

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

MICHELE HERZER GLICKSTEIN : CIVIL ACTION
 :
 v. :
 :
 NESHAMINY SCHOOL DISTRICT, et al. : NO. 96-6236

MEMORANDUM AND ORDER

HUTTON, J.

October 15, 1997

Presently before the Court are the Defendants' Motion to Compel Arbitration, Motion to Dismiss and/or for Summary Judgment, under Rules 12(b)(1), 12(b)(6), and 56(c) of the Federal Rules of Civil Procedure, and the Plaintiff's response thereto. For the foregoing reasons, the Defendants' Motion is GRANTED in part and DENIED in part.

I. BACKGROUND

This civil rights litigation arises from the plaintiff, Michele Herzer Glickstein's ("Glickstein"), employment as a chemistry teacher at the Neshaminy High School (the "High School") in Langhorne, Pennsylvania. The defendants in this case are the Neshaminy School District (the "School District"), Neshaminy Board of School Directors (the "Board"), and eight of Glickstein's supervisors: L. Christopher Melley, Bernard Hoffman, Bruce Wyatt, Harry Jones, Ronald Daggett, Gary Bowman, Mary Anne Crumlish, and James Scanlon.

Glickstein charges the defendants variously with Sex Harassment (Count I) and Sex Discrimination (Count II) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2000e17 (1994) ("Title VII"), Sex Harassment (Count III) and Sex Discrimination (Count IV) under the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 (1996) ("PHRA"), Intentional Infliction of Emotional Distress (Count V), and Sex Discrimination in violation of Title IX of the Education Amendments Act of 1972 ("Title IX"), 20 U.S.C. § 1681 et seq. (1994) (Count VI).

In her Second Amended Complaint ("Complaint"), Glickstein states that in March, 1989, Melley, her immediate supervisor in the science department, began to make inappropriate sexual advances towards her. Melley frequently entered Glickstein's classroom when she was alone and physically cornered her there. Melley also leered at Glickstein and commented to her about her appearance. Glickstein alleges that Melley subjected her to other unspecified verbal and physical acts of a sexual nature. Finally, on February 7, 1991, Melley told Glickstein that the tone of a letter she had written to a publishing company sounded like she had PMS. Melley wrote the letters "PMS" on the letter.

On or about February 14, 1991, Glickstein reported Melley's conduct to the Assistant Principal of Neshaminy High School, Joseph Blair. Upon Blair's suggestion, Glickstein reported Melley to Bernard Hoffman, the Deputy Superintendent. Hoffman, however, took

no action. Glickstein then reported Melley to Harry Jones, the Director of Personnel, who she alleges supported Melley. Glickstein then reported Melley's conduct to Bruce Wyatt and Ronald Dagett, Assistant Principals of the High School, and Gary Bowman, Superintendent of the School District. All of these supervisors failed to reprimand Melley or otherwise resolve the situation. In May of 1991, Melley allegedly cornered Glickstein, grabbed her, and forcibly kissed her on the mouth.

Glickstein states that Melley retaliated against her because she reported him to their supervisors. Melley was allegedly rude to Glickstein and attempted to intimidate her by following her and watching her obviously. He allegedly criticized her in front of other colleagues in a manner calculated to embarrass and humiliate her, and told her to stop her "bitching," and went through her personal belongings in her classroom. He refused to support Glickstein for requested class assignments and scheduling. Finally, in June, 1992, Melley allegedly spit on Glickstein.

Glickstein states that the defendants discriminated against her because she is female. In 1993, Melley passed over Glickstein in assigning the class Chemistry II, giving it to an allegedly less qualified male teacher, Michael Hoy. Also, defendant, James Scanlon, refused to promote Glickstein to the position of Lead Teacher, and promoted an allegedly less qualified male, Robert Kolenda, to the job. Glickstein alleges that, in general, the

defendants give preferential treatment to males with regard to

promotion of teachers and advancement to supervisory and administrative positions within the School District.

In August, 1993, Glickstein filed a grievance with her union, the Neshaminy Federation of Teachers (the "Federation"), challenging the School District's failure to promote her to Lead Teacher. She alleges that the defendants retaliated against her by failing to grant Glickstein her chosen class assignments and scheduling, and refusing to promote her in spite of her excellent record of performance as a researcher and teacher. Glickstein also states that the defendants dragged their feet in dispersing award money to her students; denied her application to start a student science club; denied grant proposals and project requests without fair review; and permitted an improperly supervised science project involving dangerous bacteria to be conducted in her lab area. Finally, the defendants dragged their feet in responding to Glickstein's union grievance. When asked to bring her charges to arbitration, the Federation refused.

On August 31, 1993, Glickstein filed a charge with the Pennsylvania Human Rights Commission ("PHRC") and Equal Employment Opportunity Commission ("EEOC") against the School District, alleging age and sex discrimination. When a female teacher, Maria DiDonato, provided evidence in support of her claims, Glickstein states DiDonato was subjected to unspecified retaliation. Throughout the entire period, Glickstein attempted to resolve

matters through the Federation's grievance procedure, but various defendants prevented her from obtaining a hearing.

On June 18, 1996, the EEOC issued Glickstein a Right to Sue letter, and she brought the present action on September 12, 1996.

II. DISCUSSION

A. Standard Of Review

In their motion, the defendants seek to dismiss Glickstein's Complaint for lack of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted. Alternatively, the defendants move for summary judgment.¹

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), the Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)). Dismissal is highly disfavored, and only appropriate "where it is certain that no relief could be granted under any set of facts that could be proved." Id.; see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989).

