

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>JAMES McASSEY,</b>	:	
<b>Plaintiff</b>	:	<b>No. 4:16-cv-705</b>
	:	
<b>v.</b>	:	<b>(Judge Kane)</b>
	:	<b>(Magistrate Judge Carlson)</b>
<b>DISCOVERY MACHINE, INC., <u>et al.</u>,</b>	:	
<b>Defendants</b>	:	

**ORDER**

**THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:**

From June 2010 until May 2015, Plaintiff James McAssey worked as the Vice President of Business Development for Defendant Discovery Machine Inc. (“DMI”). (Doc. No. 1 ¶¶ 20, 22.) Plaintiff asserts that he experienced a “serious brain incident” in 2009 and has occasionally suffered acute headaches as a consequence of hydrocephalus. (Id. ¶ 21.) Defendant Anna Griffith, owner and chief executive officer of DMI, allegedly commented “on occasion that she did not want Plaintiff to represent DMI.” (Id. ¶¶ 4-5, 21.) Defendant Anna Griffith also purportedly subjected Plaintiff to unwelcome and unsolicited acts that included, inter alia, sexual requests, “lying to Plaintiff about DMI client contact,” and “going out to meals to provide the Plaintiff alcohol.” (Id. ¶ 25.)

On February 24, 2016, Plaintiff filed a complaint in the United States District Court for the Eastern District of Pennsylvania against Defendants DMI, Anna Griffith, Todd Griffith, Howard Lewis, Molly Lusk, and Vanessa Chapla, alleging violations under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq. (“Title VII”), the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (“ADA”), and the Pennsylvania Human Relations Act, 43 P.S. § 951, et seq. (“PHRA”). (Doc. No. 1.) In his complaint, Plaintiff alleges, inter alia, that Defendants subjected him to a hostile work environment and terminated him for his refusal to be subjected to

continued harassment and because of his disability. (Id. ¶¶ 26, 27<sup>1</sup>, 32, 33<sup>2</sup>.) Plaintiff also asserts that Defendants Todd Griffith, Howard Lewis, Molly Lusk, and Vanessa Chapla “aided and abetted Ms. [Anna] Griffith’s harassment against Plaintiff.” (Id. ¶ 6.)

On March 21, 2016, Defendants filed a motion to transfer venue to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). (Doc. No. 10.) Judge Timothy J. Savage granted the motion on April 18, 2016 and the above-captioned case was transferred to the Middle District of Pennsylvania on April 28, 2016. (Doc. Nos. 18-19, 21.) Pending at the time of transfer was Defendant’s motion to dismiss Plaintiff’s complaint filed pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 13.) In their motion to dismiss, Defendants argue that the complaint is “devoid of any factual allegations” involving Todd Griffith, Howard Lewis, Molly Lusk, and Vanessa Chapla, fails to state a claim for disability discrimination under the ADA and PHRA, and fails to state a claim for retaliation under Title VII. (Id. at 10-14 & n.19.)

On January 18, 2017, Magistrate Judge Carlson issued a Report and Recommendation, recommending that this Court grant in part and deny in part Defendants’ motion to dismiss. (Doc. No. 40.) Specifically, Magistrate Judge Carlson recommends that this Court: (1) dismiss without prejudice Plaintiff’s ADA claim;<sup>3</sup> and (2) decline to dismiss Plaintiff’s Title VII claim

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<sup>1</sup> Plaintiff’s complaint appears to mistakenly number paragraphs 27 and 28 as paragraphs 29 and 30. (Doc. No. 1 at 10.)

<sup>2</sup> Plaintiff’s complaint appears to mistakenly number paragraph 33 as paragraph “333.” (Doc. No. 1 at 11.)

