

Not Reported in F.Supp.2d, 2007 WL 2407095 (E.D.Pa.)
(Cite as: 2007 WL 2407095 (E.D.Pa.))

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United States District Court,
E.D. Pennsylvania.
EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION, Plaintiff

v.

TURKEY HILL DAIRY, INC., Defendant.

Civil Action No. 06-CV-04332.

Aug. 8, 2007.

Jacqueline H. McNair, Esquire, Judith A. O'Boyle,
Esquire and Dawn M. Edge, Esquire, on behalf of
Plaintiff.

Amy G. Mancinati, Esquire, on behalf of Defendant.

MEMORANDUM

JAMES KNOLL GARDNER, United States District
Judge.

*1 This matter is before the court on Defendant's Motion to Dismiss, which motion was filed on November 14, 2006. Plaintiff EEOC's Memorandum of Law in Opposition to Defendant, Turkey Hill Dairy, Inc.'s, Motion to Dismiss Pursuant to Rule 12(b)(6) was filed on November 28, 2006. For the following reasons, I deny Defendant's Motion to Dismiss this matter pursuant to Federal Rule of Civil Procedure 12(b)(6).

Specifically, I deny Defendant's Motion to Dismiss plaintiff's claims of discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ^{FN1}. I conclude that plaintiff has averred sufficient evidence of gender discrimination and retaliation to survive a motion to dismiss for failure to state a claim upon which relief can be granted.

FN1. 42 U.S.C. § 2000e to 2000e-17.

JURISDICTION AND VENUE

Jurisdiction in this case is based upon federal ques-

tion jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiff's claims allegedly occurred in Conestoga, Lancaster County, Pennsylvania, which is located within this judicial district.

PROCEDURAL HISTORY

On September 28, 2006 plaintiff Equal Employment Opportunity Commission ("EEOC") filed the within Complaint in this court. Plaintiff's Complaint alleges that defendant Turkey Hill Dairy, Inc. ("Turkey Hill") violated Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ^{FN2} ("Title VII") by subjecting former employee Nathan Rush to a hostile work environment based upon his gender. The Complaint also avers that Turkey Hill violated Title VII by firing Mr. Rush in retaliation for complaining about the hostile work environment.

FN2. 42 U.S.C. § 2000e-2(a)(1)

On November 14, 2006 Turkey Hill filed its within motion to dismiss this action pursuant to Rule 12(b)(6). In its motion, defendant claims that Mr. Rush was not harassed because of his gender but because of his sexual preference and, as such, cannot recover under Title VII. Plaintiff filed its response to Defendant's Motion to Dismiss on November 28, 2006 arguing that Mr. Rush was discriminated against for deviating from male gender stereotypes. On January 5, 2007, with leave of court, defendant filed a brief in reply to plaintiff's response.

STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, --- U.S. ---, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Ordinarily, a court's review of a motion to dismiss is

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limited to the contents of the complaint, including any attached exhibits. See [Kulwicki v. Dawson](#), 969 F.2d 1454, 1462 (3d Cir.1992). However, evidence beyond a complaint which the court may consider in deciding a 12(b)(6) motion to dismiss includes public records (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), documents essential to plaintiff's claim which are attached to defendant's motion, and items appearing in the record of the case. [Oshiver v. Levin, Fishbein, Sedran & Ber-man](#), 38 F.3d 1380, n.1 and n.2 (3d Cir.1995).

*2 Except as provided in [Federal Rule of Civil Procedure 9](#), a complaint is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. [Twombly](#), --- U.S. at ---, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a complaint, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. [Worldcom, Inc. v. Graphnet, Inc.](#), 343 F.3d 651, 653 (3d Cir.2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions" when deciding a motion to dismiss. [In re Burlington Coat Factory Securities Litigation](#), 114 F.3d 1410, 1429-1430 (3d Cir.1997).

In considering whether the complaint survives a motion to dismiss, both the District Court and the Court of Appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." [Twombly](#), ---U.S. at ---, 127 S.Ct. at 1969, 167 L.Ed.2d at 944 (quoting [Car Carriers, Inc. v. Ford Motor Company](#), 745 F.2d 1101, 1106 (7th Cir.1984) (emphasis in original)).

FACTS

Based upon the averments in plaintiff's Complaint, which I must accept as true under the foregoing standard of review, the pertinent facts are as follows. On August 1, 2004 Nathan D. Rush was hired in the capacity of a Fluid Utility II Warehouseman by defendant Turkey Hill Dairy, Inc. in Conestoga, Lancaster

County, Pennsylvania. Plaintiff EEOC asserts that Mr. Rush's co-workers began to harass him as soon as Mr. Rush's employment commenced.

