UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DEBRA S. BOENIG, Plaintiff,	:	
v.	:	Civil Action No. 3:03cv2275(CFD)
JOHN E. POTTER, POSTMASTER GENERAL OF THE UNITED STATES POST OFFICE, et al. Defendants.	:	

RULING ON PENDING MOTIONS

The plaintiff, Debra Boenig, an employee of the United States Postal Service ("the USPS"), brings this action against the Postmaster General, John E. Potter, and three other employees of the USPS: Thomas Brummett, Andrew Moore and Douglas Bardot. The amended complaint sets forth the following claims: (1) sexual harassment and hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.; (2) violations of the First and Fourteenth Amendment of the U.S. Constitution, brought through 42 U.S.C. § 1983; (3) negligent infliction of emotional distress; and (4) intentional infliction of emotional distress. In addition, the complaint seeks compensatory damages in the amount of $3 million, and punitive damages in the amount of $2.5 million. Pending are the defendants' motion to dismiss and motions to strike. For the following reasons, the motion to dismiss **[Doc. # 15]** is **GRANTED**, the motion to strike **[Doc. # 11]** is **GRANTED** and the motion to strike **[Doc. # 13]** is **GRANTED**.

I Background

The complaint alleges the following: From approximately 1994 to the present, the

plaintiff has been employed by the USPO as a letter carrier in the Norwich, Connecticut area. Brummett is the postmaster for the Norwich post office. The plaintiff's supervisors are Moore and Brummett. On August 5, 2002, assistant supervisor Angel Manuel Cordero was assigned to accompany the plaintiff for "route inspection."[1] While accompanying the plaintiff, Cordero used profanity when discussing Brummett, referred to the plaintiff as "darling," "honey," "sweetheart," and "babe," and made other inappropriate remarks that were sexual in nature.

The next day, Cordero approached the plaintiff and placed both of his hands on her waist while speaking to her about the prior day's inspection. Cordero was then again assigned to accompany the plaintiff on a route inspection. During this second inspection, Cordero again made additional inappropriate remarks that were sexual in nature. Moreover, at one point during the inspection, Cordero failed to accompany the plaintiff up the stairs at one of the stops on her route. When the plaintiff asked why he had not accompanied her up those stairs, Cordero replied that he would rather look at her backside. Later, Cordero also refused leave the plaintiff's seat in the back of her truck, and used profanity to refer to her.

On August 7, 2002, the plaintiff learned that Cordero would once again be going out on a route inspection with her. The plaintiff voiced her concern about this plan to June Martin, her union steward. Martin brought the plaintiff in to meet with Brummett and explain her concerns about working with Cordero. Brummett asked the plaintiff whether she would like to file a formal complaint against Cordero, and she told him yes. Brummett then indicated that he would replace Cordero with another supervisor for the route inspection, yet the plaintiff stated that she was too upset and went home. The plaintiff then saw her doctor, who gave her a medical leave

[1]Cordero was not named as a defendant in this action.

note keeping her out of work due to stress.

The plaintiff returned to work on August 9, 2002, at which time she had a meeting with Martin, Brummett and a Mr. Daniels, whom the complaint refers to as the president of the NALC.[2] In response to a question from Brummett, the plaintiff stated that she had a problem with any male supervisor completing the route inspection with her due to Cordero's prior conduct, and that she was also afraid that another inspector would give her an unfair report because she had reported the prior incident with Cordero. The plaintiff also indicated during that meeting that she wished to file an EEOC complaint because Cordero was still working in the building, and she did not want to have a similar experience with him.[3]

The complaint also alleges the following acts by the other individual defendants, Bardot and Moore: Bardot, a former supervisor in the Norwich post office, stated that he was going to tell Brummett that when he accompanied the plaintiff on her route several months previously, the plaintiff told him that if Cordero ever "walked her route" again, she would report sexual harassment. In addition, Bardot also said that "no craft employee takes down a manager and, I will see to it that her career is over." Bardot then engaged in an effort to discredit the plaintiff, including conspiring with Brummett to have her fired.

As to Moore, the complaint alleges that he denied the plaintiff's request to remove Cordero from the post office floor while she was working. Also, on November 29, 2002, another post office employee, Anthony Dougherty, began screaming at the plaintiff. Moore witnessed

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[2]Apparently, the NALC is the National Association of Letter Carriers, the plaintiff's union. It is undefined in the complaint.

[3]The plaintiff also alleges that Brummett denied her request for a "special inspection."

this incident, yet failed to stop Dougherty. After the plaintiff asked him to make Dougherty stop, Moore sent her home–causing the plaintiff to lose a day's pay. No disciplinary action was taken against Dougherty as a result of that incident. The plaintiff claims that she was treated this way because she was a female employee, and that the action was in retaliation for her complaints against Cordero. Finally, on December 24, 2002, Moore told the plaintiff that "he wanted her case up and down by 9:30 a.m."[4] When the plaintiff stated that she may need help, Moore responded: "You always need help from the neck up." The plaintiff claims that when other male carriers have requested assistance for case work and route assistance, they have not been subjected to such insults and harassment.

