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

LORIE MATTISON, Plaintiff,	:	
v.	:	Civil Action No. 97-CV-2736
CLICK CORPORATION OF AMERICA, INC., ET AL., Defendants.	:	

McGlynn, J. **January 27, 1998**

MEMORANDUM OF DECISION

Plaintiff Lorie Mattison filed this action against various defendants, seeking damages for injuries sustained in violation of: (1) 42 U.S.C. § 1985; (2) 42 U.S.C. § 1986; (3) the Violence Against Women Act, 42 U.S.C. § 13981 ("VAWA"); and (4) various state law claims including sexual discrimination and sexual harassment.[1] The defendants are: John C. Imbesi ("defendant" or "defendant John Imbesi"); Lawrence, Joseph and Mark Imbesi ("Imbesi brothers"); Click Corporation of America, Inc. ("Click") and North American Beverage Company ("NAB") (collectively "defendants").

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[1] Plaintiff's thirteen count Complaint is comprised of the following: Count I: New Jersey Law Against Discrimination Sexual Harassment - Quid Pro Quo, N.J.S.A. 10:5-1 et seq. (¶¶ 61-72); Count II: New Jersey Law Against Discrimination Sexual Harassment - Hostile Environment, N.J.S.A. 10:5-1 et seq. (¶¶ 73-83); Count III: The Civil Rights Remedies for Gender-Motivated Violence, 42 U.S.C. § 13981 (¶¶ 84-89); Count IV: Assault and Battery (¶¶ 90-93); Count V: Negligence-Transmission of a Venereal Disease (¶¶ 94-105); Count VI: Intentional Transmission of a Venereal Disease (¶¶ 106-13); Count VII: Negligent Infliction of Emotional Distress (¶¶ 114-19); Count VIII: Intentional Infliction of Emotional Distress; (¶¶ 120-23); Count IX: Negligence (¶¶ 124-27); Count X: Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. (¶¶ 128-36); Count XI: Wrongful Discharge (¶¶ 137-45); Count XII: 42 U.S.C. § 1985(2) (¶¶ 146-50); and Count XIII: 42 U.S.C. § 1986 (¶¶ 151-60).

Before the court are motions to dismiss under 12(b)(6) of the Federal Rule of Civil Procedure. Defendants contest the Complaint on the grounds that: (1) plaintiff lacked standing to bring suit under 42 U.S.C. §§ 1985(2), 1986; (2) plaintiff failed to allege sufficient facts to state a claim upon which relief can be granted in Counts III, V, VI, VII, IX, X, XI and XII; (3) the VAWA is an unconstitutional extension of Congress' powers under both the Commerce Clause of Article I, section 8 of the United States Constitution and section 5 of the Fourteenth Amendment to the United States Constitution; (4) plaintiff's negligence claims in Count V, VII and IX are barred by the New Jersey Workers' Compensation Act; (5) this court should not create a state law cause of action for the negligent or intentional transmission of a venereal disease; (6) plaintiff failed to sufficiently plead her constructive discharge claim; (7) plaintiff's wrongful discharge claim is barred under both the Conscientious Employee Protection Act and New Jersey's Law Against Discrimination; and (8) supplemental jurisdiction over plaintiff's state law claims is inappropriate under 28 U.S.C. § 1367(c). For the reasons set forth below, each of the motions are affirmed in part and denied in part.

I. FACTS[2]

Plaintiff began working at Click as an administrative assistant on July 1995. Compl. ¶ 17. At this time, John Imbesi

[2] As discussed below, the court accepts as true all allegations in the Complaint for the purpose of deciding each motion to dismiss as mandated under Federal Rule of Civil Procedure 12(b)(6).

and the Imbesi brothers were corporate officers and directors who controlled the daily operations of Click and NAB. Id. ¶ 18. During the first month of her employment and continuing until February 16, 1997, plaintiff contends that defendant John Imbesi sexually harassed her both inside and outside the work environment.[3]

In September of 1995, because of John Imbesi's "constant insistence" coupled with her "fear[] that she might lose her job," plaintiff began to engage in sexual relations with defendant John Imbesi for approximately a four-month period. Id. ¶ 31.

Beginning in January of 1996, however, plaintiff refused defendant John Imbesi's requests for sexual relations. Id. ¶ 32. As a result of her refusal, plaintiff claims defendant John Imbesi verbally abused plaintiff by calling her vulgar and degrading names. Id. Nevertheless, from February of 1996 through May of 1996, plaintiff again acceded to defendant's requests for sexual relations because she feared for her safety having been exposed to defendant John Imbesi's violent temper. Id. ¶ 33.[4] During this

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[3] According to the complaint, plaintiff was the victim of a continuing barrage of sexually explicit comments and requests expressed in the crudest and most offensive terms and often accompanied by physical contact and gestures. See Compl. ¶ 26.

[4] Plaintiff recounted two specific incidents from the Summer of 1996 which she claims are illustrative of defendant John Imbesi's violent temper. First, plaintiff claims that defendant John Imbesi locked plaintiff on his boat, demanded that she take off her clothes and ordered her to have sex with him. Id. ¶ 35. Next, plaintiff alleges she witnessed defendant John Imbesi violently kill a black kitten that had wandered onto his boat by kicking it to death. Id. ¶ 36.

time, defendant Imbesi's demands for sexual relations with plaintiff were made "in an increasingly threatening manner." Id. ¶ 34.

On one occasion in December of 1996, plaintiff alleges she became severely ill while riding in a car and requested that defendant John Imbesi drive her home. Id.[5] Upon their arrival, defendant unlawfully entered plaintiff's home, forcefully removed plaintiff's pantyhose against her will and penetrated plaintiff's vagina with his penis. Id. ¶ 48. According to plaintiff, this assault coupled with defendant John Imbesi's continued sexual harassment and threatening behavior finally compelled plaintiff to "flee" her position as an administrative assistant at Click on February 16, 1997. Id. ¶ 60.[6]

On April 21, 1997, plaintiff initiated this suit. The Complaint seeks declaratory relief, damages and attorney's fees against all defendants pursuant to federal law and New Jersey statutory and common law. Defendants responded by filing the

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[5] According to plaintiff, she was sick with "flu-like" symptoms from October 1996 through early February 1997. Id. ¶ 44. At one point during this time, defendant Imbesi allegedly told plaintiff that he would pay for plaintiff's medical bills if she perform oral sex on him. Id. ¶ 45. Plaintiff ultimately was diagnosed with genital herpes on February 27, 1997. Id.

[6] Plaintiff claims that she approached defendant John Imbesi on February 14, 1997, and told him that she was leaving her employment. Id. ¶ 59. Defendant John Imbesi allegedly responded by threatening that "he would tell everyone that she had just walked off the job" and he threatened to give plaintiff a poor reference. Id. As a result of defendant John Imbesi's violent temper, plaintiff claims that she fears for her personal safety and, therefore, she has gone into hiding. Id. ¶ 60.

present motions before this court.[7]

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss a complaint that fails to state a claim upon which relief can be granted. To properly adjudicate such a motion, Rule 12(b)(6) must be read in conjunction with Federal Rule of Civil Procedure 8(a), which requires a "short, plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A pleading which fails to meet this liberal standard is subject to dismissal under Rule 12(b)(6). When considering a Rule 12(b)(6) motion, a court must accept as true all allegations in the complaint and must give the benefit of every favorable inference that can be drawn from those allegations to the non-moving party. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979)(quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). But the court need not accept "bald assertions" or "legal conclusions" contained in the complaint. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-30 (3d Cir. 1997)(quoting Glassman v. Computervision Corp., 90 F.3d 617, 628 (1st Cir. 1996)).

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[7] Defendant John Imbesi's Motion to Dismiss as well as the Click and NAB Motion to Dismiss were filed on July 14, 1997, while the Imbesi brothers Motion to Dismiss was filed on July 15, 1997. Further, the Imbesi brothers, Click and NAB join, adopt and incorporate by reference the arguments set forth in Defendant John Imbesi's Motion to Dismiss and Memorandum of Law in Support of Defendant John Imbesi's Motion to Dismiss the Complaint.

A dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. DISCUSSION

A. Violation of 42 U.S.C. § 1985(2)

In Count XII of her Complaint, plaintiff attempts to structure a cause of action against defendants for witness intimidation under 42 U.S.C. § 1985(2).[8] Plaintiff alleges that she is entitled to relief under this section both as a prospective witness in the Goodwin litigation and as a party in her present action. These claims are based on the following facts.

Plaintiff alleges that defendant John Imbesi informed plaintiff sometime in January 1997 that he was submitting her name as a character witness on his behalf in the Goodwin litigation. Id. ¶ 58.[9] Plaintiff claims this was in furtherance of defendant

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[8] 42 U.S.C. § 1985(2), in relevant part, applies when:

> two or more persons . . . conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . .

42 U.S.C. § 1985(2)(1994) (emphasis added).

[9] Goodwin v. Seven-up Bottling Co. of Philadelphia, Nos. 96-CV-2301, 96-CV-7887. In Goodwin, a former employee of Seven-Up filed a sexual harassment suit against defendant John Imbesi,

John Imbesi's agreement, forged with Barbara Fullman, "to influence the verdicts and deter deposition witnesses from testifying truthfully in the Goodwin litigation." Id. ¶ 54. At this time, defendant John Imbesi allegedly ordered plaintiff to testify that defendant John Imbesi had always behaved professionally toward plaintiff and that defendant and plaintiff had never engaged in a sexual relations. Id. ¶ 58. Plaintiff claims that she declined defendant John Imbesi's request and, as a result, "[d]efendant John Imbesi became increasingly more threatening and ordered [plaintiff] to lie." Id. Plaintiff claims that this conduct, considered in conjunction with the other factual allegations regarding defendant John Imbesi's violent behavior, demonstrates defendant's intent to deter plaintiff from testifying truthfully.

Defendants, however, not only dispute these allegations factually, but also maintain that plaintiff lacks standing to pursue these claims because: (1) plaintiff neither qualifies as a party to the Goodwin litigation nor was her ability to present a case in federal court affected by the purported conspiracy in Goodwin; (2) plaintiff was not a witness in Goodwin at the time of the alleged intimidation; (3) plaintiff was not injured by the alleged conspiracy in the Goodwin litigation; and (4) there is no federal nexus between the alleged conspiracy and defendant John Imbesi's alleged attempt to influence plaintiff's testimony. Because plaintiff does not qualify as a party or a witness under 42

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his brothers and companies controlled by them.

U.S.C. § 1985(2), the motion will be granted as to Count XII.

1. Plaintiff as a Party

Plaintiff argues that she has standing to sue under section 1985(2) "as a potential witness in Goodwin, and now as a plaintiff in a closely related action . . . ." Pl's Reply, at 36. Plaintiff contends that:

> In order to prove her own case of sexual harassment and violence, [plaintiff] must rely on the testimony of co-workers who were intimidated by Defendant John Imbesi's instructions to lie about the environment in which they worked. Therefore [plaintiff's] cause of action under 21 U.S.C. § 1985(2) could hardly be more closely tied to the underlying purposes of the Ku Klux Klan Act . . . .

Pl's Reply, at 40.

That John Imbesi importuned others to lie in the Goodwin litigation will not support a finding that he has done the same in the present litigation. Accordingly, plaintiff has no standing as a party under section 1985(2). In addition, plaintiff has not demonstrated that she suffered injury as a party to the present litigation as a result of defendant's conduct.

2. Plaintiff as a Potential Witness

In the alternative, plaintiff argues that she may recover under section 1985(2) because she was a prospective witness in the Goodwin litigation.[10] Defendants, however, maintain that plaintiff

[10] Plaintiff claims that "she was listed by the plaintiff in Goodwin as a prospective trial witness, was in fact twice subpoenaed to testify [attaching subpoenas as exhibits], [and] has reason to believe that she was listed in the Goodwin plaintiff's pre-trial memorandum . . . as a prospective witness."

was not a "witness" for either party in Goodwin within the meaning of the statute at the time of the alleged intimidation. Df's Reply, at 6. Rather, plaintiff became a witness or a prospective witness for Ms. Goodwin after the alleged intimidation occurred. Id. As a result, defendants contend that plaintiff does not come within the term "witness" as used in section 1985(2).

The issue is whether a non-party, solicited by a party to testify falsely in a matter then pending and is thereafter physically threatened because of her refusal to do so, is a "witness" under 42 U.S.C. § 1985(2).

Section 1985 does not define the term "witness." However, in Malley-Duff, the Third Circuit interpreted the phrase "in any court" in section 1985(2) to mean that a person asked to provide discovery, regardless of where or in what form, was considered a witness "in court" even though no actual proceedings had occurred. 792 F.2d at 355. As a result, individuals involved in pre-trial proceedings satisfied the requirement under section 1985(2) for intimidation of witnesses testifying "in court." Id. Further, in Chahal v. Paine Webber, 725 F.2d 20, 23 (2d Cir. 1984), the Second Circuit liberally construed the term "witness" in the context of a motion under Fed. R. Civ. P. 12(b)(6). Chahal involved a

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Pl's Reply, at 39. The fact that plaintiff was subpoenaed in June and August of 1997 does not indicate that plaintiff was considered a prospective witness for Ms. Goodwin in January or February of 1997 when the alleged intimidation occurred. Indeed, plaintiff became a witness only because she had been solicited by John Imbesi to testify falsely in his favor and that was the extent of her testimony.

conspiracy to intimidate an expert witness in an effort to get him to withdraw from a case before trial. Id. Finding that a claim had been stated, the court observed:

> Congress' purpose, which was to protect citizens in the exercise of their constitutional and statutory rights to enforce laws enacted for their benefit, is achieved by interpreting the word 'witness' liberally to mean not only a person who has taken the stand or is under subpoena but also one whom a party intends to call as a witness.

Id. at 24 (emphasis added).

Thus, it would appear that a "witness" under section 1985(2) includes either an actual witness "in court" or someone who at least has been clearly identified as a prospective witness in a judicial proceeding. This definition does not encompass all persons who may have knowledge of relevant facts. Rather, a plaintiff must allege facts which clearly demonstrate that the plaintiff was designated as a prospective witness in an identifiable proceeding.

As noted above, defendant John Imbesi solicited plaintiff's cooperation as a prospective character witness in Goodwin. Of course, when she refused his overtures, he abandoned her as a witness. Obviously, the defendant himself had plaintiff in mind as a prospective witness in the Goodwin case, but the statute, by its very nature, requires more than mere contemplation. But even assuming that plaintiff is covered under section 1985(2) as a prospective witness, the question then becomes whether she has alleged the requisite injury resulting from the intimidation.

Injury is a necessary predicate to sustaining a witness intimidation claim under section 1985(2). See Slater v. Marshall, 915 F. Supp. 721, 726-27 (E.D. Pa. 1996)(requiring showing of injury to proceed with section 1985(2) claim); Rode, 845 F.2d at 1207. In Slater v. Marshall, the court dismissed plaintiff's section 1985(2) claim because no actual injury was shown. 915 F. Supp. at 726-27. The Slater court reasoned that: (1) plaintiff's witness was allegedly intimidated after giving his deposition (so there was no effect on the actual testimony); (2) there were "no allegations that the alleged intimidation ha[d] affected any other pre-trial activities"; and (3) the witness had not even testified at trial. Id. at 727.

Prior decisions regarding injury in the context of witness intimidation have primarily focused on the effect of such witness intimidation on the party's ability to present an effective case. See David, 820 F.2d at 1040 (sustaining 1985(2) claim requires plaintiff to show that "litigant was hampered in being able to present an effective case"). In considering a claim by a witness under 1985(2), the focus is on how the intimidation actually affected the witness' ability to testify.

There is no suggestion in plaintiff's pleadings that she was hindered in providing pre-trial testimony or that she was prevented from providing truthful pretrial or trial testimony in the Goodwin litigation.[11] Count XII of plaintiff's Complaint will be dismissed.

[11] Specifically, plaintiff has not alleged that her testimony was hindered during either pre-trial proceedings or

B. Violation of 42 U.S.C. § 1986

Since plaintiff failed to assert a valid section 1985 claim, plaintiff lacks standing to assert a valid section 1986 claim.[12] Therefore, Count XIII of plaintiff's Complaint will also be dismissed.

C. The Violence Against Women Act of 1994

Plaintiff claims that defendants violated her federal civil rights under the Violence Against Women Act of 1994 ("the VAWA"). Four years of extensive Congressional hearings concerning the substantial and pervasive effects of violence against women

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when she actually testified at the Goodwin trial on September 15, 1997. Compare, e.g., Chahal, 725 F.2d at 22-24 (permitting plaintiffs to proceed with section 1985(2) claim where their prospective expert witness withdrew from case one week before trial as a result of witness intimidation); see also Arroyo-Torres v. Ponce Fed. Bank, 918 F.2d 276, 279 (1st Cir. 1990) (affirming dismissal where complaint failed to allege plaintiff was in fact prevented from testifying); Rylewicz, 888 F.2d at 1181-82 (finding no allegations that witness was hampered from testifying truthfully).

[12] The existence of a viable section 1985 claim is a prerequisite to maintaining a section 1986 claim. Section 1986 states, in relevant part:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such persons by reasonable diligence could have prevented.

42 U.S.C. § 1986 (1994)(emphasis added).

culminated in the enactment of the VAWA in 1994.[13] Under section 13981 of the VAWA, Congress established a federal civil rights remedy for victims of gender-motivated violence.[14] Specifically:

> [a] person (including persons who act under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981(c) (1994).

The purpose of this remedy is "to protect the civil rights of victims of gender motivated violence and to promote the public safety, health, and activities affecting interstate commerce . . . ." Id. § 13981(a). Congress premised its authority to enact the VAWA on the Commerce Clause and section 5 of the Fourteenth Amendment. Id. Since its enactment, one circuit court and five district courts have rejected constitutional challenges to the VAWA.[15]

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[13] The VAWA was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

[14] See 42 U.S.C. §§ 13981(a)-(d) (1994). This section is commonly referred to as the civil rights remedy provision of the VAWA. The application of this provision is limited and does not extend to "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of evidence, to be motivated by gender (within the meaning of subsection(d) of this section)." Id. § 13981(e)(1) (1994).

[15] Brzonkala v. Virginia Polytechnic & State Univ., Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997); Crisonino v. New York City Housing Authority, 96-CV-9742 (HB),

In the present case, plaintiff claims that defendant John Imbesi violated the VAWA when he subjected plaintiff to incidents of sexual assault, harassment and battering. Defendant John Imbesi denies these allegations and challenges not only the constitutionality of the VAWA, but its application to the present proceedings as well.

Defendant John Imbesi's argument that Congress exceeded its authority when it enacted the VAWA has been thoroughly analyzed and rejected by each of the courts that have addressed this issue. See, e.g., Brzonkala, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997). The reasoning is compelling and clearly supports the conclusion that the VAWA passes constitutional muster.

1. Plaintiff's Factual Allegations Under the VAWA

The court's primary responsibility when faced with a Rule 12(b)(6) motion is to determine whether plaintiff adequately alleged facts, that, if true, are sufficient to state a claim under the VAWA upon which relief may be granted. See Conley, 355 U.S. at 45-46. According to 42 U.S.C. § 13981(c), an individual can maintain a cause of action under the VAWA if: (1) a crime of violence is committed; (2) which is motivated by gender; and (3) which has deprived an individual of the right to be free from such

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1997 WL 724782, 1997 WL 726013 (Harold Baer, Jr., D.J.) (S.D.N.Y. Nov. 18, 1997)(finding Congress utilized proper and authorized constitutional basis to enact the VAWA); Anisimov v. Lake, No. 97-C-263, 1997 WL 538718 (Marovich, D.J.) (N.D. Ill. Aug. 26, 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997) (same); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997)(same); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996)(same);

gender-motivated crimes. Defendant John Imbesi argues that the second element, the gender factor, is missing in the case.

Section 13981 defines the phrase "crime of violence motivated by gender" as: "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender . . . ." 42 U.S.C. § 13981(d)(1) (1994).[16]

a. Crime of violence committed "because of" or "on the basis of" the victim's gender.

Plaintiff maintains that her factual allegations of sexual assault, harassment and battering by defendant John Imbesi, are sufficient for Rule 12(b)(6) purposes to demonstrate that defendant

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[16] The relevant VAWA section states:

> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
> (2) the term "crime of violence" means-
> (A) an act or series of acts that would constitute a felony against a person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction . . . and
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981(d)(1994).

committed these acts "because of" or "on the basis of" her gender.[17] As the court in Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), pointed out:

> [a]lthough there might be some difficulty in determining whether other crimes, even crimes against the person, were "because of" or "on the basis of" the victim's gender, the court has little doubt that allegations of sexual assault or sexual exploitation crimes are allegations of crimes committed "because of" or "on the basis of" the victim's gender.

Id. at 1406.

b. Crime of violence "due, at least in part to an animus based on the victim's gender."

Defendant John Imbesi next claims that plaintiff failed to demonstrate that the alleged sexual assault, harassment and battering were "due, at least in part, to an animus based on the victim's gender." He maintains that a "longstanding sexual relationship" does not demonstrate the type of animus targeted by the VAWA. Df's Mem., at 14.[18] He argues, to the contrary, his remarks to plaintiff "demonstrate an affinity, not animosity towards women, and plaintiff in particular." Id. (emphasis in original). However, these occasional protestations of "affinity" are completely overshadowed by detailed allegations of outrageous,

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[17] Specifically, plaintiff claims, "[b]ut for [plaintiff's] gender, defendant would not have sexually assaulted her." Pl's Reply, at 31.

[18] Defendant alleges that the "longstanding sexual relationship" between plaintiff and defendant Imbesi is "highly relevant to whether the challenged conduct occurred (at least in part) because of plaintiff's class status or, as defendant contends, because of who plaintiff is as an individual and the nature of their relationship." Df's Reply, at 15.

humiliating and degrading behavior on the part of defendant John Imbesi which, if proven, demonstrates "disrespect for women in general and connects this gender disrespect to sexual intercourse." Brzonkala, 1997 WL 785529, at *14. Such conduct is ample evidence from which the factfinder can infer the requisite gender bias.

Under Rule 12(b)(6), the court must determine whether a "plaintiff may be entitled to relief under any reasonable reading of the pleadings . . . ." See Alexander v. Whitman, 114 F.3d 1392, 1397-98 (3d Cir. 1997). If true, plaintiff's averments demonstrate that defendant Imbesi was consumed by a desire to subordinate, demean, humiliate and intimidate.[19]

Section 13981(e) of the VAWA excludes "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of evidence, to be motivated by gender (within the meaning of subsection(d) of this section)." See 42 U.S.C. § 13981(e)(1) (1994). This limitation safeguards defendants against frivolous claims. To be actionable under the VAWA, the "crime of violence" must be a felony. Id. §§ 13981(d)(2)(A),(B). Thus, only unwanted sexual advances amounting to a felony will suffice. Defendant's contention that the VAWA will supplant state tort law is incorrect. There is nothing in the VAWA which precludes a

[19] Pertinent characteristics accepted as useful for determining whether gender-motivation bias exists include: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense . . . ." S.Rep. No. 197, 102d Cong., 2d Sess. 50 n.72.

victim of gender motivated violence, such as sexual assault, from bringing a state tort claim. See Doe, 929 F. Supp. at 616 (finding "[t]he significance of this Act [VAWA] is its recognition of a federal civil right, with attendant remedies, which is distinct in remedy and purpose from state tort claim.").

D. State Law Claims and Supplemental Jurisdiction

Finally, plaintiff asks this court to exercise supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367 (1994).[20] Even when the state claim "derives from a common nucleus of operative fact" as the federal claim and "a plaintiff would ordinarily be expected to try them in one judicial proceeding", United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), a court may decline jurisdiction if:

> (1) the claim raises a novel or complex issue of State law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (1994).

