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

DWAYNE JACKSON, Plaintiff, v. T & N VAN SERVICE, et al., Defendants.	CIVIL ACTION NO. 99-1267

MEMORANDUM

R.F. KELLY, J. MAY 9, 2000

Before this Court is a motion filed on behalf of Defendants T & N Van Service, Harry Murphy, Vince Harrington, Don Taddei, David Nelson and Russell Taddei, Jr., for summary judgment.[1] Defendants are requesting that this Court dismiss Plaintiff's federal and state law claims arising from alleged discriminatory conduct by T & N owners and employees that culminated on November 4, 1998, when Plaintiff, an African American employee of T & N Van Service ("T & N") was grabbed from behind by a white co-employee, Defendant Joseph Larose, who forced the loop of a hangman's noose over Plaintiff's head. Larose then hollered "skin him!" to two other T & N employees, Defendants Walter Felton and Christopher Larosa, who smiled and laughed. Plaintiff was able to remove the noose and reported the incident to T & N supervisors and the police.

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[1] Another motion for summary judgment has been filed by Defendant Teamsters Union Local 676 ("the Union") and will be dealt with separately by this Court.

On March 9, 2000, this Court issued a Memorandum and Order, denying Plaintiff's Motion for Partial Summary Judgment against T & N on Counts I (42 U.S.C. § 1981), IV (New Jersey Law Against Discrimination ("NJLAD")), and VIII (Title VII) of his Second Amended Complaint, and granting a Motion for Partial Summary Judgment filed by Defendants T & N Van Service, Harry Murphy, Vince Harrington, Don Taddei, David Nelson and Russell Taddei, Jr., requesting that this Court rule as a matter of law that Defendants Larose, Felton and Larosa were not Plaintiff's "supervisors," and that employer liability be viewed under the test of "co-worker harassment." See Jackson v. T & N Van Service, 86 F. Supp.2d 497 (E.D. Pa. 2000). At the end of that memorandum opinion, this Court acknowledged Plaintiff's contention that a reasonable jury could find that T & N management knew or should have known prior to November 4, 1998, that certain of its employees were capable of, and in fact did act in, racially intimidating ways toward black employees in the workforce, making Defendants liable for a racially hostile work environment under the "co-worker standard of harassment." While Defendants indicated that they would be able to establish that Plaintiff cannot meet his burden of prior knowledge of racial harassment, this Court deferred ruling further on this matter until all parties had been given an opportunity to fully brief

the issues at hand.[2] Id. at 503. Now that the parties have submitted their memoranda, the motions in this case are ripe for disposition. Accordingly, for the following reasons, the motion filed by Defendants T & N Van Service, Harry Murphy, Vince Harrington, Don Taddei, David Nelson and Russell Taddei, Jr., will be granted in part and denied in part.

I. STANDARD OF REVIEW

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, reveal no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law." Wragg v. Comcast Metrophone, 18 F. Supp.2d 524, 526 (E.D. Pa. 1998)(citing Fed R. Civ. P. 56(c)). In deciding a motion for summary judgment, all facts, and reasonable inferences drawn therefrom, must be viewed in the light most favorable to the non-moving party. Id. at 527; Clark v. Commonwealth of Pennsylvania, 885 F. Supp. 694, 707 (E.D. Pa. 1995).

To obtain summary judgment relief, the moving party has the initial burden of identifying evidence that shows an absence of a genuine issue of material fact. Coregis Ins. Co. v. Wheeler, 24 F. Supp.2d 475, 477 (E.D. Pa. 1998). The non-moving

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[2] Defendants were granted an extension of time in which to file dispositive motions until February 18, 2000, at which time Plaintiff was given the opportunity to supplement his motion for summary judgment.

party then must go beyond the mere allegations of the pleadings, and, from the evidence of record, designate specific facts showing that there is a genuine disputed issue for trial.[3] Stickney v. Muhlenberg College TIAA-CREF Retirement Plan, 896 F. Supp. 412, 417 (E.D. Pa. 1995); see also Coregis, 24 F. Supp.2d at 477. In deciding whether an issue is genuine, "the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." Orsatti, 71 F.3d at 482. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

II. DISCUSSION

A. INDIVIDUAL LIABILITY UNDER THE NJLAD

Plaintiff has alleged that T & N, as his employer, discriminated against him based on race, and that the individual T & N Defendants aided and abetted each other in violating the

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[3] "[A] dispute over those facts that might affect the outcome of the suit under the governing substantive law, i.e., the material facts, will preclude the entry of summary judgment." Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995); see also Mertig v. Milliken & Michaels of Delaware, Inc., 923 F. Supp. 636, 642 (D. Del. 1996).

NJLAD. (Second Am. Compl. ¶¶ 72 and 75.) In their motion, however, Defendants submit that there is no basis for individual liability against Harry Murphy, Vince Harrington, Russell Taddei, Ken Taddei, Don Taddei and Dave Nelson pursuant to the NJLAD under any aiding and abetting theory since they engaged in no affirmative discriminatory act toward Plaintiff, and did not knowingly give substantial assistance or encouragement to the perpetrators of the misconduct directed at Plaintiff. (Defs.' Summ. J. Mem. at 46.)

