

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	:	CIVIL ACTION
	:	
	:	
KARI WASYLAK, Intervenor,	:	NO. 06-01758
	:	
	:	
v.	:	
	:	
	:	
SMOKIN' JOE'S TOBACCO SHOP, Inc., Defendant.	:	

MEMORANDUM

STENGEL, J.

April 27, 2007

Kari Wasylak alleges that her immediate supervisor Darryl Wormuth sexually harassed her while she was employed as a cashier at defendant Smokin' Joe's Tobacco Shop and that Smokin' Joe's retaliated against her by terminating her employment when she complained about the harassment. Both parties have filed motions for summary judgment. For the reasons discussed below, I will deny the majority of Smokin' Joe's motion because there are unresolved genuine issues of material fact as to Wasylak's sex discrimination and retaliation claim; however, I will grant the motion as to Wasylak's claim under the Pennsylvania Equal Rights Amendment. I will deny Wasylak's motion for summary judgment based on Smokin' Joe's spoliation of a resignation report, although I will revisit this issue at trial when charging the jury.

I. BACKGROUND¹

A. Smokin' Joe's Harassment Policy

Smokin' Joe's hired Kari Wasylak as a full-time cashier on December 13, 2004. The next day, Wasylak received a copy of the Employee Handbook and understood it was her responsibility to read and comply with the policies it contained. Wasylak, in fact, did browse through the handbook. Section 3.03 of the Handbook contains a policy on harassment and states that Smokin' Joe's "has a zero tolerance policy with respect to harassment of any kind." Def's Mot. Summ. J. Ex. G, Handbook, Section 3.03, p. 13. The policy provides that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" are "expressly forbidden." *Id.* The policy also establishes a complaint procedure. Employees are asked to report incidents or conduct promptly to a supervisor or the Human Resources Director—whichever the employee prefers. Smokin' Joe's "will investigate all allegations of harassment in as prompt and confidential a manner as possible and will take appropriate corrective action when warranted." *Id.* Employees will not be penalized for making complaints and are required to cooperate in any investigations. Beyond this information in their handbooks, employees at Smokin' Joe's did not receive training about what sexual harassment is or how to prevent it.²

¹ All facts have been taken from the parties' statements of facts and the court will make inferences in favor of the non-movant.

² Smokin' Joe's did not provide sexual harassment training until it entered into a consent decree with the EEOC, which partially resolved the case but did not affect Wasylak's claims. See Section I.D.

B. Sexual Harassment by Darryl Wormuth

Throughout her employment at Smokin' Joe's, Darryl Wormuth,³ Wasylak's immediate supervisor, used obscenities and made sexual comments about Wasylak and other women.⁴ This made Wasylak feel uncomfortable. Wormuth told Wasylak that she was hotter and cuter than other employees. He called her "girlfriend," "cupcake," and "muffin;" asked her out on dates; told her he would be her boyfriend; and offered to bring her presents for her birthday and Valentine's day. Wormuth stared at Wasylak's breasts, which made her feel uncomfortable. Other employees noticed Wormuth's ogling and asked Wasylak how it made her feel.

Wormuth made excuses to take Wasylak into his office in the back of the store and asked her to tell him stories about her sex life. Wasylak testified that Wormuth "asked me what kind of things I like, what kind of men I like, what's the wildest thing I have done in bed." Wasylak Dep. Oct. 13, 2006, p. 32. Other employees believed that something inappropriate was going on in the back room and would ask Wasylak if she and Wormuth had left semen stains on the chair. On one occasion, Wasylak was standing in the back room and Wormuth came up behind her, started smelling her neck and told her that she "smelled so good, if [she] were a piece of fruit that he would eat [her]".

³ Wormuth became a manager at Smokin' Joe's in November 1998. By the time Wasylak began working at Smokin' Joe's, Wormuth was a regional manager and managed several stores.

⁴ Wasylak was not the only target of Wormuth's inappropriate comments. Wasylak's pleadings include allegations of statements Wormuth made to other female employees at Smokin' Joe's. However, the court will focus its discussion on Wasylak's experiences.

Wasylak Dep. Sept. 27, 2006, p. 129. Wormuth invaded Wasylak's personal space, passing by her unnecessarily close so that his chest would rub up against her breasts. Several days before she made her complaint, Wormuth lifted up Wasylak's shirt, pulled at the bottom of her pants and commented that the tattoo she had on her back "would be sexier" if it had been placed lower down. Id. p. 142.

Wormuth used the video surveillance system to watch women at Smokin' Joe's, which made Wasylak and other female employees at Smokin' Joe's uncomfortable. Wasylak knew that Wormuth was watching her and this made her reluctant to bend over to grab anything. Wormuth would discuss the bodies of female customers and cashiers with the male cashiers.

Wormuth made comments about Wasylak to other employees like "look at that ass" and "she looks like she'd put a hurtin' on you in the bedroom." Def's Statement of Uncontested Facts ¶¶ 6-7. Wormuth commented to an employee that Wasylak "looks like she would suck dick." Wasylak Dep. Sept. 27, 2006, p. 136. He told co-worker Erin Murphy that even though Wasylak was wearing the same shirt as another female employee that the shirt "looks better on [Wasylak] because she has bigger tits." Def's Statement of Uncontested Facts ¶ 7.

C. Wasylak's Complaint and Her Termination

On March 1, 2005, Wasylak called David Prezelski, Human Resources Director, to complain about Wormuth's behavior. On February 28, 2005, Wasylak had telephoned

Wormuth to request permission to leave the store and drive home since it was snowing hard and she was concerned about road conditions and wanted to be home with her child. Wormuth got angry with her and said the decision to close the store was not up to him. Wormuth told her “you might as well just fucking leave.” Wasylak Dep. Sept. 27, 2006, pp. 156-57. Wasylak called to complain about this and Wormuth’s other inappropriate behavior.

