

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.

January 26, 1999

Presently before the Court are the Motion for Summary Judgment of Defendants Neshaminy School District, Gary Bowman, Harry Jones, and Bruce Wyatt (Docket Nos. 41 & 42), Plaintiff Michele Glickstein's reply (Docket Nos. 44 & 48), and Defendants sur reply thereto (Docket No. 49). Also before the Court are Defendant L. Christopher Melley's Motion for Summary Judgment (Docket No. 40), Plaintiff Michele Glickstein's reply (Docket Nos. 45 & 47), and Defendant's sur reply thereto (Docket No. 50).

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. In 1986, Defendant Neshaminy School District ("School District") hired Plaintiff Michele Herzer Glickstein's as a chemistry teacher. At the time, Defendant L. Christopher Melley was Chairperson of the Science Department. As Chairperson, Melley was "a member of the teaching staff . . . assigned curricular and supervisory responsibilities in a subject field." Pl.'s Ex. 6.

Melley's responsibilities as Chairperson included: (1) making classroom visits and working with each staff member to maintain and improve instruction; (2) recommending to the administration workshops and conferences to assist in the development of in service programs and faculty meetings; and (3) keeping the principal informed on departments needs, goals, and personnel matters. See id.

On October 29, 1989, the Neshaminy Board of School Directors adopted a sexual harassment policy. Under that policy, employees were to immediately refer alleged sexual harassment incidents to the Superintendent or designee. After the adoption of the policy, Defendant Superintendent Harry Bowman designated the District's Director of Human Resources, Defendant Harry Jones, to receive and investigate all reported incidents of alleged sexual harassment. Jones wrote a series of articles in the employee newsletter to publicize the policy. The School District placed this newsletter in all employee's paycheck envelope.

In March 1989, Glickstein alleges that Melley began to make inappropriate sexual advances towards her. Melley frequently entered Glickstein's classroom when she was alone and cornered her. Melley also leered at Glickstein and commented to her on her appearance. Prior to February 1991, Glickstein testified that Melley: (1) commented how a blouse hung on her; (2) invaded her personal space; (3) bumped into her several times in a stockroom

resulting in hip to hip contact; (4) leaned over her back to put paper into department racks; and (5) got close to her and said "I bet you do everything with a passion." 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 "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. Blair told Glickstein to report Melley to Bernard Hoffman, the Deputy Superintendent. Hoffman suggested that Glickstein try and communicate better with Melley and perhaps bring Melley some carrots or other vegetables for Melley's lunch. Hoffman took no other action other than recommending that she speak with Jones, Director of Human Resources. Several months later, Glickstein reported Melley's conduct to Jones.

In March 1991, Glickstein told Jones that: (1) Melley wrote "PMS" on her letter; (2) Melley was "very unprofessional and unpredictable"; (3) Melley was "all over her"; (4) Melley was derogatory to women; and (5) she was afraid of Melley. Jones responded that "Mr. Melley would never do those things to you because he's my friend." Nevertheless, Jones spoke with Melley who admitted that he made the "PMS" comment. In October 1991, Jones gave Melley a verbal reprimand, but did not advise Glickstein of this action. Glickstein then reported Melley's conduct to

Defendant Bruce Wyatt and Defendant Ronald Daggett, who were Assistant Principals of the high school, and Superintendent Bowman. These supervisors failed to reprimand Melley or otherwise resolve the situation.

Glickstein states that Melley retaliated against her because she reported him to their supervisors. In May of 1991, Glickstein testified that Melley cornered her, grabbed her, and forcibly kissed her on the mouth. Over the next couple of months after this incident, Glickstein stated that Melley: (1) referred to her as a sissy; (2) told her to stop bitching; and (3) entered her classroom to discuss a matter involving a fellow teacher and refused to leave after being asked to leave three times. Glickstein also stated that Melley assigned her lower level courses and lower level administrative tasks, including cafeteria duty and study hall. Many of her co-teachers told her to "watch herself." Other teachers would not be seen with her for fear of getting a "schedule like hers." In June, 1992, Melley allegedly spit on Glickstein.

On October 15, 1992, Marlene Steinberg saw Glickstein crying. Steinberg, who was the teachers' union representative, requested that Jones have another meeting with Glickstein. On October 15, 1992, Jones again met with Glickstein. Glickstein raised many issues with Jones including many of the above incidents. Glickstein also told Jones that Melley was slamming her classroom door while she was teaching. The next day, October 16, 1992, Jones

met with Melley to discuss Glickstein's complaints against him. At the meeting, Melley acknowledged calling Glickstein a sissy but

denied the other allegations. Jones then interviewed several other science teachers to verify Glickstein's complaints.

On October 27, 1992, Jones discussed his investigation with several members of the administration. Jones stated that he was going to give Melley a written reprimand. On November 4, 1992, Jones met with Wyatt, Melley, and a union representative, George Schaubhut. Jones advised the group of his interviews and issued a written reprimand on Melley for his PMS comment, sissy comment, and slamming of Glickstein's door. On November 9, 1992, Jones provided a written memorandum setting forth the results of the investigation. Glickstein told Jones and Schaubhut that her claims were not completely represented by the memorandum. Schaubhut replied that he was representing Melley and not her at the meeting.