Plaintiff alleges that Mr. Keith Souders, the Assistant Leaderman at defendant's Conestoga location, harassed Mr. Rush on a daily basis. Plaintiff's Complaint states that Mr. Souders called Mr. Rush a "bitch", blew kisses to and whistled at Mr. Rush, and made perverse comments to Mr. Rush which implied that Mr. Rush had engaged or wished to engage in sexual acts with other male co-workers, such as, "Hey Nate (Mr. Rush), when Scott [co-worker] came in today, he had a big smile on his face. You must have done a good job sucking his d-last night!"

The Complaint further avers that other employees of defendant called Mr. Rush "bitch", "whore", and "faggot", and made crude gestures implying homosexual behavior toward Mr. Rush. One co-worker stated to another employee of defendant's, "I wouldn't stand next to Nate if I were you; he'll probably want you to pat him on the butt!" These actions were done regardless of plaintiff's assertion that Mr. Rush told his co-workers that he was not homosexual and did not engage in homosexual activity.

According to the Complaint, the actions of Mr. Rush's co-workers led him to complain to his supervisor, Mr. William Hershey, on three separate occasions including July 18, August 19, and December 1, 2005. Plaintiff states that Mr. Hershey failed to take any action to stop the harassment.

*3 On January 23, 2006 defendant fired Mr. Rush from his job. Plaintiff avers that defendant did so because of an allegation that Mr. Rush had exposed himself to two of defendant's employees. Mr. Rush denies having done so. The two complaining employees are individuals who allegedly harassed Mr. Rush. Plaintiff avers that Mr. Rush was fired in retaliation for complaining about his harassment by defendant's employees.

DISCUSSION

Same-Sex Sexual Harassment

Plaintiff's sexual harassment claim is brought pursuant to section 703(a)(1) of Title VII [FN3](#). Section

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703(a)(1) makes it unlawful to subject one to a hostile work environment based upon gender. Title VII creates a cause of action for same-sex sexual harassment. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79-80, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201, 207 (1998).

FN3. 42 U.S.C. § 2000e-2 (a)(1)

To prevail on a hostile work environment claim, plaintiff must prove five separate elements. Specifically, plaintiff must demonstrate that (1) he suffered discrimination because of sex; (2) the discrimination occurred on a “pervasive and regular” basis; (3) the discrimination resulted in a negative impact to the plaintiff; (4) a reasonable person in a similar position would be effected by the conduct; and (5) the employer has respondeat superior liability. *Andrews v. City of Philadelphia*, 895 F.3d 1469, 1482 (3d Cir.1990).

The United States Court of Appeals for the Third Circuit has held that there are three ways a plaintiff may prove same-sex sexual harassment because of their gender, including: (1) the alleged harasser sexually desired the plaintiff; (2) the alleged harasser was expressing general hostility to one gender in the workplace; or (3) the alleged harasser was punishing the plaintiff for not complying with gender stereotypes. *Bibbly v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-263 (3d Cir.2001).

Plaintiff alleges that Mr. Rush was the victim of sexual harassment under the third *Bibbly* category, failing to conform to gender stereotypes. According to plaintiff, defendant's employees acted in a way that implicated and questioned Mr. Rush's masculinity. Therefore, according to plaintiff, Mr. Rush has a cognizable claim under Title VII.

Defendant avers that Mr. Rush was not harassed for failing to conform to gender norms. Instead, defendant argues that Mr. Rush was harassed by his co-workers for his perceived homosexuality. Harassment for sexual preference is not actionable under Title VII. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Therefore, defendant seeks to have this case dismissed.

The third *Bibbly* category of sexual harassment based

upon deviation from gender stereotypes is itself based upon the decision of the United States Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 288, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse*, a woman was denied partnership in an accounting firm because her employer found her to be overly masculine and told plaintiff that she would have a greater chance of earning partnership if she acted in a more feminine manner. *Price Waterhouse*, 409 U.S. at 235, 109 S.Ct. at 1782, 104 L.Ed.2d at 278. The Supreme Court determined that an employer's use of gender stereotyping in making employment decisions violates Title VII. *Price Waterhouse*, 409 U.S. at 250, 109 S.Ct. at 1790-1791, 104 L.Ed.2d at 288.