The Third Circuit Court of Appeals has predicted that the New Jersey Supreme Court would follow the Restatement (Second) of Torts § 876(b) to define aiding and abetting liability under the NJLAD. Failla v. City of Passaic, 146 F.3d 149, 158 (3d Cir. 1998). More specifically, the Failla court held that an employee aids and abets a violation of the NJLAD when he knowingly gives substantial assistance or encouragement to the unlawful conduct of his employer.[4] Significantly, the Third Circuit noted that liability for aiding and abetting may be based on inaction if it rises to the level of providing

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[4] The Third Circuit has recognized the following six factors that may be examined to determine whether a defendant provided "substantial assistance": (1) the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other, his state of mind, and the duration of the assistance provided. Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 127 n.27 (3d Cir. 1999)(citations omitted), cert. denied, ___ U.S. ___, 120 S. Ct. 786 (2000).

substantial assistance or encouragement. Id. at 158 n.11. However, the federal appellate court emphasized the employment of a "heightened standard" for aiding and abetting liability:

> Employees are not liable merely because they had some role, or knowledge or involvement. Rather, the degree of involvement, knowledge and culpability required as a basis for liability is heightened by the standard that the Restatement sets forth and we adopt. Only those employees who meet this heightened standard will be aiders and abettors. It is important that this standard be set above mere knowledge and/or implementation, lest a reverse respondeat superior liability could be created under the guise of aiding and abetting.

Id. at 159.

Here, Defendants argue that the only alleged act of racial discrimination experienced by Plaintiff during his employment with T & N that has any relevance is the November 4, 1998 noose incident, and because there is no evidence that any of the individual T & N defendants had prior knowledge that Joe Larose engaged in racially discriminatory conduct or aided the perpetrators of the mock lynching, summary judgment is appropriate. Additionally, Defendants claim that they have not made any prejudicial, bias and/or racially derogatory comments to Plaintiff, and that Plaintiff's assumption that these individual defendants knew what was going on with regard to the racially hostile acts in their workforce is insufficient to defeat a

motion for summary judgment.[5]

In response, Plaintiff has presented evidence of racially discriminatory comments made by Defendants Nelson and Don Taddei to show their personal racial animus, and relies on circumstantial evidence of monthly meetings regarding day-to-day operations in proving knowledge on the part of the other owners. In addition, Plaintiff has highlighted the fact that Harry Murphy saw the noose hanging up on the day of the attack prior to Larose using it, (Russ Taddei Dep. at 69), and contends that Murphy was in a position to stop the attack.

As stated above, Defendants can be held liable for aiding or abetting Larose's harassment if Plaintiff can show that the individual defendants' conduct or inaction rose to the level of rendering "substantial assistance or encouragement" to Larose. See, e.g., Whitaker v. Mercer County, 65 F. Supp.2d 230, 247 (D.N.J. 1999). In this regard, Plaintiff has come forward with evidence of racially discriminatory comments made by owners Dave Nelson and Don Taddei which may have encouraged racial animus within the company. Also, Harry Murphy's inaction as a supervisor who saw the hangman's noose prior to Larose placing it

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[5] Defendants contend that although Defendant Murphy saw the noose and, in hindsight, should have had the noose removed from the workplace, he had no idea that Larose was planning to place the noose around the neck of an African-American co-worker. (Defs.' Summ. J. Mem. at 48.) With respect to Mr. Harrington, however, Defendants argue that he did not see the noose, despite his presence in the garage/concourse area. Id. at 48-49.

around Plaintiff's neck may be viewed as indirectly aiding harassment. See Failla, 146 F.3d at 158 n.11.

Plaintiff's contention, however, that a reasonable jury could find Vince Harrington and T & N owners Ken Taddei and Russell Taddei, Jr., liable under the NJLAD falls short of the applicable standard without more evidence. Indeed, the Failla heightened standard for "aiding and abetting" liability instructs that "[e]mployees are not liable as aider and abettor merely because they had some role, or knowledge or involvement." 146 F.3d at 159. Because Plaintiff has presented no evidence that these individual defendants directly participated in any discriminatory acts or had any knowledge of the noose incident prior to Larose's harassing conduct, summary judgment shall be granted in favor of Defendants Vince Harrington, Ken Taddei and Russell Taddei, Jr. on Plaintiff's NJLAD claim. See Jones v. Jersey City Med. Ctr., 20 F. Supp.2d 770, 775 (D.N.J. 1998) (dismissing plaintiff's claim of individual liability under NJLAD where plaintiff failed to allege that defendant directly participated in any discriminatory act or that there was some other nexus leading to the discriminatory conduct at issue).

B. INDIVIDUAL LIABILITY UNDER 42 U.S.C. § 1981

Section 1981 allows a plaintiff to recover damages from an individual for injuries suffered because of that individual's intentional race discrimination. Kohn v. Lemmon Co., Civ. A. No.

97-3675, 1998 WL 67540, *4-5 (E.D. Pa. Feb. 18, 1998). More specifically, § 1981 provides in relevant part that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994).

Personal liability under § 1981 must be predicated on the actor's personal involvement and, consequently, there must be some affirmative link to causally connect the actor with the discriminatory action. Johnson v. Resources for Human Dev., Inc., 843 F. Supp. 974, 978 (E.D. Pa. 1994). For example, individuals may be held liable under § 1981 for their personal involvement in discrimination if they authorized, directed, or participated in the alleged discriminatory conduct. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 518 (3d Cir. 1986), aff'd, 481 U.S. 604 (1987). "In particular, directors, officers and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable." Id.

Here, the specific allegations under § 1981 against the individual T & N Defendants are that they (1) subjected Plaintiff

to demeaning and harassing behavior in the workplace, (2) created a racially discriminatory work environment, (3) interfered with Plaintiff's right to enter into an employment contract while permitting white males to enter into such a contract with T & N, (4) committed assault and battery against Plaintiff, and (5) constructively terminated Plaintiff's employment with T & N.