<sup>3</sup> Magistrate Judge Carlson reasons that Plaintiff has failed to allege any facts that “would link the actions of his employer to discrimination based upon any medical condition which he experienced.” (Doc. No. 40 at 17.) Given that Magistrate Judge Carlson noted “that the analytical framework used to evaluate a disability discrimination claim under the PHRA is effectively indistinguishable from that under the ADA,” (Doc. No. 40 at 9) (quoting Wilson v. Iron Tiger Logistics, Inc., 628 F. App’x 832, 835-36 (3d Cir. 2015)), the Court construes the Report and Recommendation as also recommending the dismissal of Plaintiff’s disability discrimination claim brought under the PHRA (see Doc. No. 1).

regarding sexual harassment and retaliation, but direct Plaintiff “to file a more definite statement” concerning his Title VII claim. (Doc. No. 40 at 17-18, 22-23.) Defendants filed objections to the Report and Recommendation (Doc. Nos. 44, 44-2), and the parties each filed briefs addressing Defendants’ objections (Doc. Nos. 45, 47).

In their objections, Defendants contend that the Report and Recommendation did not address whether Plaintiff adequately alleged a PHRA claim against Todd Griffith, Howard Lewis, Molly Lusk, and Vanessa Chapla. (Doc. Nos. 44 at 2; 44-2 at 2.) Defendants reason that only a “supervisory employee can be shown to have aided and abetted the employer’s discriminatory actions in violation of the PHRA,” (Doc. No. 44-2 at 12-13) (quoting Cohen v. Temple Physicians, Inc., 11 F. Supp. 2d 733, 737 (E.D. Pa. 1998)), and that Plaintiff failed to allege that Todd Griffith, Howard Lewis, Molly Lusk and Vanessa Chapla were supervisors (id. at 13). Plaintiff responds that the complaint adequately alleges that Defendants Anna Griffith, Todd Griffith, Howard Lewis, Molly Lusk, and Vanessa Chapla committed “acts of discrimination as Plaintiff’s supervisor or fellow employee” and are liable under 43 Pa. Stat. § 955(e). (Doc. No. 45 at 4, 8.)

The Report and Recommendation correctly recognized that “[t]he analytical framework used to evaluate a disability discrimination claim under the PHRA is effectively indistinguishable from that under the ADA.” (Doc. No. 40 at 9) (quoting Wilson v. Iron Tiger Logistics, Inc., 628 F. App’x 832, 835-36 (3d Cir. 2015)). Similarly, as a general rule, “[c]laims brought under the Pennsylvania Human Relations Act ... [are] ‘interpreted coextensively with Title VII claims.’” Faush v. Tuesday Morning, Inc., 808 F.3d 208, 213 (3d Cir. 2015). However, the Report and Recommendation did not squarely address whether Plaintiff adequately alleged an aiding and abetting claim under the PHRA against Todd Griffith, Howard Lewis,

Molly Lusk, and Vanessa Chapla.<sup>4</sup> (Doc. Nos. 40; 44 at 2.) Accordingly, the Court now turns to the Defendants' PHRA challenge.<sup>5</sup>

Section 5(e) of the PHRA, codified at 43 Pa. Stat. § 955(e), contemplates “individual liability for aiding and abetting employers’ violations of the PHRA” by forbidding:

(e) [A]ny person, employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

43 Pa. Stat. Ann. § 955(e); see Snyder v. Pennsylvania, No. 09-1814, 2010 WL 4362440, at \*7 (M.D. Pa. Oct. 27, 2010) (citing Dici v. Com. of Pa., 91 F.3d 542, 551-52 (3d Cir. 1996)).

“[D]istrict courts sitting in the Third Circuit have consistently held that ‘[l]iability under § 955(e) attaches only to supervisory employees.’” Suero v. Motorworld Auto. Grp., Inc., No. 16-686, 2017 WL 413005, at \*5 (M.D. Pa. Jan. 31, 2017) (collecting cases). This approach to § 955(e) liability tracks “the theory that only supervisors can share the discriminatory purpose and intent of the employer that is required for aiding and abetting.” See, e.g., Holock v. Luzerne Cty. Head Start, Inc., 385 F. Supp. 2d 491, 497 (M.D. Pa. 2005) (Vanaskie, J.) (citing Bacone v. Philadelphia Housing Auth., No. 01-419, 2001 WL 748177, \*2 (E.D. Pa. June 27, 2001)).