In sum, the plaintiff alleges that her harassment continued following her complaints about Cordero, and that her complaints resulted in a concerted effort by Brummett, Moore and Bardot to retaliate against her by terminating her employment and blocking any attempted claim for workers' compensation benefits.

On October 18, 2002, the plaintiff filed a formal complaint of discrimination with the United States Postal Service Equal Employment Opportunity Commission. Because the Commission had not acted within 180 days of the plaintiff's complaint, and no final action had been taken on a decision by an administrative judge, the plaintiff filed the instant action. The defendants now move to dismiss on several different grounds, and to strike certain portions of the complaint. The Court will address the motion to dismiss first.

II Motion to Dismiss

A) Standard of Review

[4]The complaint does not define what "getting a case up and down" entails.

The defendants move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Todd v. Exxon Corp., 275 F.3d 191, 197 (2d Cir. 2001). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Todd v. Exxon Corp., 275 F.3d at 197-98 . "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale New Haven Hosp., 727 F.Supp. 784, 786 (D.Conn.1990) (citing Scheuer, 416 U.S. at 232). In other words, the question is "whether or not it appears to a certainty under existing laws that no relief can be granted under any set of facts that might be proved in support of" the claims. De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978). In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken. Fed. R. Civ. P. 12(c): see also Courtenay Communications Corp. v. Hall, 334 F.3d 210, 213 (2d Cir. 2003); Leonard F. v. Israel Discount Bank of N.Y., 199 F.3d 99, 107 (2d Cir. 1999); Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

As noted previously, count one alleges a violation of Title VII against the USPS Postmaster General. Count two alleges constitutional claims through 42 U.S.C. § 1983 against the three individual defendants: Brummett, Moore and Bardot. Counts three and four set forth Connecticut common law claims against the individual defendants. The defendants moved to

dismiss counts two, three and four for failure to state a claim upon which relief may be granted.[5] Although the plaintiff originally opposed the motion as to all three counts, she subsequently filed a notice with this Court stating that she "withdraws her objection to defendants' motion to dismiss the Second Count only." [Doc. # 24]. Consequently, count two is dismissed, absent objection, and the Court must only address the motion to dismiss counts three and four in this ruling.

B) Negligent Infliction of Emotional Distress

Count three sets forth a Connecticut common law claim for negligent infliction of emotional distress against Brummett, Moore and Bardot. The defendants seek to dismiss this claim on the grounds that: (1) it is barred by the exclusivity provision of Title VII; (2) it is barred by the Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1); and (3) it is barred by the Connecticut Supreme Court's decision in Perodeau v. Hartford, 259 Conn. 729, 792 A.2d 752 (2002). The plaintiff contests the defendants' arguments on all three grounds.

In Perodeau, the Connecticut Supreme Court held that, for policy reasons, an individual employee "may not be found liable for negligent infliction of emotional distress arising out of conduct occurring within a continuing employment context, as distinguished from conduct occurring in the termination of employment." Id. at 744. The rationale for this holding was that

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[5]The defendants' motion also sought dismissal of count one on the ground that the plaintiff failed to make adequate service on the Postmaster General within the time provided by Fed. R. Civ. P. 4(m). Subsequent to the filing of the motion to dismiss, however, the plaintiff filed a motion for extension of time in which to serve the Postmaster General. The defendants submitted notice that there was no objection to the plaintiff's request. Therefore, the plaintiff's motion was granted by the Court, and the plaintiff has since filed notice that service on the Postmaster General has properly been effectuated. Consequently, the Court need not address that portion of the motion to dismiss, and count one remains pending against the Postmaster General.

subjecting employees to lawsuits for negligent infliction of emotional distress would have a "pervasive chilling effect" which "outweigh[s] the safety interest of employees in being protected from negligent infliction of emotional distress," and "in light of the inherently competitive and stressful nature of the workplace and the difficulties surrounding proof of emotional distress, extending the tort of negligent infliction of emotional distress to ongoing employment relationships would open the door to spurious claims." Id. at 758. Therefore, "after Perodeau, only conduct occurring in the process of termination can be a basis for recovery for negligent infliction of emotional distress in the employment context." Brunson v. Bayer Corp., 237 F.Supp.2d 192, 208 (D.Conn. 2002); see also Antonopolous v. Zitnay, __ F.Supp.2d __, __, 2005 WL 488683 at *7 (D.Conn. 2005) ("Recovery for negligent infliction of emotional distress is limited to the termination process itself, not conduct preceding that discharge, be it constructive or actual").

