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

	:	**CIVIL ACTION**
PATRICIA ANN HARPER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT J. CASEY, JR. & ASSOCIATES,	:	
ROBERT J. CASEY, JR., ESQUIRE, and	:	
STATE FARM INSURANCE COMPANY	:	
	:	
Defendants	:	**NO. 95-7704**

M E M O R A N D U M

Reed, J. **September 9, 1998**

Plaintiff Patricia Ann Harper ("Harper") filed a complaint against defendants Robert J. Casey, Jr. & Associates ("the firm"), Robert J. Casey, Jr., Esquire ("Casey"), and State Farm Insurance Company ("State Farm") in this Court alleging claims of sex discrimination under 42 U.S.C. § 2000e ("Title VII"), sex discrimination under the Pennsylvania Human Relations Act ("PHRA"), retaliation under Title VII, retaliation under the PHRA, and intentional infliction of emotional distress.[1] Before the Court is the defendants' motion for summary judgment on all of Harper's claims, the response of Harper,[2] and the reply of the defendants. For the reasons given below, the motion will be granted in part and denied in part.

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[1] In an Order dated June 28, 1996, this Court granted Casey's motion to dismiss Harper's claims against him in Counts I through IV of the complaint. (Document No. 13). Thus, the only remaining claim against Casey is for intentional infliction of emotional distress.

[2] The response of Harper was sealed by this Court in a Stipulation and Order dated March 17, 1998. Because this Memorandum and Order does not disclose any of the confidential information contained in the response, however, it will not be filed under seal.

I. BACKGROUND

The following facts are gleaned from the record and are taken in the light most favorable to Harper, the non-moving party. Harper started working as an attorney for the firm on February 15, 1993. The firm functioned as the wholly owned and operated legal department of State Farm. Casey was the managing attorney of the firm and supervised the attorneys at the firm, including Harper. Harper alleges that during her employ at the firm, Casey treated the female employees, including herself, differently than he treated the male employees. Harper alleges that Casey "would answer questions and try to resolve problems with male attorneys in a helpful and civil manner while female attorneys with similar concerns were addressed in a demeaning tone, bordering on nastiness." For example, he would often respond to questions from women by asking, "What's your problem?" or by leaving yellow sticky notes with condescending messages on their chairs. Harper claims that Casey spoke condescendingly to the female support staff on a daily basis, with the exception of his own secretary. Harper alleges that Casey made comments about the way the women of the office dressed, and he only once made a comment about the attire of a male employee. The discriminatory nature of Casey's attitude toward and treatment of women was recognized and discussed among the women of the firm.

Harper claims that she expressed to Casey in March or April of 1993 that she did not think that his behavior and attitude toward women was appropriate. Harper alleges that Casey told her in a phone conversation in May of 1993 that he had a "Irish vendetta" against her and that he would see to it that she was fired. Beginning in June of 1993, Casey wrote multiple memos to Harper's employee file regarding errors in her work, which Harper claims are

unfounded and examples of Casey's critical examination of her work which he did not exhibit for the work of the men in the office. The first memo was an informal warning dated June 18, 1993, after Harper returned from a week-long training course for State Farm. The memo criticized Harper for using an improper procedure in referring a case to outside counsel and for failing to arrange for other attorneys to cover her casework. Harper points to a male attorney in the firm, Michael Phillips, who failed to file an appeal in a timely fashion but never received a memo like the one Harper received.

Casey sent memos to Harper's file on June 25, 1993 and July 2, 1993 criticizing Harper's work performance. In the July 2, 1993 memo, Casey stated that Harper was "AWOL" when she did not return to the office after an afternoon deposition, which was grounds for termination; however, Casey testified at his deposition that attorneys had no set hours at the firm. Indeed, Harper claims that Michael Trioani would often leave the firm at 4:00 P.M.. to play golf, without facing reprimand from Casey.

On August 20, 1993, Harper utilized the open door policy at State Farm and met with Denise Thomas, the regional human resources representative from State Farm, to discuss her problems with Casey. At the meeting Harper expressed her concern that Casey was treating the women of the office differently than he was treating the men. Thomas acknowledged that she knew of problems with Casey's treatment of women and that Harper's was not the first complaint she had received.

On August 27, 1993, at Casey's initiative, Harper was placed on 90-day probation, which included that among other things, that she submit all of her status reports to Casey for approval and that she sign in and out of work everyday. Harper initiated a second open door meeting with

Debra Taylor, Denise Thomas' replacement, on September 2, 1993. In that meeting, Harper again revealed her concern regarding Casey's discriminatory treatment of women and the "Irish vendetta" he had against her.

On September 27, 1993, Casey wrote a memo to Harper's file indicating that she was AWOL for time she was out of the office for a doctor's appointment. In October of 1993, Casey confronted Harper about a case that she had transferred to another attorney; Harper claims that the case involved the hospital where her mother had died and she did not feel that she could handle the case for that reason. On October 25, 1993, Casey wrote a memorandum to Harper's file reprimanding her for asking another attorney to cover a deposition in one of her cases while she attended a Bar Association function; Harper claims that Casey encouraged the attorneys to participate in the function. In November of 1993, after Harper informed Casey that all of her status reports were up-to-date, Harper claims that Casey began tracking Harper's sixty day follow-ups, something that he did not track for any other attorney. On November 4, 1993, Casey wrote a memorandum to Harper's file criticizing a typo that appeared in one of Harper's status reports. On November 11, 1993, Harper sent a memorandum to Casey regarding his criticism of her work and alleging that she would not have been treated in the same manner if she "were a man, single or married" in Casey's employ.

During the period from late August 1993 to December 14, 1993, Harper and Casey met several times to discuss the conflict between them and Harper's performance. At some of these meetings, Debra Taylor was present as an observer and facilitator. On November 17, 1993, Harper met with Casey and Taylor. Harper was questioned regarding her allegation of sex discrimination. Casey asked Harper, "Why don't you just get an attorney?" to which Taylor

allegedly responded, “We don’t get attorneys at State Farm,” and then ended the meeting and told Harper to leave. The day following this meeting, Casey wrote four memoranda to Harper’s file, criticizing her work performance. On November 19, 1993, Casey refused to approve expense vouchers for parking submitted by Harper; Harper claims it was the first time that such an expense had ever been refused for her by Casey.

On November 29, 1993, Harper’s probationary period ended. On December 10, 1993, Casey recommended to his supervisor Lynn Madden that Harper be terminated. On December 14, 1993, again at Casey’s initiative, Harper was terminated by Casey.[3]

Harper claims that she suffered sex discrimination by Casey through his disparate treatment of women and through the hostile work environment he created. In addition, Harper claims that after she voiced her concerns to Casey and utilized the open door policy of State Farm to express her concerns, Casey retaliated against her by placing her on probation, writing negative memos about her work performance to her employee file, and ultimately firing her. She also brings a claim under Pennsylvania law for intentional infliction of emotional distress.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

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[3] Harper also submitted evidence of an opinion survey taken of the employees of the firm shortly after Harper’s termination which revealed the attitudes of the other employees regarding Casey’s ability as a supervisor and treatment of women and the reasons for Harper’s termination. The defendants object to this Court’s consideration of this survey and related evidence of State Farm’s dealings with Casey after Harper’s termination because they contend it is inadmissable hearsay. Because this evidence is not necessary for my decision on this motion for summary judgment as I find that Harper has submitted sufficient evidence to survive summary judgment without this Court considering the survey and related evidence, I will not consider this evidence and will not resolve the issue of its admissibility at this point.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" then a motion for summary judgment may be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). The movant can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case;" the movant is not required to produce affidavits or other evidence to establish that there are no genuine issues of material fact. Celotex, 477 U.S. at 323-25.

Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in her favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50.

III. ANALYSIS

Courts have uniformly interpreted the PHRA consistent with Title VII. See Clark v. Commonwealth of Pennsylvania, 885 F. Supp. 694, 714 (E.D. Pa. 1995); Violanti v. Emery Worldwide A-CF Co., 847 F. Supp. 1251, 1257 (M.D. Pa. 1994). Thus, I will analyze Harper's claims only under Title VII; however, my analysis and conclusions as to each type of claim are equally applicable to Harper's claims under both Title VII and the PHRA.

A. DISPARATE TREATMENT SEX DISCRIMINATION

The defendants claim that Harper waived her claim for disparate treatment sex discrimination because she only argued a hostile work environment claim in her response to their motion for summary judgment. However, it is clear from Harper's memorandum in response to the defendants' motion for summary judgment that Harper is bringing claims for disparate treatment and hostile work environment (Document No. 43 at 27).

Alternatively, the defendants argue that Harper has not produced evidence to support a prima facie claim of disparate treatment sex discrimination. To establish a claim for disparate treatment under Title VII, a plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was discharged from or denied the position; and (4) that non-members of the protected class were treated more favorably. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To support a finding that other employees were treated more favorably, a plaintiff must present evidence such that a jury could reasonably infer that her discharge was the result of discrimination. See Phillips v. Dalton, 1997 WL 24846, *3 (E.D. Pa.)(noting that "plaintiff must show that [s]he was terminated 'under circumstances which give rise to an inference of unlawful discrimination'")(quoting Texas Department of Community

Affairs v. Burdine, 450 U.S. 248, 253 (1981)). The defendants claim that Harper is judicially estopped from claiming that she was qualified for the position because she made a successful claim for disability benefits in which she alleged that she was disabled in May or June of 1993.[4]

The circumstances of this case present an interesting question: Is a plaintiff estopped from claiming that she was a qualified employee in a sex discrimination case if she has represented that she was totally unable to work in a subsequent application for disability benefits, particularly if she alleges that her disability, at least in part, was caused by the defendants' discriminatory conduct toward her? The defendants refer to cases in which a plaintiff was estopped from claiming that she was a qualified employee with a disability in a claim under the Americans with Disabilities Act if she claimed total disability on an application for disability benefits. See e.g., McNemar v. Disney Stores, Inc., 91 F.3d 610 (3d Cir. 1996). However, the defendants cite no case in which a plaintiff claimed she was a qualified employee in a sex discrimination case after claiming total disability on an application for disability benefits.

In McNemar, the Court of Appeals for the Third Circuit explained that "judicial estoppel is an equitable doctrine, invoked by a court in its discretion (1) to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming inconsistent positions, and (2) with a recognition that each case must be decided upon its own particular facts and circumstances." Id. at 617. Thus, a court should ask: "Is the Party's present position inconsistent with a position already asserted? (2) If so, did the party assert either or both

[4] In a footnote, the defendants also argue that Harper cannot show that she was qualified for the position due to the evidence of her poor performance at the firm. I conclude that there is a genuine issue of material fact as to the quality of Harper's work while at the firm, and the defendants' are not entitled to summary judgment on this ground.

of the inconsistent positions in bad faith– i.e. 'with the intent to play fast and loose' with the court?" Id. at 618 (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)).

I conclude that Harper is not estopped from claiming she was qualified for her position at the firm because she alleges that the disability she suffered was caused by the conduct of Casey; the defendants cannot shield themselves from liability behind a disability which Harper alleges was caused by the defendants. In addition, I conclude that Harper has brought forth sufficient evidence that she was not totally disabled while working at the firm from February to December of 1993; she submitted a doctor's report and the deposition testimony of Dr. Martin Gelman which indicate that her termination at work contributed to her disability and that Harper's treatment for her disability began in December of 1993. Thus, Harper has established a genuine issue of material fact as to the date when she became totally disabled and on the issue of her ability to perform her job at the firm from February to December of 1993. In light of the facts and circumstances of this case, Harper's position in this case that she was qualified for the job at the firm is not wholly inconsistent with her application for disability benefits, does not threaten or undermine the integrity of the judicial system, nor indicate that Harper intended to play fast and loose with the Court.

The defendants' second attack on Harper's ability to show a prima facie case of disparate treatment is that she has no evidence of circumstances giving rise to an inference of discrimination. The defendants point out that a female was hired to replace Harper. They also suggest that no similarly situated males existed at the firm to which a comparison may be made because, with the exception of Casey, the highest ranking attorneys at the firm (including Harper)

were all women. However, I conclude that the pool of comparison encompasses more than just the level of attorneys to which Harper belonged; Casey's conduct toward Harper may be compared to his conduct toward all male lawyers at the firm regardless of their rank, especially because Harper alleges that she was not treated as well as male attorneys of a lower rank.

The defendants contend that even if Harper is compared to lower ranking male attorneys, she has no evidence to substantiate her mere speculations and suspicion of disparate treatment. (Pl.'s Ex. A, Harper dep. at 302, 419, 430-31, 458-64). However, Harper produced the deposition testimony of Lydia Wiley and Maura Lynch, two other female attorneys at the firm, as well as her own deposition testimony, in which these three women testified that Casey treated the women of the office differently than the men. The women testified that Casey took a condescending tone and attitude with the women and was more critical of the women than the men. (Pl.'s Ex. C, Wiley dep. at 21-22, 25-27, 51-53; Ex. D, Lynch dep. at 54-56, 90-92). Harper produced evidence that Casey told her that he had an "Irish vendetta" against her and intended to have her fired. (Pl.'s Ex. A, Harper dep. at 412-14). Harper points to the deposition testimony of Casey, in which he stated that there were no set hours for the attorneys at the firm (Pl.'s Ex. F, Casey dep. of January 15, 1997 at 82; Pl.'s Ex. H, Casey dep. of February 5, 1997 at 8-9), and a memorandum dated July 2, 1993 from Casey to Harper in which Casey states that when Harper did not return to the office after an afternoon deposition, she was "AWOL," which was grounds for termination (Pl.'s Ex. O). Harper claims that this evidence exhibits Casey's disparate treatment of women and his discriminatory animus toward her, which culminated in his firing her based on her gender.

I find that there are factual disputes over whether Casey treated only women in a

condescending way or whether he treated the men of the office in the same manner, and whether Casey reprimanded the women and men in the firm differently for the same conduct. Thus, I conclude that Harper has established the existence of a genuine issue of material fact regarding whether the circumstances give rise to an inference of unlawful discrimination, and the defendants are not entitled to summary judgment on this ground.

The defendants contend that even if Harper can make out a prima facie case, she cannot show that the defendants' legitimate business reason for her probation and termination, Harper's alleged poor work performance, is pretextual. Once a plaintiff has established a prima facie case of disparate treatment, the burden of production shifts to the defendant to show a legitimate, nondiscriminatory reason for the adverse consequence to the employee. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Once a defendant has established a legitimate business reason, the plaintiff must show that this proffered reason is a pretext for discrimination. To survive a motion for summary judgment, a plaintiff need not come forward with additional evidence of discrimination beyond the prima facie case, but she must produce evidence, direct or circumstantial, such that a jury can reasonably infer from the inconsistencies, weaknesses, or implausibilities in the employer's reasons that they are not worthy of belief, or that a discriminatory reason was more likely than not a motivating or determinative cause in the decision. Id. at 764-65. A plaintiff does not have to show that discrimination was the sole reason, but rather a determinative factor in the decision. Id. at 764. The Court of Appeals for the Third Circuit has indicated that such a showing can be accomplished by demonstrating that the employer in the past had subjected her to unlawful discriminatory treatment, that "the employer treated other, similarly situated persons not of her protected class more favorably, or that the

employer has discriminated against other members of her protected class or other protected categories of persons." Id. at 765.

I conclude that Harper had produced evidence such that a jury could reasonably infer that the defendants proffered reasons for their termination of Harper are not worthy of credence based on Casey's statement that he had an "Irish vendetta" against Harper and that he would see to it that she was fired, and the flurry of memoranda that followed this announcement criticizing Harper's work for errors for which he did not criticize other male attorneys. Thus, the defendants are not entitled to summary judgment on Harper's claim of disparate treatment.

B. HOSTILE WORK ENVIRONMENT

The defendants claim that Harper cannot pursue a claim for hostile work environment because she did not include this claim in her EEOC/PHRA complaint. They contend that the words "hostile work environment" or "sexual harassment" do not appear within the "four corners of the complaint." Harper's EEOC/PHRA complaint states that she is bringing claims for "gender based discrimination and retaliation." (Defs.' Mem. Ex. LL). The complaint filed in this Court by Harper contains similar language. I conclude that the allegations of the EEOC/PHRA complaint are broad enough to include Harper's claim for hostile work environment as it is a type of gender discrimination, and the defendants are not entitled to summary judgment on this ground.