In late 1992, Glickstein wanted to create a student science club at the high school. Wyatt told Glickstein that she could proceed, but that it would not be funded because the high school funded a maximum number of clubs. In 1994, the high school finally had an opening and funded the club.

On March 5, 1993, Glickstein wrote Wyatt and advised him that she had personal items stolen for the past few months. She also advised Wyatt that the heat was turned down in her classroom. Glickstein suspected Melley of these actions. In August 1993, Glickstein interviewed for the newly created Lead Teacher position. The interview panel unanimously refused to promote Glickstein to

the position of Lead Teacher, and promoted an allegedly less qualified male, Robert Kolenda, for that position.

On August 31, 1993, Glickstein filed an administrative charge of discrimination against the School District with the Pennsylvania Human Relations Commission ("PHRC") and Equal Employment Opportunity Commission ("EEOC"). Glickstein alleged age and sex discrimination. When a female teacher, Maria DiDonato, provided evidence in support of her claims, Glickstein states DiDonato was subjected to retaliation.

As a result of filing her discrimination charge, Glickstein's relationship with the School District worsened. On one occasion, the local rotary club invited Glickstein to speak at their meeting. Wyatt, who was at the meeting, said of Glickstein "I see you brought a belly dancer to us today." On another occasion, Wyatt grabbed Glickstein's buttocks and put his face in her neck. The next day he apologized for the incident. Finally, on yet another occasion, Wyatt learned that the School District received a \$1,000 check from Miami University without indicating to whom it was directed. Apparently, Glickstein applied for a grant from the university and had done so the previous year without incident. After calling to confirm the grant, Wyatt released the money to her.

On June 30, 1993, Melley retired from the School District. Prior to his retirement and as one of his last duties, however,

Melley passed over Glickstein in assigning the class Honors Chemistry II. Melley assigned an allegedly less qualified male teacher, Michael Hoy, to teach the class.

On November 29, 1993, Glickstein filed a grievance with her union, the Neshaminy Federation of Teachers ("Federation"), challenging the School District's failure to promote her to Lead Teacher. Assistant Superintendent James Scanlon, Superintendent Bowman, and Assistant Principal Hoffman reviewed the grievance and concluded there was no violation of that contract. When asked to bring her charges to arbitration, the Federation refused.

On January 26, 1996, the new Science Chairperson, Mary Jane Crumlish, advised Glickstein that a student was performing a science project in the stock room adjacent to her classroom. Glickstein questioned the placement of the project given the impact on her space to prepare and raised concerns over its safety. Crumlish concluded the experiment was safe. Despite this conclusion, Glickstein still wanted the experiment to be located in Hoy's storage room.

Also in late February 1996, the School District denied Glickstein's grant proposal. She met with Assistant Superintendent Scanlon to ascertain why it was not funded. Scanlon indicated that the School District denied her grant because the proposal was nearly identical to her proposal the previous year. Glickstein contends that the topic was different. Glickstein also contends

that her proposal was not considered anonymously as required.

At the end of the school year in 1996, Glickstein requested a one semester sabbatical during the 1996-1997 school year. Superintendent Bowman recommended that the School Board of Directors approve Glickstein's request for a sabbatical. On June 14, 1996, the School Board of Directors approved her sabbatical.

Glickstein started the 1996-1997 school year, but went on paid sick leave starting on November 12, 1996. On January 17, 1997, Jones wrote Glickstein that her last day would be January 28, 1997, at which time she would begin her requested sabbatical. On January 29, 1997, Jones received a letter from Glickstein stating she rescinded her sabbatical request. Jones responded by letter and stated that she could not rescind her sabbatical because the second semester was already underway and the School District hired a long-term substitute to fill in for her that semester. On February 11, 1997, Glickstein tendered a letter of resignation.

On June 18, 1996, the EEOC issued Glickstein a Right to Sue letter. Glickstein brought the present action on September 12, 1996. Glickstein charged 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") (Count VI).

On March 26, 1997, Defendants filed a Motion to Dismiss and/or for Summary Judgment. On October 15, 1997, this Court granted in part and denied in part Defendants' motion. The Court dismissed the Neshaminy Board of School Directors as defendants in this matter. See Glickstein v. Neshaminy Sch. Dist., No. CIV.A.96-6236, 1997 WL 660636, at *5 (Oct. 22, 1997). The Court also dismissed the claim for intentional infliction of emotional distress (Count V) and the claim under Title IX (Count VI). See id. at *14, 16. On July 13, 1998, by stipulation, Plaintiff dismissed Defendants Bernard Hoffman, Ronald Daggett, James Scanlon, and Mary Jane Crumlish as parties in this matter.

