

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

RACHEL WASSERMAN : CIVIL ACTION  
: :  
v. : :  
: :  
POTAMKIN TOYOTA, INC., : :  
SPRINGFIELD AUTO OUTLET, : :  
DAVID HYMAN, SANTI PARRILLA, and : :  
ROBERT WEISEN : NO. 98-0792

**MEMORANDUM AND ORDER**

HUTTON, J.

October 22, 1998

Presently before the Court are Defendants' Motion to Dismiss Count III and Count IV of Plaintiff's Complaint pursuant to Rule 12(b)(6) or 28 U.S.C. § 1367(c) (Docket No. 7) and Plaintiff's response thereto (Docket No. 9). For the reasons that follow, the Defendants' motion is **GRANTED IN PART AND DENIED IN PART.**

**I. BACKGROUND**

The Plaintiff alleges the following facts in her complaint. Plaintiff, Rachel Wasserman ("Wasserman" or Plaintiff), worked for Potamkin Toyota from October 19, 1994 until August 12, 1996. Plaintiff was an executive assistant. Defendants Weisen and Parrilla were Managers and Defendant Hyman was Vice President.

During her employment at Toyota, she alleges that Defendants David Hyman ("Hyman"), Robert Weisen ("Weisen"), and Santi Parrilla ("Parrilla") subjected her to a continuous pattern of sexually hostile and offensive conduct. This included sexually offensive

gestures and comments. Plaintiff also alleges that these acts created a hostile and offensive work environment which interfered with the performance of her employment.

Plaintiff repeatedly objected to the conduct of Defendants Weisen and Parrilla. When her objections fell on deaf ears, Plaintiff brought her objections to Defendant Hyman. Defendant Hyman failed to cease the acts of sexual harassment and sex discrimination, and thus, added to the already hostile and offensive work environment. Defendant Hyman also subjected Plaintiff to sexually offensive conduct. On August 12, 1996, realizing that the Defendants would not cease this behavior, Plaintiff involuntarily resigned her position.

Plaintiff subsequently filed a complaint and alleged four causes of actions. The four counts are: (1) Count I - Title VII claim against Potamkin Toyota; (2) Count II - Pennsylvania Human Relations Act ("PHRA") claim against Potamkin Toyota; (3) Count III - PHRA claim against Weisen, Parrilla, and Hyman; (4) Count IV - intentional infliction of emotional distress claim against all Defendants. Defendants now move to dismiss Counts III and IV.

## **II. MOTION TO DISMISS STANDARD**

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set

out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),<sup>1</sup> this 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). The Court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

### **III. DISCUSSION**

#### **A. Failure to State a Claim under Rule 12(b)(6)**

##### **1. Pennsylvania Human Relations Act Claim (Count III)**

Defendants argue that Count III should be dismissed because Plaintiff failed to meet the special pleading requirements for a

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<sup>1</sup> Rule 12(b)(6) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

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. Pennsylvania, 91 F.3d 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 the Plaintiff failed to allege sufficient facts to support their claims of accomplice liability.

"[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." Glickstein v. Neshaminy Sch. Dist., No.CIV.A.96-6236, 1997 WL 660636, at \* 12 (E.D. Pa. Oct. 22, 1997) (citing Tyson v. CIGNA Corp., 918 F. Supp. 836, 841 (D.N.J. 1996), aff'd, 149 F.3d 1165 (3d Cir. 1998) (unpublished table opinion)). "Thus, a supervisor's failure to take action to prevent discrimination, even when it is the supervisory employee's own practices at issue, can make him or her liable for aiding and abetting the employer's insufficient remedial measures." Frye v. Robinson Alarm Co., No.97-0603, at \*7

(E.D. Pa. Feb. 11, 1998) (citing Glickstein, 1997 WL 660636, at \*11-13); see Wien v. Sun Co., Inc., No.CIV.A.95-7647, 1997 WL 772810, at \*7 (E.D. Pa. Nov. 21, 1997).

In the present case, Defendants contend that "the pleadings are insufficient to establish the direct supervisor-employee nexus" required. See Defs.' Mem. of Law in Support of Mot. to Dismiss at 10. This Court disagrees. Plaintiff alleges that Weisen and Parrilla were Managers of the Defendant corporation. Pl.'s Compl. at ¶¶ 8, 9. Plaintiff also alleges that, as executive assistant, she received assignments from the Managers of the corporation. See id. at ¶ 13. Finally, Plaintiff alleges that Weisen and Parrilla committed sexually harassing conduct, including sexually offensive comments and gestures. See id. at ¶ 15. This Court finds that Plaintiff sufficiently pled that Weisen and Parrilla were, in addition to being her direct harassers, her supervisors. Therefore, despite the Defendants' assertions to the contrary, Plaintiff's complaint meets the pleading requirements for § 955(e) liability and the Court will not dismiss Count III with respect to Weisen and Parrilla.

Defendants also argue that Plaintiff failed to allege facts under which Defendant Hyman could be liable under § 955(e) because there were only allegations that Hyman was informed of the harassment and did nothing to remedy it. This Court disagrees. First, Plaintiff alleges that Hyman, as Vice President and

supervisor, failed to take appropriate remedial measures. Pl.'s Compl ¶ 7, 18. Second, Plaintiff alleges that Hyman personally and directly engaged in sexually offensive and hostile conduct. See id. at ¶ 15. These allegations provide an ample basis for Plaintiff's § 955(e) claims. Thus, the Court will not dismiss Count III of the Plaintiff's complaint.

## **2. Intentional Infliction of Emotional Distress (Count IV)**

Defendants next move to dismiss Plaintiff's claim for intentional infliction of emotional distress. Defendants argue that this count fails to state the necessary level of outrageous conduct required for sexual harassment in the workplace under Pennsylvania law.<sup>2</sup> This Court agrees.

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). In the

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<sup>2</sup> Defendant corporations first argue that this claim is barred by the exclusivity provisions of the Pennsylvania Workers' Compensation Act. Because this Court agrees with the Defendants' argument that the complaint fails to allege conduct sufficient to meet the level of outrageousness required, it will not consider the argument that the Pennsylvania Workers' Compensation Act bars this claim.

employment context, it is extremely rare that ordinary sexual harassment will rise to the level of outrageousness required by Pennsylvania law. Id. The Third Circuit also noted that:

[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 Phila., 895 F.2d 1469, 1486-87 (3d Cir. 1990); see also Kinally v. Bell of Pa., 748 F. Supp. 1136, 1144-45 (E.D. Pa. 1990); Stilley v. University of Pittsburgh, 968 F. Supp. 252, 260 (W.D. Pa. 1996).

In this case, the Court finds that Plaintiff fails to state a claim of intentional infliction of emotional distress against all Defendants because she did not allege any facts suggesting that any of the individual Defendants made sexual propositions. See Andrews, 895 F.2d at 1487. Plaintiff only alleges that Defendants Hyman, Weisen, and Parrilla committed "uninvited and unwanted offensive sexually-oriented conduct, including but not limited to, various sexually-offensive comments and gestures." Pl.'s Compl. at ¶ 15 (emphasis added). A review of the case law in this district suggests that offensive comments and gestures in the workplace,

even though sexually explicit, are not enough to satisfy the Andrews extra requirement of sexual propositions. See DiFlorio v. Nabisco Biscuit Co., No. CIV.A.95-0089, 1995 WL 295367 (E.D. Pa. May 12, 1995) (noting that many district courts have found that allegations of "sexual conversation and conduct" do not constitute the type of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress due to sexual harassment in the workplace); see also Restatement (Second) of Torts § 46 cmt. d (1965) (noting that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not reach the requisite level of outrageousness). For example, the court in Lang v. Seiko Instruments, USA, Inc., No. CIV.A.96-5398, 1997 WL 11301, at \*4 (E.D. Pa. Jan. 14, 1997, stated:

Nowhere in the Complaint is it averred that [the defendants] sexually propositioned Mrs. Lang, let alone retaliated against her for rebuffing the same. In the absence of such allegations--and any compelling argument as to why this Court should depart from what Andrews has termed to be a "general requirement" for successfully pleading intentional infliction of emotional distress in the context of sexual harassment in the workplace--Mrs. Lang's claims against [the Defendants] are dismissed.

Id. (footnote omitted). This case is similar to Lang in that Plaintiff failed to allege the required "extra factor" of sexual proposition. Thus, this Court finds that Plaintiff's complaint does not meet the pleading requirements of Andrews.

Moreover, Plaintiff has not alleged that the Defendants retaliated against her for refusal of any sexual propositions. See Andrews, 895 F.2d at 1487. Plaintiff did allege that:

The said unlawful practices for which Defendant Corporation is liable to Plaintiff include, but are not limited to, fostering and perpetuating a hostile and offensive work environment, retaliating against Plaintiff because of her expressed opposition to offensive sexually related conduct in the workplace, subjecting Plaintiff to more onerous working conditions, treating Plaintiff in a disparate manner and constructively discharging Plaintiff from her employment.