In the instant case, the plaintiff still is employed with the USPS, and all of the alleged conduct giving rise to her negligent infliction of emotional distress claim occurred during her continuing employment. Pursuant to the holding of Perodeau, therefore, count three fails to state a claim upon which relief may be granted, and it is dismissed. Consequently, the Court need not address whether count three was precluded by Title VII or the Federal Tort Claims Act.

C) Intentional Infliction of Emotional Distress

Count four sets forth a claim for intentional infliction of emotional distress against Brummett, Moore and Bardot. The defendants seek to dismiss this claim on the grounds that: (1) it is barred by the exclusivity provision of Title VII; (2) it is barred by the Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1); and (3) it fails to state a claim upon which relief may be granted.

The plaintiff contests the defendants' arguments on all three grounds.

In order to state a claim for intentional infliction of emotional distress, a plaintiff must establish: (1) that the defendant intended to inflict emotional distress, or that the defendant knew or should have known that emotional distress was a likely result of the defendant's conduct; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. Petyan v. Ellis, 200 Conn. 243, 253, 510 A.2d 1337 (1986); Olson v. Bristol-Burlington Health Dist., 87 Conn. App. 1, 6-7, 863 A.2d 748 (2005). "In order to state a cognizable cause of action, Plaintiff must not only allege each of the four elements, but also must allege facts sufficient to support them." Carroll v. Ragaglia, 292 F.Supp.2d 324, 344 (D.Conn. 2003) (quoting Whitaker v. Haynes Constr. Co., 167 F.Supp.2d 251, 254 (D.Conn. 2001)). It is for the court to determine in the first instance whether alleged conduct of a defendant may, as a matter of law, be found to satisfy the elements of an intentional infliction claim. Appleton, 254 Conn. at 210; Ancona v. Manafort Bros., Inc., 56 Conn.App. 701, 712, 746 A.2d 184 (2000); Bell v. Board of Education, 55 Conn.App. 400, 410, 739 A.2d 321 (1999). Scott v. Town of Monroe, 306 F.Supp.2d 191, 198 (D.Conn. 2004).

In regard to the second element, extreme and outrageous conduct, the Connecticut Supreme Court has stated:

> Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society ... Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim,

> Outrageous! ... Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

Appleton v. Board of Education, 254 Conn. at 210-11 (internal citations and quotation marks omitted); see also 1 Restatement (Second) Torts § 46, comment (d), p. 73 (1965); Brown v. Ellis, 40 Conn.Supp. 165, 167, 484 A.2d 944 (1984) ("[m]ere insults, indignities, or annoyances that are not extreme or outrageous will not suffice"). Courts carefully review claims for intentional infliction of emotional distress in the employment context. Golnik v. Amato, 299 F.Supp.2d 8, 15 (D.Conn. 2003) (citing cases); Grigorenko v. Pauls, 297 F.Supp.2d 446, 448 (D.Conn. 2003) (noting that "[i]ntentional infliction of emotional distress claims are often pleaded but rarely get very far" under the Appleton standard); see also Lopez-Salerno v. Hartford Fire Ins., No. 3:97CV273 (AHN), 1997 WL 766890 at *7 (D.Conn., Dec.8, 1997). Moreover, the district courts in this district have dismissed claims for intentional infliction of emotional distress that contain only conclusory allegations of extreme and outrageous conduct. See, e.g., Scott, 306 F.Supp.2d at 198-99 (granting motion to dismiss when facts pled by plaintiff failed to establish extreme or outrageous conduct); Golnik, 299 F.Supp.2d at 16-17 (teacher failed to state a claim for intentional infliction of emotion distress in action arising out of the termination of his employment); Grigorenko, 297 F.Supp.2d at 448 (charge of plagiarism, based on misrepresented evidence, insufficient to state claim); Harhay, 160 F.Supp.2d at 315 (termination of employee, even when accompanied by other aggravating factors, does not itself give rise to a claim for intentional infliction of emotional distress); see also Mulkin v. Anixter, Inc., No. 3:03CV901, 2004 WL 288806 (D.Conn. Feb 10, 2004) (plaintiff's intentional infliction of emotional distress claim dismissed because it didn't meet the "stringent requirements" for such a claim);

Lopez-Salerno, 1997 WL 766890 at *7 (granting motion to dismiss where plaintiff alleged she was terminated so that defendant could avoid giving her long-term disability benefits).[6]