¹ Given its resolution of the defendants' motion with respect to Glickstein's federal claims, the Court need not address the argument that the dismissal of the federal claims robs it of subject matter jurisdiction to hear the state claims. (See Def.'s Mot. to Compel Arbitration, Mot. to Dismiss and/or for Summ. J. at ¶ 21).

The defendants also move for summary judgment.² Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of proving that there is no triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

As with a Rule 12(b)(6) motion, the court must draw all inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). However, the party opposing summary judgment must present affirmative evidence of a dispute as to a material fact, and may not rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Status of Neshaminy Board of School Directors

At the outset, the defendant Board seeks to be dismissed as a party because the Pennsylvania Public School Code of 1949, 24 Pa. Cons. Stat. Ann. § 2-213 (Purdon 1992), provides no authority for

² A defending party may move for summary judgment at any time. Fed. R. Civ. P. 56(b). While the nonmovant may apply to the court for a continuance to engage in further discovery, Fed. R. Civ. P. 56(f); Radich v. Goode, 886 F.2d 1391, 1393 (3d Cir. 1989), Glickstein has not done so in this case.

a suit against it, as distinct from the School District. It further argues that it should be dismissed in any event because Glickstein has made no allegations in her Complaint against the Board or any of its individual members.

Glickstein responds that it is premature to dismiss the Board from the action at this stage because discovery may produce evidence of acts by the Board or its members that establish liability "separate and apart" from that of the School District. (Pl.'s Mot. at 12).

Both parties concede that the courts are silent as to whether a plaintiff may bring separate actions against a Pennsylvania school district and its board of school directors. (Mem. of Law in Supp. of Def.s' Mot. to Compel Arbitration, Mot. to Dismiss and/or for Summ. J. at 3); (Pl.'s Resp. To Def.s' Mot. to Compel Arbitration, Mot. to Dismiss and/or for Summ. J. at 11). However, Pennsylvania statutory law supplies a straight-forward answer.

Pennsylvania Rule of Civil Procedure 2102(b), which governs actions against the state, provides that "An action may be brought by or against a political subdivision in its name."³ Rule 76 defines a "political subdivision" exclusively as "any county, city, borough, incorporated town, township, school district, vocational school district or county institution district." Although no cases

³ Section 213 of the Public School Code of 1949, 24 Pa. Cons. Stat. Ann. § 2-213, cited by defendants, was repealed by Pennsylvania Rule of Civil Procedure 2125(2) and replaced with Rule 2102.

deal with the present question, the plain language of Rules 2102(b) and 76 precludes the possibility of suit against a public school board of directors. While Rule 76 provides for suit against a school district, it does not include a board of school directors among the political subdivisions that may be sued under Rule 2102(b). Therefore, it follows that a board of school directors is not generally amenable to suit as such under Pennsylvania law.⁴

1. Federal Claims

Only one federal court has considered the issue of whether a public school board of directors may be a Title VII or Title IX defendant. See Kelley v. Troy State Univ., 923 F. Supp. 1494, 1499 (M.D.Ala. 1996) (dismissing plaintiff's Title VII and Title IX claims as against board of directors). It found that where state law did not endow a state university's board of directors with independent corporate existence, no legally cognizable claims could be asserted against it. See id.; see also United States v. Olavarrieta, 812 F.2d 640, 643 (11th Cir. 1987) (dismissing complaint against the University of Florida where university lacked independent corporate existence under Florida law). The Court

⁴ The text of Rule 2102(b)'s predecessor, 24 Pa. Cons. Stat. Ann. § 2-213, suggests the same result. It provides: "Each school district shall have the right to sue and be sued in its corporate name. Any legal process against any school district shall be served on the president or secretary of its board of school directors." 24 Pa. Cons. Stat. Ann. § 2-213. Again, while no case law under this provision offers guidance in the present case, the text suggests that a school district's capacity for suit is tied to its corporate existence. The second sentence, providing for service of process on the board of school directors, further indicates that its drafters did not contemplate suits brought against the board itself.

further found that even if the Title VII and IX claims were legally cognizable, they were redundant and unnecessary as against the Board because the plaintiff had brought the same claims against the proper party--the University itself. See Kelley, 923 F. Supp. at 1499. Accordingly, the court dismissed the complaint as against the University's board of directors. See id.

In the present case, Rules 2102(b) and 76 mandate the same result. Because the Board lacks the status of a political subdivision, it lacks corporate existence independent from the School District. Glickstein names both the Board and the School District as defendants in all Title VII and IX counts of her Second Amended Complaint. (Compl. at 11, 13, and 22). The School District bears ultimate liability for the conduct of the Board and its members. Therefore, plaintiff's Title VII and IX claims against the Board are not legally cognizable, and in any case are redundant with those against the School District. See id. Accordingly, the defendants' motion to dismiss plaintiff's Title VII and IX claims against the Board is granted.

2. State Claims

The Court also finds that the Board should be dismissed from Glickstein's PHRA and Intentional Infliction of Emotional Distress claims in Counts III through V.

