

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

FRANCIS K. MCLAUGHLIN : CIVIL ACTION
: :
v. : :
: :
COMMONWEALTH OF PENNSYLVANIA, :
PHILADELPHIA HOUSING AUTHORITY : NO. 98-CV-2686

M E M O R A N D U M

Ludwig, J.

January 25, 1999

Defendant Commonwealth of Pennsylvania, Philadelphia Housing Authority (PHA) moves for summary judgment.¹ Fed. R. Civ. P. 56. Jurisdiction is federal question. 42 U.S.C. § 1331 (1998).

This Title VII action, 42 U.S.C. § 2000e, asserts two discriminatory violations, one based on sexually hostile work environment, the other on unlawful retaliation. On January 22, 1999 summary judgment was granted as to the first claim and denied as to the second. The facts are viewed from plaintiff's standpoint, as they must be on ruling this motion.

On September 25, 1995 PHA hired plaintiff Francis K. McLaughlin to work as a resident monitor. Pl. dep. at I:7. Monitors screen persons entering and exiting PHA buildings and often come into contact with PHA police officers. Id. at I:7, I:66, 165.

¹"[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997).

In October 1995, shortly after starting her job, PHA Officer Jonathan Knuckles began harassing plaintiff. In their first meeting, after commenting that she was attractive, id. at I:26, he said he could convince her to cheat on her husband, id. at I:34. On another occasion, he kissed her on the neck and, a few minutes later, apologized and then purported to brush something off her coat near her breasts. Id. at I:38-42. Some three months later, he pounded on plaintiff's booth with his nightstick and cursed. Id. at I:64. Another time, he took one of her cigarettes and told her that he was "better than her husband." Id. at I:67-68.

On February 24, 1996 Knuckles again beat his nightstick on plaintiff's booth and yelled. Id. at I:70. On that day, plaintiff then filed a sexual harassment complaint with PHA against him, id. at II:202-03; pl. ex. A, B, and thereafter was transferred to another location. Gregg dep. at 16. In retaliation, other PHA police harassed plaintiff. Pl. dep. at I:108, 180.

The harassment, which persisted until June 1998, consisted of the following: (1) officers refused to relieve her for lunchtime and other breaks, id. at I:109, Lott dep. at 9, 13, 14, 17, Jenkins dep. at 28, 29, 50, 52-54, 67-68; (2) two officers falsely accused her for not responding to a radio call and leaving her booth unattended, pl. dep. at I:109-12; (3) she was assigned to locations where her harassers worked and was falsely cited for refusing to work at one such location, id. at I:154-56, 169, II:72-74, 96-97; (4) a female officer made "obscene" phone calls to her

at work, id. at I:217; (5) two officers locked her in her booth for 15-20 minutes, id. at I:223; (6) an officer told her to "take that damn wig off your head," id. at I:137; (7) twice she was ordered to work despite being ill, id. at II:70-71; (8) she was written up for refusing to work in a booth with a faulty air-conditioner, id. at II:68-71; (9) officers refused to speak with her, Jenkins dep. at 56, 61-62; (10) an officer told her that he "got an erection" when he entered her booth, pl. dep. at I:229-230; (11) plaintiff was denied a promotion, id. at I:247-51; and (12) an officer falsely reported that she was absent without leave, which resulted in a loss of pay, Jenkins dep. at 55.

Plaintiff, who continues to be employed by PHA as a resident monitor, has consistently received outstanding performance evaluations. Id. at I:7, II:87-88. She has not been threatened with discipline or discharge. Id. at II:89.

PHA opposes the sexual harassment claim contending that it was untimely and, further as a substantive matter, the complained of conduct was not pervasive or sufficiently severe. According to defendant, the retaliation claim must also be dismissed because plaintiff cannot establish that an adverse employment action was taken against her.

Sexual Harassment Claim

Under Title VII, a complaint must be filed with the EEOC either within 180 days of the alleged discrimination or within 300 days if the complainant initially instituted proceedings with an appropriate state or local agency. See 42 U.S.C. § 2000e-5(e);

West v. Philadelphia Elec. Co., 45 F.3d 744, 754 & n.8 (3d Cir. 1995); LaRose v. Philadelphia Newspapers, Inc., 21 F. Supp. 2d 492, 498 (E.D. Pa. 1998).