Pl.'s Compl. at ¶ 22. Plaintiff also alleges that she sustained loss of earnings, severe emotional distress, loss of self esteem, loss of future earning power, loss of backpay, front pay and interest. See id. at ¶ 23. This is not the retaliation, however, that the Andrews court contemplated. See DiFlorio, 1995 WL 295367, at \*4 (holding that allegations of failure to respond promptly to plaintiff's complaints of sexual harassment, failure to take action against male workers who sexually harassed females, failure to disseminate a policy against sexual harassment, failure to provide a safe workplace, refusal of permission to go the bathroom, and defamatory responses to her complaints did not sufficiently state a claim of retaliation as required under Andrews). Andrews requires that a Plaintiff allege retaliation based on a rejection of sexual advances or propositions. Therefore, in light of Plaintiff's failure to plead sufficient facts alleging a claim for

intentional infliction of emotional distress due to sexual harassment in the workplace, this Court dismisses Count IV of the complaint.

In the event that the Court dismissed Count IV, Plaintiff asks this Court for leave to amend its complaint in order to plead sufficient facts of outrageousness as required under Pennsylvania law. The Court grants Plaintiff's request. Plaintiff has twenty (20) days from the date of this Order to file an amended complaint.

**B. Declining Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)**

Finally, Defendants argue that this Court should decline the exercise of supplemental jurisdiction over Plaintiff's PHRA claims. Defendants contend that these claims present a novel and complex issue of state law because Pennsylvania courts have not concluded whether the PHRA imposes personal liability on individual employees.<sup>3</sup> This Court does not agree.

Section 1367 states that the federal courts "shall have supplemental jurisdiction" over claims which are "part of the same case or controversy" as a claim over which the court exercises original jurisdiction. 28 U.S.C. § 1367(a) (1994). Thus, in order to properly exercise supplemental jurisdiction, there are three requirements. First, the "federal claim must have substance

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<sup>3</sup> Defendants also argue that this Court should not exercise supplemental jurisdiction over Plaintiff's intentional infliction of emotional distress claim, because it would necessitate medical testimony, and thus, enlarge the scope of trial well beyond what would be necessary to resolve the claim under Title VII. See Mazzare v. Burroughs Corp., 473 F. Supp. 234 (E.D. Pa. 1979) (concluding that judicial economy would not be served by permitting an intentional infliction of emotional distress claim to be tried because proof of medical harm would enlarge the scope of trial well beyond the ADEA claim brought by the plaintiff). This Court will not consider this argument at this time because the Court already dismissed Plaintiff's intentional infliction of emotional distress claim for failure to plead sufficient facts of outrageousness as required under Pennsylvania law.

sufficient to confer subject matter jurisdiction on the court.'" Lyon v. Whisman, 45 F.3d 758, 760 (3d Cir. 1995) (quoting Gibbs, 383 U.S. at 725)). Plaintiff's Title VII claim satisfies that standard. Second, the state and federal claims must derive from a common nucleus of operative fact. See id. Plaintiff's Title VII and PHRA claims are derived from the same set of facts concerning the sexual harassment of three supervisors. See Goodwin v. Seven Up Bottling Co. of Phila., (E.D. Pa. 1996) ("Federal Courts have consistently held that the power to exercise supplemental jurisdiction exists when a Plaintiff makes a Title VII claim and state law claims based upon the same allegedly discriminatory conduct."). Third and finally, Plaintiff must ordinarily expect to try all claims in one judicial proceeding. See Lyon, 45 F.3d at 760. Here, Plaintiff should have expected to try both her Title VII claim and PHRA claim together because: (1) these claims mirror one another and (2) she would save on litigation expenses. See Dici v. Commonwealth of Pa., 91 F.3d 542, 552 (3d Cir. 1996) ("Generally, the PHRA is applied in accordance with Title VII."); Smith v. Pathmark Stores, Inc., No. CIV.A.97-1561, 1998 WL 309916, at \*3 (E.D. Pa. June 11, 1998) ("Courts have uniformly interpreted the PHRA consistent with Title VII.").

Thus, the Court concludes that it has supplemental jurisdiction over Plaintiff's PHRA claim. Nevertheless, Section 1367(c) provides that a district court may, in its discretion,

decline to exercise jurisdiction if any of four conditions are met.

