IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELLA DENICE MACK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00-470-GMS
	)	
GREENVILLE RETIREMENT COMMUNITY, LLC, a Delaware LLC dba Stonegates,	)	
	)	
Defendant.	)	

M E M O R A N D U M AND O R D E R

I. INTRODUCTION

On June 14, 2001, Della Denice Mack ("Mack") filed this employment discrimination lawsuit against her former employer, Greenville Retirement Community, LLC, doing business as Stonegates ("Stonegates"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (2000). In her complaint, Mack alleges that a co-worker sexually harassed her by fondling and ridiculing her, and by making inappropriate gestures. As a result, Mack claims that she experienced a hostile work environment, and was terminated because she complained of her co-worker's advances. Presently before the court is Stonegates' motion for summary judgment. After reviewing the record in the light most favorable to Mack, the court concludes that she cannot establish her claims as a matter of law, and, therefore, will grant Stonegates' motion for summary judgment.

The following sections explain the reasons for the court's decision more thoroughly.

II. FACTS

Stonegates hired Mack as a kitchen utility person on September 18, 1996. On that day, Mack received and read the Employee Handbook (the "handbook") which included Stonegates' sexual

harassment policy, the grievance procedure, and an equal employment opportunity policy. The handbook also contained provisions requiring employees to "clock in and out" from work. Stonegates further explicitly reserved the right to terminate any employee that clocked out or left his or her work area without permission.

Mack's supervisor at Stonegates was Food Service Director John Gangloff ("Gangloff"). During her employment, Gangloff gave Mack numerous warnings about her conduct and performance, namely her tendency to get into physical and verbal altercations with her co-workers. In fact, Gangloff told Mack as early as 1997 that if the complained-of conduct did not stop, she would be terminated. Mack does not dispute that she received such warnings. Nor does she dispute that she continued to be disciplined during her remaining time at Stonegates. Specifically, Gangloff disciplined Mack in writing on March 3, 1997 for ignoring repeated instructions, and for complaining about such instructions to her co-workers. Gangloff also documented his displeasure with Mack's insubordination in his September 8, 1997 performance evaluation. Mack further acknowledges that she was disciplined on four occasions during the summer of 1998 for insubordination, leaving her job without permission, failing to report for work and lack of personal hygiene.

On March 2, 1999, Mack was again late for work. She was to report to her station at 5:30 P.M., however, at 5:40 P.M., Gangloff could not locate her. At 6:20 P.M., another dishwasher asked Gangloff where Mack was, as she was still not at her station. When Gangloff eventually did locate Mack, he asked her where she had been. Mack denied she had been late. Instead, she claimed that a member of the staff asked her to work in the Health Center because they were short-staffed. Mack later retracted this statement and admitted no one had told her to report to the Health Center. Later

that evening, Gangloff spoke with the Assistant Director, Kathy Neylan ("Neylan"), about Mack. He voiced his opinion that Mack's lateness was simply the last straw, and that he wanted to terminate her employment. Neylan agreed termination was the appropriate action.

During Mack's last shift on March 2, 1999, she was also involved in an altercation with a co-worker, Ray Stevens ("Stevens"). Mack and Stevens exchanged angry words, beginning with Mack inviting Stevens to "kiss her ass" when Stevens told her Gangloff was looking for her. Stevens replied that he would not, but would have his sister "put her foot up Ms. Macks' butt." This continued until Herb Trotter ("Trotter") told Stevens that it was not worth arguing over. Stevens agreed and subsequently left for the night.

When Gangloff arrived at work on March 3, 1999, he checked the time clock records to determine when Mack had actually clocked in the previous evening. He saw that it was not until 5:55 P.M. He also saw the note from Margaret Harris, a night supervisor, saying that Stevens and Mack had been involved in an "argument." Based on this information, Gangloff again spoke with Neylan and, together, they finalized the decision to terminate Mack.

Around 8:45 A.M. on March 3, 1999, Mack asked to speak with Gangloff before her shift began at 4:20 P.M. She said nothing of sexual harassment at that time. When she arrived at 3:00 P.M., Gangloff informed Mack that he did not wish to discuss her argument the night before. Instead, he informed Mack that he was terminating her employment for arriving late, leaving her workstation, lying about her arrival time and not calling in when she was going to be late. Mack left Gangloff with the indication that he would be hearing from her lawyer. She again did not mention sexual harassment. It was not until the following day that Mack alleged that Stevens had sexually harassed her. Stonegates maintains that this was the first notice Gangloff, Neylan or the Irene Owens, the Executive Director, had of any sexual harassment issue involving Mack.

Upon receiving Mack's claim of sexual harassment, Gangloff, Neylan, and Owens launched an investigation into her allegations. However, they found no evidence that the allegations were true. Moreover, the other cooks who worked side-by-side with Stevens assert that they never saw him sexually harass Mack.