These filing requirements are subject to equitable principles. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994).

Under the continuing violation theory:

[T]he plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant. . . . To establish that a claim falls within the continuing violations theory, the plaintiff must do two things. First, he must demonstrate that at least one act occurred within the filing period. "The crucial question is whether any present violation exists." United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). Next, the plaintiff must establish that the harassment is "more than the occurrence of isolated or sporadic actions of intentional discrimination." Jewett v. International Tel. & Tel. Corp., 653 F.2d 89, 91 (3d Cir. 1981). The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.

West, 45 F.3d at 754-55 (Jewett citation in full). Three factors are relevant to a continuing violation: (1) subject matter – do the alleged acts involve the same type of discrimination; (2) frequency; and (3) degree of permanence – as affects the employee awareness of her rights? See Rush v. Scott Specialty Gases, Inc.,

113 F.3d 476, 481-82 (3d Cir. 1997) (quoting Berry v. Board of Supervisors of La. State Univ., 715 F.2d 971, 981 (5th Cir. 1983)).

On September 22, 1997 plaintiff filed her EEOC charge. She must therefore show the occurrence of at least one incident of sex discrimination within the prior 300-day period and that it was preceded by and was a part of a continuing practice or pattern of discrimination. Defendant maintains that the claimed sexual harassment by Knuckles predated the 300-day limitations, plaintiff having admitted that he did not sexually harass her beyond February 1996. Pl. dep. at I:101, 233. Plaintiff contends that the subsequent retaliation was substantially similar in nature and was a continuation of Knuckle's sexual harassment.

Plaintiff's retaliation claim "is distinct from her sexual harassment claim and cannot be regarded as having been timely by reason of her other allegations of discriminatory treatment." Rush, 113 F.3d at 483. "A district court must scrutinize the claims to establish that they are related." Id. at 485. The sexual harassment claim is entirely based on a series of incidents with Officer Knuckles - which plaintiff testified ended by February 1996.² The unlawful retaliation claim concerns a different type of misconduct - the treatment she received after she

²The only incident within the limitations period that could constitute sexual harassment was Officer Stratton's statement regarding "an erection" when he entered plaintiff's booth. Pl. dep. at I:229-30. Given that there was no pattern or practice of sexual harassment and that plaintiff was aware of the discrimination by February 1996, Stratton's comment is insufficient to support the continuing violation theory.

reported Knuckles. Plaintiff attributed the retaliatory conduct of other officers to the filing of her Knuckles' claim and did not classify it as a form of sex discrimination.³ Pl. dep. at I:108, 180.

The critical inquiry under Berry is the degree of permanence of the discriminatory conduct. See Berry, 715 F.2d at 981. It is beyond dispute that plaintiff was convinced she was being sexually harassed no later than February 1996, when she filed a complaint with an investigating officer.⁴ Pl. dep. at II:202-03; pl. ex. A, B. Inasmuch as plaintiff had concluded that Officer Knuckles' actions constituted sexual harassment, the continuing violation theory cannot be applied to save her stale claim.

Even if it were timely, plaintiff's claim would have to be dismissed as not meeting the Andrews test for hostile work environment: (1) that plaintiff suffered intentional discrimination because of her gender; (2) that the discrimination was pervasive and regular; (3) that the discrimination detrimentally affected plaintiff; (4) that the discrimination would detrimentally affect a reasonable person of the same sex in the same position; and (5) that respondeat superior liability exists. Andrews v. City of Philadelphia, 895 F.2d, 1469, 1482 (3d Cir. 1990).

³Another lobby monitor corroborated this observation. Jenkins dep. at 21-22, 26-28.

⁴In November 1995, plaintiff reported the kissing incident to PHA Officer Moyer but did not file a complaint. Pl. dep. at I:55-57; Jenkins dep. at 17-19.

Plaintiff's evidence does not demonstrate pervasive or severe discrimination. "Harassment is pervasive when 'incidents of harassment occur either in concert or with regularity.'" Andrews, 895 F.2d at 1484 (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987)). To be actionable, harassment must "alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)). Relevant factors include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with an employee's work performance. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." Id. at 21, 114 S.Ct. at 370.