Alternatively, the defendants argue that Harper's hostile work environment claims must fail because she cannot produce evidence to support a prima facie case. The defendants contend that Harper cannot show that the conduct of Casey was sufficiently severe, pervasive, or regular

to constitute a hostile work environment, nor can she show that she was detrimentally affected by Casey's conduct because she was already suffering from mental illness. The defendants also contend that Harper cannot show that State Farm has respondeat superior liability because it did not know nor should have known about Casey's behavior and it took reasonable remedial action once Harper's complaints were known.

Five elements must be proven to support a hostile work environment claim: (1) that the employee suffered intentional discrimination because of her sex; (2) that the discrimination was pervasive and regular; (3) that the discrimination detrimentally affected the plaintiff; (4) that the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

In Meritor Savings Bank v. Vinson, the Supreme Court observed that the harassment must be pervasive or severe enough "'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). In making this determination, the totality of the circumstances must be considered, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably interferes with an employee's work performance. Id. These factors are to be viewed objectively and subjectively, such that "conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993).

A plaintiff cannot rely upon casual, isolated, or sporadic incidents to support her claim of hostile work environment sexual harassment. See Andrews, 895 F.2d at 1482; Harris, 510 U.S. at 20. While it is possible for a single action to constitute a claim for hostile work environment sexual harassment if the act is "of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work," generally a plaintiff must show that she was subjected to "repeated, if not persistent acts of harassment." Bedford v. Southeastern Pennsylvania Transportation. Authority, 867 F. Supp. 288, 297 (E.D. Pa. 1994). A supervisor's criticism of an employee's work, while not sexual in nature, may be considered in the totality of the circumstances in determining whether the environment was hostile. See Vinson, 477 U.S. at 65 ("Title VII affords employees that right to work in an environment free from discriminatory intimidation, ridicule, and insult."); Aman v. Cort Furniture Rental Corporation, 85 F.3d 1074, 1083 (3d Cir. 1996) (noting in a racial harassment case that the alleged behavior does not have to be overtly racial in nature to contribute to a pervasive and severely hostile environment); Andrews, 895 F.2d at 1485 (criticizing the lower court's emphasis on the lack of sexual advances, innuendo, or contact in finding against plaintiff on a hostile work environment claim). However, such criticism alone usually will not support a claim for hostile work environment sexual harassment. See Miller, 679 F. Supp. at 502 ("Snubs and unjust criticisms of one's work are not poisonous enough to create an actionable hostile work environment.")

To support her argument regarding the pervasiveness or severity of Casey's conduct, Harper alleges that Casey criticized her work many times a month during the period of June 1993 to December 1993, sometimes by sending more than one memo to her file in a day. Harper

maintains that Casey's condescending treatment of the female support staff occurred on a daily basis, and that the women of the firm acknowledged and discussed that Casey treated them in a discriminatory manner. The only exception Casey made in his condescending attitude toward the female employees he supervised was his own secretary. Harper claims that Casey's conduct altered the conditions of her work and interfered with her ability to do her job, which is supported by the report and deposition testimony of her doctors, which indicate that Harper's mental health suffered during this time.

While the individual incidents of Casey's behavior are not severe in nature in that Harper does not allege any conduct that was blatantly sexual in nature or physically dangerous to her, the deposition testimony of Harper, Wiley, and Lynch reveal that Casey's ridicule toward women and Harper in particular was so pervasive that at least these three women found the environment to be hostile or abusive. Thus, I cannot conclude as a matter of law that these three women are unreasonable in their assessment of their work environment; such a determination is within the province of the jury. Considering the totality of the circumstances, I conclude that Harper has come forth with evidence sufficient to create a genuine issue of material fact regarding whether the pervasiveness of Casey's conduct was such that a reasonable person would find the environment hostile or abusive.

The defendants' second argument is that Harper has not produced evidence that she was detrimentally affected by the alleged hostile work environment as the defendants allege that Harper already suffered from mental problems when she went to work at the firm. Harper argues, however, that she was detrimentally affected by the hostile work environment and provides the reports and testimony of her doctors which provide that Harper's mental condition

was in the least exacerbated by the hostile conditions of her job. I conclude that the report and deposition testimony of her doctors that Harper's mental stability suffered greatly during the duration of her employment at the firm is sufficient to create a genuine issue of material fact as to the effect of the environment on Harper.