Prezelski was skeptical of Wasylak’s complaint. Wasylak requested that Prezelski keep her complaint confidential. Prezelski stated that he would do his best but he could not guarantee confidentiality. Wasylak also informed Prezelski that she had retained an attorney and intended to sue for sexual harassment. When Prezelski met with Wormuth on March 2, 2005, he told Wormuth that Wasylak had complained that she had been sexually harassed by Wormuth.

Wednesday, March 2, 2005 was the next day Wasylak was scheduled to work. On this date, Wasylak called the store to say that she was not coming in. Wasylak spoke to the shift manager, Carey Phipps. She did not speak to Wormuth, her direct supervisor, as required by store policy because she had already made her complaint to Prezleski and was uncomfortable speaking to Wormuth because he would know she had made a complaint. Phipps checked the schedule and told Wasylak that her name⁵ had been crossed off the

⁵ Smokin’ Joe’s argues that Wasylak’s name had not been crossed off the schedule to support its contention that Wasylak resigned and was not fired. Wasylak attaches a copy of the “blacked out schedule” with her motion, which shows that only the “time in” and “time out” sections for March 2-4, and not her name, were blacked out. Pl’s Resp. Opp’n Def’s Mot. Summ. J. Ex. 27. For the purposes of this motion, the court must make all inferences in

schedule with a black magic marker. Phipps noted on the schedule that Wasylak had called in sick.⁶ Another cashier, Nick Tufano, also told Wasylak that her name was crossed off the schedule. This meant that Wasylak was fired.

On Thursday, March 3, after 4:00 p.m., Wormuth wrote up “resignation”⁷ papers for Wasylak. It was common practice at Smokin’ Joe’s to assume an employee has resigned if she did not notify a direct supervisor that she would be absent for a scheduled shift. Wormuth testified that he was not aware that Wasylak had called into the store on March 2 to let him know she would not be coming to work on that day. According to Wormuth, the resignation paper said “that [Wasylak] had failed to show up to her scheduled shifts on the above dates” and assumed that she had resigned. Wormuth Dep. p. 137. Wormuth turned over the draft resignation report, along with other undelivered employee warnings and paperwork, to his supervisory replacement William Lowry. Smokin’ Joe’s has attempted to locate the draft report without success.

On March 4, 2005, Wasylak reported to work.⁸ The employees who were working

Wasylak’s favor and find that Phipps told Wasylak that her name had been blacked off the schedule. Employees at Smokin’ Joe’s have testified that this indicated that Wasylak had been fired.

⁶ This notation does not appear on the time schedule. See Pl’s Resp. Opp’n Def’s Mot. Summ. J. Ex. 27.

⁷ Wasylak argues that the proper name for this document is an “employment termination report” and provides a sample “Employment Termination Report” in her pleadings. See Pl’s Resp. Opp’n Def’s Mot. Summ. J. Ex. 18. This document is missing and the parties sharply contest its import. Since Wasylak has moved for summary judgment on the basis of the spoliation of this report, all inferences regarding this report will be made in Smokin’ Joe’s favor.

⁸ It is unclear why Wasylak reported to work on March 4th if she believed she had been terminated as of March 2nd. Wasylak testified that she reported to work “because I didn’t understand why I would be blacked off the schedule. So, I wanted to go in and see what was going on because, as far as I knew, I still had a job.” Wasylak Dep. Sept. 27, 2006 p. 189.

that day, Melissa Bagley, Heather Kelly, and a new employee named Donna, were surprised to see Wasylak because Wormuth had told them that Wasylak had quit the day of the snowstorm. They called Wormuth and he told them that he had prepared resignation papers for Wasylak and she was to leave the store. Wasylak remonstrated that she had not resigned.

Wasylak returned later in the day on March 4, 2005 to pick up her paycheck. She discovered William Lowry, the company's Loss Control Manager, at the store conducting an investigation into complaints against Wormuth made by Wasylak and other employees. While Lowry had training in investigations, he had no specific training in how to investigate a sexual harassment complaint or in Title VII investigations.⁹

Lowry asked to speak to Wasylak in the back room, which was Wormuth's office. Wormuth was in the stockroom, right outside the door. Although Lowry shut the door, Wasylak could hear Wormuth outside the door in the stockroom and knew he could hear her through the door. Lowry asked Wasylak what was going on and Wasylak answered him but was reluctant to get into details since she knew Wormuth was right outside the door, which intimidated her.¹⁰ Smokin' Joe's issued an employee warning report to Wasylak on March 8, 2005 for violating company procedures by failing to cooperate with a company investigation on March 4, 2005. Another employee, Carey Phipps, was not

⁹ At his deposition, Lowry testified that he did not know what Title VII was. Lowry Dep. pp. 25-26.

¹⁰ There is a factual dispute concerning whether Lowry offered Wasylak the opportunity to discuss the matter at another location.

written up for his failure to cooperate with Lowry's investigation.

Lowry questioned Wasylak in an intimidating manner, yelling at times and making insinuations. During her conversation with Lowry on March 4, 2005, Wasylak asked Lowry if she still had a job. He responded "I don't have a comment, I'm not here to talk about your employment status, I'm here to talk about...the complaint you made." Lowry Dep. p. 75. Lowry asked Wasylak to return her employee handbook, which Wasylak did. The employee handbook indicates that employees are asked to return the handbook upon termination; Lowry also testified that he would never request a person who was going to stay employed return a handbook. When she returned her handbook to Lowry, Wasylak felt she had been terminated.