As previously discussed, Rule 2101(b) generally restricts state defendants to the class of political subdivisions, and Rule

76 defines those political subdivisions. However, the PHRA specifically permits actions against the "boards" of political subdivisions of the state. See 43 Pa. Cons. Stat. Ann. §§ 954(b), 955(a) (Purdon 1992). Section 955(a) makes unlawful any discriminatory practice by an "employer." Section 954(b) defines "employer" to include "the Commonwealth or any political subdivision or board, department, commission or school district thereof." Although the inclusion of both "board" and "school district" suggests that the Board might also be a permissible PHRA defendant, the Court finds that it would be a redundant party in this case. See Kelley, 923 F. Supp. at 1499. Therefore, the Board is dismissed as a defendant in Glickstein's PHRA claims.

In the absence of specific statutory authority--like that found in the PHRA--Rules 76 and 2102(b) govern. As there is no such authority to bring a claim for intentional infliction of emotional distress against a board of school directors, plaintiff's claim against the Board is dismissed.

Accordingly, the defendants' motion is granted as to both Glickstein's PHRA and intentional infliction emotional distress claims.

C. Plaintiff's Title VII Claims Survive

The defendants next argue that Counts I and II of Glickstein's Complaint should be dismissed, or summary judgment granted because (1) Glickstein is required to arbitrate her Title VII claims under the terms of the arbitration agreement between the Federation and the Board; and (2) her claims are time-barred. The Court will address these arguments in turn.

1. Plaintiff is Not Required to Arbitrate Her Claims

The defendants first argue that Glickstein may not bring her Title VII claims in federal court because she is bound to arbitrate them under the terms of the 1989-1993 Collective Bargaining Agreement ("CBA") between the Board and the Federation.

Article II of the CBA contains the following contractual anti-discrimination provision:

2-5 NO DISCRIMINATION

2-5.1 The Board agrees to continue its policy of not discriminating against any Employee on the basis of race, creed, color, national origin, sex, age, place of residence, marital status, membership or participation in, or association with, the activities of any Employee organization.

(Def.'s Mot. at App. A).

Article V establishes a special grievance procedure. Section 5-1.1 defines a "grievance" as "a complaint that there has been a violation, misinterpretation, inequitable or otherwise improper

application of any provision of this Agreement." Id. (emphasis added). Under the grievance procedure, the employee must first attempt an informal resolution of the grievance, Id. § 5-2, and is then entitled to up to three tiers of review within the school administration, Id. §§ 5-3- 5-5. If still dissatisfied, the employee may petition the Federation to bring the matter to arbitration. Section 5-6 states:

An appeal from the decision of the District Superintendent may be made only by the Federation or the District to the American Arbitration Association for arbitration in accord with its rules, which shall govern the arbitration proceeding ... Both parties agree to be bound by the award of the arbitrator.

In summary, § 2-5.1 grants an employee a contractual right to be free from discrimination. Next, the grievance procedure establishes a mechanism for the vindication of an employee's contractual rights. Finally, under the CBA only the Federation and the School District have standing to take a grievance to arbitration, and an employee has no power to compel the Federation to do so on his behalf.

The defendants argue that the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 29 (1991), requires Glickstein to arbitrate her present Title VII claims under the grievance procedure provided in the CBA. The Third Circuit recently held that the arbitration clause in a CBA may require a Title VII plaintiff to arbitrate his claims, Martin v. Dana Corp.,

1997 WL 313054 (3d Cir. 1997), but later vacated the opinion pending rehearing, Martin v. Dana Corp., 1997 WL 368629 (3d Cir. 1997). Defendants cite only one case in which a plaintiff has been compelled to arbitrate her claims under the terms of a CBA--the Fourth Circuit's opinion in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).⁵ This Court agrees with the Seventh and Eighth Circuits, Pryner v. Tractor Supply Co., 109 F.3d 354, 363-64 (7th Cir. 1997); Varner v. National Super Markets Inc., 94 F.3d 1209, 1213 (8th Cir. 1996), and the dissenting opinion in Austin, 78 F.3d at 886-87, that Austin ignores the special considerations that are present where the asserted arbitration provision is in a collective-bargaining agreement rather than an individual agreement made by the employee.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974), the Supreme Court rejected an employer's claim that the arbitration clause in its CBA precluded the plaintiff-employee from bringing his Title VII claims in federal court. The Court distinguished between the employee's contractual rights under the CBA--which may be subject to mandatory arbitration--and his statutory rights,

⁵ In every other case cited, the court compelled the plaintiff to arbitrate its claims under the terms of a direct contractual agreement between employer and employee, see, e.g., Gilmer, 500 U.S. at 23 (arbitration clause in securities registration agreement); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1486 (10th Cir. 1994) (same); Alford v. Dean Witter Reynolds, Inc., 393 F.2d 229, 230 (5th Cir. 1991) (same); Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 318 (E.D.Pa. 1996) (same), or a mandatory arbitration provision of federal law, see Hiras v. National R.R. Passenger Corp., 10 F.3d 1142 (5th Cir. 1994) (requiring arbitration under the Railway Labor Act).

granted by Congress under Title VII:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Id. Congress, the Court explained, maintained this distinction to prevent unions from bargaining away a minority union member's federal statutory rights in the interest of the majority. See id. at 58 n.19.

In its later Gilmer opinion, the Supreme Court held that an employee who had signed an arbitration agreement in his application to be a securities representative was bound to arbitrate his Title VII claims. Gilmer, 500 U.S. at 23. However, the Court was careful to distinguish the situation in Alexander--and in the present case--where the arbitration clause is in a CBA to which the employee is not an individual party. Id. at 33-35. With respect to Alexander and its subsequent line of cases, it noted:

because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.

