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

PEGGY MCFERRON,	**:**	**No. 3:02cv1989**
Plaintiff	**:**	
	:	**(Judge Munley)**
v.	**:**	
	:	
L.R. COSTANZO COMPANY,	**:**	
INC., and MATTHEW	**:**	
D. MICHALEK,	**:**	
Defendants	**:**	

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MEMORANDUM

Before the court for disposition are motions to dismiss plaintiff's amended complaint involving, *inter alia*, allegations of sex discrimination in employment. The plaintiff is Peggy McFerron, an employee of Defendant L.R. Costanzo Company. Matthew D. Michalek, Costanzo's Vice President of Operations during relevant times, is also a defendant. For the reasons that follow, the motions will be granted in part and denied part.

Background

Defendant LR. Costanzo hired plaintiff on March 11, 1999. Plaintiff contends that she has been exposed to a sexually hostile work environment and has been subject to two forced sexual encounters with Defendant Michalek. In October 2001, plaintiff's employer requested that she sign an arbitration agreement that would in effect cause her to give up her civil rights and the ability to complain to the Equal Employment Opportunity Commission ("EEOC") or take the company to court. Plaintiff's attorney notified the company on

October 29, 2001 that she did not want to sign the agreement because of Michalek's unwelcome sexual attention, unwelcome sexual conduct, sexual assault and because of the hostile work environment. On November 12, 2001, Costanzo placed plaintiff on twelve (12) weeks of unpaid leave. Michalek remains in a managerial position and has jurisdiction over everybody in the company. As a result, plaintiff remains fearful of returning to the company. On January 2, 2002, a psychiatrist advised her not to return. A more detailed explanation of the alleged facts is set forth *infra* where appropriate.

Plaintiff filed the instant six count complaint asserting the following causes of action: Count I, Violation of Title VII of the Civil Rights Act of 1964, Hostile Work Environment; Count II, Violation of Title VII of the Civil Rights Act of 1964, Quid Pro Quo; Count III, Retaliation under Title VII; Count IV, Violation of the Pennsylvania Human Relations Act, (hereinafter "PHRA"), sexually hostile work environment and termination because of sex and retaliation; Count V, Assault and Battery; Count VI, Intentional Infliction of Emotional Distress. Both defendants have moved to dismiss the case pursuant to both FED. R. CIV. P. 12(b)(1) and FED. R. CIV. P. 12(b)(6).

Jurisdiction

Since there is a federal question before the court under 42 U.S.C. § 2000(e), this court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1331, as well as 28 U.S.C. § 1343(a)(4).[1] This court also has supplemental jurisdiction over the plaintiff's claims that

[1]Pursuant to 28 U.S.C. § 1331, this court has jurisdiction over questions of federal law, and 28 U.S.C. § 1343(a)(4) grants this court jurisdiction to hear cases involving alleged violations of any

arise under state law, pursuant to 28 U.S.C. § 1367(a), as these claims are "part of the same case or controversy" as the plaintiff's federal claims.

Standard of review

The defendants have moved pursuant to FED. R. CIV. P. 12(b)(6).[2] When a 12(b)(6) motion is filed, the sufficiency of a complaint's allegations are tested. The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. In deciding a 12(b)(6) motion, the court must accept as true all factual allegations in the complaint and give the pleader the benefit of all reasonable inferences that can fairly be drawn therefrom, and view them in the light most favorable to the plaintiff. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

Discussion

I. Common Issues

Initially we shall discuss two issues that are common to both of the defendant's motions. The first common issue is the assertion that the PHRA claims should be dismissed

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civil rights that are protected by an Act of Congress.

[2]Both defendants move to dismiss the plaintiff's PHRA claim pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction based upon the plaintiff's alleged failure to exhaust administrative remedies. The Third Circuit Court of Appeals has, however, explained that a failure to exhaust administrative remedies does not affect the court's subject matter jurisdiction. Accordingly, a plaintiff's alleged failure to exhaust should be addressed under FED. R. CIV. P. 12(b)(6) for failure to state a claim, rather than FED. R. CIV. P. 12(b)(1). Anjelino v. New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999). We shall overlook the defendants' error and address the issue as if it had been asserted pursuant to FED. R. CIV. P. 12(b)(6).

for the plaintiff's failure to exhaust administrative remedies.