After March 4, 2005, Wasylak did not have direct contact with Smokin' Joe's. Instead, Wasylak's attorney, Martha Sperling, queried Smokin' Joe's about Wasylak's employment status. Initially Sperling made telephone inquiries. On March 8, 2005, she wrote to Morris Raub, counsel for Smokin' Joe's, requesting clarification as to whether Wasylak was still an employee at Smokin' Joe's and noting that Wasylak had not resigned. On March 9, 2005, Raub responded that "the status of Ms. Wasylak's employment is currently under review." Pl's Opp'n Def's Mot. Summ. J. Ex. 21.¹¹ On

¹¹ Raub noted that Wasylak had not reported to work on March 2nd, 3rd, and 4th and did not inform her immediate supervisor or the Human Resources Office of her plans. While Smokin' Joe's could have terminated Wasylak for this, it had decided to issue her a warning and consider her absence as unpaid leave. Raub also noted that Wasylak could be terminated for failing to cooperate in a corporate investigation. Raub stated that "Smokin' Joe's is unable to come to a final determination without first speaking with Ms. Wasylak regarding other issues that have recently come to light pertaining to her conduct during her employment with Smokin' Joe's" and requested that Wasylak contact David Prezelski to coordinate a meeting. If Wasylak did not attend a meeting, Raub noted that she

March 14, 2005, Sperling responded that “[w]e consider that [Wasylak] has been discharged” and that “[i]t is impossible for Ms. Wasylak to return to work at Smokin’ Joe’s under these circumstances, nor will she cooperate with an investigation of Mr. Wormuth.” Def’s Mot. Summ. J. Ex. L. Raub responded on the same day and informed Sperling that if Wasylak failed to coordinate a meeting with Prezelski before March 18, 2005, she would be terminated for cause. Smokin’ Joe’s terminated Wasylak on March 21, 2005 for failing to cooperate with a company investigation. See Def’s Mot. Summ. J. Ex. M. “Employee Warning Report.” Wasylak is the only employee Smokin’ Joe’s has ever terminated for failing to cooperate in an investigation.

There is conflicting evidence regarding Smokin’ Joe’s discipline of Wormuth. While Wormuth testified that his managerial responsibilities were suspended for a six to eight month period commencing after the March 2, 2005 meeting, Wormuth’s Employee Warning Report indicates the only action Smokin’ Joe’s took was to suspend Wormuth without pay for a week. At the March 2, 2005 meeting, Richard and David Prezelski told Wormuth not to address any employee issues and to minimize interaction with employees. However, at least one employee, Melissa Bagley, noted no change in Wormuth’s responsibilities. Wormuth himself testified that he prepared resignation papers for Wasylak as part of his “normal management duties” on March 3, the day after these duties had been suspended. Wormuth Dep. pp. 119-20.

would be disciplined and possibly terminated.

D. Procedural History

On April 26, 2006, the Equal Employment Opportunity Commission (“EEOC”) filed a complaint against Smokin’ Joe’s on behalf of Erin Murphy and Wasylak alleging that the two women were subjected to sexual harassment that created a hostile work environment through the actions of their direct supervisor, Darryl Wormuth. The EEOC also alleged that Smokin’ Joe’s terminated Wasylak in retaliation for her complaint. On May 11, 2006, Wasylak filed a motion to intervene, which the court granted on June 6, 2006. Her complaint against Smokin’ Joe’s alleged: (1) sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e-2 et seq (“Title VII”); (2) sex discrimination and retaliation in violation of the Pennsylvania Human Relations Act 43 PA. CONS. STAT. § 951 et seq (“PHRA”); and (3) sexual harassment in violation of the Pennsylvania Equal Rights Amendment (“ERA”) PA. CONST. art. 1 § 28.

On October 30, 2006, the EEOC and Smokin’ Joe’s entered into a consent decree to resolve all the claims that were raised by the EEOC on behalf of Erin Murphy. See Def’s Mot. Summ. J. Ex. E “Consent Decree.” The decree was not binding on any of Wasylak’s claims. Smokin’ Joe’s and Wasylak filed timely cross-motions for summary judgment, which are now before the court.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

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); see also Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions,

unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). The standards governing cross-motions for summary judgment are the same, although the court must construe the motions independently, viewing the evidence presented by each moving party in the light most favorable to the nonmovant. Grove v. City of York, 342 F. Supp.2d 291, 299 (M.D. Pa. 2004). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Smokin' Joe's Motion for Summary Judgment

(1) Hostile Work Environment Claim

In order to prevail on a sex discrimination hostile environment claim, a plaintiff must prove five elements: "(1) she suffered intentional discrimination because of her [sex]; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected her; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability is present." Jensen v. Potter, 435

F.3d 444, 449 (3d Cir. 2006).¹² The Supreme Court has cautioned that a court must look at the totality of the circumstances when judging whether a work environment is hostile. Harris v. Forklift Sys., 510 U.S. 17, 23 (1993) The Third Circuit has adopted this approach, noting that “courts should not consider each incident of harassment in isolation. Rather, a court must evaluate the sum total of abuse over time.” Durham Life Ins. Co. v. Evans, 166 F.3d 139, 155 (3d Cir. 1999) (citations omitted). For this reason, a plaintiff’s claim will survive summary judgment if the plaintiff “presents sufficient evidence to give rise to an inference of discrimination by offering proof that her workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” and the conduct is based on one of the categories protected under Title VII.” Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 279 (3d Cir. 2001) (citing Harris, 510 U.S. at 21).