*4 When considering the facts of this case in the light most favorable to the plaintiff, the EEOC has alleged sufficient evidence that Mr. Rush was discriminated against for failing to comply with gender stereotypes. Mr. Rush's co-workers repeatedly referred to Rush as “bitch” and “whore”. These phrases are typically directed toward females in a derogatory manner.^{FN4} Thus, the use of these words implicate Mr. Rush's masculinity. See *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726, 738 (E.D.Pa.2002) (Brody, J.) (citing *Nichols v. Azteca Restaurant Enterprise, Inc.*, 256 F.3d 864, 869-870 (9th Cir.2001)).

FN4. According to *The Compact Oxford English Dictionary* (2d ed.2004), the term “bitch” is typically “[a]ppplied opprobriously to a woman; strictly, a lewd or sensual woman.” The word “whore” is used to reference “[a] woman who prostitutes herself for hire” or, more generally, “[a]n unchaste or lewd woman.”

Furthermore, plaintiff's Complaint describes incidents whereby one of Mr. Rush's co-workers, Keith Souders, blew kisses to Mr. Rush and whistled at Mr. Rush in a flirtatious manner. Taking this allegation in the light most favorable to plaintiff, it is equally reasonable to infer that Mr. Souders was punishing Mr. Rush for not complying with gender stereotypes (the third type of same-sex sexual harassment as set forth in *Bibbly*) or that Mr. Souders sexually desired Mr. Rush (the first type of same-sex sexual harassment as set forth in *Bibbly*).

“[W]hen a gay or lesbian supervisor treats a same-sex

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subordinate in a way that is sexually charged, it is reasonable to infer that the harasser acts as he or she does because of the victim's sex." [Bibbly, 260 F.3d at 261](#). I note that blowing kisses and whistling are common means of romancing. In taking this allegation in the light most favorable to the plaintiff, it is a reasonable inference that Mr. Souders may have sexually desired Mr. Rush. This lends itself to a finding that plaintiff has pled facts sufficient to allege a cause of action for the first type of same-sex sexual harassment as set forth in *Bibbly*.

Plaintiff's Complaint further describes several incidents during which Mr. Rush's co-workers made sexually explicit statements to him. These statements, described above, imply that Mr. Rush engaged in or sought to engage in homosexual behavior. On their face, these statements imply that Mr. Rush was perceived by his co-workers to be a homosexual.

However, plaintiff's Complaint states that Mr. Rush informed his co-workers that he was "not gay nor did he engage in homosexual activity." ^{FN5} Thus, taking the facts in the light most favorable to plaintiff, I find these statements can also be construed to support a claim based on Mr. Rush not conforming to gender stereotypes (the third type of *Bibbly* harassment).

[FN5](#). Complaint, paragraph 7(g).

Courts have often found that evidence suggesting a victim was harassed because others believed he or she to be a homosexual defeats one's ability to put forth a claim for same-sex harassment under Title VII. In *Kay v. Independence Blue Cross*, 142 Fed.App. 48, 51 (3d Cir.2005), a plaintiff who was called "fag" and "queer" and given homosexual paraphernalia by his co-workers was determined to have been harassed because of perceived sexual orientation and not gender. Similarly, in *Allen v. Mineral Fiber Specialists, Inc.*, 2004 U.S. Dist. LEXIS 1982, at *17 (E.D.Pa. Jan. 30, 2004) (Van Antwerpen, J.), this court held that a plaintiff called "fag boy" and subjected to sexually explicit references to the plaintiff's perceived homosexuality by co-workers was not harassed because of his gender.

*5 Like the plaintiffs in *Allen* and *Kay*, Mr. Rush's co-workers referred to Mr. Rush as "faggot" and directed comments about homosexuality toward Mr. Rush. However, both *Allen* and *Kay* were decided on

motions for summary judgment, under a different standard of review, while the current matter concerns a motion to dismiss. Under the motion to dismiss standard, plaintiff need only put forth allegations that are, at a minimum, sufficient to state a claim for gender discrimination. See [Gavura v. Pennsylvania State House of Representatives](#), 55 Fed.Appx. 60, 65 (3d Cir.2002).

In dismissing the plaintiff's claims in *Bianchi*, *supra.*, my colleague United States District Judge Anita B. Brody noted that plaintiff's Complaint would have survived a motion to dismiss despite evidence of perceived homosexuality. Judge Brody found this to be the case because plaintiff's Complaint could be interpreted as containing an inference that Mr. Rush was harassed for failing to conform with gender norms. [Bianchi](#), 183 F.Supp.2d at 736 n.6.

