

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

SANDRA J. KINGCAID, et al.,)
)
 Plaintiffs,)
)
 vs.) CIVIL ACTION No. 99-4065
)
 JANNEY MONTGOMERY SCOTT, INC.,)
)
 Defendant.)

MEMORANDUM

Padova, J. November , 1999

This matter arises on Defendant's Partial Motion to Dismiss, filed August 19, 1999. Plaintiff filed a Response on September 20, 1999. Defendant filed a Reply on October 4, 1999. For the reasons that follow, the Court will grant Defendant's Motion, but allow Plaintiff Sandra Kingcaid twenty days to file an Amended Complaint.

I. BACKGROUND

Plaintiff Sandra Kingcaid was employed by Defendant from March 1992 to October 1996 as a secretary. On June 24, 1999, Ms. Kingcaid and her husband Dennis Kingcaid filed the instant action in the Court of Common Pleas of Northampton County, Pennsylvania. Plaintiffs bring two "causes of action," against Defendant. Each cause of action includes two separate counts. In the First Cause of Action, Plaintiff Sandra Kingcaid brings a sexual harassment and retaliation claim pursuant to 42 U.S.C. §2000e et seq; the Pennsylvania Human Relations Act, 43 Pa. Const. Stat. §951 et seq; and 42 U.S.C. §1981. In Count II of the First Cause of Action, Plaintiff Dennis Kingcaid brings a loss of consortium claim. In the Second Cause of Action, both Plaintiffs bring wrongful termination claims. Plaintiff Sandra Kingcaid brings Count I of the Second Cause of Action; her husband Dennis brings Count II of the Second Cause of Action.

Defendant timely removed the matter to this Court on August 12, 1999. A week later, Defendant filed a Partial Motion to Dismiss.

II. STANDARD

The purpose of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A claim may be dismissed under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). In considering such a motion, a Court must accept all of the facts alleged in the complaint as true and must liberally construe the complaint in the light most favorable to the plaintiff. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). The question is not whether the plaintiff will ultimately prevail, but whether he is entitled to present evidence in support of his claims. Scheuer v. Rhodes, 416 U.S. at 236, 94 S. Ct. at 1686.

III. ANALYSIS

Defendant moves to dismiss Plaintiff Sandra Kingcaid's sexual harassment claim under Rule 12(b)(6). Defendant further moves to dismiss Ms. Kingcaid's wrongful termination claim on the ground that this claim is preempted by the Pennsylvania Human Relations Act, 43 Pa. Const. Stat. §951 et seq. With respect to Plaintiff Dennis Kingcaid's claims, Defendant moves to dismiss his loss of consortium claim on the grounds that he cannot attach this derivative claim to his wife's civil rights claim. Defendant further moves to dismiss Mr. Kingcaid's wrongful discharge claim because Mr. Kingcaid does not allege that he was ever employed by Defendant.

In response, Ms. Kingcaid submits that she states a claim for retaliation under Title VII. Ms. Kingcaid asks leave to amend her Complaint to plead a Section 1983 claim instead of the Section 1981 claim. Plaintiffs argue that Mr. Kingcaid's loss of consortium claim can be based on Ms. Kingcaid's wrongful discharge claim. At the same time, Plaintiffs, however, voluntarily dismiss Ms. Kingcaid's wrongful termination claim.¹

A. COUNT I²

In Count I, Plaintiff Sandra Kingcaid brings a sexual harassment and retaliation claim pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq; 42 U.S.C. §1981; and the Pennsylvania Human Relations Act, 42 Pa. Const. Stat. §951 et seq. Defendant moves to dismiss Ms. Kingcaid's sexual harassment claim under Fed.R. Civ. P. 12(b)(6). In her response, Plaintiffs fail to address the adequacy of the sexual harassment claim, focusing instead on the sufficiency of the retaliation claim.

The EEOC guidelines define sexual harassment as unwelcome verbal or physical conduct of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R.

¹Plaintiffs briefing in this regard lacks clarity. “Plaintiff[s] agree[] that the P.H.R.A. is the exclusive remedy for discrimination claims. Therefore, [Ms. Kingcaid's] wrongful termination claim is preempted by the PHRA.” [Plf. Resp., p. 3]. One paragraph later, however, Plaintiffs ask leave of the Court to substitute Ms. Kingcaid for Mr. Kingcaid on Mr. Kingcaid's wrongful termination claim. Since the PHRA preempts a wrongful termination claim by Ms. Kingcaid, the Court will deny Plaintiffs' request to amend as futile. See Lee v. Geceqicz, No. Civ. A. 99-158, 1999 WL 320918, at * 6 (E.D. Pa. May 20, 1999)(“The Pennsylvania Supreme Court has held that the PHRA preempts common law tort claims for wrongful discharge based upon sexual harassment and retaliation because the PHRA prohibits this conduct and provides an exclusive statutory remedy for the violation.”). Accordingly, the Court will dismiss the Second Cause of Action in its entirety.

