IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lanny Toth,	:	
Appellant	:	
v.	:	No. 351 C.D. 2010
	:	Submitted: September 13, 2010
Slippery Rock University of Pennsylvania	:	
	:	

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM **FILED:** October 20, 2010

Appellant Lanny Toth (Toth) appeals from an order of the Court of Common Pleas of Butler County (trial court), dated June 29, 2009. The trial court granted Appellee Slippery Rock University's (University) motion for summary judgment against Toth's claims of disability discrimination and retaliation under the Pennsylvania Human Relations Act (PHRA).[1] We affirm the trial court.

Toth's claims of disability discrimination and retaliation stem from Toth's permanent dismissal from the University following a hearing held before a University board on December 16, 1998. The University board's decision to permanently dismiss Toth was based on three incidents of misconduct.

The first incident occurred on September 11, 1998, when Toth angrily confronted a faculty member, Deb Mariacher, in her office, causing Mariacher to become concerned for her safety. Mariacher filed a complaint with the University, which was referred to Christopher Cole, Coordinator of Student Standards. Cole and Robert Rhoads, Assistant Coordinator of Student Standards, met with Toth on September 18, 1998, to discuss Mariacher's complaint. At the meeting, Toth

[1] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§ 951-963.

admitted to barging into Mariacher's office and accusing her of sexual harassment. Toth believed that Mariacher was "coming on to him" by moving in her chair and thrusting her hips. (Reproduced Record (R.R.) at 55a-56a, 107a.) Toth further claimed that unnamed female students were also attempting to sexually harass him by moving their feet and legs in a provocative manner. (R.R. at 55a-56a, 107a.) Rather than formal discipline, Toth was warned not to confront faculty for any perceived transgressions and was instructed to utilize available University resources to address future concerns. (R.R. at 56a, 71a, 108a.)

The second incident occurred on December 2, 1998, while Toth was waiting to meet with his tutor at the University's Academic Services Center. When his tutor failed to appear, Toth became frustrated and stuck a pencil through a blueberry muffin—as if it had been stabbed. (*See* R.R. at 73a.) Toth then left the muffin on the desk where Amanda Yale, Assistant to the Dean and Academic Services Coordinator, had been sitting. Yale reported the incident as "unusual behavior." (R.R. at 72a.)

The final incident occurred on December 4, 1998, when Toth sent two harassing emails to Cole. On November 2, 1998, Toth sent Cole an email indicating that a "typed 50 or so pages of paralegal research" had been removed from his possession. (R.R. at 75a.) Cole replied the same day, suggesting that Toth contact the police. On December 4, 1998, Cole received two emails sent by Toth in reply to Cole's November 2, 1998 reply email. The first email was received at 3:00 p.m. and read, "You Suck [expletive], and everyone hates you." (R.R. at 77a.) The second email was received at 3:01 p.m. and read, "Mother [expletive]." (R.R. at 78a.) In response, Cole filed a complaint with the Office of Student Standards, alleging harassment by email.

Based on the foregoing incidents, Toth was charged with multiple violations of the University's Student Code of Conduct—harassment, disorderly conduct, and failure to abide by University rules and regulations—and a hearing before a University board—consisting of three faculty representatives and two student representatives—was scheduled for December 16, 1998. At the hearing, the University board heard testimony from Mariacher, Cole, and Yale concerning the above described events. The University board also heard the testimony of Dean Lindley, the University's email postmaster, who testified that he traced the emails sent to Cole on December 4, 1998, to Toth's H: drive. Toth testified on his own behalf and denied sending the emails to Cole, claiming that anyone could have sent the emails using his login information.

The University board found Toth guilty of harassment and failure to abide by University rules and regulations based on the following:

> Testimony of witnesses supported allegations of sexual harassment, harassment by intimidation; admitted to leaving muffin w/ pencil jabbed into it as he was angry; email trace showed outgoing on his H drive; he indicated he did not give his email password to anyone.

(R.R. at 84a.) As a result of Toth's violations of the University's Student Code of Conduct, the University board imposed a sanction of "Permanent Dismissal w/a permanent No Trespass to the University, its faculty, staff and students." (R.R. at 84a.) Toth appealed the University board's decision to the University appeal board. The appeal board met on January 14, 1999, and denied Toth's appeal.