Smokin’ Joe’s argues that summary judgment is appropriate because Wormuth’s actions, while inappropriate, “simply were not sufficiently severe or pervasive to establish an environment that could be deemed hostile.” Def’s Mot. Summ. J. p. 13.¹³ Smokin’

¹² Courts interpret the PHRA consistently with Title VII. Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001) (“The proper analysis under Title VII and the Pennsylvania Human Relations Act is identical, as Pennsylvania courts have construed the protections of the two acts interchangeably.”). Therefore, the same analysis applies to Wasylak’s sex discrimination claims under both statutes.

¹³ While Smokin’ Joe’s only takes issue with the severe or pervasive element of Wasylak’s hostile work environment claim, the court will address the remaining elements here. First, Wasylak suffered intentional discrimination because of sex. Second, Wasylak testified that Wormuth’s behavior made her feel uncomfortable in the workplace and humiliated her. Third, these discriminatory behaviors would have detrimentally affected a

Joe's reaches this conclusion by cherry-picking Wormuth's statements and considering each remark in isolation.

Reviewing the totality of the circumstances, Wasylak establishes a genuine issue of material fact concerning whether Wormuth's harassment was severe or pervasive. The Third Circuit has explained that this requirement of "an objectively abusive work environment further distinguishes Title VII from a generalized 'civility code.' The statute prohibits severe or pervasive harassment; it does not mandate a happy workplace.

Occasional insults, teasing, or episodic instances of ridicule are not enough; they do not 'permeate' the workplace and change the very nature of the plaintiff's employment."

Jensen, 435 F.3d at 451. To evaluate whether harassment was severe or pervasive, a court must consider the following factors: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Harris v. Forklift Sys., Inc. 510 U.S. 17, 23 (1993).

Wasylak satisfies the severe or pervasive standard because Wormuth's inappropriate sexual comments to and about Wasylak, inappropriate touching, and ogling permeated the work environment and changed the nature of Wasylak's employment.

reasonable woman. Fourth, *respondeat superior* liability is satisfied because "[i]f supervisors create the hostile environment, the employer is strictly liable, though an affirmative defense may be available where there is no tangible employment action." Jensen, 435 F.3d at 452; see also Faragher v. City of Boca Raton, 524 U.S. 755, 777 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee").

Wormuth called Wasylak his girlfriend and asked her out on dates. He stared at her breasts, which other employees noticed and commented on, and passed unnecessarily close to her in order to rub up against her breasts. Wormuth invited Wasylak into his private back office, closed the door, and asked her to tell him stories about her sex life. Other employees noticed these visits to the back office and asked Wasylak if she had had sexual encounters with Wormuth there. On one occasion, Wormuth came up behind Wasylak and smelled her neck and said that she “smelled so good” that he would eat her if she was a piece of fruit. Another time Wormuth pulled up Wasylak’s shirt, lowered her pants, and told Wasylak that her tattoo would be sexier if it was placed lower down on her back. Wormuth made sexual comments to other employees about Wasylak, specifically that Wasylak looks like she would “suck dick” and “put a hurtin’ on you in the bedroom.” Wormuth’s inappropriate comments and activities continued persistently throughout Wasylak’s short tenure at Smokin’ Joe’s and lay the basis for Wasylak’s hostile work environment claim.

(a) **Smokin’ Joe’s is not entitled to summary judgment on its Faragher/ Ellerth affirmative defense.**

In Faragher, the Court clarified that employers are vicariously liable for supervisory harassment that culminates in a tangible employment action such as a discharge, demotion, or undesirable reassignment. 524 U.S. at 808; see also Durham Life Ins. Co., 166 F.3d at 152 (“sex-based mistreatment by a supervisor--whether overtly

sexual or facially neutral and whether motivated by lust or by dislike--creates automatic liability when it rises to the level of a tangible adverse employment action.”). But if there is no tangible employment action, the employer has an affirmative defense if it can prove two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). This defense is encouraged to promote effective anti-harassment policies and “[t]he affirmative defense remains a defense and not an element of the plaintiff’s case because the burdens of production and proof remain at all times on the employer...”. Durham Life Ins. Co., 166 F.3d at 152.

Smokin’ Joe’s is not entitled to summary judgment based on its Faragher/ Ellerth affirmative defense because there is a genuine issue of material fact concerning whether Smokin’ Joe’s took a tangible employment action against Wasylak by firing her. On March 2, 2005, several employees told Wasylak that her name was blacked off the schedule after her altercation with Wormuth concerning the snow storm. Employees at Smokin’ Joe’s stated that blacking a name off the schedule indicated that an employee had been terminated. On March 4, 2005, when Wasylak came to the store to pick up her paycheck, Lowry asked her to return her employee handbook after speaking with her—a request he would not have made if Wasylak were to remain an employee. According to

the employee handbook, terminated employees must return their handbooks. Lowry did not confirm Wasylak's employment status when she asked him whether she had a job. Corporate counsel for Smokin' Joe's also refused to confirm Wasylak's employment status.

Moreover, even if Smokin' Joe's did not take a tangible employment action against Wasylak by firing her, it has not met the burden of proving its affirmative defense because there are questions of fact regarding whether Smokin' Joe's exercised reasonable care to prevent and promptly correct any sexually harassing behavior. While Smokin' Joe's had an anti-discrimination policy that was disseminated to employees in the employee handbook, this alone is not a basis for granting summary judgment to the defendant. See Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1999) ("Ellerth and Faragher do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort."). Employees and managers received no training about sexual harassment beyond the handbook. Lowry, the individual who investigated Wasylak's complaint had no special training regarding sexual harassment investigations. Prezelski made no attempt to keep Wasylak's complaint confidential and immediately told Wormuth about the complaint. Lowry questioned Wasylak about her complaint at Smokin' Joe's with Wormuth right outside the office. Additionally, there are factual

disputes regarding whether Smokin' Joe's adequately censured Wormuth for his conduct by suspending him from his managerial duties. Smokin' Joe's has not met the burden of proving its affirmative defense and is not entitled to summary judgment on this issue.