These four conditions are:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. § 1367(c). The Court may properly decline to exercise supplemental jurisdiction and dismiss the state claims if any one of these conditions apply. See Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993). In making its determination, the district court should take into account generally accepted principles of "judicial economy, convenience, and fairness to the litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

In this case, Defendants urge this Court to exercise its discretion and deny supplemental jurisdiction because Plaintiff's PHRA claim present a novel and complex state law issue. Defendants argue that Pennsylvania courts have not concluded whether individual employees may be liable under § 955(e) of the PHRA, and therefore, this Court should dismiss that claim under 28 U.S.C. § 1367(c)(1). In support of this argument, Defendants cite Goodwin v. Seven Up Bottling Co. of Phila., No. CIV.A.96-2301, 1996 WL

601683 (E.D. Pa. Oct. 18, 1996). In Goodwin, the court dismissed the plaintiff's PHRA claim against the individual defendants because the Pennsylvania state courts had yet to decide whether § 955 imposes personal liability on individual employees. See id. at \*6. Based on comity, federalism, and 28 U.S.C. § 1367(1), the court dismissed that part of the plaintiff's case. See id.

In the case at bar, the Court declines to exercise its discretion to refuse supplemental jurisdiction and retains jurisdiction over Plaintiff's PHRA claim. The situation presented to the court in Goodwin is distinguishable from the present case. In Goodwin, the court also dismissed the Title VII case against the individual employees. See id. Thus, the Goodwin court declined supplemental jurisdiction pursuant to § 1367(1), which authorizes dismissal when presented with a novel state issue, and § 1367(2), which authorizes dismissal when the federal claim against the defendant is dismissed. See id. Therefore, the court in Goodwin found that it would not prejudice the plaintiffs if the Court dismissed this claim and forced them to file their PHRA claim in state court. See id.

The situation in Goodwin is not presented in this case. The Title VII claim is still viable against the individual employees. Thus, if this Court were to dismiss Plaintiff's PHRA claim, she would have to maintain a separate action involving the same exact set of facts in state court. The Plaintiff would have to expend a

substantial amount of time, effort, and money to prepare a claim that could just as easily be argued in federal court. See Gibbs, 383 U.S. at 726 (noting that the district court should take into account generally accepted principles of "judicial economy, convenience, and fairness to the litigants" in making its determination of whether to exercise or decline supplemental jurisdiction); see also Hargest v. Smithkline Beecham Corp., No. CIV.A.91-6981, 1993 WL 62752, at \*2 (E.D. Pa. Mar. 9, 1993) ("This Court, in exercising its discretion pursuant to § 1367(c), determines that it would not be in the interest of justice to decline supplemental jurisdiction over plaintiff's PHRA claims based on the same alleged wrongful conduct [as plaintiff's Title VII claims]. As pointed out above . . . it would create duplication and waste.").

Moreover, this Court finds that Plaintiff's PHRA claim no longer presents a novel or complex state law issue. In Goodwin, the Third Circuit had just issued the then recent Dici opinion which found that individual employees may be liable under § 955(e) of the PHRA. See Goodwin, 1996 WL 601683, at \*6 n.11 ("The Third Circuit, only recently stated in Dici . . . that individuals can be held personally liable as an accomplice under the PHRA § 955(e) . . . , [however], we should leave further interpretation and application of § 955 to the Pennsylvania state courts."). Many courts have since concluded that individual employees may be liable

under § 955(e) of the PHRA. See, e.g., Cohen v. Temple Physicians, Inc., 11 F. Supp.2d 733, 737 (E.D. Pa. 1998) (“The holding of Dici as to the PHRA claims has since been followed in this district on at least two occasions.”). While the Supreme Court of Pennsylvania has yet to rule on this issue, the Court is confident that the Supreme Court would agree with the numerous courts that have concluded that individual employee liability is possible under § 955 of the PHRA. Therefore, this Court rejects Defendants’ invitation to decline supplemental jurisdiction on this ground.

An appropriate Order follows.

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O R D E R

AND NOW, this 22nd day of October, 1998, upon consideration of the Defendants' Motion to Dismiss Count III and Count IV of Plaintiff's Complaint pursuant to Rule 12(b)(6) or 28 U.S.C. § 1367(c) (Docket No. 7) and Plaintiff's response thereto (Docket No. 9), IT IS HEREBY ORDERED THAT the Defendants' Motion is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that:

- (1) Count IV of Plaintiff's complaint is **DISMISSED**; and
- (2) Plaintiff has twenty (20) days from the date of this Order to file an Amended Complaint.

BY THE COURT:

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HERBERT J. HUTTON, J.