa. 2002). Mr. Lee has only alleged a handful of incidents, in which Mr. Milbourne touched his arm or said something Mr. Lee perceived as inappropriate - actions which Mr.

Milbourne ceased the instant Mr. Lee asked him to. At the most, then, Mr. Milbourne's behavior amounted to a nuisance - Mr. Lee does not even allege that the conditions of his employment were affected as a result of the inappropriate touching or comments.

Further, isolated incidents are not sufficient to prove that discrimination is severe or pervasive. *See id.* at 410. Mr. Lee has thus not shown that the harassment was either pervasive or severe.<sup>4</sup> As a result, I will dismiss the Title VII hostile environment sexual harassment claim as well.

### C. Title VII Retaliation Claim

To prove a retaliation claim under Title VII, 42 U.S.C. § 2000e-3, a plaintiff must show “(1) the employee engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action.” *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000). Plaintiff here alleges that he was unlawfully terminated in retaliation for his complaints about Mr. Milbourne's harassment and for the complaints he filed alleging client abuse.

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<sup>4</sup> Because I find that Mr. Lee hasn't made out a case that the harassment was severe or pervasive, I will not discuss the *respondeat superior* issue in depth. Nonetheless, Mr. Lee has not shown that this case is appropriate for *respondeat superior* liability. An employer is generally liable for harassing behavior by a supervisory employee, but if they can show that the company “had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998). Setting aside the fact that Mr. Milbourne was not a supervisory employee, I find that Comhar has shown evidence that it reasonably investigated Mr. Lee's complaints. Therefore, I find that even if Mr. Lee could make out a case of otherwise actionable harassment, he could not show supervisory liability.

First, Mr. Lee has satisfied the first prong of a *prima facie* retaliation claim because complaints to management about unlawful behavior are “protected employee activity” under Title VII. *See Barber v. CSX Distribution Svs.*, 68 F.3d 694, 702 (3d Cir. 1995). Second, because he was terminated within a few months of the complaints of alleged sexual discrimination, he has satisfied the second prong as well. The deficiency with Mr. Lee’s claim lies in the third prong. He argues that because he was terminated eight weeks after his filing of the complaints of sexual harassment, the causal connection is clear. Temporal proximity is sometimes enough to create an inference of a causal relationship between the protected activity and the adverse employment action. *See, e.g. Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997). This is true, however, in only very clear cases, such as when the adverse action is almost immediately after the protected activity. *See id.* As a result, Mr. Lee is obligated to affirmatively prove a causal connection between his termination and his complaints of sexual harassment. I find that he has failed to do this. There is no evidence, save the timing, that Mr. Lee’s complaints precipitated his termination. Moreover, defendant has offered a legitimate reason for his termination. Thus, I will dismiss Mr. Lee’s Title VII retaliation claim as well.

#### D. Pennsylvania Whistleblower Statute Retaliation Claim

Mr. Lee also brings a claim under the Pennsylvania Whistleblower Statute, 43 P.S.

§ 1421, *et seq.*, alleging that he was terminated for reporting incidents of client abuse.<sup>5</sup>

The Pennsylvania Whistleblower Statute provides that:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

43 P.S. § 1423(a). “Employee” is defined as a “person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body.” 43 P.S. § 1422; *see also Holewinski v. Children’s Hosp. of Pittsburgh*, 649 A.2d 712, (Pa. Super. Ct. 1994) (“although there is a whistleblower law in Pennsylvania, it only applies to employees discharged from governmental entities.”). Here, there is no allegation or showing that Comhar is a public body, therefore, this law is inapplicable to the instant claim, and the claim must be dismissed.<sup>6</sup>

E. Intentional/Negligent Misrepresentation

Mr. Lee alleges, somewhat obliquely, that Comhar intentionally or negligently misrepresented the contents of a settlement agreement, which was not executed, in the Unemployment Commission hearing. *See* Exh. 2 to Pl.’s Complaint. It appears that Mr. Lee believes the proposed agreement was an attempt to defraud him of his future right to

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<sup>5</sup> Neither party has provided a cite to the “Pennsylvania Whistleblower Statutes.” As 43 P.S. § 1421, *et seq.* is, by its own definition, the Pennsylvania Whistleblower Statute, 43 P.S. § 1421, I will presume that this is the statute to which the parties refer.

<sup>6</sup> Defendant did not raise this as an issue. As it is dispositive, I will not address the issues otherwise raised by defendant with regard to the Whistleblower claim.

sue Comhar.

To prove negligent misrepresentation, a plaintiff must show: “(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.” *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 277 (Pa. 2005). Intentional misrepresentation differs from negligent misrepresentation in that the “misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words.” *Id.*

I do not see any indication that Mr. Lee’s allegations fulfill any of these requirements. The only misrepresentation that he pointed to (on the reverse side of the proposed settlement) is a paragraph that states that he had conferred with counsel about the contents of the release. As Mr. Lee did not sign the release, he was not induced to do anything and neither did he suffer any cognizable injury. I will therefore dismiss the negligent misrepresentation claim.

F. All other claims

Mr. Lee has also brought claims under the Pennsylvania Unemployment Code, 43 Pa. C.S.A. §§ 861, 872 and 873, as well as under the Pennsylvania Criminal Code, 18 Pa. C.S.A. §§ 4902, 4903 and 4904. As there is no private cause of action under any of these sections, these claims must be dismissed as well.