On March 5, 1999, Mack filed a charge with the Delaware Department of Labor and the United States Equal Employment Opportunity Commission, alleging sexual harassment and retaliation for complaining of the sexual harassment. In her complaint, however, Mack acknowledged that March 2, 1999 was the first time she had complained of any harassment. Moreover, although Mack says she reported the alleged harassment immediately to two night supervisors, she did not say she was being *sexually* harassed. Rather, she complained that Stevens was harassing her. Specifically, Mack asked one of the night supervisors to tell Stevens to "leave [her] alone because [she] was tired of him messing with [her]."

Finally, Mack does not dispute that she committed many offenses for which her employer could have terminated her employment.

III. STANDARD OF REVIEW

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, the court may grant summary judgment only if the moving party shows that there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *See Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id*. (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986)). An issue is

genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id*. In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id*.; *see also Assaf v. Fields*, 178 F.3d 170, 173-174 (3d Cir. 1999).

With these standards in mind, the court will turn to the substance of Stonegates' motion for summary judgment.

IV. DISCUSSION

In its briefing on the motion, Stonegates argues that it is entitled to summary judgment because Mack cannot establish her claims for hostile work environment and retaliatory discharge. In contrast, Mack alleges that there are sufficient facts in the record from which a reasonable jury could rule in her favor on these issues. The court will address Mack's claims in turn.[1]

A. Hostile Work Environment

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). Although the statute mentions specific employment decisions with immediate consequences, it covers more than "terms" and "conditions" in the narrow contractual sense. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). Thus, sexual harassment that is so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment" violates Title VII. *Id*. (quoting *Meritor Savs. Bank FSB v. Vinson*, 477 U.S.

[1]According to her complaint, Mack filed a charge of discrimination with the DDOL and the EEOC on March 5, 1999. There is no evidence in the record that she subsequently received a "right to sue" letter. Thus, there is a question as to whether she has established that she complied with all of Title VII's pre-filing requirements in a timely manner. *See* 42 U.S.C. § 2000e-5(e)(1). However, as the parties have failed to address this issue, the court need not address it.

57, 67 (1986)); *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 293 (3d Cir. 1999) (stating that it is well established that a plaintiff can prove a violation of Title VII by proving that sexual harassment created a hostile or abusive work environment).

Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance, or creates an intimidating, hostile or offensive working environment. *See Meritor Savs. Bank FSB v. Vinson*, 477 U.S. 57, 65 (1986). In order to fall within the purview of Title VII, the conduct in question must be severe or pervasive enough to create both an "objectively hostile or abusive work environment - an environment that a reasonable person would find hostile," and an environment the victim-employee subjectively perceives as abusive or hostile. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). Mere "offhand comments and isolated incidents" are not sufficient to set forth a claim for a hostile work environment. *See Faragher*, 524 U.S. at 786.

With regard to employer liability for sexual harassment, the Court distinguished the principles applicable to harassment by co-workers versus the principles applicable to harassment by supervisors. *See id.* at 803. Specifically, the Court noted that in the instance of co-worker sexual harassment, the standard for employer liability is negligence. *See id*. at 799. The Court defined negligence with respect to sexual harassment as whether the employer knew or should have known about the conduct and failed to stop it. *See Burlington Indust. Inc., v. Ellerth* 524 U.S. 742, 759 (1998); *see also* 29 C.F.R. § 1604.11(d) (2001).

In this case, Mack argues that she was subjected to a hostile work environment by her co-worker Stevens' actions.[2] Mack has adduced no evidence that Stonegates had actual knowledge of

[2]Mack does not dispute that Stevens was only a co-worker and held no supervisory authority over her.

the alleged harassment. She admits that she never notified anyone in a position of authority that Stevens was harassing her prior to March 2, 1999. Moreover, while it may be that Mack told her night supervisors that Stevens' actions on the night of March 2, 1999 were harassing, it is undisputed that she did not tell them that she felt Stevens was *sexually* harassing her. Specifically, she told them only that Stevens was "messing with [her]." In light of the fact that Mack herself failed to describe the episode as sexual harassment, there is no evidence that her supervisors were aware of anything other than what Mack admits were frequent altercations with her co-workers. In fact, based on the night supervisors' contemporaneously written file notes, the supervisors saw this as nothing more than an argument between co-workers. Accordingly, because Mack did not complain specifically that Stevens was sexually harassing her, her statements to the night supervisors did not rise to the level of actual notice. *See Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999) (stating that an employee must complain specifically for actual notice to exist).

There is also no evidence in the record that Stonegates should have known that Mack was being sexually harassed. Constructive notice can exist in two situations: (1) "where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it" and (2) "where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer." *See id*. at 294.