²Because the Court has previously indicated that it will dismiss Plaintiffs' Second Cause of Action in its entirety, supra note 1, all future cites to a specific count refer to Plaintiffs' First Cause of Action.

§1604.11(a). Sexual harassment is, fundamentally, harassment of a person because of his or her sex. See id. The discrimination, however, need not be overtly sexual in nature. Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir.1990); see also 29 C.F.R. §1604.11(b) (“in determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances”).

In her Complaint, Plaintiffs allege the following facts in support of Ms. Kingcaid's sexual harassment claim:

Plaintiff, Sandra J. Kingcaid was last employed as a sales assistant by Janney Montgomery Scott, Inc. from March 11, 1992, until her last day of employment on October 21, 1996, during which period, Defendant permitted their agents, servants and/or employees to engage in conduct of a sexually harassing and discriminatory manner.

On or about October 15, 1996, Charles Walter, an agent, servant, and /or employee of Defendant, was looking for a confirmation of a client's sales who he [sic] had a hyphenated last name.

Mr. Walter looked for the name with the first or middle name, whereas Mrs. Kingcaid had filed it under the last name. Mr. Walter questioned Mrs. Kingcaid concerning filing it under the last name instead of the first name.

During the dispute, Mrs. Kingcaid said words to the effect: “that's why I'm the secretary and you're the broker”, to which Mr. Walter took offense and told her that they should no longer work together.

Mrs. Kingcaid asked whether Mr. Walter was firing her and he said he could not and cautioned her not to call the Philadelphia office.

As a result of being upset by Mr. Walter's reaction, Mrs. Kingcaid called the Philadelphia office and also spoke to Mr. Biggs, who was in charge of the office in the absence of the office manager, and expressed complaints to both regarding among other concerns, past and ongoing sexually harassing conduct by Mr. Walter.

For the remainder of the week, Mrs. Kingcaid worked for another broker or was scheduled off.

On Monday, October 24, the office manager returned to the office, and terminated Mrs. Kingcaid's employment.

[Plf. Compl. ¶¶3-10].

Rule 12 of the Federal Rules of Civil Procedure operates in conjunction with Rule 8. Under the “notice pleading” requirements of Rule 8, a plaintiff’s complaint must “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson, 355 U.S. 41, 47-48 (1957). Plaintiff’s allegations, taken as true, do not show that she was subject to any sexual harassment. Indeed, Plaintiff’s Complaint does not reveal whether she is pursuing a quid pro quo theory of sexual harassment, or a hostile work environment claim. See generally Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). The Court, therefore, concludes that Plaintiff’s Complaint fails to state a claim for sexual harassment upon which relief can be granted.

Plaintiff, however, asks the Court for leave to amend her Complaint to cure any deficiencies, and to substitute a Section 1983 claim for the pled Section 1981 claim. In the interest of justice, the Court will grant Plaintiff Sandra Kingcaid twenty (20) days from the date of this Order to file an Amended Complaint. Failure to file an Amended Complaint will result in dismissal of Plaintiff’s sexual harassment claim.

B. COUNT II

In Count II, Plaintiff Dennis Kingcaid brings a loss of consortium claim. Because none of the tort counts survive Defendant’s Motion to Dismiss, the Court will dismiss Mr. Kingcaid’s claim for loss of consortium. Verde v. Philadelphia, 862 F.Supp. 1329, 1337 n. 5 (E.D.Pa.1994) (noting that “[t]he loss of consortium ... is deemed to be derivative only of the claim for intentional infliction of emotional distress.... Title VII ... [does not] allow other than a personal right of action”); Goldberg v. Philadelphia, 1994 WL 313030, at *13 (E.D.Pa. June 29, 1994) (“Title VII does not provide for loss of consortium damages”). Accordingly, the Court will dismiss Plaintiff Dennis Kingcaid from this action.

An appropriate Order follows.

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 Defendant.)

ORDER

AND NOW this day of November, 1999, upon consideration of Defendant's Partial Motion to Dismiss, Plaintiffs' Response thereto, and Defendant's Reply, **IT IS HEREBY ORDERED** that

1. Defendant's Partial Motion to Dismiss (docket #3) is **GRANTED**;
2. Plaintiff Dennis Kingcaid is **DISMISSED** from this action; and
2. Plaintiff is **GRANTED** fifteen (15) days from the date of this Order to file an Amended Complaint. Failure to file an Amended Complaint will result in dismissal of Plaintiff's sexual harassment claim.

BY THE COURT:

John R. Padova