The court may properly decline to exercise supplemental jurisdiction and dismiss the state claims if any one of these factors is applicable. See Growth Horizons, Inc. v. Delaware

[20] These remaining state claims include: NJLAD-Quid Pro Quo(Count I); NJLAD-Hostile Environment (Count II); assault and battery (Count IV); negligent transmission of a venereal disease (Count V); intentional transmission of a venereal disease (Count VI; and intentional infliction of emotional distress (Count VIII).

County, 983 F.2d 1277, 1284 (3d Cir. 1993). When deciding whether to exercise supplemental jurisdiction, the court should consider the principles of judicial economy, the interests of comity, convenience and fairness to the litigants, the stage of the litigation, whether either party will be prejudiced by dismissal of the state law claims and whether the state law claims involve issues of federal policy. Glanzar Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 823 F. Supp. 1191, 1197 (E.D. Pa. 1993).

In the present case, the court has federal question jurisdiction over plaintiff's VAWA claim against defendant John Imbesi. The only claims against Lawrence, Joseph and Mark Imbesi and the corporations are state law claims unrelated to the VAWA, thus, there is no independent basis for exercising jurisdiction over these other defendants. However, even if the federal and state law claims formed part of the "same case and controversy," the state law claims would substantially predominate over the VAWA claim.

In addition, plaintiff's state law claims present novel and complex issues of New Jersey state law. For example, in Counts V and VI, plaintiff alleges that defendant John Imbesi negligently and/or intentionally infected plaintiff with the genital herpes virus. While lower courts have recognized the validity of such a cause of action,[21] the New Jersey Supreme Court has yet to speak on

[21] See, e.g., Earle v. Kuklo, 98 A.2d 107, 108, 109 (N.J. Super. Ct. App. Div. 1953) (finding landlord failing to inform

this issue.

There is also the question of whether plaintiff's negligence claims are barred under the New Jersey Workers' Compensation Act ("NJWCA"). The NJWCA provides the exclusive remedy for an employee's personal injuries "arising out of and in the course of his employment." N.J.S.A. §§ 34:15-1, 15-7. The NJWCA also contains an "exclusivity" provision which operates as a bar to common law claims.[22] According to defendants, plaintiff's claim for negligent transmission of a venereal disease is covered by the NJWCA and barred by its exclusivity provision because the only injuries exempt from the NJWCA's reach, and therefore the only claims which remain cognizable at common law, are those due to "intentional wrong". See N.J.S.A. § 34:15-8.

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tenant that premises infected with contagious disease is liable in damages for injuries resulting); McIntosh v. Milano, 403 A.2d 500, 509 (N.J. Super. Ct. Law Div. 1979)(recognizing the propriety of Earle v. Kuklo); J.Z.M. v. S.M.M., 545 A.2d 249, 251 (N.J. Super. Ct. Law Div. 1988)(stating tort action for transmission of genital herpes should not be consolidated with post-judgment custody dispute because tort action was "so distinct and independent in nature and extent"); G.L. v. M.L., 550 A.2d 525, 527 (N.J. Super. Ct. Ch. Div. 1988)("It is unconscionable that a person could escape liability for infecting a spouse with genital herpes or other sexually transmitted disease by merely claiming that the transmission occurred during privileged sexual relations of marriage.").

[22] The "exclusivity" provision provides:

> 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 (emphasis added).