The defendants' third attack on Harper's prima facie case of hostile work environment is that Harper cannot establish State Farm's respondeat superior liability for Casey's actions. However, this argument fails in light of the guidance provided by the recent decisions of the United States Supreme Court in Burlington Industries, Inc., v. Ellerth, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998), in which the Supreme Court refined the standard for an employer's liability for supervisory harassment in hostile work environment cases. The Supreme Court held that while in cases in which no tangible employment decision is taken against an employee, a defending employer may raise an affirmative defense to liability or damages, in cases in which "the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment," no affirmative defense is available, and "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher, 118 S.Ct. at 2292-93; see also Vinson, 477 U.S. at 70-71 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions").

Because Harper suffered a tangible employment decision, her termination, State Farm is precluded from presenting an affirmative defense in this case and is vicariously liable for the

actions of Casey. Therefore, I find that State Farm is not entitled to judgment as a matter of law on this ground.

C. RETALIATION

Title VII prohibits employers from retaliating against employees who have "opposed any practice made unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). Under the applicable McDonnell Douglas model, to establish a prima facie case of retaliation, an employee must show (1) she engaged in activity protected under Title VII, (2) that the employer took an adverse employment action against her, and (3) a causal connection between her protected activity and the adverse employment action. See Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995). Once the plaintiff has met this burden, the defendant has the burden to produce a legitimate, nondiscriminatory reason for the employment action. See Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir.), cert. denied, 502 U.S. 940 (1991). After this, the plaintiff must then demonstrate that the defendant's reason is a pretext for retaliation. See Waddell v. Small Tube Prods., Inc., 799 F.2d 69, 73 (3d Cir. 1986).

The Court of Appeals for the Third Circuit has held that informal protests of discrimination, such as complaints to management, rise to the level of protected activity. See Barber v. CSX Distribution Services, 68 F.3d 694, 702 (3d Cir. 1995) (citing Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990)). An employee does not have to be correct on the underlying merits of her discrimination claim for her actions to be protected

activity; an employee only need to act "under a good faith, reasonable belief that a violation existed." Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir. 1993).

It is clear that Harper engaged in protected activity when she discussed Casey's behavior with him and with Denise Thomas and Debra Taylor under the open door policy. The adverse action Harper suffered was her subsequent termination from the firm.

The third element Harper must show is that a causal connection exists between the first two elements. A causal connection between an employee's protected activity and an adverse action by her employer may be inferred if the events occurred close in temporal proximity to each other. See Kachmer v. Sungard Data Systems, Inc., 109 F.3d 173, 178 (3d Cir. 1997) (holding that there are no specific time parameters to raise an inference of causation and that "[w]hen there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation"); Jalil v. Avdel Corporation, 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990).

The defendants claim that Harper has no evidence of a causal link because her suspicion that she was fired after she complained of Casey's treatment is mere conjecture. The defendants argue that Casey began to reprimand Harper for poor performance up to five months before she voiced her complaints at the open door meeting on August 20, 1993. The defendants point out that Harper knew she was going to be fired when she mentioned discrimination at the meetings with the human resources representatives, so her mentioning discrimination was consistent with her efforts to "concoct a lawsuit," not evidence of retaliation by Casey. The defendants contend that Casey did not know that Harper had complained about his treatment of women when he placed her on probation on August 27, 1993. The defendants maintain that Harper did not

express her concerns to Casey in terms of "sex discrimination" until November of 1993. Finally, the defendants argue that the four months which passed between the open door meeting of August 20, 1993 and Harper's termination on December 14, 1993 destroy any causal link between the two.

While it is unclear from the record when Casey first became aware of Harper's complaints to Denise Thomas and Debra Taylor, it is clear that he knew of the complaints by November 17, 1993 because he attended a meeting with Taylor and Harper to discuss Harper's allegations. Casey recommended Harper's termination within one month of this meeting. In addition, Harper has produced evidence that she expressed her concerns to Casey verbally as early as March or April of 1993 and in writing on November 11, 1993. After Harper expressed these concerns to Casey in early 1993, Casey reprimanded Harper for errors in her work, sent memos to her file, and placed her on probation over the months that followed.