Defendants contend that their actions included investigating the November 4, 1998 incident, suspending Larose, Felton and Larosa with intent to discharge them, aggressively defending the discharge of the perpetrators at the Joint Area Committee arbitration proceedings, and promising Plaintiff to schedule work assignments so as to minimize contact between Plaintiff and Felton and Larosa following their reinstatement. Defendants recitation of the above events is limited, however, to alleged conduct by Defendants following the noose incident. In this regard, Plaintiff contends that T & N owners not only knew that racial harassment was going on in their workforce long before the November 4, 1998 incident, and chose to do nothing about it, but encouraged and participated in it. In doing so, Plaintiff again refers to specific examples where Dave Nelson and Don Taddei used racially discriminatory comments. Such derogatory comments are evidence of discriminatory animus on the part of the persons who spoke them. See Kohn, 1998 WL 675450 at *6. Thus, taking all reasonable inferences in Plaintiff's favor,

this Court finds that genuine issues of fact exist with regard to whether individual defendants Dave Nelson and Don Taddei intentionally caused an infringement of rights protected by § 1981 by participating in alleged discriminatory conduct which encouraged the creation of a hostile work environment that altered the conditions of Plaintiff's employment.

Plaintiff has failed, however, to present any evidence of affirmative discriminatory action on the part of the other individual defendants to support his § 1981 claims against them. Accordingly, summary judgment shall be granted on Plaintiff's § 1981 claims against Defendants Murphy, Harrington, Ken Taddei and Russell Taddei, Jr. on Plaintiff's § 1981 claim.

C. CONSPIRACY UNDER 42 U.S.C. § 1985(3)

In order to establish a claim under 42 U.S.C. § 1985(3), Plaintiff must provide evidence of (1) a conspiracy; (2) motivated by racial discriminatory animus; (3) for the purpose of depriving a person or class of persons of the equal protection of the law or equal privileges and immunities under the laws; (4) an act in furtherance of the conspiracy; (5) whereby a person is injured. Armstrong v. School District of Philadelphia, 597 F. Supp. 1309, 1313 (E.D. Pa. 1984); Pitak v. Bell Atlantic Network Servs., 928 F. Supp. 1354, 1368-69 (D.N.J. 1996). In his Second Amended Complaint, Plaintiff alleges that all of the defendants are liable under this theory of liability for conspiring with one

or more co-defendants to deprive Plaintiff of the equal protection of the law or of equal privileges and immunities under the law, and committed overt acts in furtherance of the conspiracy as follows: "defendants Murphy and Harrington willfully failed to remove the noose or take action to prevent execution of the conspiracy that resulted in the attack on plaintiff;" and "defendants Don Taddei, Ken Taddei, Russell Taddei, David Nelson and Local 676 refused to act as necessary to uphold Larosa's and Felton's terminations." (Second Am. Compl. at ¶¶ 62, 63, 64(b) & (c).)

Defendants first argue that the intracorporate conspiracy exception makes this claim meritless.

> Under the intracorporate conspiracy doctrine, a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation. This doctrine stems from basic agency principles that "attribute the acts of agents of a corporation to the corporation, so that all of their acts are considered to be those of a single legal actor." The reasoning behind the intracorporate conspiracy doctrine is that it is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself.

Dickerson v. Alachua County Comm'n, 200 F.3d 761, 767 (3d Cir. 2000)(citations omitted), petition for certiorari filed (April 13, 2000)(No. 99-1676). While agents acting on behalf of a single legal entity normally cannot conspire with themselves or

with the entity, "a section 1985(3) conspiracy between a corporation and one of its officers may be maintained if the officer is acting in a personal, as opposed to official, capacity, or if independent third parties are alleged to have joined the conspiracy." Robison v. Canterbury Village, Inc., 848 F.2d 424, 431 (3d Cir. 1988); see also Heffernan v. Hunter, 189 F.3d 405, 412-13 (3d Cir. 1999)(recognizing that courts that have followed the intracorporate conspiracy doctrine allow an exception when employees have acted for their sole personal benefit and thus outside the course and scope of their employment). Here, Plaintiff not only has alleged that the T & N defendants conspired with a third party, the defendant Union, but the individual defendants in this case can be viewed as having acted in a personal, as opposed to official, capacity and, thus, outside the scope of employment. Under such circumstances, the intracorporate conspiracy doctrine does not preclude Plaintiff from pursuing damages based on his conspiracy claim.

Defendants have also asserted that summary judgment on Plaintiff's conspiracy claim is appropriate because Plaintiff has failed to establish any facts to support the existence of a conspiracy. Defendants submit that there is no evidence that any of the T & N Defendants entered into any agreement with the Union regarding the disciplinary actions against Larose, Felton, and Larosa. Absent any evidence from which a jury could reasonably

infer that a unity of purpose or common design existed between T & N defendants and the Union to fix the outcome of the Committee hearings so that Larosa and Felton would be reinstated, Defendants argue that summary judgment should be granted. Cf. Brady v. Cheltenham Township, No. 97-4655, 1998 WL 164994, *8 (E.D. Pa. April 9, 1998)(finding evidence that individual defendants met to coordinate their actions before searching plaintiffs' home that allegedly violated plaintiffs' rights)

In Gray v. City of Eufaula, 31 F. Supp.2d 957 (M.D. Ala. 1998), off-duty police officers, Ivan Gray and Frankie Peterman, sued an on-duty officer, Dalton Francis, and the City of Eufaula under section 42 U.S.C. §§ 1983 and 1985(3) after the off-duty officers had been pursued and detained by Francis. Prior to the pursuit of the off-duty officers, Peterman, from ten to fifteen feet away, yelled "Hey copper, Hey copper," over to Francis, with whom he was familiar, and then drove away. Francis did not recognize Peterman, pulled the two off-duty officers over and ordered them to put their hands out of the car, but when they did not take him seriously, Francis walked over, grabbed Gray's left wrist, twisted it backwards and started pulling his arm to the back of the car. Gray then identified himself as a police officer, however, Francis ordered Gray to step out of the car and kept his arm twisted behind his back. Next, Francis ordered Peterman to exit the vehicle and, after he complied and asked

what was wrong, Francis released Gray's arm, walked over to Peterman, grabbed his left arm, twisting it behind his back, and shoved him up against the car. Soon afterward, two or three backup patrol cars arrived with officers who knew Peterman, causing Francis to finally recognize the officer he had previously worked with for the City of Eufaula. Francis then released the off-duty officers.

The district court in Gray granted the defendants' motion for summary judgment on the plaintiffs' claims. In dismissing the conspiracy claim under section 1985(3), the court found that the cause of action failed for lack of a conspiracy, reasoning as follows:

> Plaintiffs have failed to produce any evidence tending to show that Defendant Francis conspired with any other officer to deprive Plaintiffs of their equal protection rights. Plaintiffs have admitted that Defendant Francis was on patrol by himself on the afternoon of September 5, 1998. In fact, he radioed in to the station for assistance after his initial encounter with the Plaintiffs' during which they drove by in the Corvette. Furthermore, Plaintiffs have not alleged that any other back-up officers who arrived were involved in Defendant Francis' alleged conspiracy. In fact, according to the Plaintiffs' testimony, the officers who arrived to assist Defendant Francis "got out [of their patrol car] smiling because they recognized who I was." (Peterman's Dep. at 68.) Their arrival caused Defendant Francis to recognize Plaintiff Peterman and everyone eventually got in their respective cars and went home. Accordingly, the court finds that there is no evidence of concerted action, nor are there any facts from which a

> conspiracy can be inferred. See Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986)(dismissing Plaintiff's Section 1985(3) claim because there was no evidence of a conspiracy). Therefore, the court finds that Defendants' Motion for Summary Judgment is due to be granted as Plaintiffs' have failed to offer any evidence tending to show a conspiracy to deprive Plaintiffs' of their rights under Section 1985.

Gray, 31 F. Supp.2d at 967.

Similarly, in Redpath v. City of Overland Park, 857 F. Supp. 1448 (D. Kan. 1994), two female police officers brought a race and sex discrimination suit against the city, city manager, and various police department officials, alleging that their treatment in the police department, letters of reprimand, and transfers to the Patrol division were the result of (1) sexual discrimination and harassment; (2) retaliation; and (3) a conspiracy to deprive them of their civil rights. The district court concluded that no constitutional violation resulted from the letters of reprimand or transfers and granted summary judgment for all defendants on the plaintiffs' section 1985(3) conspiracy claims as to those allegations. The court then considered whether a conspiracy existed with respect to the plaintiffs' allegations of racial and sexual harassment and, likewise granted summary judgment based on the plaintiffs' failure to provide evidence. In doing so, the court opined:

> A § 1985(3) claim requires proof of a conspiracy motivated by a class-based invidiously discriminatory animus. See

> Dixon, 898 F.2d at 1447. The Court acknowledges that plaintiffs often must prove conspiracies with circumstantial evidence. In this case, however, plaintiffs offer no evidence – direct or circumstantial – which warrants the inference of a discriminatory agreement to harass plaintiffs. Rather, plaintiffs appear to ask the Court to accept their conclusory allegations of conspiracy on a "common sense" basis, an approach recently condemned by the Tenth Circuit. See Gallegos, 984 F.2d at 364. Furthermore, the Court finds nothing in the Round Memo which would warrant discovery on the conspiracy claims. While it purports to catalog offensive comments by Scafe, it nowhere references any conduct of the other defendants or any agreement to harass plaintiffs. The Court therefore grants summary judgment to all defendants on plaintiffs' conspiracy claims.

Id. at 1465.

Here, Plaintiff has pointed to several instances in which T & N employees and owners had used racial slurs and discriminatory comments which can be considered as circumstantial evidence of a racially hostile work environment. What is lacking in the context of Plaintiff's conspiracy claim, as in Gray and Redpath, is any evidence of an agreement or coordinated efforts on the part of any of the defendants to engage in the harassment at issue. Accordingly, summary judgment shall be granted on Plaintiff's § 1985(3) conspiracy claim.

D. PLAINTIFF'S CLAIM UNDER 42 U.S.C. § 1986

Next, Defendants challenge Plaintiff's cause of action pursuant to 42 U.S.C. § 1986 against Harry Murphy, Vince

Harrington and T & N. Section 1986 provides a cause of action against anyone who has "knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 . . ., are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses so to do . . . ." Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994). In this regard, Plaintiff contends that T & N Supervisor Harry Murphy, on the day of the attack, and prior to it, saw the noose hanging up and was in a position to stop the attack.[6]

The Third Circuit has noted that to maintain a cause of action under § 1986, a plaintiff must show the existence of a § 1985 conspiracy. Id. at 1295 n.5. Indeed, "[a]ny issue of material fact in a § 1986 action presupposes and relates to a § 1985 conspiracy. Thus, if the elements of the § 1985 conspiracy are missing, a § 1986 cause of action is properly dismissed on summary judgment." Id.; see also Lohr v. Association of Catholic Teachers, 416 F. Supp. 619, 623 (E.D. Pa. 1976) ("Plaintiffs' claim against these defendants pursuant to Title 42 U.S.C. § 1986 is a derivative claim since this statute provides a remedy only for injuries resulting from a conspiracy prohibited by § 1985(3)."). As already stated above, Plaintiff has failed in

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[6] According to Plaintiff, Murphy later lectured the perpetrators as to the racist symbolism of the noose, indicating that he understood the racist nature of it. Thus, Plaintiff argues that if Murphy had taken down the noose at the moment he saw it, Plaintiff would not have been attacked.

this case to show the existence of an underlying conspiracy. Accordingly, Plaintiff's claims under § 1986 must likewise be dismissed.

E. LIABILITY OF T & N UNDER § 1981, THE NJLAD, AND TITLE VII

As stated in this Court's March 9th Memorandum and Order, T & N's employer liability under § 1981, the NJLAD, and Title VII is governed by the negligence standard that requires Plaintiff to show that the employer knew or should have known of the harassment and failed to take prompt and adequate remedial action. Jackson, 86 F. Supp.2d at 503. Having properly characterized Plaintiff's cause of action as a racially hostile work environment claim created by the actions of non-supervisory co-workers, T & N Defendants now contend that they are entitled to summary judgment based on their prompt investigation of the November 4, 1998 incident and their decision to terminate Joe Larose, Walt Felton and Chris Larosa. In addition, T & N argues that it prepared to vigorously defend the terminations before the Committee. T & N adds that, in the meantime, Plaintiff was allowed to stay away from the work environment through an approved, open-ended leave of absence with a continuing invitation to return to work.

The difficulty with T & N's line of argument is that it assumes that an employer is under no duty to address an allegedly hostile work environment until the harassed employee makes a

complaint. Third Circuit case law makes clear, however, that the employer must take prompt remedial action when the hostile environment is discovered in order to avoid liability. Harley v. McCoach, 928 F. Supp. 533, 540 (E.D. Pa. 1996)(citing Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994)). Here, Plaintiff has provided evidence of ongoing racial discrimination in the workplace in the months immediately preceding the November 4, 1998 noose incident. Such evidence includes the testimony of white employees that the use of racial slurs, including "nigger," was a common-place occurrence in the workforce; the testimony of a white employee that T & N owners Dave Nelson and Don Taddei made racially derogatory comments (Pl.'s Ex. A, Crist Dep., dated 12/6/99, at 8-14); Plaintiff's testimony that he was called "nigger" and "Dr. Dre" by white T & N co-workers prior to the noose incident (Pl.'s Ex. G., Jackson Dep., dated 10/27/99, at 74; Pl.'s Ex. I, Jackson Dep., dated 11/3/99, at 47) and that T & N owner Taddei snubbed him while treating white employees in a friendly manner (Pl.'s Ex. G., Jackson Dep., dated 10/27/99, at 86-87); and the testimony of black employee Dan Gainey that he complained repeatedly to T & N owners over a period of years that he was racially harassed to the point of filing a race discrimination lawsuit against the Company which was settled eleven days prior to the attack on Mr. Jackson (Pl.'s Ex. B, Gainey Dep., dated 7/1/99, at 132; Gainey Dep., dated 7/22/99, at

126, 138-39).

T & N has framed the issue of prior knowledge as relating only to whether T & N knew or should of known that Joe Larose had the inclination to commit a racially intimidating act toward Mr. Jackson using a hangman's noose as the instrument. However, in cases where evidence was raised suggesting that a company's supervisors and management had knowledge of an open and obvious hostile work environment prior to the time a plaintiff made complaints, yet took no action to stop it, courts have denied motions for summary judgment, concluding that a genuine dispute existed as to whether the employer took prompt and effective remedial measures once it became aware of the allegedly hostile work environment. See, e.g., Harley, 928 F. Supp. at 540.

In Kunin v. Sears Roebuck & Co., 175 F.3d 289 (3d Cir.), cert. denied, ___ U.S. ___, 120 S. Ct. 398 (1999), the Third Circuit Court of Appeals examined the type and extent of notice necessary to impose liability on an employer under Title VII.[7] Our federal appellate court found that there can be

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[7] In Kunin, the plaintiff worked as a salesperson for Sears at its Neshaminy Mall store in Bensalem, Pennsylvania, from 1987 to 1996. The complaint in that case alleged sexual harassment that the plaintiff experienced at that store from a fellow employee, Randy Lodato. On appeal from the district court's denial of Sears' motion for summary judgment, the Third Circuit found that the plaintiff could not show respondeat superior liability based on the reasonable failure of Sears to discover the alleged harassment. In doing so, the appellate

constructive notice as it relates to harassment claims in two situations: "where an employee provides management level personnel with enough information to raise a probability of . . . harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it." Id. at 294.

Applying the above standards to the case at hand, the evidence presented by Plaintiff creates a dispute as to whether T & N had constructive notice of an alleged racially hostile work environment so open and pervasive that a reasonable employer could not have been ignorant of it. In this regard, the parties disagree as to whether T & N Defendants were put on notice of the existence of racial harassment in the workplace based on the allegations raised by Dan Gainey in February 1998. While T & N argues that the Company's assessment of the situation was that Gainey did not work well with other employees – the problem being limited to Mr. Gainey as an individual, Gainey's EEOC Complaint, deposition testimony, and the February 12, 1998 letter from Gainey's attorney, Johnson Doty, Esq., serves to, at the very least, create a genuine issue of material fact as to whether T & N had notice of alleged racial harassment in the workplace.

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court concluded that record did not support a finding that Sears had constructive notice of the harassment since the offensive conduct was not of the kind that would have been easily discoverable by Sears' management. Kunin, 175 F.3d at 295.