On July 14, 1998, Defendant Melley filed a Motion for Summary Judgment. Also, on July 14, 1998, Defendants Neshaminy School District, Gary Bowman, Harry Jones, and Bruce Wyatt filed a Motion for Summary Judgment. The Court addresses both motions.

II. STANDARD OF REVIEW

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 party moving for summary judgment has the initial burden of showing

the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Failure to Include Certain Defendants in PHRC Charge

Defendants move for summary judgment because several of the Defendants were not named in Plaintiff's administrative charge. 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 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 or her administrative charge all persons alleged to have committed acts of discrimination, so they may be included in informal proceedings. See 42 U.S.C. § 2000e-5(f)(1) (1994); 43 Pa. Cons. Stat. Ann. § 959 (Purdon Supp. 1996). 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.

Federal courts have uniformly held that the PHRA should be interpreted consistently with Title VII. See Clark v. Commonwealth 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. 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. See Kinally v. Bell of Pa., 748 F. Supp. 1136, 1140 (E.D. Pa. 1990) (permitting suit against parties named in administrative charge); see also 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 addition, the Third Circuit "enumerated four factors that should be considered in determining whether the district court had jurisdiction under Title VII." Glus v. G.C. Murphy Co., 629 F.2d 248, 251 (3d Cir. 1980), vacated on other grounds, 451 U.S. 935 (1981). The four factors are: (1) whether the role of the unnamed party could, through reasonable effort by the complainant, be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named party are so similar to the unnamed party that for purposes of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; and (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

See id.

In the present case, Glickstein named only the Neshaminy School District as a respondent in her August 31, 1993 PHRC complaint. However, in the body of the complaint, she cited conduct by Defendants Melley and Jones. Therefore, the Court denies summary judgment on Glickstein's claims against these Defendants. See Kinally, 748 F. Supp. at 1140.

The PHRC charge did not mention Defendants Wyatt or Bowman. These parties were among Glickstein's supervisors during the relevant period. Wyatt was Assistant Principal between 1987-1990, and has served as Principal since 1990. Bowman has been Superintendent of the School District since 1992. Glickstein alleges that these Defendants had actual notice that their conduct was under PHRC review by service of the PHRC complaint. 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. 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.¹ Accordingly, the Court finds that summary judgment is not proper on this ground.

¹ 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.

B. Plaintiff's Title VII Claims Are Not Time Barred

The Defendants next argue that the Court should grant summary judgment because Plaintiff's claims are time-barred. Defendants contend that 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. Glickstein filed her charge with the PHRC on August 31, 1993. 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. See Pl.'s Compl. at ¶¶ 39, 40. She alleges discriminatory conduct that occurred as recently as August 20, 1993. See 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. at 755 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. See 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' failure to respond to the situation properly or retaliation for Glickstein's complaining about it. See Lesko v. Clark Publisher Servs., 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. Therefore, the Court finds that summary judgment is not proper in this respect.

C. Pervasive and Regular

In order to recover on a claim for hostile work environment sexual harassment under Title VII, a plaintiff must show that: "(1) the [plaintiff] suffered intentional discrimination because of [her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." Andrews v. City of Phila., 895 F.2d 1469, 1482 (3d Cir. 1990) (footnote and citations omitted); see also West v. Philadelphia Elec. Co., 45 F.3d 744, 752-54 (3d Cir. 1995). Defendants contend that the conduct in question was not "pervasive and regular." In determining if conduct is pervasive and regular, the totality of circumstances must be considered, including the frequency of the conduct, its severity, whether its physically threatening or humiliating or merely an offensive utterance, and whether it reasonably interferes with an employee's work performance. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Moreover, a plaintiff must establish that the environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the

victim in fact did perceive to be so." Id. at 21-22.

The Plaintiff's evidence is sufficient to raise a genuine issue of material fact regarding whether Defendant Melley's alleged conduct was pervasive and regular. Plaintiff testified that she was subjected to a nearly daily routine of harassment from Melley. These incidents ranged from sexually inappropriate behavior-- such as forcibly kissing the Plaintiff-- to physically threatening behavior to the point that Plaintiff feared Melley. In addition, the Plaintiff demonstrated that the challenged conduct substantially interfered with her ability to work. Melley would interrupt her while she taught classes, refuse to leave when asked, and then finally leave by slamming her classroom door. In addition, numerous teachers witnessed the Plaintiff crying during school hours allegedly due to the Melley's harassment. These instances of harassment were "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank, 477 U.S. at 67 (internal quotation omitted). Accordingly, the Defendants' Motion is denied in this respect.

D. Vicarious Liability in the Aftermath of Faragher and Ellerth

With regard to the prima facie case of sexual harassment, Defendants also argue that the Plaintiff cannot establish the fifth element: the existence of respondeat superior liability. Recently, the Supreme Court issued two opinions which addressed when an

employer may be liable for an employee's sexual harassment. See Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). Defendants contend that this Court should grant summary judgment under the Supreme Court's newly adopted framework for analyzing the existence of respondeat superior liability.