Id. at 35. This language shows that Gilmer preserved the Alexander

line of cases to control the special situation where the asserted

arbitration agreement was negotiated not by the employee, but by a labor union.

In Austin, 78 F.3d at 882-885, the Fourth Circuit reviewed the line of arbitration cases that developed since Gilmer, many of which the Defendants cite in the present case. See Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir 1991); Benefits Communication Corp. v. Klieforth, 642 A.2d 1299 (D.C. 1994); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998 (N.Y. 1993). In all of these cases, the courts enforced arbitration agreements that the employees made directly with their employers. Austin, 78 F.3d at 883-85. In reaching its decision, the Fourth Circuit concluded, contrary to Gilmer, that there was no meaningful distinction between an arbitration agreement negotiated by a union and one entered into individually by an employee:

The only difference between these six cases and this case is that this case arises in the context of a collective bargaining agreement. Bender, Willis, Alford, Klieforth, and Fletcher arose in the context of employment contracts growing out of securities registration applications, and Mago also arose in the context of an employment contract. In all of the cases, however, including the case at hand, the employee attempting to sue had made an agreement to arbitrate employment disputes. Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been

made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.

Id. at 885. The Fourth Circuit determined that the plaintiff, via a CBA, was "party to a voluntary agreement to submit statutory claims to arbitration." Id. Therefore, it dismissed her case as precluded by "her" prior agreement.

This Court agrees with Judge Hall's dissent in Austin that "the only difference makes all the difference." Id. at 886. An arbitration clause negotiated by a union and employer--located in a document the employee may never see--does not represent meaningful consent to arbitrate important federal statutory claims like those arising under Title VII. See Pryner, 109 F.3d at 363 ("All we are holding is that the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.") (emphasis in original); Varner, 94 F.3d at 1213. The potential is too great for a conflict of interest between union and individual employee where, as here, the union has sole discretion whether to enforce the employee's rights in arbitration. See Gilmer, 500 U.S. at 35; Pryner, 109 F.3d at 363-64. Indeed, in this case Glickstein alleges that the defendants have influenced the Federation, and caused it not to arbitrate her claims against them. (Compl. at ¶ 30). Therefore, the Court finds that Glickstein is not precluded

from bringing her present Title VII claims by the presence of an arbitration agreement in the CBA between her union and employer.

Even if the Third Circuit later takes the position that an employee may be bound to arbitrate statutory claims under the arbitration clause in a CBA, the Court finds the arbitration clause in this case does not preclude the plaintiff's Title VII claims. Article 5-1.1 of the CBA defines a "grievance" as a dispute as to rights arising under the collective-bargaining contract itself. Therefore, the grievance procedure that terminates in arbitration is--according to its own terms--expressly meant for contractual disputes, and does not contemplate the resolution of federal statutory claims. Glickstein was not required to bring her statutory claims through a grievance procedure designed to resolve contractual disputes only. Accordingly, the CBA does not affect the plaintiff's right to bring her Title VII claims in federal court.

2. Timeliness of Plaintiff's Sex Harassment Claim

The defendants next argue that Glickstein's claim of sexual harassment in Count I is time-barred because she failed to file her administrative charge within the 300 day period required by 42 U.S.C. § 2000e-5(e) (1994). They argue that Glickstein's requirement to file her charge was triggered by certain discrete events of harassment that she alleges, the latest being when Melley allegedly spit on Glickstein in June, 1992. (Def.'s Mot. at 8).

Glickstein filed her charge with the PHRC on August 31, 1993. (Pl.'s Mot. at App. A). Therefore, the defendants argue, her filing was untimely.

Glickstein, however, does not state a claim of discrete incidents of harassment, but of a hostile work environment and a continuing pattern of retaliation. (Compl. at ¶¶ 39, 40). She alleges discriminatory conduct that occurred as recently as August 20, 1993. Id. at ¶ 25(b). Glickstein alleges violations of a continuing nature, which she may prove persisted until within 300 days of the filing date. See West v. Philadelphia Elec. Co., 45 F.3d 744, 754-55 (3d Cir. 1995).

To establish that a claim falls within the continuing violations theory, a plaintiff must prove: (1) that at least one act occurred within the filing period, and (2) "that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination." Id. at 755. In making the second assessment, the Court must consider factors such as:

(I) subject matter--whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence--whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Id. n.9. If the plaintiff is able to make out a proof of a continuing violation, as long as one event in the sequence occurs within the statutory period, the plaintiff may offer evidence of,

and recover for, the entire continuing violation. Id. at 755.

Glickstein easily satisfies the requirement of a present violation with her allegation that on August 20, 1993 the School District refused to appoint her Lead Teacher in retaliation for her claims of sexual harassment. Glickstein also satisfies the second requirement: that the alleged violations were all part of the same on-going pattern of discrimination. All of Glickstein's claims concern either her alleged harassment by Melley, or the other defendants' (1) failure to respond to the situation properly, or (2) retaliation for Glickstein's complaining about it. See Lesko v. Clark Publisher Services, 904 F. Supp. 415, 419-20 (W.D.Pa. 1995). Further, Glickstein alleges that the harassment has been continuous up to the present. Therefore, the Court is satisfied that Glickstein alleges sufficient facts to invoke the continuing violation doctrine, and to support her claim that she filed her administrative charge within the applicable 300 day filing period.