In addition, Plaintiff has called into doubt the effectiveness of any anti-harassment and nondiscrimination policy that was employed at T & N by noting the deposition testimony of T & N employees' Bob Crist and Bradd Kemerley, who stated that they were never notified of any anti-discrimination policy. (Pl.'s Mem. at 12-13 n.5.) Based on the above, this Court shall deny T & N's Motion for Summary Judgment on Plaintiff's claims under § 1981, the NJLAD, and Title VII.[8]

F. NEGLIGENT SUPERVISION

In order to establish a claim of negligent supervision against an employer, a plaintiff must present evidence of the following: (1) that the employer knew or had reason to know of the particular unfitness, incompetence, or dangerous attributes of the employee, (2) that the employer could reasonably have foreseen that these qualities created a risk of harm to other persons, and (3) that the employer's negligence and the

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[8] T & N Defendants have also requested summary judgment dismissing any claims against the individual defendants based on Title VII, despite the fact that Count VII of the Second Amended Complaint only names T & N Van Service as a defendant to that claim. Defendants explain that their concern is based on the reference in the "Relief Requested" section, located at the end of Plaintiff's Second Amended Complaint, which seeks relief from unspecified "defendants." While it is clear that there is no individual liability under Title VII, see Sheridan v. E.J. DuPont De Nemours & Co., 100 F.3d 1061 (3d Cir. 1996), cert. denied, 521 U.S. 1129 (1997), it is also clear that Plaintiff has not alleged that any of the individual defendants in this action are liable under Title VII. (Second Am. Compl. at ¶¶ 93-95.) Thus, Defendants' request shall be denied as moot.

employee's unfitness or dangerous characteristic proximately caused the injury. Silvestre v. Bell Atlantic Corp., 973 F. Supp. 475, 486 (D.N.J. 1997), aff'd, 156 F.3d 1225 (3d Cir. 1998).

An employee, however, cannot assert a claim of negligent supervision against an employer because, under New Jersey law, an action in negligence against an employer is barred by the New Jersey Workers Compensation Act, N.J.S.A. § 34:15-8. Id. That statute provides in pertinent part:

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

N.J.S.A. § 34:15-8. Thus, because Mr. Jackson is an employee suing T & N, his employer, this Court must grant summary judgment in favor of T & N on this claim. See, e.g., Fregara v. Jet Aviation Bus. Jets, 764 F. Supp. 940, 954 n.8 (D.N.J. 1991) (dismissing plaintiff's negligent evaluation claim, and noting that no cause of action based on negligence can be brought due to the exclusive remedy provision of the New Jersey Workers' Compensation Act).

G. CONSTRUCTIVE DISCHARGE

Defendants also contend that to the extent Plaintiff has alleged a separate cause of action for constructive

discharge, such a claim has no merit. A constructive discharge occurs when an 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, 887 (3d Cir. 1984). In applying this standard to the instant action, T & N, not surprisingly, argues that Plaintiff was not constructively discharged from employment with T & N based on the following: (1) the Company vigorously defended the termination decisions of Larose, Felton and Larosa, (2) Mr. Jackson was offered continued employment with T & N, (3) T & N offered to attempt to schedule Mr. Jackson so that he has minimal exposure to the two reinstated employees, Felton and Larosa, and T & N would alert supervisors if the three employees would be at the same work site, and (4) the Company welcomed any suggestions and/or accommodations Plaintiff wanted to address regarding the T & N workplace. In addition, T & N points out that Plaintiff did not respond to T & N's offers of accommodation, and has chosen not to return to work. In any event, T & N concludes that its inability to offer Plaintiff an assignment in a different location, where none existed, and guarantee complete separation from Larosa and Felton does not meet the standard of conditions so intolerable that a reasonable person would resign.

In support of his constructive discharge allegations, Plaintiff has argued that he was brutally attacked in the

workplace by a group of three employees, one of whom was the subject of charges of racial harassment and intimidation by another African-American employee that Plaintiff contends were disregarded by management. Under such circumstances, Plaintiff submits that it was necessary for T & N to guarantee that he would be separated from Felton and Larosa, two of the perpetrators of the "mock lynching." Plaintiff further argues that a reasonable person would not continue to subject himself to conditions of employment where he had reason to believe that T & N's owners did not like African-Americans,[9] and where other employees had also acted in racist ways without rebuke by T & N management.[10]

In analyzing the viability of similar constructive discharge claims, the Third Circuit Court of Appeals has consistently refused to state as a broad proposition of law that a single non-trivial incident of discrimination can never be

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[9] Plaintiff bases this belief on his own observations as well as information that he received from another employee. (Pl.'s Summ. J. Mot. at 12)(citing Pl.'s Ex. J, Jackson Dep., dated 10/27/99, pp. 86-87; Pl.'s Ex. K, Jackson Dep., dated 11/3/99, at 21-28).

[10] Examples or racial comments cited by Plaintiff include Felton calling another T & N employee, Corey Mahoney, a "boy" (Pl.'s Summ. J. Mot. at 12-13, Ex. L, Jackson Dep., dated 11/19/99 at 40); unsworn notes recounting interviews with former T & N employees Justin Syers and Brad Kemerley that T & N employees used racial slurs (Pl.'s Summ. J. Mot., Ex. M); and testimony about a temporary driver who, while working with other employees, used the N word over and over again (Pl.'s Summ. J. Mot., Ex. K, Jackson Dep., dated 11/3/99, at 22).

egregious enough to compel a reasonable person to resign. See Levendos v. Stern Entertainment, Inc., 860 F.2d 1227, 1232 (3d Cir. 1988); Schafer v. Bd. Of Pub. Educ. Of the Sch. Dist. Of Pittsburgh, 903 F.2d 243, 250 (3d Cir. 1990). Notwithstanding the noose incident, however, Plaintiff has not alleged circumstances that are usually found in cases where employees claim to have been constructively discharged.