(b) Constructive Discharge

Additionally, Smokin' Joe's is not entitled to summary judgment on Wasylak's hostile work environment claim based on a Faragher/Ellerth defense because Wasylak sufficiently alleges that she has been constructively discharged. An employer cannot use the Faragher/Ellerth defense if the constructive discharge was precipitated by a supervisor's official act. Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). The test for constructive discharge is an objective one, which requires the court to ask if "working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Id. at 141; Clegg v. Falcon Plastics, Inc., 174 Fed. Appx. 18, 27 (3d Cir. 2006) ("To find constructive discharge, we 'need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.'") (internal citation omitted).

Wasylak argues that she meets this standard not only because of Wormuth's harassment, but due to the way Smokin' Joe's reacted to her complaint and investigated. A reasonable jury could agree. Wasylak voiced her complaint about Wormuth to Prezelski and asked that it be kept confidential. Prezelski did not honor this request and

expressed skepticism about the complaint. Smokin' Joe's investigation was insensitive. Lowry questioned Wasylak in an intimidating manner, yelling at times and making insinuations. Wormuth was right outside the door during the interview, which also intimidated Wasylak.

In addition to greeting her sexual harassment complaint with suspicion, Smokin' Joe's actions after she made the complaint suggested to Wasylak that she had been fired. When she showed up for work on March 4, 2005, Wormuth told Wasylak to leave the store because she had resigned. Later that day, Lowry asked her to return her employee handbook and had no information about her employment status. Subsequently, Smokin' Joe's was unwilling to confirm whether Wasylak was an employee at the store and ultimately terminated her for failing to cooperate with an investigation, even though other non-cooperative employees had not been terminated. Wormuth's discrimination and Smokin' Joe's insufficient response lay a basis for Wasylak's constructive discharge claim.

(2) Retaliation Claim

To establish a *prima facie* claim of retaliation under Title VII or the PHRA,¹⁴ a plaintiff must establish three elements: (1) protected employee activity; (2) adverse action

¹⁴ Title VII prohibits employers from retaliating against employees who oppose discriminatory employment practices or file their own charge of discrimination. 42 U.S.C. § 2000e-3(a). The PHRA also prohibits an employer from discriminating against employees who oppose discrimination or file charges of discrimination. 43 PA. CONS. STAT. § 955(d). The elements of a retaliation claims are the same under both statutes. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997).

by the employer either after or contemporaneous with the employee's protected conduct; (3) a causal connection between the employee's protected activity and the employer's adverse action. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). The McDonnell Douglas burden shifting formula also applies to retaliation claims; once a plaintiff establishes a *prima facie* case of discrimination, the defendant must produce a legitimate non-discriminatory reason for the adverse action and then the plaintiff must establish that the employer's reason is pretextual. Id.

While Smokin' Joe's ignores and misconstrues the facts to argue that there is no evidence of antagonism after Wasylak lodged her sexual harassment complaint against Wasylak, the court finds that Wasylak establishes a *prima facie* case of retaliation and pretext. Wasylak satisfies the first element of the *prima facie* case requirement: she engaged in protected activity by making a sexual harassment complaint. To prove the second element of a *prima facie* case of retaliation, a plaintiff must show that the employer's action was materially adverse, which means the action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2415 (U.S. 2006). In the Third Circuit, "temporal proximity between the protected activity and the termination is sufficient to establish a causal link" and satisfy the third element of the *prima facie* case. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997).

While Smokin' Joe's argues that it did not take an adverse employment action

against Wasylak because it did not fire her, Wasylak establishes that there is a genuine issue of material fact concerning whether Smokin' Joe's terminated her employment. Moreover, the Supreme Court in Burlington has defined an adverse employment action broadly as any action that would dissuade an employee from making a discrimination complaint. Smokin' Joe's actions after she reported Wormuth's discrimination would have dissuaded a reasonable employee from complaining of discrimination. Prezleski and Lowry were skeptical of Wasylak's complaint. Employees told Wasylak that her name had been blacked off the schedule, indicating that she had been fired, days after she made her complaint. Wormuth filled out a resignation report for Wasylak on March 3rd and when she reported to work on May 4th, he ordered her to leave the premises. Lowry questioned Wasylak about her complaint with Wormuth, her alleged harasser, right outside the office door. Wasylak was reluctant to answer his questions under these circumstances and Smokin' Joe's issued an employee warning report to Wasylak on March 8th for failing to cooperate with the investigation. Smokin' Joe's did not write up other employees who failed to cooperate. In total, Smokin' Joe's issued three disciplinary warnings, one of which resulted in her termination, within weeks of making her complaint. Smokin' Joe's also refused to clarify Wasylak's employment status after she complained of harassment. As all of these adverse actions occurred soon after Wasylak made her complaint, this "pattern of antagonism" in the time period between Wasylak's complaint and her termination establishes a causal link. Woodson, 109 F.3d at 920-921.

Once Wasylak has established a *prima facie* case of retaliation, Smokin' Joe's must articulate a legitimate non-discriminatory action for its decision to terminate her. This is a light burden and one that "is satisfied if the defendant articulates any legitimate reason for the discharge...". Woodson, 109 F.3d at 920 n2. Smokin' Joe's satisfies this burden by stating that it decided to terminate Wasylak on March 21, 2005 for failing to cooperate with a company investigation after she did not meet with Prezelski.