Harper has established a genuine issue of material fact over when Casey became aware of Harper's complaints about his treatment of women and over whether Harper expressed her concerns to Casey in terms of sex discrimination before November of 1993. I find that Harper has produced evidence such that a reasonable jury could find she established the necessary causal nexus between her termination and the exercise of the protected activity; thus, she has established a prima facie case of retaliation.

Alternatively, the defendants argue that even if Harper can establish a prima facie case, she has no evidence to show that the defendants reason for her termination, her poor work performance, was a pretext for retaliation. The burden on a plaintiff to show pretext in a retaliation claim is the same as in a claim for disparate treatment, as set forth above.

Based on my conclusion that Harper has produced evidence of pretext for her disparate treatment claim, I conclude that a jury could reject the defendants proffered reasons for the adverse employment decision on Harper's retaliation claim based on the same evidence. Thus, summary judgment is precluded on Harper's claims of retaliation under Title VII and the PHRA.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The defendants argue that as a matter of law Harper has not produced evidence of conduct that is outrageous, intentional, or reckless so as to make a claim for intentional infliction of emotional distress. Under Pennsylvania law, conduct in the employment context will rarely rise to the level of outrageous conduct required to support a claim for intentional infliction of emotion distress. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (noting that sexual harassment alone does not constitute outrageous conduct to state a claim for intentional infliction of emotional distress under Pennsylvania law); Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1998) (applying Pennsylvania law and citing cases). Thus, even if taken as true, Harper's allegations of Casey's conduct do not rise to the level of outrageous conduct. I conclude that the defendants are entitled to summary judgment on Harper's claim for intentional infliction of emotional distress.[5]

IV. CONCLUSION

[5] The defendants also argue that this claim is barred by the Workers Compensation Act, 77 Pa. Stat. Ann § 481(a), which provides the exclusive remedy for injury suffered at the workplace, even for the intentional actions of the employer. Harper argues that her claim falls within the "third party exception" to this statute because Casey's conduct was driven by his personal animosity toward her. Because I conclude that summary judgment will be awarded to the defendants on other grounds, I need not address this issue.

For the foregoing reasons, I conclude that genuine issues of material fact exist regarding Harper's claims of disparate treatment, hostile work environment, and retaliation such to preclude summary judgment. The defendants are entitled to judgment as a matter of law on Harper's claim of intentional infliction of emotional distress. Accordingly, the motion of the defendants will be granted in part and denied in part.

An appropriate Order follows.

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

PATRICIA ANN HARPER,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT J. CASEY, JR. & ASSOCIATES,	:	
ROBERT J. CASEY, JR., ESQUIRE, and	:	
STATE FARM INSURANCE COMPANY	:	
	:	
Defendants	:	**NO. 95-7704**

ORDER

AND NOW, this 9th day of September, 1998, upon consideration of the motion of defendants Robert J. Casey, Jr. & Associates, Robert J. Casey, Jr., Esquire, and State Farm Insurance Company for summary judgment (Document No. 40), the response of plaintiff Patricia Ann Harper (Document No. 43), the reply of the defendants (Document No. 45), as well as the supporting memoranda, depositions, and other exhibits submitted by the parties, and based on the foregoing Memorandum, it is hereby accordingly **ORDERED** that the motion of defendants is **GRANTED IN PART** and **DENIED IN PART**. **JUDGMENT IS HEREBY ENTERED** in favor of the defendants and against the plaintiff on the claim for intentional infliction of emotion distress. Robert J. Casey, Jr., Esquire is **DISMISSED** as a party in this case. This case shall proceed to trial on Harper's claims of disparate treatment sex discrimination, hostile work environment, and retaliation against Robert J. Casey, Jr. and Associates and State Farm Insurance Company only.

IT IS FURTHER ORDERED that the parties shall submit a joint report to the Court no later than September 28, 1998 as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report should so indicate. By said date, plaintiff shall contact the Deputy Clerk to arrange a date for a final scheduling conference.

LOWELL A. REED, JR., J.