In Roche v. Supervalu, No. CIV. A. 97-2753, 1999 WL 46226 (E.D. Pa. Jan. 15, 1999), aff'd, 193 F.3d 514 (3d Cir. 1999), the plaintiff alleged violations of the American with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-963. In granting a motion for summary judgment filed by the defendants, the court dismissed, inter alia, the plaintiff's constructive discharge claim based on his narcolepsy, finding that no inference could reasonably be drawn that the defendant knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. In addition, the court made the following observations:

> The Court also notes that Plaintiff has not alleged any factors that are commonly cited by employees who claim to have been constructively discharged. See Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993). Plaintiff was never threatened with discharge, nor did Defendant ever urge or suggest that he resign.

> Defendant also did not demote Plaintiff, reduce his pay, or involuntarily transfer him to a less desirable position. Plaintiff had the opportunity to work an early shift, a 9:00 a.m. to 5:00 p.m. shift, but Plaintiff chose to bypass that opportunity in order to remain in the perishables department. Furthermore, Plaintiff did not resign; he took a leave of absence. Thus, the court finds that a reasonable individual with Plaintiff's disability would not have found the unavailability of the 6:30 a.m. to 2:30 p.m. shift intolerable. As stated earlier, because Defendant provided Plaintiff with a reasonable alternative to working the 6:30 a.m. to 2:30 p.m. shift (a shift that was unavailable as it was bid by more senior employees), Plaintiff has not satisfied his burden to sustain his constructive discharge claim for failure to make reasonable accommodations for Plaintiff's disability.

Id. at *10.

Like the plaintiff in Roche, Mr. Jackson did not choose to resign, but remains on a leave of absence. T & N has offered Plaintiff continued employment and his attorney was informed that the Company would attempt to schedule Mr. Jackson so he has minimum exposure to the two reinstated employees, Felton and Larosa. Furthermore, T & N specifically requested that if Mr. Jackson elected not to resume his duties with T & N Van Service, that he provide reasons for his inability and/or unwillingness to return, and allow T & N the opportunity to address and resolve his concerns. (Defs.' Ex. O, Betley Letter, dated 12/29/98, to Lawrence Krasner.) Despite the above, no response was received from Mr. Jackson or his attorney to T & N's offers of

accommodation.

Given that Plaintiff has not resigned, yet refuses to return to T & N's workplace -- where steps have been taken to make reasonable accommodations for Plaintiff, this Court finds, like in Roche, that Plaintiff has failed to satisfy the elements necessary to sustain his constructive discharge claim. Accordingly, Defendants' Motion for Summary Judgment with respect to Plaintiff's constructive discharge allegations shall be granted.

H. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In order to state a cause of action for intentional infliction of emotional distress, Plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe. Taylor v. Metzger, 706 A.2d 685, 694 (N.J. 1998). There is little doubt that the November 4th mock lynching of Plaintiff is conduct that a jury could find so extreme and outrageous as to be utterly intolerable in a civilized community, and, thus satisfies the outrageous requirement. Id. at 700 (holding that a reference by Sheriff to an African-American officer as a "jungle bunny" in the presence of another supervising officer was sufficiently extreme and outrageous to survive summary judgment motion). However, the issue at hand is whether T & N should be held vicariously liable for the conduct exhibited by perpetrators of the noose incident.

In McAllister v. Greyhound Lines, Inc., No. CIV. A. 96-2225, 1997 WL 642994 (D.N.J. Oct. 7, 1997), aff'd, 172 F.3d 41 (3d Cir. 1998), the plaintiffs alleged that, upon boarding a bus for a round trip from Newark, New Jersey to Petersburgh, Virginia, they were harassed and humiliated when the bus driver refused to allow them to sit in the front of the bus. The bus driver did not give a reason for his refusal, yet threatened to call the police. After the plaintiffs and the driver spoke to two Port Authority police officers and a Greyhound supervisor, the driver refused to move the bus until the plaintiffs agreed to change their seats. The delay lasted for 30 to 60 minutes. Then the bus traveled its regular route, stopping once at a rest stop where the driver allegedly complained of an odor as he passed the plaintiffs on his way off the bus. The plaintiffs did not get off the bus at the rest stop, alleging that the driver warned that he would leave without them. The plaintiffs ultimately exited the bus in Petersburg.

In granting summary judgment on the plaintiffs common law claims, the New Jersey federal court applied section 228 of the Restatement (Second) of Agency and determined that Greyhound was not liable under the doctrine of respondeat superior for the bus driver's actions:

> The scope of employment standard is a formula designed to delineate, in general terms, which unauthorized acts of an employee can be charged to the employer. Section 228

of the Restatement (Second) of Agency provides that an employee's conduct is generally considered to be within the scope of employment if: (a) he is hired to perform that kind of conduct; (b) such conduct occurred substantially "within the authorized time and space limits;" (c) the employee acted, wholly or in part, with the purpose of serving his employer; and (d) if the employee intentionally used force against another, the employer would not be surprised by the use of force. Restatement (Second) of Agency § 228(1)(a)-(d)(1957)(emphasis added). Additionally, an employee's conduct is deemed to be outside the scope of employment if it "is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Id. § 228(2).

The alleged acts did occur substantially within the authorized time and space limits of Morris' job; Morris was on duty and driving the bus during the alleged incident. However, the definition of scope of employment is conjunctive - all the elements of section 228 must be satisfied. There is nothing in the record to indicate that Morris' alleged conduct was "even vaguely authorized." Di Cosala v. Kay, 91 N.J. at 167, 450 A.2d 508. The Third Circuit has instructed that "[e]mployer liability should not be imputed under § 219(1) without use of actual authority." Bouton v. BMW of North America, Inc., 29 F.3d 103, 107 (3d Cir. 1994). No facts were presented by the plaintiffs to suggest that Morris' alleged discriminatory conduct was within the scope of his employment. Further, the Court does not deem Morris' actions (the alleged discriminatory conduct) served Greyhound. Morris' conduct was unrelated to his position as a bus driver; his comments and behavior were not of the kind he was hired to perform. Accordingly, as the Court concludes that Morris' conduct falls outside the scope of his employment with Greyhound as contemplated within section 228 of the Restatement Second

> of Agency and within the common law doctrine of respondeat superior, Greyhound's motion for summary judgment on this court will be granted.