To establish pretext, Wasylak must "point to some evidence, direct or circumstantial, from which a factfinder could 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." Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998) (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). Wasylak satisfies this burden. There is an issue of material fact concerning whether Smokin' Joe's terminated Wasylak on a much earlier date almost immediately after she complained of harassment. Smokin' Joe's singled out Wasylak for disciplinary measures after she made her complaint and has never terminated anyone else for failing to participate in an investigation. These inconsistencies show that a reasonable jury could disbelieve Smokin' Joe's articulated reason for firing Wasylak or believe that discrimination was a factor in its decision. Therefore, I decline to grant Smokin' Joe's summary judgment on Wasylak's retaliation claim.

(3) Punitive Damages

Under Title VII, punitive damages are limited “to cases in which the employer has engaged in intentional discrimination and has done so ‘with malice or with reckless indifference to the federally protected rights of an aggrieved individual.’ The terms “malice” or “reckless indifference” pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.” Kolstad v. American Dental Ass’n, 527 U.S. 526, 529-530 (1999) (citing 42 U.S.C. § 1981a(b)(1)). After establishing reckless indifference, a plaintiff must impute liability to the employer for the employee’s actions. This analysis is governed by agency principles and the employer will be liable for the acts of its agent if (1) the “agent is employed in a position of managerial capacity; (2) the agent acts within the scope of employment; and (3) the agent acts with malice or reckless indifference towards the federally protected rights of the plaintiff.” Medcalf v. Trs. of Univ. of Pa., 71 Fed. Appx. 924, 932 (3d Cir. 2003) (citing Kolstad, 527 U.S. at 535-45). However, to encourage an employer’s proactive efforts to prevent discrimination, the Supreme Court established an exception that “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s good-faith efforts to comply with Title VII.” Id. at 932 (citing Kolstad, 527 U.S. at 545).

Smokin’ Joe’s argues that summary judgment is appropriate on Wasylak’s claim for punitive damages based on Kolstad’s good faith defense. The Third Circuit has not

clearly addressed what constitutes good faith compliance. Medcalf, 71 Fed. Appx. at 933. However, it has noted that an employer must do more than adopt an anti-discrimination policy; it also must implement the policy and train staff to take discrimination attempts seriously. See Ridley v. Costco Wholesale Corp., No. 06-1690, 2007 U.S. App. LEXIS 2493, 20-21 (3d Cir. Feb. 5, 2007) (affirming summary judgement for employer based on good faith compliance to implement and enforce an anti-discrimination policy where the record established that the employer maintained anti-discrimination policies and extensively trained supervisors and staff as to how to handle complaints and that all complaints were to be taken seriously).

Wasylak has presented enough evidence to show that Smokin' Joe's was recklessly indifferent to her federal rights and that Smokin' Joe's is liable for the conduct of Wormuth. Wasylak also has established genuine issues of material fact that suggest Smokin' Joe's should not benefit from the Kolstad good faith exception. Wasylak has alleged that Smokin' Joe's was skeptical of her complaint, insensitive in its investigation, did not penalize Wormuth for his conduct, and ultimately retaliated against her complaint. While Smokin' Joe's had an anti-discrimination policy, it did not train its employees on this policy or effectively implement it. Wasylak's claim for punitive damages will proceed to trial.

(4) Pennsylvania Equal Rights Amendment Claim

Wasylak also brings a claim under Pennsylvania's Equal Rights Amendment

(“ERA”), which states that “[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Pa. Const. art. 1, § 28. Smokin’ Joe’s argues that Wasylak’s claim fails as a matter of law because she cannot assert a private cause of action under this section. The Pennsylvania Supreme Court has not adjudicated this issue and district court opinions on this issue is mixed. When a state’s highest court has not authoritatively decided an issue, federal courts may look to intermediate appellate and lower state court decisions to assist in its prediction of how the state supreme court would rule. Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998). A court’s analysis may also be informed by “[t]he policies underlying the applicable legal doctrines, the doctrinal trends indicated by these policies,... treatises, the Restatement, and the works of scholarly commentators.” Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167 (3d Cir. 1981).

Instead of looking to Pennsylvania law, district courts in the Third Circuit have primarily relied on the Third Circuit’s decision in Pfeiffer v. Marion Center Area School District, 917 F.2d 779 (3d Cir. 1990). In Pfeiffer, a student brought suit under Title IX alleging that she had been dismissed from the National Honor Society because of her pregnancy. After a bench trial, the district court concluded that the faculty dismissed the plaintiff not because of gender discrimination but because she failed to uphold the society’s standards by engaging in premarital sex. Id. at 784-85. The Third Circuit

remanded the case because the court had failed to consider evidence of premarital sex by a male member, who the society did not dismiss. Id. at 786. The plaintiff had also brought a claim for sex discrimination under the ERA and the Third Circuit stated that this claim could be dismissed if the district court found no federal violation on remand. Id. at 789. Without analysis, the Third Circuit noted that “[w]e are of the view that a private right of action is available for cases of gender discrimination under the Pennsylvania ERA.” Id. (citing Bartholomew v. Foster, 541 A.2d 393 (Pa. Commw. Ct. 1988) aff’d 563 A.2d 1390 (Pa. 1989); Welsch v. Aetna Ins. Co., 494 A.2d 409 (Pa. Super. Ct. 1985)). Both Bartholomew and Welsch concern discriminatory sex-based insurance classifications. Pfeiffer is not an employment discrimination case and the Third Circuit did not consider Pennsylvania case law on common law causes of action for discriminatory discharge, specifically Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989), which will be discussed *infra*, in reaching the conclusion that there is a private right of action under the ERA.

The split in district court rulings in this Circuit depends on how courts classify Pfeiffer’s discussion of the ERA. Some district courts categorize Pfeiffer’s comment on the ERA as dictum and refuse to recognize a private cause of action under the ERA. See Walsh v. Irvin Stern’s Costumes, No. 05-2515, 2006 U.S. Lexis 2120 (E.D. Pa. Jan. 19, 2006); EEOC v. Dan Lepore & Sons Co., No. 03-5462, 2004 U.S. Dist. LEXIS 1943 (E.D. Pa. Feb. 9, 2004); Ryan v. Gen. Mach. Prod., 277 F. Supp.2d 585, 594-595 (E.D. Pa.