Under Pennsylvania law, a plaintiff must exhaust her administrative remedies under the PHRA before maintaining a civil suit under that act. 43 P.S. § 962(c). Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir.), cert. denied, 552 U.S. 914 (1997). The PHRA provides that to exhaust her remedies, a plaintiff must file an administrative complaint with the Pennsylvania Human Relations Commission, (hereinafter "PHRC"), and then wait one year before seeking redress in court. See 43 P.S. § 962(c).

The defendants claim that the plaintiff did not wait a year from the date of filing her complaint with the PHRC before seeking redress in this court. Defendants argue that the PHRA complaint was filed on October 9, 2002, and that plaintiff instituted the instant complaint on November 1, 2002. Plaintiff's amended complaint asserts that she filed her complaint with the PHRC on January 2, 2002 (Compl. ¶ 85) and filed her amended complaint on January 22, 2003, after the one-year waiting period had passed.

In support of their position, the defendants submit a correspondence from the PHRC to Defendant L.R. Costanzo Company, Inc. See Ex A to Costanzo's Motion to Dismiss. The letter presented by the defendants is not convincing evidence that the PHRC charge was filed less than a year before the amended complaint was filed. The correspondence is not a model of clarity. It states that "PHRC has the discretion to waive the opportunity to investigate the charge. In accordance with the Work sharing [sic] Agreement between EEOC and the PHRC, PHRC waived the opportunity to investigate the complaint back to the EEOC." Id. It

further states: "Be advised that PHRC will take no further action on the filing at this time. . . ." Id. Apparently, the letter indicates that the PHRC is providing the EEOC the opportunity to investigate the claim pursuant to a work sharing agreement. It is uncontested that the plaintiff has received a "right to sue" letter from the EEOC. Compl. ¶ 2.

In the light of the lack of evidence to the contrary, we credit the plaintiff's allegation that the charge was filed more than a year before the filing of the amended complaint. Hence, we will deny the defendants' motion to dismiss the PHRA claim.[3]

Both of the defendants also assert that the punitive damages claim under the PHRA should be dismissed as such relief is not available under the PHRA. Defendants are correct. punitive damages are not permitted to be awarded under the PHRA. Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570 n. 3 (3d Cir. 2002). Plaintiff concedes that such relief is not available and agrees that that portion of the relief sought should be stricken. See Pl. Oppo. Br. at 5. Accordingly, any claim that the plaintiff is asserting under the PHRA for punitive damages will be dismissed.

II. Defendant Costanzo's arguments

Next we shall address the remainder of Defendant Costanzo's arguments *seriatim*.

1) Remedial action

[3]Our conclusion is especially apt in light of the fact that the PHRA claims are identical to the claims being raised under Title VII. In addition, even if the charge was not filed until October 2002, nearly a year has passed since then to the present date.

Defendant L.R. Costanzo argues that because it took prompt remedial action in response to plaintiff's complaints of hostile work environment sexual harassment and plaintiff failed to take advantage of these preventative or corrective opportunities that there is no *respondeat superior* liability and Counts I, II, III and IV must be dismissed. We are unconvinced. At this early stage in the proceedings, we do not examine the facts of the case. We merely review the allegations of the complaint. Whether the employer took remedial actions and the plaintiff's response to the remedial actions are clearly factual matters that may be appropriate for a motion for summary judgment argument or a trial, but it is premature to raise such matters at this stage. Accordingly, we are unconvinced by Defendant Costanzo's position.

2) Hostile work environment/quid pro quo sexual harassment

Next, Defendant Costanzo argues the Counts I, II and IV of the amended complaint must be dismissed because plaintiff fails to state claims upon which relief can be granted for hostile work environment and quid pro quo sexual harassment against Defendant Costanzo. We will address each cause of action separately.

a.) Hostile work environment

In order to assert a cause of action for sexually hostile work environment, a plaintiff must allege that: 1) the employee 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. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1304 n. 19 (3d Cir. 1997).