1. The State of the Law Prior to Faragher/ Ellerth

Before the Supreme Court's decisions in Faragher and Ellerth, the Third Circuit held that employers are not always automatically liable for sexual harassment by their employees. See Bouton v. BMW, 29 F.3d 103, 106 (3d Cir. 1994). The Third Circuit, however, recognized three potential bases in the Restatement (Second) of Agency for holding employers liable for sexual harassment committed by their employees. See id. First, under § 219(1), employers are liable for the torts committed by employees within the scope of their employment. See id. at 107. Scope-of-employment liability is often invoked in quid pro quo cases because a supervisor has used his or her actual authority over the employee to gain sexual favors. See id. This type of liability, however, is inapposite in hostile environment cases. See id. "[I]n a hostile environment case, the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere." Id.

Prior to Faragher and Ellerth, the Third Circuit recognized two other theories through which a plaintiff could hold an employer

liable for an employee's sexual harassment. Under Restatement § 219(2)(b), employers are liable for their own negligence or recklessness. See id. In this context, an employer is liable for "negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment." Id. Finally, under § 219(2)(d), employers are liable if the harassing employee "relied upon apparent authority or was aided by the agency relationship." Id.

2. The Faragher/Ellerth Holding

In Faragher and Ellerth, the Supreme Court, while adhering to the Restatement's basic principles of agency law, announced new standards to be applied in determining whether an employer may be held liable for an employee's sexually harassing conduct in violation of Title VII. See Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270. The Supreme Court held that where a supervisor's sexual harassment of an employee results in a "tangible employment action," the employer is liable for the harassment, regardless of whether the employer knew or should have known of the harassment and regardless of whether the employer took remedial steps to end the harassment after learning of it. See Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270. Conversely, the Supreme Court held that where a supervisor's sexual harassment of an employee does not result in a "tangible employment action," the employer may still be vicariously liable for the

hostile environment created by its supervisor, unless the employer can prove by a preponderance of the evidence: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm." Id.

3. The Third Circuit's Interpretation of Faragher/Ellerth

In Durham Life Ins. Co. v. Evans, No. CIV.A.97-1683, 1999 WL 16779 (3d Cir. Jan. 15, 1999), the Third Circuit addressed how the Faragher and Ellerth decisions altered the framework provided by the Third Circuit for analyzing the existence of respondeat superior liability in sexual harassment cases. In Durham, the Third Circuit clarified that an employer may not use the Faragher/Ellerth affirmative defense if the employee suffered a tangible adverse action. See id. at *9. More importantly, the Third Circuit found that the Supreme Court drew a distinction between sexual harassment cases. See id. at *7. First, an employer is automatically liable for a supervisor's sexual harassment if it falls within the scope of the employment. See id. Second, if the sexual harassment does not fall within the scope of employment (and it rarely does), the Third Circuit found that the an employer is liable for a supervisor's sexual harassment if it meets the "aided by the agency relationship test." Id. at *8.

4. The New Framework

Based upon the Supreme Court's decision in Faragher and Ellerth and the Third Circuit's decision in Durham, the courts must first ask whether a supervisor or employee committed the sexual harassment. The Supreme Court found that an employer's liability for hostile environment apparently depends upon whether the harasser is the victim's supervisor or merely a co-employee. See Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270; see also Parkins v. Civil Constructors of Ill., Inc., No. CIV.A.98-1687, 1998 WL 909885, at *3 (7th Cir. Dec. 30, 1998). The Supreme Court found that harassment by a co-employee differs from harassment by supervisors. See Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270. An employer entrusts more authority with a supervisor and, thus, a supervisor's harassment is made possible with the aid of his supervisory or apparent authority. See Faragher, 118 S. Ct. at 2292. In this context, the Supreme Court held an employer liable where a supervisor "relied upon apparent authority or was aided by the agency relationship" under § 219(2)(d) of the Restatement (Second) of Agency. See Ellerth, 118 S. Ct. at 2267.

Alternatively, an employer does not entrust a co-employee with authority enabling them to harass another employee. See Parkins, 1998 WL 909885, at *3. In this context, the Supreme Court appeared to reaffirm a standard of negligence in determining whether an

employer is vicariously liable for their employee's action. See Ellerth, 118 S. Ct. at 2267. The Supreme Court justified this type of employer liability based on "negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment" pursuant to § 219(2)(b) of the Restatement (Second) of Agency. See id.

This distinction is important because the standards of liability for employers are different depending on whether a supervisor or co-employee sexually harasses the victim. If a supervisor sexual harasses an employee, then the courts must next ask whether the harassment was within the scope of the employment. See Durham, 1999 WL 16779, at *12. If it is within the scope of the employment, then the employer is liable.² See id. If it is not, then the standard to be applied for determining respondeat superior liability is the "aided by the agency relationship test." See id. Furthermore, if the harassment culminates in a "tangible employment action," the "aided by the agency relationship test" is met and the employer is liable for the harassment regardless of whether the employer knew or should have known of the harassment and regardless of whether the employer took remedial steps to end the harassment after learning of it. See Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270. Conversely, where a

² In Durham, Judge Becker stated that there might be cases where the sexual harassment by the supervisor is both within the scope of the employment and aided by the agency relationship. See Durham, 1999 WL , at *. The Court does not address this issue because the Plaintiff does not make this argument.

supervisor's sexual harassment of an employee does not result in a "tangible employment action," the employer may still be vicariously liable if the supervisor was aided by the agency relationship in creating the hostile environment unless the employer can prove by a preponderance of the evidence: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm." Id.

On the other hand, if a co-employee sexually harasses another employee, the decisions in Faragher and Ellerth appear to reaffirm a negligence standard. See id. The Supreme Court stated:

Under subsection (b) [of the Restatement], an employer is liable when the tort is attributable to the employer's own negligence. § 219(2)(b) An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII, but [the plaintiff in this case] seeks to invoke the more stringent standard of vicarious liability.

Id. at 2267. As this quote indicates, the Supreme Court did not specifically state the appropriate negligence standard to be applied by the courts in this context. Thus, where the harasser is a co-employee, this Court finds that the appropriate standard remains as previously defined prior to Faragher and Ellerth by the Third Circuit in Bouton: whether the employer took "prompt and effective remedial action." Bouton, 29 F.3d at 107.

In sum, if a co-employee sexually harassed an employee, then the standard is whether the employer took "prompt and effective remedial action." Id. If a supervisor sexually harasses an employee, then an employer is liable if it falls within the scope of the employment. See Durham Life Ins. Co. v. Evans, No. CIV.A.97-1683, 1999 WL 16779, at *7 (3d Cir. Jan. 15, 1999). If the supervisor's sexual harassment falls outside the scope of the employment, as it generally does, the standard is the "aided by the agency relationship test." Id. at *8. If the supervisor's sexual harassment resulted in a tangible employment decision, then the "aided by the agency relationship test" is met and the employer is liable regardless of whether it knew or should have known of the harassment and regardless of whether the employer took remedial steps to end the harassment after learning of it. See id. If the supervisor's sexual harassment did not result in a tangible employment decision, then the employer is liable if the "aided by agency relationship test" is met unless the employer can prove by a preponderance of the evidence: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm." Id.

5. Analysis of Framework to Defendants' Motion

a. Supervisor Status

In this case, Defendants contend that summary judgment is warranted in part because Melley cannot be considered a "supervisor" as a matter of law. Neither Title VII nor the Supreme Court define the term "supervisor." In announcing the new standard for determining the existence of respondeat superior liability, the Supreme Court merely referred to an individual who is a "supervisor with immediate (or successively higher) authority." Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270. Nevertheless, the case law subsequent to the Faragher and Ellerth decisions are helpful in defining "supervisor." While the Third Circuit in Durham did not expressly define supervisor, this Court finds the following definition used by the Seventh Circuit in Parkins persuasive:

Hence, it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

Parkins, 1998 WL 909885, at *3.

Under this definition, the Court finds that summary judgment is not appropriate in this case because whether Melley was Glickstein's supervisor is a genuine issue of material fact

remaining for trial. Except where the facts are undisputed, the jury determines questions of agency. See Woolfolk v. Duncan, 872 F. Supp. 1381, 1392 (E.D. Pa. 1995) (“[W]here the scope of authority of an employee is a disputed question of fact, the extent of his authority is ordinarily a question of fact for the jury.”). In this case, the Plaintiff presented evidence that Melley’s responsibilities as Chairperson included keeping the principal informed on departments needs, goals, and personnel matters. See Pl.’s Ex. 6. Moreover, the School District defined Melley’s Chairperson position as “a member of the teaching staff . . . assigned curricular and supervisory responsibilities in a subject field.” Id. (emphasis added); see also Durham, 1999 WL 16779, at *12 (finding that the harassing employee was a supervisor within the meaning of Faragher and Ellerth because the employer’s own materials indicated he was two levels above victim). In this regard, Glickstein testified that her duties substantially changed after Melley allegedly began sexually harassing her and after she reported Melley’s conduct. She testified that Melley made her teach less desirable classes, monitor study hall, and take cafeteria duty. Other teachers feared being seen with Glickstein because it might result in a schedule “like hers.” Further, a reasonable jury could conclude that Melley recommended hirings, firings, and promotions to the school’s administration or that Melley made these decisions in conjunction with the school

administration. See id. (finding that, even though harassing employee did not have complete authority to act on employer's behalf without agreement of others, he was a supervisor because witnesses testified that the harassing employee was part of ruling "triumvirate"). At the very least, this evidence could suggest that Melley had the authority to discipline and demote teachers by changing the amount, nature, and character of their work. See id. Therefore, the Court denies Defendants' motion for summary judgment.

b. Standards for Employer Liability

Defendants also argue that this Court should grant summary judgment under the standards for respondeat superior liability. Even though the Court finds that an issue remains for trial concerning whether Melley was a supervisor within the meaning of the newly adopted standards, the Plaintiff may still present evidence under the co-employee standard in the event that the jury finds Melley was not Glickstein's supervisor. It is undisputed that Melley was Glickstein's co-employee. Therefore, the Court must analyze Defendants' arguments under the supervisor standard recently announced by the Supreme Court and the co-employee standard previously established by the Third Circuit.