2003). The majority of courts consider Pfeiffer as a signal from the Third Circuit that a private right of action is available for gender discrimination under the ERA. See Benard v. Wash. County, 465 F. Supp. 2d 461 (W.D. Pa. 2006); Jespersen v. H&R Block Mortgage Co., No. 06-1212, 2006 U.S. Dist. LEXIS 47974 (E.D. Pa. July 14, 2006); Clark v. Amerisourcebegen Corp., No. 04-4332, 2005 U.S. Dist. LEXIS 1459 (E.D. Pa. Feb. 2, 2005); Spirk v. Centennial Sch. Dist., No. 04-4821, 2005 U.S. Dist. LEXIS 2782 (E.D. Pa. Feb. 22, 2005); EEOC v. Fed. Express Corp., No. 02-1194, 2005 U.S. Dist. LEXIS 5834 (M.D. Pa. Jan. 18 2005); Barrett v. Greater Hatboro Chamber of Commerce, No. 02-4421, 2003 U.S. Dist. LEXIS 15498 (E.D. Pa. Aug. 20, 2003); McCormack v. Bennigan's, No. 93-1603, 1993 U.S. Dist. LEXIS 10424 (E.D. Pa. July 29, 1993). However, the appropriate inquiry is not to look for signals from the Third Circuit, but to predict how the Pennsylvania Supreme Court would construe the ERA.

Pennsylvania adopted the ERA in 1971. Hon. Phyllis W. Beck & Joanne A. Baker, An Analysis of the Impact of the Pennsylvania Equal Rights Amendment, 3 WIDENER J. PUB. L. 743, 744 (1994). The ERA reinforced the constitutional prohibition against sex-based discrimination, equalized the positions of men and women under Pennsylvania law, and expressed a public policy for gender equality. Id. at 797-98. The ERA has abolished gender-based distinctions in statutory law, placing men and women in Pennsylvania on equal footing. See generally id. The PHRA, which prohibits gender discrimination in the workplace, is an expression of this public policy. Id. However, “the

ERA did not markedly change the social fabric of the Commonwealth and...judicial decisions rendered under the ERA may have had the pragmatic effect of improving the condition of men more than that of women.” Hon. Phyllis W. Beck & Patricia A. Daly, Pennsylvania’s Equal Rights Amendment Law: What Does it Portend for the Future?, 74 TEMP. L. REV. 579, 582 (2001). There is a dearth of published judicial opinions analyzing and applying the amendment. Id. at 583. Since 1994, Pennsylvania courts have discussed the ERA in less than one case per year and among those cases, the amendment was relevant in less than half. Id.

Pennsylvania courts have considered the role, if any, the ERA is to play in employment discrimination claims. In Pennsylvania, the general rule is that “there is no common law cause of action against an employer for termination of an at-will employment relationship.” Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989) (citing Geary v. United States Steel Corp., 310 A.2d 174 (Pa. 1974)). The Pennsylvania Supreme Court has recognized limited exceptions to this rule “where discharges of at-will employees would threaten clear mandates of public policy.” Id.

Generally speaking, the PHRA’s statutory remedy for employment discrimination is the sole cause of action against an employer under Pennsylvania law. Clay, 559 A.2d at 918. Therefore, the Pennsylvania Supreme Court affirmed the dismissal of a lawsuit alleging that an employer fired an at-will employee after that employee refused sexual advances from a manager because the plaintiff had not sought relief under the PHRA. Id.

The court reasoned that the PHRA’s statutory scheme “would be frustrated if aggrieved employees were permitted to circumvent the PHRC by simply filing claims in court” and that there was “no basis for belief [that the legislature intended] broad and unrestricted access to civil actions, outside of the PHRA, alleging discriminatory termination of at-will employment.” Id. at 920-21.

In her brief, Wasylak cites Justice Zappala’s concurrence in Clay to argue that the Pennsylvania Supreme Court has sent a “strong message” that it would permit a private cause of action for sexual discrimination if confronted with the issue. Justice Zappala concurrence notes “that the Commonwealth has recognized a public policy favoring the equal treatment of employees without regard to sex” and therefore, he would “not eliminate the possibility that our developing body of common law would encompass a cause of action for wrongful discharge arising out of sexual discrimination once that issue is before us. Id. at 924 (Zappala, J., concurring).

A recent decision of the Pennsylvania Superior Court will put this very issue before the Pennsylvania Supreme Court. In Weaver v. Harpster & Shipman Fin. Servs., 885 A.2d 1073 (Pa. Super. Ct. 2005), the court permitted an employee to bring a common-law sexual discrimination suit against her employer, which was not subject to the PHRA because it had an insufficient number of employees. Wasylak argues that Weaver creates a common law cause of action for sex discrimination; however, a careful reading of Weaver shows that its holding is not so broad. The plaintiff in Weaver, unlike

Wasylak, did not have recourse to the statutory remedies established by the PHRA and Title VII because the defendant did not qualify as an employer under either statute because it had less than four employees. *Id.* at 1074. The plaintiff in Weaver urged the court to extend the public policy exception to the at-will employment doctrine to victims of sexual harassment. The court looked to the ERA to find a public policy in Pennsylvania against sexual discrimination and established a narrow rule that “where an employee is prevented from bringing a sexual discrimination suit under the PHRA only because his or her employer has less than four employees”¹⁵ there is a public policy exception to the at-will employment doctrine that allows a plaintiff to bring a common law cause of action against her employer. *Id.* at 1078.