On May 10, 1999, Toth filed a complaint with the Pennsylvania Human Relations Commission (PHRC), alleging that his permanent dismissal from the University was based on his disability, schizophrenia, and because he reported incidents of sexual harassment on campus. The PHRC dismissed Toth's complaint

on January 24, 2000, finding that "the facts of the case do not establish that probable cause exists to credit the allegations of unlawful discrimination." (Original Record, University Exhibit 12, at 5.) As a result of the PHRC's dismissal, Toth had a right to sue the University in the trial court pursuant to Section 12(c) of the PHRA, 43 P.S. § 962(c).[2]

On December 4, 2000, Toth filed a praecipe for a writ of summons in the trial court. After the issuance of a rule to file a complaint, Toth filed a complaint containing five counts on June 25, 2001. All counts, except those relating to disability discrimination and retaliation, were dismissed by way of preliminary objections on November 16, 2001. The case then languished for seven years until a status conference was held on November 20, 2008.

On April 30, 2009, the University moved for summary judgment on Toth's remaining claims. In opposition, Toth submitted, *inter alia*, his own affidavit and medical documentation, supporting his diagnosis of schizophrenia.[3]

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[2] Section 12(c) of the PHRA provides, in pertinent part:

> (c) (1) In cases involving a claim of discrimination, if a complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. *If within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party, the Commission must so notify the complainant. On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from discrimination granted by this act.*

(Emphasis added).

[3] The medical documentation provided by Toth to support his diagnosis of schizophrenia are a letter from a Program Administrator at the Northcoast Behavioral Health System dated June 23, 2005; a mental status report by A.L. Webersinn, Ph.D., a psychologist, dated December 15,

By order dated June 29, 2009, the trial court granted summary judgment in favor of the University. The trial court found that Toth did not make out a prima facie case of disability discrimination because there was no evidence that the University had knowledge of Toth's mental condition. The trial court further found that Toth failed to establish a prima facie case of retaliation because Toth had not engaged in protected activity and because the University's decision to permanently dismiss Toth was based on Toth's misconduct, not retaliation for Toth's complaint of sexual harassment. This appeal followed.

On appeal,[4] Toth argues that the trial court erred in determining that Toth failed to make out a prima facie case of disability discrimination. Toth also argues that the trial court erred in determining that Toth failed to make out a prima facie case of retaliation.

Initially, we note that disability discrimination and retaliation claims in Pennsylvania are covered by the PHRA, whereas, under federal law, disability discrimination claims are covered by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213,[5] and retaliation claims concerning sexual harassment

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1999; a psychiatric evaluation authored by Shoukry Matta, M.D., dated December 27, 1995; and a discharge summary by M. Patel, M.D., dated April 4, 1989.

[4] "In reviewing whether a trial court's award of summary judgment was appropriate in a case, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered." *Skipworth by Williams v. Lead Indus. Ass'n, Inc.*, 547 Pa. 224, 230, 690 A.2d 169, 171 (1997).

[5] On September 25, 2008, Congress enacted the ADA Amendments Act of 2008 (ADAA)—effective January 1, 2009—in order to "reinstat[e] a broad scope of protection" under the ADA and to "reject" the holdings in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines*, 527 U.S. 471 (1999). ADAA § 2(b), Pub. L. No. 110-325, 122 Stat. 3553, 3554. Significantly, the ADAA amended the

are covered by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17. Although we are not bound in our interpretation of the PHRA by federal interpretations of parallel provisions in the ADA and Title VII, Pennsylvania courts generally interpret the PHRA in accordance with its federal counterparts. *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996); *see also Imler v. Hollidaysburg Am. Legion Ambulance Serv.*, 731 A.2d 169, 173-74 (Pa. Super.) ("The PHRA and ADA are interpreted in a co-extensive manner. This is because the PHRA and ADA deal with similar subject matter and are grounded on similar legislative goals. . . . Thus, we use as guidance the decisions of the federal courts to assist in the interpretation of the PHRA."), *appeal denied*, 560 Pa. 706, 743 A.2d 920 (1999). Accordingly, this Court's analysis of Toth's PHRA claims will be guided by decisions interpreting the ADA and Title VII.

We address, first, Toth's argument that the trial court erred in determining that Toth failed to make out a prima facie case of disability discrimination because there was no evidence that the University had knowledge of Toth's mental condition. Section 3 of the PHRA, 43 P.S. § 953, provides that individuals have the right to obtain all "accommodations, advantages, facilities and privileges of any public accommodation . . . without discrimination because of . . . handicap or disability." Similarly, Section 12132 of the ADA, 42 U.S.C. § 12132,

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definition of "disability," making it easier for an individual to establish that he or she has a disability under the ADA. ADAA § 4(a), 122 Stat. at 3555. Notwithstanding, multiple United States courts of appeals have held that the ADAA does not apply retroactively. *See Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936 (D.C. Cir. 2009); *Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562 (6th Cir. 2009); *E.E.O.C. v. Agro Distrib., L.L.C.*, 555 F.3d 462 (5th Cir. 2009); *Kiesewetter v. Caterpillar, Inc.*, 295 Fed.Appx. 850 (7th Cir. 2008). The ADAA amendments to the ADA, therefore, do not apply to actions taken before January 1, 2009. Accordingly, because the actions in the present matter took place prior to January 1, 2009, we will apply the ADA as it existed prior to the enactment of the ADAA.

provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." To make out a prima facie case of disability discrimination, therefore, a plaintiff must demonstrate that "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

To satisfy the third prong of the prima facie case, the plaintiff is required to show that he was denied benefits or discriminated against because of his disability. A defendant cannot discriminate "because of" a disability unless the defendant has knowledge that the plaintiff is disabled. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 884 (6th Cir. 1996). Toth argues that the University knew he was disabled because the University was aware that he suffered from schizophrenia. We disagree.

Here, the only evidence demonstrating that the University even had knowledge that Toth suffered from schizophrenia is Toth's own affidavit, in which Toth stated that he fully disclosed his schizophrenic condition to his advisor and an unnamed medical doctor at the University. (R.R. at 141a.) Toth further stated that his advisor disseminated information about his schizophrenia among the University faculty and others.[6] (R.R. at 138a-39a.) The fact that individual members of the

[6] Toth's allegation that his advisor disseminated information about his schizophrenia is premised upon a letter written by Mariacher following the September 11, 1998 incident, in which Mariacher stated: "In my concern for safety, mine and others, I called his advisor, and she, also, has serious concern about his *current level of stability*." (R.R. at 53a (emphasis added).) Mariacher's letter, however, merely proves that Mariacher and Toth's advisor discussed Toth's

University's staff may have been aware of Toth's mental condition, however, fails to demonstrate that the University board or the University appeal board, who made the ultimate decision to permanently dismiss Toth, had knowledge of Toth's schizophrenia. There is no evidence that Toth disclosed his mental condition at any stage of the disciplinary proceedings relating to his permanent dismissal. Toth did not mention his schizophrenia at the September 18, 1998 meeting with Cole and Rhoads; in a December 14, 1998 letter Toth wrote to the President of the University (R.R. at 90a-91a);[7] at a December 11, 1998 meeting with Rhoads to discuss Toth's upcoming hearing (R.R. at 108a-09a); at the December 16, 1998 hearing before the University board (R.R. at 83a-88a); or in his appeal from the University board's decision (R.R. 109a).[8]

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mental stability. The letter fails to establish that Toth's advisor revealed Toth's schizophrenia to Mariacher or that Toth's advisor knew of Toth's schizophrenia in the first place.

[7] Toth contends that his December 14, 1998 letter to the President of the University made the University aware of his schizophrenia because he sought postponement of the December 16, 1998 hearing and complained that he was experiencing "extreme stress, both psychologically and physically," because of the disciplinary charges against him. (R.R. at 90a.) A request for postponement and a general complaint of "extreme stress," without more, is insufficient to put the University on notice that Toth suffered from schizophrenia.

[8] Toth also argues that the University had knowledge of his mental impairment because of the following passage from Toth's appeal letter to the University appeal board: "If there is any meaningful, honest, and legitimate concern to discuss the issues involved here I encourage you to contact Attorney Peter M. Suwak, Esquire." (R.R. at 97a.) We disagree. As the trial court stated:

> While it may be true that Mr. Suwak knew of the Plaintiff's mental condition and could explain it to the University, language encouraging the University to contact the Plaintiff's attorney without any specific mention of a handicap or of the reason for the University to contact Plaintiff's counsel does not provide the University with knowledge of the Plaintiff's handicap.

(Trial court's 1925(a) opinion, p. 5.)

Moreover, even if the University was aware of Toth's schizophrenia, it does not follow that the University knew that Toth was *disabled*. "[S]imply informing an employer of a particular condition is not tantamount to providing the employer with knowledge that the employee is substantially limited in some major life activity." *Sever v. Henderson*, 381 F.Supp.2d 405, 418 (M.D. Pa. 2005). As the Fifth Circuit explained in *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 163-64 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996):

> Under the ADA, an actionable disability means, in relevant part, a physical or mental impairment that substantially limits one or more major life activities of an individual. 42 U.S.C. § 12102(2)(A). *To prove discrimination, an employee must show that the employer knew of such employee's substantial physical or mental limitation.*
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> . . . .
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> For purposes of proving ADA discrimination, it is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of that disability. This distinction is important because the ADA requires employers to reasonably accommodate limitations, not disabilities. "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. 1630.2(j), App. (1995).

(Emphasis added.) The evidence offered by Toth tended to show only that the University may have been aware that Toth suffered from schizophrenia. That evidence failed to demonstrate that the University had knowledge that Toth

suffered a substantial mental limitation as a result of his schizophrenia. Toth, therefore, failed to establish that the University knew he was *disabled*.[9, 10]

We address, next, Toth's argument that the trial court erred in determining that Toth failed to make out a prima facie case of retaliation. Toth contends that his permanent dismissal from the University constituted unlawful retaliation for his complaint of sexual harassment against Mariacher and unnamed female classmates. We disagree.

Claims of retaliation are covered under Section 5(d) of the PHRA, which provides, that is shall be an unlawful discriminatory practice:

> (d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual

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[9] Furthermore, "[a]lthough the ADA prevents an employer from discharging an employee based on his disability, it does not prevent an employer from discharging an employee for misconduct, even if that misconduct is related to his disability." *Sever*, 381 F. Supp.2d at 420 (quotation marks omitted); *see also Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) ("The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability"); *Hamilton v. Southwestern Bell*, 136 F.3d 1047, 1052 (5th Cir. 1998) ("[T]he ADA does not insulate emotional or violent outbursts blamed on an impairment. An employee who is fired because of outbursts at work directed at fellow employees has no ADA claim."). Here, it is clear that Toth was permanently dismissed from the University for three separate incidents of misconduct, each of which violated the University's Student Code of Conduct. Accordingly, Toth failed to demonstrate that he was discriminated against because of his alleged disability.

[10] Toth also argues the trial court erred in granting summary judgment because the University failed to engage in an interactive process to determine a reasonable accommodation for his alleged disability. Even if we assume, *arguendo*, that Title II of the ADA imposes a duty on universities to engage in an interactive process with students, we need not address this argument having concluded that Toth failed to demonstrate the University knew he was disabled. *See Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 545 (7th Cir. 2008) (holding that plaintiff must show defendant was aware of plaintiff's disability in order to prevail on failure to accommodate claim).

> has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

43 P.S. § 955(d). To make out a prima facie case of retaliation, the plaintiff must show that: (1) he was engaged in a protected activity; (2) the defendant was aware of the protected activity; (3) the plaintiff was subjected to adverse action subsequent to participation in the protected activity; and (4) there is a causal connection between the adverse action and participation in the protected activity. *Spanish Council of York v. Pa. Human Relations Comm'n*, 879 A.2d 391, 399 (Pa. Cmwlth. 2005). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. *Id*. If the defendant succeeds, the burden shifts back to the plaintiff to show that the defendant's proffered legitimate, non-discriminatory reason is pretextual. *Id*.

To satisfy the first prong of the prima facie case, the plaintiff is required to have engaged in protected activity. "'[P]rotected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." *Fantini v. Salem State Coll.*, 557 F.3d 22, 32 (1st Cir. 2009) (quotations omitted). The term includes informal protests, such as making complaints to management. *Circle Bolt & Nut Co. v. Pa. Human Relations Comm'n*, 954 A.2d 1265, 1269 n.12 (Pa. Cmwlth. 2008). To have engaged in protected activity, however, the plaintiff "must demonstrate that . . . [he] had a good faith, reasonable belief that the underlying challenged actions . . . violated the law." *Fantini*, 557 F.3d at 32.

Here, Toth's complaint of sexual harassment does not constitute protected activity because Toth's belief that he was being sexually harassed was not reasonable. At the September 18, 1998 meeting with Cole and Rhoads, Toth complained that Mariacher and unnamed female students were conspiring to sexually harass him. Toth believed that these "sorority sisters"—referring to

Mariacher and the unnamed female students—were coming on to him by the way that they moved in their chairs. (R.R. at 55a-56a.) No reasonable person in Toth's position could have similarly believed they were being sexually harassed by Mariacher and the unnamed female students.[11] Toth, therefore, was not engaged in protected activity.

Assuming *arguendo* that Toth was engaged in protected activity, Toth also failed to establish a causal connection between his complaint of sexual harassment and the University's decision to permanently dismiss him, as required by the fourth prong of the prima facie case. To establish a causal connection, "a plaintiff must proffer evidence sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 588 (6th Cir. 2009) (quotations omitted). In this case, Toth relies exclusively on the temporal proximity between the date he complained of sexual harassment—September 18, 1998—and the date the University charged him with multiple violations of the Student Code of Conduct—December 9, 1998—to establish a causal connection. Although it is possible, under a particular set of facts, for extremely close temporal proximity alone to permit an inference of retaliatory motive, temporal proximity is generally not sufficient to establish causation without other compelling evidence. *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 401 (6th Cir. 2010). As the Supreme Court explained in *Clark County School District v. Breeden*, 532 U.S. 268, 273-74 (2001):

> The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an

[11] Both Cole and Rhoads stated in their affidavits that they found Toth's accusations to be implausible and irrational. (R.R. at 56a, 107a.) In fact, Cole responded to Toth's complaint of sexual harassment by inquiring whether Toth was under the influence of drugs or alcohol. (R.R. at 56a.)

> adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (C.A.10 2001). See, *e.g.*, *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (C.A.7 1992) (4-month period insufficient).

The nearly three-month temporal proximity in this case, therefore, is insufficient to permit an inference of retaliatory motive without other compelling evidence.

Moreover, any retaliatory motive that would be inferred through temporal proximity is diminished by the intervening events occurring between September 18, 1998, and December 9, 1998. Toth ignores the fact that, at the September 18, 1998 meeting with Cole and Rhoads, he was initially given only a verbal warning for the September 11, 1998 incident involving Mariacher. It was not until after the muffin incident on December 2, 1998, and the harassing emails on December 4, 1998, that the University initiated formal charges against Toth for violations of the University's Student Code of Conduct. Toth, therefore, failed to present sufficient evidence "to raise the inference" that his complaint of sexual harassment "was the likely reason for" the University's decision to permanently dismiss him. *Upshaw*, 576 F.3d at 588. Accordingly, Toth did not make out a prima facie case of retaliation.[12]

[12] We note that summary judgment was appropriate on Toth's retaliation claim even if Toth had made out a prima facie case because the University established a legitimate, non-discriminatory reason for its actions. As the trial court found, the University's decision to permanently dismiss Toth was not premised on retaliation for Toth's complaint of sexual harassment, but rather, on Toth's three incidents of misconduct in violation of the University's Student Code of Conduct. Toth has presented no evidence indicating that the University's proffered, legitimate, non-discriminatory reason was pretextual.

Because Toth failed to establish a prima facie case of both disability discrimination and retaliation, the trial court did not err in granting the University's motion for summary judgment. Accordingly, we affirm.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lanny Toth,	:	
Appellant	:	
v.	:	No. 351 C.D. 2010
	:	
Slippery Rock University of Pennsylvania	:	
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	:	

PER CURIAM

O R D E R

AND NOW, this 20th day of October, 2010, the order of the Court of Common Pleas of Butler County, dated June 29, 2009, is hereby AFFIRMED.