Id. at *3.

Like in McAllister, Mr. Jackson cannot satisfy all of the elements required to establish that the perpetrators of the noose incident acted within the scope of their employment. For example, while the incident did occur within the authorized time and space limits of Larose's job, Plaintiff has not provided any evidence to support a finding that the noose incident took place because of the authority given to Plaintiff's harassers by T & N. Jackson, 86 F. Supp.2d 501 n.7. In addition, Plaintiff has not provided sufficient evidence to support a finding that the harassment at issue served T & N. Id. at 500 n.6. Indeed, the mock lynching conducted by Mr. Larose was unrelated to his position with T & N; his comments and behavior were not of the kind he was hired to perform. McAllister, 1997 WL 642994 at *3. Thus, this Court concludes that the harassment at issue falls outside the scope of Larose's employment with T & N. Accordingly, summary judgment shall be granted in favor of T & N on Plaintiff's claim of intentional infliction of emotional distress for lack of respondeat superior liability.

I. PUNITIVE DAMAGES

Finally, Defendants contend that the record does not establish a cause of action that warrants punitive damages. In

support of their position, T & N Defendants argue that there is simply no evidence that can establish willful indifference, evil motive or reckless indifference regarding the rights of Plaintiff.

The standards allowing recovery of punitive damages under the claims set forth in Plaintiff's Second Amended Complaint vary. Compare Kolstad v. American Dental Assoc., 527 U.S. 526, ___, 119 S. Ct. 2118, 2120 (1999) ("An employer's conduct need not be independently `egregious' to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the `malice' or `reckless indifference' needed to qualify for such an award."), with Cavuoti v. New Jersey Transit Corp., 735 A.2d 548 (N.J. 1999) (recovery of punitive damages under NJLAD requires actual participation in or willful indifference to the wrongful conduct on the part of upper management, and proof that the offending conduct is especially egregious). The concepts, however, are somewhat similar in that both the United States Supreme Court, in the context of a Title VII claim, and the New Jersey Supreme Court, in the context of a NJLAD claim, "have recognized the imposition of vicarious liability for punitive damages on employers based on the misconduct of employees requires a distinct method of analysis." Cavuoti, 735 A.2d at 555-56. In

addition, both applications afford "a form of a safe haven for employers who promulgate and support an active, anti-harassment policy." Id. at 556; compare Payton v. New Jersey Turnpike Auth., 691 A.2d 321, ___ (N.J. 1997) (efficacy of employer's remedial program is highly relevant to employee's claim and employer's defense to liability), with Kolstad, 527 U.S. at ___, 119 S. Ct. at 2129 ("[I]n punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's `good-faith efforts to comply with Title VII.'").

As stated above, T & N has absolved itself of liability based on the incorrect assumption that an employer is under no duty to address an allegedly hostile work environment until the harassed employee makes a complaint. While it is true that the record shows strong efforts by T & N to terminate the perpetrators of the noose incident, the record is unclear as to whether T & N had notice of a racially hostile work environment prior to the "mock lynching" of Mr. Jackson. Because an employer must take prompt remedial action at the time the hostile environment is discovered in order to avoid liability, see Harley v. McCoach, 928 F. Supp. 533, 540 (E.D. Pa. 1996)(citing Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994)), and there still remain questions as to the effectiveness of any anti-

harassment/nondiscrimination policy that was employed by T & N, Defendants Motion for Summary Judgment on Plaintiff's claims of punitive damages must be denied.

For all the above reasons, T & N Defendants' Motion for Summary Judgment is granted in part and denied in part. An Order follows.

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

DWAYNE JACKSON, Plaintiff, v. T & N VAN SERVICE, et al., Defendants.	:	CIVIL ACTION NO. 99-1267

ORDER

AND NOW, this 9th day of May, 2000, upon consideration of the Motion for Summary Judgment on behalf of Defendants T & N Van Service, Harry Murphy, Vince Harrington, Don Taddei, David Nelson and Russell Taddei, Jr., and all responses thereto, the following is hereby ORDERED:

1. Defendants' Motion for Summary Judgment on Plaintiff's claims pursuant to the New Jersey Law Against Discrimination is GRANTED with respect to Defendants Vince Harrington, Ken Taddei and Russell Taddei, Jr., and DENIED with

respect to the other defendants;

2. Defendants' Motion for Summary Judgment on Plaintiff's claims pursuant to 42 U.S.C. § 1981 is GRANTED with respect to Defendants Harry Murphy, Vince Harrington, Ken Taddei and Russell Taddei, Jr., and DENIED with respect to the other defendants;

3. Defendants' Motion for Summary Judgment on Plaintiff's claims pursuant to Title VII is GRANTED with respect to Plaintiff's constructive discharge allegations and DENIED in all other respects;

4. Defendants' Motion for Summary Judgment on Plaintiff's claims pursuant to 42 U.S.C. § 1985(3) is GRANTED;

5. Defendants' Motion for Summary Judgment on Plaintiff's claims pursuant to 42 U.S.C. § 1986 is GRANTED;

6. Defendants' Motion for Summary Judgment on Plaintiff's claims of negligent supervision is GRANTED;

7. Defendants' Motion for Summary Judgment on Plaintiff's claims of intentional infliction of emotional distress is GRANTED; and

8. Defendants' Motion for Summary Judgment on Plaintiff's claims for punitive damages is DENIED.

BY THE COURT:

____
ROBERT F. KELLY, J.