(1) Employer Liability for Supervisor Sexual Harassment

(a) "Aided by the Agency Relationship Test"

In this case, Plaintiff does not argue that Melley sexually

harassed her in the scope of his employment. Therefore, the Court must next decide whether Plaintiff presented sufficient evidence to suggest that Melley, as the harassing supervisor, was aided by the agency relationship. If the employee suffered a "tangible employment action," then this test is met. See Durham, 1999 WL 16779, at *9 ("A supervisor can only take a tangible adverse employment action because of the authority delegated by the employer . . . and thus the employer is properly charged with the consequences of that delegation."). The Supreme Court defined "tangible employment action" as "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." Ellerth, 118 S. Ct. at 2268-69. Although a "tangible employment action" need not always involve economic harm, the Supreme Court stated that "[a] tangible employment action in most cases inflicts direct economic harm." Id.

In this case, Glickstein offers sufficient evidence that she suffered a "tangible employment action" to give rise to the automatic imputation of liability against Defendants for Melley's actions. Glickstein testified that Melley assigned her extra work, assigned her less desirable work, and subjected her to other harm as a result of her rejection of Melley's sexual advances. See Durham, 1999 WL 16779, at *10 (finding a tangible adverse

employment action within the meaning of Faragher and Ellerth because the harassing employee prevented victim from having a secretary and an office, and stole certain of her files). This evidence may be considered a tangible employment action akin to a demotion or a reassignment entailing significantly different job responsibilities. See id. ("If an employer's act substantially decreases an employee's earning potential and causes significant disruption in his or her working conditions, a tangible adverse employment action may be found.").

Furthermore, notwithstanding a tangible employment action, Glickstein presented evidence to raise a genuine issue of material fact concerning whether Melley was "aided by the agency relationship" in harassing Glickstein. A reasonable jury could conclude that Melley used his supervisory to prevent her from receiving the promotion she sought to Lead Teacher. Therefore, the Court finds that Glickstein presented sufficient evidence to stave off summary judgment and, consequently, whether Melley was aided by the agency relationship is a genuine issue of material fact for trial.

(b) Supervisor Affirmative Defense

At trial, if the jury concludes that Melley was Glickstein's supervisor and that Glickstein did not suffer a tangible employment action, the employer may still be vicariously liable for the hostile environment created by its supervisor if the "aided by the

agency relationship test" is met. See Ellerth, 118 S. Ct. at 2270. As noted above, Glickstein offered sufficient evidence at this stage to meet that test. In that situation, however, the employer has an affirmative defense by proving by a preponderance of the evidence that: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm." Id. With respect to the first prong of this affirmative defense, the Court stated in Ellerth that proof that the employer promulgated an anti-harassment policy with a complaint procedure was not necessary in every instance as a matter of law. See id.

In this case, the question becomes then whether Defendants can avoid liability for Melley's conduct by proving by a preponderance of the evidence that: (1) they exercised reasonable care to prevent and correct promptly Melley's sexually harassing behavior and (2) that Glickstein unreasonably failed to avail herself of any preventive or corrective opportunities. See Faragher, 118 S. Ct. at 2292-93; Ellerth, 118 S. Ct. at 2270. Again, the Court finds that this issue is not properly decided at the summary judgment stage for two reasons.

First, the Court already concluded that whether Plaintiff suffered a tangible employment action is a genuine issue of

material fact. See Durham, 1999 WL 16779, at *9. Second, whether such policy was an effective complaint procedure remains an unanswered question for trial. It is undisputed that the School District had a policy against sexual harassment in place at the time of the alleged harassment. Nevertheless, Glickstein presented sufficient evidence to suggest that the School District did not exercise reasonable care in attempting to avoid or remedy Melley's actions. For instance, Glickstein testified that the "point man" designated to receive all complaints of sexual harassment, Harry Jones, was a good friend of the harasser, Melley. Glickstein stated that Jones would defend Melley's actions. Furthermore, Glickstein's attempts to go around Jones as the point man, were constantly thwarted by school administrators who simply told Glickstein to see Jones or to confront Melley herself. Indeed, one school administrator told Glickstein to attempt to resolve the alleged harassment by bringing Melley vegetables for lunch. Thus, the Court finds that a reasonable jury could conclude that the School District failed to exercise reasonable care to promptly prevent and correct Melley's sexually harassing behavior despite the existence of the sexual harassment policy.