Plaintiff concedes that negligent acts are covered by the NJWCA, however, she argues that the NJWCA is not the exclusive remedy.[23] In support of this proposition, plaintiff relies on Millison v. E.I. du Pont deNemours & Co., 501 A.2d 505 (N.J. 1985), where the court determined that an employer's knowing concealment from an employee of an asbestos-related disease removed the exclusivity bar under the NJWCA because it was "not one of risks an employee should have to assume." Id. at 516. Plaintiff also cites Cremen v. Harrah's Marina Hotel Casino, 680 F. Supp. 150 (D.N.J. 1989), which involved the sexual assault of a female cocktail waitress by her supervisor. The Cremen court exempted the plaintiff's battery and intentional infliction of emotional distress claims from the exclusivity bar of the NJWCA finding that "the incidents as averred are 'sufficiently flagrant' so as to constitute 'intentional wrongs'. . . ." Id. at 158. The court reasoned that these claims do not amount to "a fact of life of industrial employment." Id. at 158-59 ("this court cannot believe that the job description of a cocktail server at a major casino reasonably contemplates exposure to sexual assault or harassment from the server's superiors or co-workers."). Likewise, plaintiff

[23] Plaintiff contends that "the fact that some of [plaintiff's] negligence-related harms might be compensable as work-related injuries does not make those harms compensable only under the Workers' Compensation laws." Pl's Reply, at 49 (emphasis in original). See Schmidt v. Smith, 684 A.2d 66, 74 (N.J. Super. Ct. App. Div. 1996)(finding non-intentional sexual harassment claims not subject to "exclusivity" provision even though these claims may be actionable under NJWCA), cert. granted on other grounds, 690 A.2d 608 (1997).

in the present case argues that the negligent transmission of a venereal disease is also exempted from the exclusivity bar.

It is unclear whether the NJWCA is the exclusive remedy for such negligent acts. Consequently, interpreting the breadth of the NJWCA raises a novel and complex issue of New Jersey state law which, in the interests of comity, should be determined by New Jersey state courts.

Defendants also argue that plaintiff's common law claim for wrongful discharge in Count XI is waived by the institution of a CEPA claim or, in the alternative, waived under the New Jersey Law Against Discrimination ("NJLAD"). Defendants maintain that plaintiff premised, at least in part, both her CEPA claim and her wrongful discharge claim on plaintiff's refusal to testify in Goodwin.[24] Because CEPA contains a waiver provision barring an employee from pursuing both statutory and common law claims based on the same conduct, defendants argue that plaintiff's wrongful discharge claim is barred under CEPA. Df's Reply, at 29. Plaintiff, however, claims that wrongful discharge based on sexual harassment and constructive discharge based on a refusal to testify falsely are substantially independent of each other and therefore do not fall under the CEPA waiver provision. The resolution of this factual issue, however, is beyond the scope of the VAWA

[24] Plaintiff claims she "was forced to flee her job at Click and [NAB] when defendant John Imbesi engaged in acts in furtherance of a conspiracy to prevent employees from testifying" in Goodwin. Pl's Reply, at 68.

claim.[25]

In addition, defendant John Imbesi claims that he cannot be held individually liable under the NJLAD. "New Jersey law on the subject of individual liability under the NJLAD is unsettled." Hurley v. Atlantic City Police Dep't, 933 F. Supp. 396, 417 (D.N.J. 1996). This, of course, presents another substantial issue of New Jersey law. Specifically, defendant's argument raises issues of fact and New Jersey law which exceed the scope of the VAWA claim because unlike the NJLAD, the VAWA claim is not dependant upon the employment relationship.

Based upon the foregoing considerations, the court declines to exercise supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. § 1367, with the exception of Count IV (assault and battery) against John Imbesi which is inextricably tied to plaintiff's VAWA claim.

IV. Conclusion

Plaintiff's federal claims under 42 U.S.C. § 1985(2) and 42 U.S.C. § 1986 will be dismissed as to all defendants. All other claims will be dismissed as to Lawrence Imbesi, Joseph Imbesi, Mark Imbesi, Click Corporation of America, Inc. and North America

[25] The CEPA waiver only applies to those causes of action relating to retaliatory discharge and not to causes of action that are substantially independent of the CEPA claim. If plaintiff buttresses her CEPA claim with the same factual allegations that are inextricably linked with her wrongful discharge claim, then her claims are not substantially independent of each other and plaintiff's common law wrongful discharge claim will be dismissed. If this occurs, there would be no need to address defendant John Imbesi's claim that he cannot be held individually liable under the NJLAD.

Beverage Company. The motion to dismiss Counts III and IV will be denied as to John Imbesi only.