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<sup>4</sup> As to distinguishing between supervisors and non-supervisory co-workers, the Report and Recommendation did discuss that the “basis of an employer’s liability [under Title VII] for hostile environment sexual harassment depends on whether the harasser is the victim’s supervisor or merely a coworker.” (Doc. No. 40 at 13) (quoting Larochelle v. Wilmac Corp., 210 F. Supp. 3d 658, 682 (E.D. Pa. 2016)).

<sup>5</sup> To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts “to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (citing Twombly, 550 U.S. at 556). A court must accept as true all factual allegations in the complaint and all reasonable inferences that can be drawn from them, viewed in the light most favorable to the plaintiff. See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 314 (3d Cir. 2010).

Here, in his complaint, Plaintiff alleges that Todd Griffith, Howard Lewis, Vanessa Chapla, and Molly Lusk are “employees and/or officers of DMI” who “aided and abetted” Anna Griffith’s harassment and, more generally, aided and abetted “the harassment and discrimination.” (Doc. No. 1 ¶¶ 6, 29, 40) The three exhibits Plaintiff attaches to his complaint similarly only permit the Court to draw the following inferences therefrom: (1) Howard Lewis is a chairman of DMI’s board and a paid consultant (id. at 17, 24); (2) Plaintiff notified Howard Lewis of Anna Griffith’s “vulgar and abuse treatment” on April 27, 2015 (id. at 17; see Doc. No. 1-1 at 1); (3) Howard Lewis responded on April 27, 2015 that “sometimes people have a bad day” and mentioned approaching “things differently next time” (Doc. No. 1 at 17, 24); and (4) the termination letter was provided to Plaintiff by Anna Griffith, Todd Griffith, and Howard Lewis (Doc. No. 1-1 at 1, 8).

Upon review of the complaint and the exhibits attached thereto, the Court finds that Plaintiff fails to adequately allege an aiding and abetting claim under the PHRA against Todd Griffith, Howard Lewis, Vanessa Chapla and Molly Lusk. First, Plaintiff fails to allege or otherwise permit this Court to reasonably infer that Todd Griffith, Howard Lewis, Vanessa Chapla and Molly Lusk were Plaintiff’s supervisors. Second, although the complaint makes references to the conduct of “Defendants” and “foregoing acts,” Plaintiff fails to plead factual allegations that support the conclusory assertion that Todd Griffith, Howard Lewis, Vanessa Chapla, and Molly Lusk aided and abetted PHRA violations. (Id. ¶¶ 40, 41.) Therefore, the Court will dismiss without prejudice Plaintiff’s aiding and abetting claims under the PHRA for failure to state a claim upon which relief can be granted.

**ACCORDINGLY**, upon independent review of the record and applicable law, on this 20th day of July 2017, **IT IS ORDERED THAT**:

1. Magistrate Judge Carlson’s Report and Recommendation (Doc. No. 5), is **ADOPTED**;
2. Defendants’ Rule 12(b)(6) motion to dismiss (Doc. No. 13), is **GRANTED IN PART** and **DENIED IN PART** as follows:
  - a. Plaintiff’s ADA claim and corresponding disability discrimination claim under the PHRA are **DISMISSED WITHOUT PREJUDICE**;
  - b. Plaintiff’s aiding and abetting claim under the PHRA against Defendants Todd Griffith, Howard Lewis, Vanessa Chapla and Molly Lusk is **DISMISSED WITHOUT PREJUDICE**; and
  - c. In all other respects, Defendants’ motion to dismiss is **DENIED**;
3. Plaintiff James McAssey is granted leave to file, within twenty-one (21) days of the date of this Order, an amended complaint that addresses the defects identified in this Order and the Report and Recommendation. Specifically, Plaintiff is directed to file a more definite statement of his sexual harassment and retaliation claims pursuant to Federal Rule of Civil Procedure 12(e). Further, any “amended complaint must be complete in all respects. It must be a new pleading which stands by itself as an adequate complaint without reference to the complaint already filed.” Young v. Keohane, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992); and
4. The above-captioned action is referred back to Magistrate Judge Carlson for further pre-trial management.

s/ Yvette Kane  
Yvette Kane, District Judge  
United States District Court  
Middle District of Pennsylvania