Similarly, here plaintiff's Complaint contains sufficient averments which if taken as true and viewed in the light most favorable to plaintiff, as I am required to do, I can draw reasonable inferences suggesting that Mr. Rush was the victim of gender-based harassment. The use of the terms "bitch" and "whore" to refer to Mr. Rush can be read to suggest that Mr. Rush was seen as effeminate. Also, from Mr. Souders actions of blowing kisses and whistling at Mr. Rush I can draw the inference that Mr. Souders may have sexually desired Mr. Rush. Accordingly, I conclude that plaintiff has provided sufficient evidence to survive Defendant's Motion to Dismiss plaintiff's hostile workplace claim.

Retaliation

Plaintiff's retaliation claim is brought pursuant to section 704(a) of Title VII ^{FN6}. To establish retaliation under Title VII, a plaintiff must show that: (1) the victim engaged in a protected activity; (2) the victim suffered an adverse employment action after engaging in the activity; and (3) a causal connection exists between the protected activity and adverse employment action. [Weston v. Pennsylvania](#), 251 F.3d 420, 430 (3d Cir.2001).

[FN6](#). 42 U.S.C. § 2000e-(a).

According to his Charge of Discrimination, Mr. Rush complained about sexual harassment to his supervisor on July 18, August 19, and December 1, 2005. ^{FN7}

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Plaintiff avers that these complaints were protected activities. ^{FN8} In addition, the Complaint alleges that Mr. Rush suffered an adverse employment action subsequent to reporting sexual harassment to his supervisor. ^{FN9} Finally, the Complaint states that Mr. Rush was fired from his job for allegedly committing a lewd act at defendant's facility the month following his third and final complaint to his supervisor. ^{FN10}

^{FN7}. Plaintiff's Charge of Discrimination dated April 12, 2006.

^{FN8}. Complaint, paragraph 9.

^{FN9}. Complaint, paragraph 9.

^{FN10}. Complaint, paragraph 7(i).

Defendant argues that plaintiff is unable to establish the third element of a hostile work environment claim, that is, the element of causation. According to defendant, the temporal proximity between the protected activity and adverse employment action is insufficient as a matter of law to establish causation. Therefore, defendant argues, plaintiff is unable to establish a prima facie case of retaliation.

*6 With the exception of a single case, the United States Court of Appeals for the Third Circuit has never held that timing alone is sufficient to prove or disprove causation for a prima facie case of retaliation. See, Weston, 251 F.3d at 431. However, a plaintiff need not establish a prima facie case in order to survive a motion to dismiss. Rather, a plaintiff merely needs to aver enough facts to give a defendant fair notice of the nature of the retaliation claim. Gavura, 55 Fed.Appx. at 65.

A short and plain statement of the facts, pursuant to the liberal pleading requirements of Federal Rule of Civil Procedure 8(a), is all that is required to survive a motion to dismiss. No heightened pleading requirements exist for employment discrimination suits. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514-515, 122 S.Ct. 992, 999, 152 L.Ed.2d 1, 11 (2002).

Plaintiff's Complaint states that Mr. Rush was discharged from his employment with defendant within one month after Rush's last complaint of harassment,

on January 23, 2006. ^{FN11} I find this statement sufficient to fulfill the pleading requirements of Rule 8(a), to put the defendant on notice of the basis of plaintiff's claim, and to raise the inference that his firing was close enough in time to satisfy the causation factor of the retaliation requirements.

^{FN11}. Complaint, paragraph 7(i).

Furthermore, I note that the people who accused Mr. Rush of the alleged lewd act which resulted in his termination were the very same individuals about whom Mr. Rush had complained. Taking this fact, as well as temporal proximity, in the light most favorable to the non-movant, plaintiff has pled sufficient evidence upon which I can reasonably infer causation. Accordingly, I conclude under the authority cited above that plaintiff's retaliation claim must survive Defendant's Motion to Dismiss.

CONCLUSION

For all the foregoing reasons, I deny Defendant Turkey Hill Dairy, Inc.'s Motion to Dismiss.

ORDER

NOW, this 8th day of August, 2007, upon consideration of Defendant's Motion to Dismiss filed on November 14, 2006; upon consideration of Plaintiff EEOC's Memorandum of Law in Opposition to Defendant, Turkey Hill Dairy, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), which memorandum was filed on November 28, 2006; upon consideration of the briefs of the parties; and for the reasons articulated in the accompanying Memorandum,

IT IS ORDERED that Defendant's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that defendant shall have until on or before August 31, 2007 to answer plaintiff's Complaint.

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