Defendant Costanzo claims that dismissal of the hostile work environment claim is appropriate because plaintiff has failed to establish that the discrimination was sufficiently severe and pervasive. Defendant's argument is unconvincing. At this stage of the proceedings, with a motion to dismiss pending, the plaintiff need not "establish" any facts. We merely must examine the allegations of the complaint. Without going into the details of the allegations, the complaint asserts sufficient severity and pervasiveness to defeat a motion to dismiss. See, generally, Compl.

b. Quid pro quo

The Third Circuit Court of Appeals has explained quid pro quo sexual harassment as follows: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute quid pro quo sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual...." Bonenberger v. Plymouth Tp., 132 F.3d 20, 27 (3d Cir. 1997) (internal quotation marks omitted). Defendant Costanzo argues that the plaintiff has not alleged sufficient facts to make out a cause of action for quid pro quo sexual harassment. We are unconvinced. The defendant's vice president of operations forced plaintiff to perform fellatio on him twice according to the

complaint. The complaint further asserts that he threatened her job when she refused advances. Compl. ¶ 19. He also told her that "Pennsylvania is an at-will state and I can let you go for no reason." Compl. ¶ 26. After the second instance of forced oral sex, the plaintiff informed the defendant that she was not comfortable about a "parallel position" she had been put into at work , where her cubicle was directly across from his. A few days later, he accused her of stealing corporate property. Compl. ¶ 37. These allegations are just a sample of those found in the complaint that support plaintiff's quid pro quo claim and render defendant's motion to dismiss meritless.

4. Retaliation

Count III of the complaint asserts a cause of action for retaliation. Defendant claims that this count should be dismissed as plaintiff cannot establish a prima facie case of retaliation. We find that the defendant's position lacks merit.

The plaintiff's retaliation claims fall under both Title VII of the Civil Rights of 1964 and the PHRA. See Compl. Cts. III and IV. Section 704(a) of Title VII prohibits discrimination against an employee "because [she] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation . . . under this subchapter." 42 U.S.C. §2000e-3(a). Likewise, the PHRA makes it unlawful for an employer "to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge . . . under this

act." 43 P.S. § 955(d); see also Woodson v. Scott Paper Co., 109 F.3d 913, 919-20 (3d Cir.) cert. denied, 522 U.S. 914 (1997)

The law provides that to establish a *prima facie* case of retaliation the plaintiff must demonstrate that (1) she was engaged in protected activity; (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the protected activity and the discharge. Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001).

Defendant Costanzo asserts that plaintiff has not alleged an adverse employment action. A review of the complaint, however, reveals that she was placed on an unasked for twelve-week unpaid leave on November 7, 2001, within two weeks of when she complained of sexual harassment and a hostile work environment. See Compl. ¶ 51, 60. Accordingly, the plaintiff has made sufficient allegations with regard to an adverse employment action to overcome a motion to dismiss.

Defendant Costanzo also asserts that the plaintiff will be unable to establish the prima facie element of causation. It is too early, at the motion to dismiss stage, to determine whether plaintiff will be able to demonstrate the causation element. Therefore, the motion to dismiss will be denied.

5. Assault and Battery

Count V of the Amended Complaint asserts a cause of action for assault and battery. Defendant Costanzo seeks to dismiss this cause of action against them on the basis that, as a

matter of law, it is not vicariously liable for the alleged assault and battery against the plaintiff. We agree partially.

Generally, an employer can be held liable either vicariously or directly (under negligence) for the torts of its employees. Plaintiff's complaint is silent with regard to which theory of liability it seeks to apply to Defendant Costanzo. Plaintiff's brief, however, discusses vicarious liability and touches on the issue of negligence. Therefore, we shall address each theory of liability.

Under the theory of vicarious liability, an employer may be held liable for the intentional torts of its employees if they are performed within the scope of their employment. "The conduct of an employee is considered 'within the scope of employment' for purposes of vicarious liability if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer." Costa v. Roxborough Memorial Hosp., 708 A.2d 490, 493 (Pa. Super. Ct. 1998). Where an assault is committed by an employee in an outrageous manner or for personal reasons, it is not within the scope of employment. Id.

In the instant case, the plaintiff alleges two forceful sexual assaults. These assaults as alleged cannot be said to have been performed except for personal reasons, and as alleged they were performed in an outrageous manner. Accordingly, the employee cannot be said to

have been acting within the scope of his employment and Defendant Costanzo cannot be vicariously liable.

The second possible theory of liability under which Defendant Costanzo could be liable for the intentional torts of its employee is negligence. See Costa, 708 A.2d 495-96 at Plaintiff states in her brief that Defendant Costanzo was negligent in that it knew of its employee's sexual proclivities, and implicitly, therefore, had a duty to control him and prevent him from intentionally harming others. Pl. Oppo. Brief at 7.

The Pennsylvania courts have adopted section 317 of the Restatement (Second) of Torts, which provides as follows:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master,
>
> and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should have reason to know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts, § 317, quoted in Costa, 708 A.2d at 495-96.