D. Plaintiff's PHRA Claims

In Counts III and IV of her Complaint, Glickstein charges the defendants with Sex Harassment and Sex Discrimination in violation of § 955 of the PHRA. The defendants' move to dismiss on three grounds: (1) Glickstein's claim of Sex Harassment in Count III should be dismissed as time-barred; (2) her claims should be dismissed as against several defendants who were not named in her administrative charge; and (3) her claims against some of the

defendants should be dismissed as failing to plead that they aided and abetted in any discriminatory practice.

1. Count III Not Time-Barred

The defendants first argue that Glickstein's claim in Count III is time-barred because she filed her administrative charge outside of the 180 day period specified in § 959(h) of the PHRA. This is essentially a reiteration of their earlier argument attacking Glickstein's Title VII claim in Count I. Because the continuing violation theory also applies to claims under the PHRA, see West, 45 F.3d at 755-57; Lesko, 904 F. Supp. at 419, the Court finds that Glickstein has also plead sufficient facts to support her claim that she filed within the applicable 180 day period.

2. Parties Not Named in Administrative Charge

The defendants next argue that Glickstein's PHRA claims in both Counts III and IV should be dismissed as against defendants Hoffman, Wyatt, Jones, Daggett, Bowman and Scanlon because they were not named as respondents in the administrative charge she filed with the PHRC.

One of the goals behind the administrative procedures in both Title VII and the PHRA is to encourage a more informal process of conciliation before allowing the matter to proceed to litigation. See Glus v. G.C. Murphy Co., 562 F.2d 880, 888 (3d Cir. 1977); Dreisbach v. Cummins Diesel Engines, Inc., 848 F. Supp. 593, 595

(E.D.Pa. 1994). Therefore, both Title VII and the PHRA require the complainant to name in his administrative charge all persons alleged to have committed acts of discrimination, 42 U.S.C. § 2000e-5(f)(1) (1994); 43 Pa. Cons. Stat. Ann. § 959 (Purdon Supp. 1996), so they may be included in informal proceedings. To add teeth to this rule, Title VII imposes a jurisdictional requirement that permits a complainant to bring a subsequent civil action only "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1); see Dreisbach, 848 F. Supp. at 596-97. The PHRA contains no analogous language. See 43 Pa. Cons. Stat. Ann. § 959. In fact, as the Defendants point out, there is no authority addressing whether the PHRA permits a civil action to be brought against parties not named as respondents in an administrative charge.

Federal courts have uniformly held that the PHRA should be interpreted consistently with Title VII. See Clark v. Com. of Pennsylvania, 885 F. Supp. 694, 714 (E.D.Pa. 1995). Both parties have presented their arguments under federal law. Therefore, the Court will apply decisions under Title VII in resolving this PHRA question.

The Third Circuit has found that Title VII must be construed liberally to prevent its jurisdictional requirements from thwarting the statute's substantive policies. See Glus, 562 F.2d at 887-888. Particularly where a complainant files her administrative complaint pro se, she should not be expected to anticipate the legal

significance that might be attached to whether particular individuals are named as respondents or merely named in the body of the complaint. See id.; Kinally v. Bell of Pennsylvania, 748 F. Supp. 1136, 1140 (E.D.Pa. 1990). Therefore, courts relax Title VII's jurisdictional requirements--and necessarily the PHRA's as well--where a plaintiff has named the subsequent defendants in the body of the administrative charge. Kinally, 748 F. Supp. at 1140 (permitting suit against parties named in administrative charge); see Dreisbach, 848 F. Supp. at 596-97 (distinguishing Kinally where individual defendants were not named in charge). Naming the defendants in the charge ensures that they will know of and participate in the PHRC proceedings, and gives them an opportunity to resolve matters informally, without further litigation.

In the present case, Glickstein named only the Neshaminy School District as a respondent in her August 31, 1993 PHRC complaint. (See Pl.'s Response at Ex. A). However, in the body of the complaint she cited conduct by defendants Melley, Blair, Hoffman, Jones, and Scanlon. Id. Therefore, the Court will not dismiss Glickstein's claims against these defendants. See Kinally, 748 F. Supp. at 1140.

The PHRC charge did not mention defendants Wyatt, Daggett or Bowman. These parties were among Glickstein's supervisors during the relevant period: Wyatt was Assistant Principal between 1987 and 1990, and has served as Principal since 1990; Daggett has served as

Assistant Principal since 1990; and Bowman has been Superintendent of the School District since 1992. (Compl. at 3-4). Glickstein alleges that these defendants had actual notice that their conduct was under PHRC review by service of the PHRC complaint. (Pl.'s Response at 18). She further alleges that defendants Wyatt and Bowman--who she says were among those who attended the PHRC conference--had notice of all claims set forth in the PHRC complaint. Id. Drawing all inferences in her favor, the Court finds that Glickstein should be permitted to prove that these defendants were sufficiently involved in the PHRC conciliation proceedings to make their inclusion in the administrative charge unnecessary.⁶ Accordingly, the Court also will not dismiss defendants Wyatt, Daggett, and Bowman from the case as uncharged defendants.

3. Aiding and Abetting Liability

The defendants next argue that Counts III and IV should be dismissed because Glickstein has failed to meet the special pleading requirements for a claim against an individual employee under § 955(e) of the PHRA.