The Pennsylvania Supreme Court has yet to rule on a pending appeal in Weaver. However, under current precedent from the Pennsylvania Supreme Court and Weaver, Wasylak cannot maintain a private cause of action under the Pennsylvania Constitution by filing a common law tort claim for wrongful discharge because she had recourse to pursue—and took advantage of—remedies under the PHRA and Title VII. Both those claims survive this motion for summary judgment and will proceed to trial.

¹⁵ The narrowness of the court’s holding is emphasized by its decision to only extend a public policy exception where the employer has less than four employees, and not to cases where plaintiffs simply failed to comply with the administrative requirements of the PHRA, which was the circumstance in Clay. In Weaver, the court emphasized that the plaintiff had followed the administrative procedures required by the PHRA and turned to the courts “as a last resort” after the PHRC dismissed her claim. 885 A.2d at 1078. See also Jespersen v. H&R Block Mortgage Co., No. 06-1212, 2006 U.S. Dist. LEXIS 47974 (E.D. Pa. July 14, 2006) (applying Weaver to dismiss plaintiff’s sexual discrimination claim under the ERA because she did not comply with the PHRA administrative process).

B. Wasylak's Motion for Summary Judgment

Wasylak filed a motion for summary judgment to strike Smokin' Joe's Faragher/Ellerth defense and enter judgment for Wasylak on her retaliation claim, or, in the alternative, for a jury charge on spoliation because the resignation papers Wormuth prepared for Wasylak on March 3, 2005 are missing. Wasylak asserts that this document would have shown that Smokin' Joe's terminated her employment, which would be a tangible employment action and preclude Smokin' Joe's from utilizing the Faragher/Ellerth affirmative defense. Smokin' Joe's responds that the report was a draft based on the assumption that Wasylak had resigned. Smokin' Joe's further argues that it does not intend to use the document in any way to prove its case and that it has not purposely spoliated this evidence.

Spoliation is the destruction or alteration of evidence or the failure to otherwise preserve evidence for another party's use in pending or reasonably foreseeable litigation. MOSAID Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp.2d 332, 335 (D. N.J. 2004). A court can impose sanctions for spoliation including "dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; and attorneys' fees and costs. Id. Spoliation sanctions "serve a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation...serve a punitive function, by punishing the spoliator for its actions, and a deterrent function...". Id.

The Third Circuit permits a spoliation inference “that the destroyed evidence would have been unfavorable to the position of the offending party” but has cautioned that district courts should not impose more drastic sanctions, such as depriving the offending party of any opportunity to prove its case. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994). In order to impose a more drastic sanction than the spoliation inference, a court must consider “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.” Id.

Applying this test, it is inappropriate to dismiss Smokin’ Joe’s Faragher/Ellerth defense and enter judgment for Wasylak on her retaliation claim based on spoliation. Smokin’ Joe’s is at fault for the spoliation of the report, as the report was in its control at all times and lost when Wormuth turned over his paperwork to Lowry. However, Wasylak does not suffer a high degree of prejudice due to the spoliation of the report. The court has not granted summary judgment to Smokin’ Joe’s. Moreover, Smokin’ Joe’s asserts that the report memorializes Wasylak’s resignation and not its termination of Wasylak. Finally, lesser sanctions—such as precluding Smokin’ Joe’s use of this report or charging the jury on spoliation—will avoid unfairly penalizing Wasylak while not overly penalizing Smokin’ Joe’s. For these reasons, I will deny Wasylak’s motion for summary

judgment and reconsider Wasylak's spoliation claim as a motion *in limine* or as a jury charge¹⁶ at the appropriate juncture.

IV. CONCLUSION

For the reasons discussed above, I will grant and deny Smokin' Joe's motion for summary judgment. All of Wasylak's claims, with the except of her claim under the Pennsylvania Equal Rights Amendment, survive summary judgment. I will deny Wasylak's motion for summary judgment. An appropriate order follows.

¹⁶ In considering whether to give the jury a spoliation charge, the court must consider the following factors: (1) whether the evidence in question was within the party's control; (2) whether the party actually suppressed or withheld evidence; (3) whether the destroyed evidence was relevant; (4) whether it was reasonably foreseeable that the destroyed evidence would be discoverable in subsequent litigation. MOSAID Techs. Inc., 348 F. Supp.2d at 335. Although the court will not rule on this issue prior to the start of trial, it is likely, based on the facts now before the court, that Wasylak has a strong case for requesting a spoliation instruction. Smokin' Joe's had control over the resignation report and lost it. This report is relevant to the dispute and Wasylak told Prezleski on March 1, 2005, before Wormuth even drafted the report, that she had retained an attorney and intended to sue.

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

EQUAL EMPLOYMENT	:	CIVIL ACTION
OPPORTUNITY COMMISSION,	:	
Plaintiff,	:	
	:	
KARI WASYLAK,	:	NO. 06-01758
Intervenor,	:	
	:	
	:	
v.	:	
	:	
SMOKIN' JOE'S TOBACCO	:	
SHOP, Inc.,	:	
Defendant.	:	

ORDER

AND NOW, this 27th day of April, 2007, upon consideration of defendant's Motion for Summary Judgment (Document No. 50) and plaintiff's Motion for Sanctions (Document No. 51) and the responses thereto, it is hereby **ORDERED** that

- (1) Defendant's Motion for Summary Judgment is **GRANTED** as to plaintiff's Pennsylvania Equal Rights Amendment claim but otherwise **DENIED**;
- (2) Plaintiff's Motion for Sanction is **DENIED** in its entirety.

BY THE COURT:

/s/ Lawrence F. Stengel _____
LAWRENCE F. STENGEL, J.