(2) Employer Liability for Co-Employee Sexual Harassment

If the jury finds that Melley was not Glickstein's supervisor, Glickstein may still proceed under the Third Circuit's theory of employer liability for co-employee sexual harassment apparently

left in place despite the Supreme Court's decisions in Faragher and Ellerth. The Third Circuit has held that an employer is liable for a co-employee's behavior under a negligence theory of agency "if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile work environment and failed to take prompt and adequate remedial action." Andrews, 895 F.2d at 1486; see also Bouton, 29 F.3d at 107 ("[U]nder negligence principles, prompt and effective action by the employer will relieve it of liability."). Thus, the Defendants argue that this Court should grant summary judgment under this theory because it took prompt and adequate remedial action after receiving notice of Melley's alleged actions. In response, Plaintiff focuses on the requirement that a remedial action must be adequate and she contends that there is a genuine issue of material fact regarding the adequacy of the School District's actions.

An employer cannot be held liable for the hostile work environment created by a co-employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is lacking. See id. "In other words, the law does not require that investigations into sexual harassment complaints be perfect." Knabe v. Boury Corp., 114 F.3d 407, 412 (3d Cir. 1997). Rather, this Court must determine whether the remedial action was adequate. See id. Further, the Court must consider whether the action was "reasonably calculated to prevent further

harassment." Id.

After viewing the facts, a jury may find that the action taken in this case was not reasonably calculated to stop Melley's harassment. In March 1991, Glickstein reported Melley's conduct to Jones, the Director of Human Resources and designated point man under the School District's sexual harassment policy. Glickstein told Jones that Melley wrote "PMS" on her letter and that Melley was "all over her." Jones responded that "Mr. Melley would never do those things to you because he's my friend." Nevertheless, Jones spoke with Melley who admitted that he made the "PMS" comment. In October 1991, despite the seriousness of these charges, Jones only gave Melley a verbal reprimand and did not investigate further. See id. at 414 (noting that an "investigation might be carried out in a way that prevents the discovery of serious and significant harassment by an employee such that the remedy chosen by the employer could not be held to be reasonably calculated to prevent the harassment.").

After Melley allegedly retaliated against Glickstein for reporting him with another series of sexually harassing incidents, including forcibly kissing Glickstein on the mouth, she again reported Melley's conduct to Jones on October 15, 1992. Jones met with Melley to discuss Glickstein's complaints against him. Jones then interviewed several other science teachers to verify Glickstein's complaints. After discussing his investigation with

several members of the administration, Jones gave Melley only a written reprimand and provided a written memorandum setting forth the results of the investigation. Glickstein told Jones that her claims were not completely represented by the memorandum.

This Court finds that the Plaintiff presented sufficient evidence to survive this stage of the proceeding. After the verbal reprimand, the sexual harassment allegedly became more severe and more frequent. Given the ineffectiveness of the verbal reprimand, a reasonable jury could conclude that the written reprimand was not reasonably calculated to prevent future instances of harassment by Melley. Moreover, as a friend of the harasser, Jones may not have been carrying out his reprimands with the conviction and seriousness that the situation warranted. Plaintiff recognized this fact and attempted to circumvent Jones in order to end the harassment. These efforts resulted in no remedial action by the school administration and the harassment continued. Therefore, the Court denies Defendants' motion in this respect.

E. Constructive Discharge

Next, Defendants contend that this Court should grant summary judgment because the Plaintiff resigned and was not constructively discharged. In order to establish a constructive discharge, a plaintiff must show that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). The Court must ask if a jury could ultimately decide that a reasonable person would be forced to quit. Id.

The Court concludes that Plaintiff provided sufficient evidence to support her claim of constructive discharge. Courts have found constructive discharge based upon a continuous pattern of discriminatory treatment over a period of years. See, e.g., Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981). The fact that Glickstein had been subject to sexual harassment during her employment could support a conclusion that she "simply had had enough." See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1996). "No other precipitating facts were legally required." See id.

Defendant Melley contends that Plaintiff was not constructively discharged as a matter of law. As support, he argues that her reasons for resigning were vague. This Court disagrees. Glickstein testified at her deposition that she "felt like they were trying to push me out [after] six years of retaliation and not answering my memos." Glickstein also said that she "couldn't take it anymore, the stress, the administration, the retaliation" and that the "last straw, the last thing that happened was that [they] would not rescind my sabbatical so I felt like [they were] setting me up for failure." These statements are hardly vague, and indeed, establish an employee who "simply had had enough." Therefore, the Court denies Defendants' motion in this regard.

F. Retaliatory Discharge

Defendants next contend that Plaintiff failed to demonstrate her claim of retaliatory discharge. Protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct. See 42 U.S.C. § 2000e-3(a) (1994); Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir. 1993). "[A] plaintiff need not prove the merits of the underlying discrimination complaint, but only that '[s]he was acting under a good faith, reasonable belief that a violation existed.'" Id. (quoting Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)). To establish a prima facie case for retaliatory discharge, therefore, a plaintiff must show that: (1) she engaged in a protected activity; (2) she was discharged subsequent to or contemporaneously with such activity; and (3) a casual link exists between the protected activity and the discharge. See Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989). In this case, Defendants concede that Glickstein engaged in protected activity, the first element of the prima facie case. Defendants argue that Plaintiff cannot establish the second and third element of retaliation: adverse employment action and a causal connection.