Here, Mack claims that "everyone knew" of Stevens' sexual harassment, but she fails to bring forth concrete evidence of even one person's knowledge of that fact. In fact, two cooks who worked side-by-side with Stevens provided affidavits declaring that they had never witnessed Stevens sexually harass Mack. Mack thus points to no evidence of sexual harassment "so pervasive and open that a reasonable employer would have had to be aware of it." *See id.* at 294. Nor does Mack bring forth any concrete evidence of information that she had given her supervisors that would have been

sufficient to give rise to a "probability of sexual harassment in the mind of a reasonable employer." *See id.* As stated above, her comments to her night supervisors that Stevens was "messing with [her]" were enough only to put her supervisors on notice of a mutual disagreement, not sexual harassment. *See id*. (recognizing that, where employees' complaints do not refer to sexually offensive behavior, employers are not on constructive notice of sexual harassment.")

In light of the evidence in the record, the court concludes that Mack's hostile work environment claim is based on nothing more than mere conclusory allegations which do not rise to the level required to establish her employer's negligence. Because conclusory allegations alone are insufficient to withstand a motion for summary judgment, the court will grant the defendant's motion as to the hostile work environment claim. *See Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991) (noting that summary judgment shall be granted if, in opposition, the non-moving party rests solely "upon mere allegations, general denials, or . . . vague statements").

B. Retaliation

Mack has also alleged that she was terminated in retaliation for complaining about the alleged sexual harassment.

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must first prove (1) that she engaged in a protected activity; (2) that her employer took adverse action against her either after, or contemporaneously with, her protected activity; and (3) that there is a causal connection between the protected activity and the employer's adverse action. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997). Second, if the plaintiff succeeds in establishing her *prima facie* case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its actions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, if the defendant is able to successfully articulate such a reason, the burden then

shifts back to the plaintiff to show that the defendant's non-discriminatory reason for the termination was pretextual, and that the real reason for the termination was unlawful discrimination. *See McDonnell Douglas*, 411 U.S. at 802-804. The plaintiff's "ultimate burden in a retaliation case is to convince the factfinder that retaliatory intent had a 'determinative effect' on the employer's decision." *See Shaner v. Synthes (USA)*, 204 F.3d 494, 501 (3d Cir. 2000).[3]

Mack has failed to meet her burden of establishing a *prima facie* case. She claims that she engaged in a protected activity by reporting Stevens' alleged sexual harassment. While she is correct that such an action was clearly within her rights, her argument must nonetheless fail because she has adduced no evidence that she engaged in this protected activity prior to, or contemporaneously with, her termination. As the court discussed above in Section A, the record evidence demonstrates only that she complained of sexual harassment after her termination. Moreover, Mack herself stated in her deposition that "[Gangloff] had me fired before I could tell him what was going on."

Furthermore, Stonegates has articulated several legitimate, non-discriminatory reasons for her termination. Its basis for terminating her includes a combination of her lateness, her failure to notify her supervisor that she was going to be late, her dishonesty about her arrival time and her failure to report directly to her workstation when she arrived. Mack herself acknowledges that Stonegates had ample cause to fire her based on the frequent altercations she had with co-workers, and her general lack of respect for her supervisors.

Finally, although Mack claims Stonegates' articulated reasons for her termination are pretextual, she offers no concrete evidence of why that is so. Again, her mere conclusory allegations that she could have been terminated for her earlier infractions, but was not until her alleged sexual

[3]In her answering brief, the plaintiff grossly misstates this burden by relying on case law that is inconsistent with the United States Supreme Court decision in *St. Mary's Honor Center v. Hicks*, and its progeny. 509 U.S. 502 (1993)

harassment claim arose, are insufficient to withstand summary judgment. *See Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991).

The court thus concludes that Mack has failed to establish any concrete record evidence that she informed Stonegates of the alleged sexual harassment prior to, or concurrently with, her termination. Nor has she met her burden of bringing forth evidence that Stonegates' proffered legitimate reason for her termination was pretexual. Accordingly, no reasonable trier of fact could determine that Mack engaged in a protected activity which had a determinative effect on Stonegates' decision to terminate her.

V. CONCLUSION

For the foregoing reasons, the court concludes that Stonegates is entitled to summary judgment because Mack cannot establish her claims of hostile work environment harassment or retaliatory discharge as a matter of law.

For these reasons, IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, Greenville Retirement Community, LLC, dba Stonegates' Motion for Summary Judgment (D.I. 40) is GRANTED.
2. Summary Judgment BE AND IS HEREBY ENTERED in favor of Greenville Retirement Community, LLC, dba Stonegates, and against Mack on all claims in the complaint.

Dated: October 23, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE