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

AMANDA WHELAN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 10-1058
	:	
DOW JONES & COMPANY, INC.	:	
and	:	
JOE GERACE,	:	
	:	
Defendants.	:	

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS DOW JONES & COMPANY, INC. AND JOSEPH GERACE

Defendants Dow Jones & Company, Inc. ("Dow Jones") and Joseph Gerace ("Gerace") (collectively, "Defendants"), by and through their undersigned counsel, submit this Motion for Summary Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and this Court's Policies and Procedures, and in support thereof aver as follows:

INTRODUCTION

1. In her complaint, Plaintiff Amanda Whelan claims that Defendants discriminated against her in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Pennsylvania Human Relations Act ("PHRA") by subjecting her to sexual harassment during her six-month employment with Dow Jones. Because Plaintiff failed to exhaust the remedies available to her under Dow Jones' sexual harassment policy, Plaintiff's claims fail as a matter of law. Plaintiff's state law claims fail for the additional reason that, with no viable federal claim, this Court lacks supplemental jurisdiction. Accordingly, summary judgment should be entered in favor of Defendants and against Plaintiff on all counts of the complaint.

FACTUAL BACKGROUND[1]

2. On or about November 30, 2007, Dow Jones hired Plaintiff to work in its Philadelphia office as an Advertising Sales Representative. (Compl. at ¶¶ 11-12; Declaration of Michael Kiley ("Kiley Decl."), attached hereto as Exhibit A, at ¶ 3). Plaintiff reported to Defendant Gerace, who was the Advertising Sales Director and Regional Sales Director for the Mid-Atlantic Region. (Kiley Decl., Ex. A, at ¶ 4).

3. At all relevant times during Plaintiff's employment, Dow Jones maintained a policy, available on its intranet system to which all employees (including Plaintiff) had access, prohibiting sexual harassment and establishing a procedure by which employees could report harassment in the workplace to a number of different management-level individuals. (Kiley Decl., Ex. A, at ¶ 5; Dow Jones & Company Sexual Harassment Policy ("Sexual Harassment Policy"), attached to Kiley Decl. at Tab 1). Specifically, Dow Jones' policy provides that "Dow Jones is committed to providing a working environment free from sexual harassment and to taking appropriate disciplinary action up to and including discharge, against violators of this policy even for a first offense." (Sexual Harassment Policy, Ex. A, at Tab 1). Dow Jones' policy further provides that "[a]ny employee who feels harassed should ***immediately*** report the situation to a corporate representative (a department manager, EEO Compliance Manager, Human Resources Manager, or other appropriate management representative such as the employee's immediate supervisor)." (Id.) (emphasis added).

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[1] For purposes of this motion only, Dow Jones accepts the "evidence in the light most favorable to the nonmovant, giving that party the benefit of all reasonable inferences derived from the evidence." Waldron v. SL Indus., Inc., 56 F.3d 491, 496 (3d Cir. 1995) (citations omitted).

4. According to Plaintiff, Gerace immediately "began subjecting [her] to a hostile work environment through various instances of sexual harassment." (Compl. at ¶ 13).

5. Plaintiff claims that she "demanded that Defendant Gerace cease and desist," but that he did not do so. (Compl. at ¶ 25). Notably, Plaintiff fails to allege in her complaint that she complained to or notified anyone else at Dow Jones of her belief that Gerace was creating a hostile work environment. Nor could she so allege, as Plaintiff never filed such a complaint with Dow Jones while she was employed there.[2] (Kiley Decl., Ex. A, at ¶ 7).

ARGUMENT

6. As Plaintiff's complaint makes clear, Plaintiff cannot survive summary judgment on her sexual harassment claims because she unreasonably failed to report any alleged harassment or to avoid harm otherwise. See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

7. An employer is entitled to an affirmative defense to respondeat superior liability for the alleged harassing acts of supervisors by showing "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

8. The first prong of the affirmative defense is established here because Dow Jones maintained a policy that prohibited sexual harassment and established a procedure for reporting harassment. See Morris v. SEPTA, No. 98-3414, 1999 U.S. Dist. LEXIS 15830, at

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[2] Plaintiff admits that the alleged harassment ended by June 26, 2008, six months after she was hired, when Dow Jones closed its Philadelphia office and laid off its Philadelphia workforce. (Compl. at ¶ 30; Kiley Decl., Ex. A, at ¶ 8).

*13-14 (E.D. Pa. Sept. 28, 1999), aff'd, 216 F.3d 1076 (3d Cir. 2000) (holding that a discrimination complaint policy that was posted and available to all employees satisfied first prong); Enders/Maden v. Super Fresh, 594 F. Supp. 2d 507, 514 (D. Del. 2009), aff'd, 346 F. Appx. 829 (3d Cir. 2009) (non-precedential) (holding that the employer established first prong by maintaining an anti-harassment policy and internal complaint policy that outlined a procedure for reporting complaints).

9. Likewise, the second prong of the affirmative defense is established here because Plaintiff unreasonably failed to report any alleged harassment by Gerace to Dow Jones. See Gawley v. Indiana Univ., 276 F.3d 301, 312 (7th Cir. 2001) (affirming summary judgment because the plaintiff unreasonably failed to report harassment at the hands of her supervisor to any corporate representative other than the alleged harasser); Beverly v. Kaupas, No. 05-6338, 2008 U.S. Dist. LEXIS 15570, at *45 (N.D. Ill. Feb. 29, 2008) (granting summary judgment because the plaintiff unreasonably failed to report "escalating harassment," occurring almost daily, by her supervisor to any corporate representative other than the perpetrator).

10. Because Defendants can establish both prongs of the Faragher/Ellerth affirmative defense, Plaintiff's Title VII and PHRA claims fail as a matter of law, and Defendants are entitled to summary judgment.[3]

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[3] As courts within this Circuit have long held, PHRA claims and Title VII claims are analyzed in pari materia. The Faragher/Ellerth affirmative defense therefore applies with equal force to Plaintiff's PHRA claims. See Evans v. Nine West Group, Inc., No. 00-4850, 2002 U.S. Dist. LEXIS 6427, at *48 (E.D. Pa. Apr. 15, 2002) (granting summary judgment on the plaintiff's sexual harassment claim under Title VII because Faragher/Ellerth affirmative defense was established and holding that the plaintiff's PHRA claim failed for the same reason); Rouse v. II-VI Inc., No. 2:06-cv-566, 2008 U.S. Dist. LEXIS 56456, at *40-42 n.11 (W.D. Pa. July 24, 2008), aff'd, No. 08-3922, 2009 U.S. App. LEXIS 10506 (3d Cir. May 14, 2009) (non-precedential) (recognizing that same analysis applies to claims against individual defendants under PHRA for aiding and abetting as to Title VII claims).

11. Moreover, this Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims because, as discussed more fully above, Plaintiff's Title VII claim against Dow Jones, the only source of this Court's jurisdiction, fails as a matter of law. See 28 U.S.C. § 1367(c); Alston v. Venture Res. Group, No. 06-3710, 2007 U.S. Dist. LEXIS 88042, at *8-9 (E.D. Pa. Nov. 29, 2007) (Rufe, J.) (declining to exercise supplemental jurisdiction over pendant state law claims after dismissal of federal claim when limited discovery had taken place and noting that "the Third Circuit does not encourage litigation in federal court in the absence of a federal cause of action").

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court enter judgment in their favor and against Plaintiff on all claims.

Respectfully submitted,

Dated: June 14, 2010

/s/ Kelly T. Kindig

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CERTIFICATE OF SERVICE

I, Kelly T. Kindig, Esquire, hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment of Defendants Dow Jones & Company, Inc. and Joseph Gerace was electronically filed with the Court and is available for viewing and downloading through the Court's ECF system. I further certify that a true and correct copy of the same was served upon the following via electronic filing:

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