In this case, the complaint alleged that Moore refused to accommodate her request to remove Cordero from the floor, made an inappropriate comment to her and failed to prevent another employee from yelling at her; that Brummett denied her request for a special inspection; that Bardot made statements about "see[ing] to it that her career is over"; and that all three defendants conspired to end her employment with the USPO.[7] This conduct, even if accepted as true and viewed in a light most favorable to the plaintiff, is not sufficient to state a colorable claim for intentional infliction of emotional distress under the standard employed by the Connecticut courts. In other words, while such conduct, if true, may be insulting, rude and display poor manners, it does not "go beyond all possible bounds of decency" and cannot be "regarded as atrocious, and utterly intolerable in a civilized community." Appleton v. Bd. of Educ., 254 Conn. at 210; see also Majewski v. Bridgeport Bd. of Educ., 2005 WL 469135 at **17-20 (Conn. Super. Ct., Jan. 20, 2005) (citing decisions from the Superior Courts where alleged sexual conduct, sexual contact and unwanted touching were determined not to be "extreme and outrageous"). Thus, count four is dismissed for failure to state a claim upon which

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[6]As one judge on the Connecticut Superior Court noted: "A review of recent Connecticut decisions on the issue of extreme and outrageous conduct within the context of a claim for intentional infliction of emotional distress reveals that there is no bright line rule to determine what constitutes extreme and outrageous conduct sufficient to maintain this action. The court looks to the specific facts and circumstances of each case in making its decisions." Craddock v. Church Community Supported Living Assn., 2000 WL 33159150, at *6 (Conn. Supp. Ct., Nov. 13, 2000).

[7]Again, Cordero, the individual who allegedly harassed the plaintiff while accompanying her on her rounds, was not named as a defendant in this action.

relief may be granted. Consequently, the Court need not address whether count four was precluded by Title VII or the Federal Tort Claims Act.

III Motion to Strike Demand for Compensatory Damages

In the complaint, the plaintiff requests $3,000,000 in compensatory damages. The defendants have moved to strike that request, claiming that the plaintiff's damages, if any, are limited by statute to $300,000. See 42 U.S.C. § 1981a (addressing right of recovery under Title VII); Newtown v. Shell Oil Co., 74 F.Supp.2d 160, 161-62 (D.Conn. 1999) (applying the statutory cap on damages to a jury award). The plaintiff concedes that her Title VII claim is subject to a statutory cap on damages, but argued that the motion to strike should be denied because her state law claims were not subject to such a cap. Because the Court has dismissed the plaintiff's state law claims, and only her Title VII claim remains pending, the motion to strike the demand for compensatory damages in excess of the statutory cap **[Doc. #11]** is **GRANTED**.

IV Motion to Strike Demand for Punitive Damages

In the complaint, the plaintiff requests $2,500,000 in punitive damages. The defendants have moved to strike that request, claiming that such damages are not permitted in a Title VII action against the Postmaster General in his official capacity. The plaintiff claims that the exemption from punitive damages does not apply to the USPS.

Under 42 U.S.C. § 1981a(b)(1):

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual (emphasis added).

The USPS is a "government agency" for purposes of statute exempting government agencies from punitive damages in Title VII action. Robinson v. Runyon, 149 F.3d 507, 516 (6th Cir. 1998); Baker v. Runyon, 114 F.3d 668, 670 (7th Cir.1997); Ausfeldt v. Runyon, 950 F.Supp. 478, 487-88 (N.D.N.Y. 1997); Miller v. Runyon, 932 F.Supp. 276, 277 (M.D.Ala.1996); see also Crumpton v. Runyon, 1998 WL 125547, at *4 (E.D.Pa. Mar. 19, 1998) (citing cases to support finding that the "majority of courts that have considered this issue have held that the USPS is a governmental agency and is therefore exempt from awards for punitive damages").[8] Therefore, the defendants' motion to strike the demand for punitive damages **[Doc. # 13]** is **GRANTED**.

As a result of this rulings in this opinion, defendants Brummett, Moore and Bardot are dismissed from this case.

SO ORDERED this 28th day of March 2005 at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

[8]The only case cited by the district court in Crumpton to support the opposite conclusion–that the USPS can be subject to a punitive damages award–was Roy v. Runyon, 954 F.Supp. 368 (D.Me. 1997). The plaintiff relies extensively on Roy in her memorandum in opposition to the motion to dismiss. In Roy, the court noted a split of authority among the district courts as to whether the USPS was not subject to punitive damages. The only case cited by the district court in support of the proposition that the USPS is subject to punitive damages was Baker v. Runyon, 922 F.Supp. 1296 (N.D.Ill. 1996). Ultimately, the court in Roy stated that "the view articulated in Baker is the more reasoned one," and, therefore, denied the defendants' motion to dismiss. Since Roy was decided, however, Baker has been reversed on appeal, with the Seventh Circuit specifically rejecting the district court's finding concerning punitive damages. See Baker v. Runyon, 114 F.3d 668, 670 (7th Cir. 1997). Therefore, this Court finds that Roy offers limited persuasive value. See Robinson v. Runyon, 149 F.3d at 516 (noting that Baker, which was the plaintiff's primary support, "was reversed on appeal by the Seventh Circuit, and the majority of the arguments therein soundly rejected by that court").