Like Title VII, § 955(a) of the PHRA establishes liability solely for employers. See Dici v. Com. of Pennsylvania, 91 F.3d

⁶ This does not preclude the defendants from moving for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure at the conclusion of Glickstein's case, should she fail to offer sufficient evidence to support a finding of knowledge of and participation in the PHRC proceedings.

542, 552 (3d Cir. 1996). However, the PHRA goes further than Title VII to establish accomplice liability for individual employees who aid and abet a § 955(a) violation by their employer. See 43 Pa. Cons. Stat. Ann § 955(e) (Purdon Supp. 1997) (providing liability for employees who "aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice"). The individual defendants in this case contend that Glickstein has failed to allege sufficient facts to support her claim of accomplice liability against them.

Defendant Melley relies primarily on Dici, in which the Third Circuit held that an employee could not be liable on an aiding and abetting theory for his own direct acts of discrimination. See id. at 552-53. In that case, the plaintiff claimed her employer had "failed to take prompt remedial measures after having notification that discriminatory actions had occurred." Id. at 552. The plaintiff also brought a separate claim against her alleged harasser as an accomplice to her employer's § 955(a) violation. Dici rejected this second theory because it required that the employee have a mens rea of intending to aid and abet his employer in a violation of neglect. Id. at 553. It agreed with the court in Tyson v. CIGNA Corp., 918 F. Supp. 836, 841 (D.N.J. 1996), that "a non-supervisory employee who engages in discriminatory conduct cannot be said to 'intend' that his employer fail to respond." Dici, 91 F.3d at 553. Therefore, Dici held that the non-

supervisory employee in that case could not be liable for his own direct acts of discrimination under § 955(e).

Although Dici did not emphasize the importance of the employee's supervisory status in its analysis, a review of Tyson indicates that the distinction between supervisory and non-supervisory status is crucial. See Tyson, 918 F. Supp. at 840-41. As Tyson explains, an employer's liability under statutes like Title VII and the PHRA is not respondeat superior in nature. Rather, "[a]n employer is liable for the conduct of nonsupervisory employees only as a by-product of its reaction to their conduct, not as a direct result of the conduct itself." Id. at 840. As Tyson further explains:

A non-supervisory employee who engages in discriminatory conduct does not aid or abet the employer's failure to take corrective action. A non-supervisory employee has no role whatever in his employer's reaction to his discriminatory conduct. A non-supervisory employee who engages in discriminatory conduct shares no intent or common purpose with his employer who fails to respond to the discriminatory conduct.

Id. at 840-41. On the other hand, under agency principles, a supervisory employee who engages in discriminatory conduct while acting in the scope of his employment shares the intent and purpose of the employer and may be held liable for aiding and abetting the employer in its unlawful conduct. Id. at 841.

Returning to Dici, where Brison--the harassing employee--was not only non-supervisory, but junior to the plaintiff, see Dici, 91 F.3d 545, it is clear that the court's prohibition was limited to

claims of aiding and abetting against non-supervisory employees. Tyson, on which Dici strongly relied, clearly held that supervisory employees may be liable, see Tyson, 918 F. Supp. at 837, 841-41, and provides no support for the broader proposition that no individual employee may be liable under § 955(e) for his direct acts of discrimination. Therefore, the Court rejects Defendant Melley's view that Dici states a general rule barring claims against any employee, regardless of his supervisory status. (See Def.'s Mot. at 13).

In the present case, Glickstein has alleged that defendant Melley was, in addition to being her direct harasser, her direct supervisor. (Compl. at ¶ 4). Therefore, despite Melley's assertions to the contrary, Glickstein does meet the pleading requirements for § 955(e) liability, see id., and the Court will not dismiss Counts III and VI as against him.

Glickstein also alleges sufficient facts to establish § 955(e) liability for the remaining defendants. First, Glickstein alleges that each of defendants Hoffman, Wyatt, Jones, Dagett, Bowman, and Scanlon are or were her supervisors. (Compl. at 2-4). Second, Glickstein alleges that in February and March, 1991, after defendant Melley subjected her to conduct amounting to unlawful discrimination:

Plaintiff reported acts of sexual harassment to her supervisors which included defendants Bruce Wyatt, Gary Bowman, Ronald Dagett as well as Bernard Hoffman and Harry Jones.

All of these defendant supervisors failed to

take action regarding plaintiff's complaint concerning Melley's improper acts and continuing misconduct.

(Compl. at ¶ 19). She also alleges in ¶¶ 22 through 34 that the defendants, including James Scanlon, retaliated against her, first for complaining, and later for pursuing her complaints through the Federation's grievance procedure and the PHRC. These allegations provide ample basis for Glickstein's § 955(e) claims. The Court will not dismiss these claims before Glickstein has had an opportunity to engage in any discovery. Finally, the Court finds that Glickstein's complaint is sufficiently clear to permit the defendants to frame an answer and, therefore, denies their motion for a more definite statement under Rule 12(e) of the Federal Rules of Civil Procedure.

E. Intentional Infliction of Emotional Distress

The defendants next move to dismiss Glickstein's claim in Count V that they are liable for intentional infliction of emotional distress. At the outset, the Court notes that because it has previously dismissed the Board from Glickstein's complaint, only the claims against the individual defendants remain.

The Pennsylvania courts recognize the tort of intentional infliction of emotional distress. See Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 190, 527 A.2d 988, 991 (1987). However, to state a cognizable claim the conduct alleged "must be so outrageous in character, and so extreme in degree, as to go

beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). It is extremely rare that ordinary sexual harassment in the employment context will rise to the level of outrageousness required by Pennsylvania law. Id.