1. Adverse Employment Action

Minor and trivial employment actions are not actionable as retaliation. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Rather, an adverse employment action alters

the employee's compensation, terms, conditions, privileges of employment, or adversely affects her status as an employee. See id. Defendants assert that the alleged retaliation in this case was "trivial" and did not affect Glickstein's conditions or terms. See Bell v. Eufaula City Bd. of Educ., 995 F. Supp. 1377, 1385 (M.D. Ala. 1998) (finding that transfer to new class assignments cannot be considered an adverse employment action because it was an "inherent aspect of the teaching profession").

This Court disagrees. The Plaintiff in this case testified at her deposition that she was retaliated against in numerous other ways than simply being assigned different, less desirable classes to teach. Plaintiff also alleges that the School District made it very difficult for her to perform other inherent aspects of teaching. Plaintiff stated that the School District retaliated by: (1) refusing to give the student organization that she started official recognition; (2) rejecting her grant proposal solely because it was hers; (3) denying her a promotion as Lead Teacher; and (4) refusing to turn over her grant money from outside sources. The fact-finder would be entitled to consider all of this evidence and may reasonably conclude that the Defendants retaliated against her for engaging in protected activity using these adverse employment actions.

2. Causal Connection

Defendants also assert that there was no causal connection

between Glickstein's engaging in protected activity and the School District refusing to promote her to Lead Teacher. In support, Defendants rely on the deposition testimony of the panel which interviewed all candidates for the position. Defendants contend that these depositions demonstrate that Plaintiff's complaints were not taken into account and may have not been even known by the interview panel.

Again, this Court must disagree. First, her failure to receive the position of Lead Teacher is only one type of retaliation alleged. Thus, summary judgment would not be appropriate on this ground. Second, a reasonable jury could conclude that Plaintiff's constant complaints to the school's administration eventually made their way to the interview panel. Plaintiff testified that she was passed over for Lead Teacher because of her complaints of sexual harassment. While the interview panel testified that this was not a factor in their decision, this conflicting testimony is for a jury to weigh, not this Court. See Big Apple BMW, 974 F.2d at 1363 (noting that a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent). Therefore, the Court denies the Defendants' motion in this respect.

G. Compensatory and Punitive Damages

Finally, Defendants argue that the Plaintiff is not entitled

to compensatory and punitive damages for two reasons. First, Defendants contend that the provisions of Title VII which permit awards of compensatory and punitive damages for acts of intentional discrimination are not retroactive and do not apply to Melley's conduct prior to their enactment on November, 21, 1991. Second, Defendants state that the Pennsylvania Supreme Court recently held that punitive damages are not available under the PHRA.

1. Damages Under Title VII for Acts Prior to 1991

In Landgraf v. USA Film Prods., 114 S. Ct. 1483, 1505-08 (1994), the Supreme Court found that the provisions of 42 U.S.C. § 1981a which permit awards of compensatory and punitive damages for acts of intentional discrimination were not retroactive. See id. An allegation that the harassment amounted to a continuing course of conduct beginning before the statute was enacted and continuing thereafter does not suffice to overcome the nonretroactivity rule. See Ascolese v. SEPTA, 902 F. Supp. 533, 541 (E.D. Pa. 1995) (finding that recovery was barred for acts occurring before the enactment of the Civil Rights Act of 1991, even if the pre-enactment acts were part of the same course of conduct as some post-enactment acts). Thus, Glickstein cannot base a claim for compensatory or punitive damages on events occurring before the date of enactment of the Civil Rights Act of 1991, which was November 21, 1991. Accordingly, the Court grants Defendants' motion for summary judgment to the extent that Plaintiff seeks

compensatory and punitive damages under Title VII based on conduct prior to November 21, 1991.

2. Punitive Damages Under PHRA

In Hoy v. Angelone, 720 A.2d 745, 751 (Pa. 1998), the Supreme Court of Pennsylvania held that punitive damages were not available under the PHRA. See id. Plaintiff concedes this point. Therefore, the Court grants Defendants' motion to the extent that Plaintiff seeks punitive damages under the PHRA.

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 26th day of January, 1999, upon consideration of the Defendants' Motions for Summary Judgment, IT IS HEREBY ORDERED that the Defendants' Motions for Summary Judgment are **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED THAT:

(1) Counts I and II of Plaintiff's complaint are **DISMISSED** in so far as these counts seek compensatory and punitive damages under Title VII based on conduct prior to November 21, 1991;

(2) Counts III and IV of Plaintiff's complaint are **DISMISSED** in so far as these counts seek punitive damages under the PHRA; and

(3) Defendants' Motions for Summary Judgment are **DENIED** in all other respects.

BY THE COURT:

HERBERT J. HUTTON, J.