The first alleged sexual assault, falls outside of the negligence theory of liability as it

did not occur on the Defendant L.R. Costanzo's premises. Compl. ¶ 11-16. The second alleged assault did occur on the defendant's premises. Compl. ¶ 31 - 34. Defendant Costanzo could potentially be liable for this second alleged assault. At this stage of the proceedings, it is too early to make any determination as to what the defendant knew or did not know about the alleged attacker's propensities and its ability to control him. Thus, viewing the facts in the light most favorable to the plaintiff, we cannot dismiss the assault and battery charge against Defendant Costanzo as they may be liable on the theory of negligence for the second alleged assault only.

III. Defendant Matthew D. Michalek

Defendant Matthew D. Michalek, the individual who plaintiff accuses of sexually assaulting her, has also filed a motion to dismiss. We shall address the issues he raises *seriatim*.

1. Quid pro quo/hostile work environment sexual harassment.

Defendant Michalek asserts that Counts I, II and IV should be dismissed because the plaintiff has "**failed to establish** 'pervasive' and 'regular' conduct by the Defendant, Michalek." (emphasis added) Def Michalek's Brief in Support, at 7. He then proceeds to argue that "Plaintiff **fails to establish** that the alleged conduct detrimentally affected her and further fails to establish respondeat superior liability." (emphasis added) Id. As set forth above in the standard of review section, it is not the plaintiff's burden to "establish" anything at this point. She merely has to allege facts, which if found to be true would support a cause

of action. As defendant is merely arguing the facts of the case, which is improper at this early stage of the proceeding, his motion to dismiss Counts I, II and IV will be denied.

2. Retaliation

Counts III and IV of the complaint assert a causes of action for retaliation. Defendant Michalek contends that the plaintiff failed to set forth a valid cause of action for retaliation against him because an independent investigation revealed that there were no instances of sexual harassment and/or sexual misconduct by him . Second, he argues that he did not exercise supervisory control over the plaintiff and that the plaintiff voluntarily left her job. Once again, the defendant is arguing the facts of the case, which is inappropriate at the motion to dismiss stage. Ergo, the defendant's motion to dismiss Counts III and IV will be denied.

3. Quid pro quo sexual harassment

With regard to Count II, quid pro quo sexual attacks, defendant, once again argues the facts of the case. For the reasons set forth above, regarding the propriety of arguing the facts at this early stage of the proceeding, the defendant's motion will be denied.

4. Intentional Infliction of Emotional Distress

Lastly, Defendant Michalek seeks to dismiss Count VI of the Complaint, Intentional Infliction of Emotional Distress. Yet again, the defendant merely argues his version facts of the case and concludes that they do not support an intentional infliction of emotional distress claim. Thus, this portion of the motion to dismiss will be denied also.

Conclusion

The defendant's motions to dismiss will be granted in part and denied in part. The amended complaint will be dismissed to the extent that it seeks to hold Defendant Costanzo liable for assault and battery with respect to the first alleged sexual assault. It will also be dismissed with regard to the second alleged sexual assault inasmuch as the plaintiff seeks to recover against Defendant Costanzo on a vicarious liability theory of recovery. To the extent that the plaintiff seeks to recover for the second alleged assault and battery on a negligence theory, the complaint will not be dismissed. The claim for punitive damages with respect to both defendants under the PHRA will be dismissed. An appropriate order follows.

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

PEGGY MCFERRON,	**:**	**No. 3:02cv1989**
Plaintiff	**:**	
	:	**(Judge Munley)**
v.	**:**	
	:	
L.R. COSTANZO COMPANY,	**:**	
INC., and MATTHEW	**:**	
D. MICHALEK,	**:**	
Defendants	**:**	

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ORDER

AND NOW, to wit, this 10th day of September 2003, it is hereby **ORDERED** as follows:

1) Defendant L.R. Costanzo Company's motion to dismiss (Doc. 12) is **GRANTED** with regard to the punitive damage claim under the PHRA and the assault and battery claim involving the incident of December 1999. The motion is **DENIED** in all other respects; and

2) Defendant Matthew D. Michalek's motion to dismiss (Doc. 13) is **GRANTED** with respect to the PHRA punitive damage claim and **DENIED** in all other respects.

BY THE COURT:

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JUDGE JAMES M. MUNLEY
United States District Court

Filed: 9/10/03