[A]s a general rule, sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for intentional infliction of emotional distress. As we noted in Cox, 861 F.2d at 395-96, 'the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee.' See, e.g., Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307, 311 (M.D.Pa. 1988). The extra factor that is generally required is retaliation for turning down sexual propositions.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1486-87 (3d Cir. 1990); Kinally v. Bell of Pennsylvania, 748 F. Supp. 1136, 1144-45 (E.D.Pa. 1990); Stilley v. University of Pittsburgh, 968 F. Supp. 252, 260 (W.D.Pa. 1996). Further, when brought against an individual defendant, rather than an entity, a plaintiff must show the defendant himself committed direct acts of sexual harassment. See Andrews, 895 F.2d at 1487 (finding that individual defendants "should not be held accountable for each individual incident regardless of their lack of participation"). Therefore, the acts of one person who has engaged in direct harassment may not be

imputed to another who has engaged in retaliation in order to make out a complete claim against the second person.

Under Pennsylvania law, the statute of limitations for a claim of intentional infliction of emotional distress is two years from the date of its accrual. 42 Pa. Cons. Stat. Ann. § 5524(7) (Purdon Supp. 1997); Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876, 884 (3d Cir. 1991). Applying this rule is simple in cases like Osei-Afriyie, where the claim arises out of a single discrete event. See id. (time-barring plaintiff's claim of emotional distress from learning defendant hospital used experimental malaria treatment on his children). In the case of a claim, like Glickstein's, in which emotional distress is alleged to have resulted from acts of ongoing employment discrimination, the analysis becomes more complicated. However, because the plaintiff must prove both outrageous sexual harassment and retaliation within the limitations period, see Andrews, 895 F.2d at 1486-87, the period must be measured from the date of the last discrete incident of harassment accompanied by retaliation. See Bougher v. University of Pittsburgh, 882 F.2d 74, 80 (3d Cir. 1989) (finding claim time-barred where only retaliatory conduct occurred within limitations period). Otherwise, in any case in which the direct acts of harassment are more than two years old, a plaintiff could render her claims timely by merely alleging that retaliation occurred and continued until the date of suit.

The defendants point out that the last direct act of sexual harassment occurred in May or June of 1992, and Glickstein filed her original Complaint on or about September 12, 1996. (See Def.'s Mot. at 14). Although Glickstein alleges in her complaint that the defendants continued to retaliate against her until the present, the Court finds her claim time-barred because she has alleged no acts of sexual harassment within two years of the date she brought suit.

In any case, the Court notes that Glickstein fails to state a claim of intentional infliction of emotional distress against at least defendants Hoffman, Wyatt, Jones, Daggett, Bowman, Crumlish and Scanlon because she has not alleged that they engaged in any acts of direct harassment. See Andrews, 895 F.2d at 1487.

F. Title IX Claim

Finally, the defendant School District argues that Glickstein's Title IX claim in Count VI is "preempted" by the remedial scheme of Title VII. Under the specific facts of this case, the Court agrees.

Title IX provides protection against gender discrimination by federally funded educational institutions that is analogous to the protections provided by Title VII. Its operative language states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

20 U.S.C. § 1681(a) (1994).

Glickstein has alleged that the School District receives federal funds, (see Pl.'s Second Am. Compl. at ¶ 83), has engaged in a pattern of intentional gender discrimination, and has violated Department of Education regulations in 34 C.F.R. § 106 et seq. (1997). So on its face, it would appear that Glickstein has met the basic pleading requirements for a private action under Title IX. See Franklin v. Gwinett County Pub. Schs., 503 U.S. 60, 72-77, 112 S.Ct. 1028, 1036-38, 117 L.Ed.2d 208 (1992) (permitting student's private action under Title IX); Stilley v. University of Pittsburgh of Com. Sys., 968 F. Supp. 252, 265066 (W.D.Pa. 1996) (listing elements of Title IX action).

However, courts have pared down Title IX in the employment discrimination context to prevent it from undermining the carefully designed administrative and statutory architecture of Title VII. See Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 247-49 (5th Cir. 1997); Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 862-63 (7th Cir. 1996); Lakoski v. James, 66 F.3d 751, 755-58 (5th Cir. 1995); Cooper v. Gustavus Adolphus College, 957 F. Supp. 191, 192-94 (D.Minn. 1997); Howard v. Board of Educ. Sycamore Community Unit, 893 F. Supp. 808, 814-15 (N.D.Ill. 1995); Wedding v. University of Toledo, 862 F. Supp. 201, 202-04 (N.D.Ohio 1994).

These courts have all reached the conclusion that since Title VII provides a comprehensive and carefully balanced remedial mechanism for

redressing employment discrimination, and since Title IX does not clearly imply a private cause of action for damages for employment discrimination, none should be created by the courts.

Cooper, 957 F. Supp. at 193 (citing Lakoski, 66 F.3d at 754). This Court agrees that Congress did not intend that private plaintiffs be able to circumvent the remedial process of Title VII and its state analogs merely by framing a complaint in terms of Title IX. This can only be prevented by barring private employment discrimination claims under Title IX to the extent that the same claims might be brought under Title VII. See Lakoski, 66 F.3d at 757-58.

But the issue remains whether Title VII preempts any possible employment discrimination claim under Title IX, as the defendants suggest, or only those claims that seek relief available under Title VII. While some courts use language that suggests total preemption, see Cooper, 957 F. Supp. at 194 ("The Court rejects any claim for employment discrimination on the basis of sex under Title IX, as Title VII is the only remedy for such a claim."); Wedding, 862 F. Supp. at 204 ("Because Title VII predates Title IX, this Court presumes Title VII preempts Title IX when employment discrimination is at issue."), upon closer inspection the Title IX claims at issue could have been brought under Title VII, see Cooper, 957 F. Supp. at 192 (termination based on gender bias); Wedding, 893 F. Supp. at 202 (claim for money damages). Other courts, including the only appellate courts to rule on the issue,

suggest that preemption is limited to the extent of the actual overlap. See Waid, 91 F.3d at 862 (analyzing preemption according in terms of specific Title VII rights); Lakoski, 66 F.3d at 753 (limiting its holding to individuals seeking money damages under Title IX and "expressing no opinion whether Title VII excludes suits seeking only declaratory or injunctive relief"); Howard, 893 F. Supp. at 815 (distinguishing where remedies sought are available under Title VII).

Glickstein argues that Count VI should survive at least to the extent that it alleges distinct violations of Title IX and seeks declaratory and injunctive relief. She argues that Lakoski, which specifically reserved this question, see Lakoski, 66 F.3d at 753, provides authority for a private action arising under Title IX alone. Since she filed her brief in this action, however, the Fifth Circuit has clarified its position--to her detriment--in Lowrey v. Texas A & M Univ. Sys., 117 F. 3d 242, 249 & 254 (5th Cir. 1997).

In Lowrey, the plaintiff, a women's college basketball coach alleged--in addition to ordinary employment discrimination--that her school retaliated against her for participating in a Gender Equity Task Force and in a civil rights complaint filed with the Department of Education that charged it with misallocating resources between male and female athletes. See id. at 244 & 247. The Fifth Circuit first reiterated its position in Lakoski that

Title VII preempts all claims of employment discrimination brought under Title IX. Id. at 247. The Court then found that the plaintiff could not bring an action against the school for substantive violations of Title IX, because Title IX is only enforceable by federal agencies. Id. at 249. See 20 U.S.C. § 1682; North Haven Bd. of Ed. v. Bell, 456 U.S. 535, 514-15, 102 S.Ct. 1912, 1914, 72 L.Ed.2d 299 (1982) (noting that enforcement is accomplished by termination of federal funds or denial of future grants).⁷ However, the Court found under Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), that the plaintiff could bring a private action against the school for retaliating against her because she charged it with violations of Title IX. See Lowrey, 117 F.3d at 249-54. Such an action it found, unlike one for employment discrimination, would not undermine the legislative scheme of Title VII. Id. at 253-54.

In the present case, Count VI of Glickstein's complaint is really a claim of employment discrimination barred by cases like Lakoski and Lowrey. However, to the extent that Count VI states a claim for distinct violations of Title IX, it must be dismissed anyway. First, there is no private right of action under Title IX

⁷ Although the Fourth Circuit has permitted a private action under Title IX on the authority of Bell, see Preston v. Com of Va. ex rel. New River Community College, 31 F.3d 203, 206 (1994), the Fifth Circuit found that Bell provides no such authority. As Lakoski explained, Bell concerned only the Department of Education's authority under Title IX to make employment discrimination a basis for the termination of federal funding. See Lakoski, 66 F.3d at 754. Bell did not authorize a private right of action under Title IX. See id.

because the statute is enforceable only by federal agencies. See Lakoski, 66 F.3d at 249. Therefore, Glickstein is not entitled to declaratory or injunctive relief for the School District's alleged failure to comply with Department of Education regulations. (Compl. at 22-23). Second, although Lowrey implied a private right of action to vindicate Title IX, it did so only in a claim of retaliation for protesting a school's violations of Title IX. See Lowrey, 117 F.3d at 253-54. Drawing all inferences in her favor, Glickstein still does not allege that the School District retaliated against her for protesting violations of Title IX. (Compl. at 22-25). Rather, she seeks relief for the School District's noncompliance with certain Department of Education regulations. In any case, her case is distinguishable from Lowrey, where the school demoted the plaintiff because of her active opposition of its funding practices. See Lowrey, 117 F.3d at 244-45. Therefore, Count VI of Glickstein's Second Amended Complaint is dismissed under Rule 12(b)(6) for failing to state a claim for which relief can be granted.

An appropriate Order follows.

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

MICHELE HERZER GLICKSTEIN : CIVIL ACTION
 :
 v. :
 :
 NESHAMINY SCHOOL DISTRICT, et al. : NO. 96-6236

O R D E R

AND NOW, this 15th day of October, 1997, upon consideration of the Defendants' Motion to Compel Arbitration, Motion to Dismiss and/or for Summary Judgment, IT IS HEREBY ORDERED that:

(1) the Defendant's Motion to Dismiss the Neshaminy Board of School Directors as a party is **GRANTED**;

(2) the Defendants' Motion to Compel Arbitration, Motion to Dismiss and/or for Summary Judgment of Counts I and II is **DENIED**;

(3) the Defendants' Motion to Compel Arbitration, Motion to Dismiss and/or for Summary Judgment of Counts III and IV is **DENIED**;

(4) the Defendants' Motion to Dismiss Count V is **GRANTED**; and

(5) the Defendants' Motion to Dismiss Count VI is **GRANTED**.

BY THE COURT:

HERBERT J. HUTTON, J.