Plaintiff produced no evidence that Knuckles physically threatened her or interfered with her ability to do her job.⁵ The claimed incidents were few in number and all but the last one

⁵Plaintiff testified that she was not threatened or subjected to physical contact, excepting the kiss. Pl. dep. at I:180-81, 259-60. She consistently received positive performance evaluations, id. at II:88, and did not miss work because of stress. Id. at II:178.

occurred within a brief period of time – four months. They cannot be said to have characterized the plaintiff's work environment.

Retaliation Claim

Under section 704(a) of Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). "To establish discriminatory retaliation under Title VII, a plaintiff must demonstrate that: (1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997). Here, according to defendant, the second element of the retaliation claim is not satisfied as a matter of law.

In June, 1998, the Court defined "an adverse employment action":

A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. . . . A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.

Burlington Indus. v. Ellerth, ___ U.S. ___, 118 S.Ct. 2257, 2268-69, ___ L.Ed.2d ___ (1998).

As explained by our Court of Appeals, not every indignity rises to the level of unlawful retaliation under Title VII:

It follows that "not everything that makes an employee unhappy" qualifies as retaliation, for "[o]therwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996) (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)). Courts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation "constitute employment action."

Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

By themselves, many of plaintiff's instances of retaliation – such as insults and indifference from co-workers – fall short of an adverse employment action. See Durhan Life Ins. Co. v. Evans, ___ F.3d ___ (3d Cir. 1999) (minor disruptions in working conditions are not tangible employment actions); Robinson, 120 F.3d at 1301 (unsubstantiated oral reprimands and unnecessary derogatory comments insufficient to establish retaliation claim). Nevertheless, several of the alleged occurrences of retaliation rise to the level of adverse employment action.

In our District, it has been held that placing disciplinary notices in a personnel file amounted to an adverse employment action. See Inzaina v. Federal Reserve Bank of Philadelphia, 76 Fair Empl. Prac. Cas. (BNA) 1538 (E.D. Pa. 1998); see also Lazic v. University of Pa., 513 F. Supp. 761, 767-69 (E.D. Pa. 1981) (deletion of positive references in file for prospective employers constitutes unlawful retaliation). This view is

consistent with the majority of other jurisdictions.⁶ Plaintiff's testimony that officers made false disciplinary reports is sufficient to establish an adverse employment action.

Withholding a promotion is a prototypical example of an adverse employment action. See Burlington, 118 S.Ct. at 2268; Allen v. Michigan Dep't of Corrections, ___ F.3d ___ (6th Cir. 1999) ("For purposes of Title VII, a failure to promote is an adverse employment action."). Standing alone, the failure to promote plaintiff to a supervisor's position is enough to withstand this aspect of the motion.

In addition, viewed most favorably to plaintiff, the evidence that she was transferred to the same location as her harassers may have altered the "terms, conditions, and privileges" of her employment. "Assigning an employee to an undesirable schedule can be more than a 'trivial' or minor change in the

⁶See, e.g., Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997) (negative personnel reports constitute adverse employment action); Johnson v. DiMario, 14 F. Supp. 2d 107, 110 (D.D.C. 1998) (written reprimand placed in employee's personnel file established prima facie case of retaliation); Pazamickas v. New York State Office of Mental Retardation & Development Disabilities, 963 F. Supp. 190, 195 (N.D.N.Y. 1997) (placing reprimand in personnel file may qualify as adverse employment action); Fowler v. Sunrise Carpet Indus., 911 F. Supp. 1560, 1583 (N.D. Ga. 1996) (written reprimand threatening termination later removed is adverse employment action); Hayes v. Shalala, 902 F. Supp. 259, 266 (formal reprimand could affect terms and conditions of employment); Armstrong v. City of Dallas, 829 F. Supp. 875, 880 (N.D. Tex. 1992) (letter of reprimand held to be adverse employment action). But see Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996) (formal warning later removed was not adverse employment action); Coney v. Department of Human Resources, 787 F. Supp. 1434, 1442 (M.D. Ga. 1992) (non-threatening written reprimand removed from personnel file is not adverse employment action).

employee's working conditions." Mondzelewski v. Pathmark Stores, Inc., ___ F.3d ___ (3d Cir. 1998). Although plaintiff knew she could be assigned to any monitor booth at PHA, pl. dep. at II:61-62, her transfers could have been a form of punishment. See id. (transfer to "punishment shift" constitutes adverse employment action).

Edmund V. Ludwig, J.