IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TAMMY CHAVIS, as next friend and parent of the minor child, Bryan R. Stewart,	)	
Plaintiff,	)	
v.	)	C.A. No. 02-334 GMS
WENDOVER INC., a Delaware corporation, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On May 2, 2002, the plaintiff, Tammy Chavis, as next friend and parent of minor child Bryan R. Stewart ("Stewart"), filed the above-captioned action alleging race discrimination and constructive discharge in violation of 42 U.S.C. § 1981. The complaint also alleges a state law claim for assault and battery.

Presently before the court is the defendants' motion for summary judgment. For the following reasons, the court will grant this motion in part and deny it in part.

II. 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 Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *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, 173-74 (3d Cir. 1999).

III. DISCUSSION

Stewart is an African-American teenager who was employed by WenDover, Inc. ("WenDover") at its Eden Square restaurant from June 2000 until August 4, 2000. On August 4, 2000, Stewart was assigned to work from 10:30 a.m. until 4:30 p.m. On that day, one of his managers, Robert Sheats, told him to empty a trash can in the restaurant. As he was returning from emptying trash, Stewart alleges that Vice President of Operations Mark Liebel ("Liebel") made a series of comments to him and then pushed his head into a trash can or trash receptacle. Specifically, Stewart alleges that he emptied the trash can, took the trash outside to the dumpster, returned to the store, and was in the process of putting a clean bag into the trash can. At that point, he claims that he was approached by Liebel.

Stewart has testified regarding the substance of his allegations concerning Liebel's comments several times. He first testified about the incident during a hearing before a Commissioner in the Family Court of the State of Delaware in the matter of *State of Delaware v. Mark Liebel*.[1] At that hearing, he stated that Liebel's alleged comments were as follows:

> He had – he said, Did you hear me, right here, I said, and he stuck my head in the trash can and said, Are you stupid or something? Are you retarded? Do you smell it? Do you see the trash?

[1]Stewart filed a complaint with the Delaware State Police that resulted in a Family Court action against Liebel for offensive touching.

Tr. of Family Court Hearing at 23.

At his deposition in the present action, Stewart testified that Liebel said, "[a]re you retarded, are you stupid, you people don't know how to clean. Are all ya'll that dumb. Do you see the trash, do you smell it." Tr. of Stewart Dep. at 92. Later in the deposition he testified that Liebel said, "are you dumb, are you retarded, are you stupid. Ya'll people don't know how to clean. Ya'll people are retarded." Tr. of Stewart Dep. at 203.

Stewart does not contend that Liebel referred to him as an "African American" or any synonym therefor. Rather, he maintains that it was his assumption that the phrase "y'all people" referred to African Americans. Specifically, at his deposition, Stewart testified as follows:

> Q. And what about what Mark Liebel had allegedly done, what about that was discriminatory?
>
> A. He put his hands on me and he said, ya'll people. He referred to, like African Americans.
>
> Q. Did he ever, Mr. Liebel, did Mr. Liebel ever use the term African Americans?
>
> A. No, he didn't.
>
> Q. Why do you say that he said African Americans?
>
> A. Ya'll people and African Americans?
>
> Q. Why do you think that?
>
> A. Because you people are discussing who I am, and I'm African American.
>
> Q. So when you say that Mr. Liebel said something about African Americans, that's your assumption, right?
>
> A. Yes.

Tr. of Stewart Dep. at 205-206.

When later asked to clarify the allegation in Paragraph 10 of the Complaint that "Liebel yelled racial epithets at plaintiff," Stewart testified as follows:

> Q. What's meant by racial epithets here?
>
> A. Racial slang words.
>
> Q. And what were those slang words?
>
> A. You people, you all.
>
> Q. Was there anything else that's meant by racial epithets here?
>
> A. Retarded can be.
>
> Q. Did Mr. Liebel actually say anything that used the word, African American, or some other term that actually refers to African American?
>
> A. A lot of words can refer to African Americans.
>
> Q. Okay. But did he ever use the word African American?
>
> A. No, he didn't.
>
> Q. Did he ever use the word, black?
>
> A. No, he didn't.
>
> Q. Is there anything else that Mr. Liebel said that you take as racial epithets?
>
> A. At this present moment, that's all I can say.

Id. at 275-276.

Following the incident in question, Stewart worked the remainder of the day, and left the restaurant at 4:30 p.m., as scheduled. At that time, he informed his mother of what had happened,

and she told him he "couldn't go back." He thus resigned his employment with WenDover.

IV. DISCUSSION

A. 42 U.S.C. § 1981

In Count I of the complaint, Stewart alleges that, due to Liebel's conduct on August 4, 2000, he was constructively discharged from his employment with WenDover. The defendants now argue that Liebel's alleged comments do not rise to the level of race discrimination, nor are his alleged actions in any way indicative of racially discriminatory animus. For the following reasons, the court must disagree that a grant of summary judgment is appropriate on this issue.

To establish a right to relief under Section 1981, a plaintiff must show: (1) that he belongs to a racial minority; (2) "an intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in" Section 1981.[2] *Pryor v. National Collegiate Athletic Assoc.*, 288 F. 3d 548, 569 (3d Cir. 2002). Moreover, to establish a claim for constructive discharge, a plaintiff must show that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3d Cir. 1996).

In the present case, there is no dispute that Stewart is African American. The defendants do dispute, however, that Liebel possessed an intent to discriminate against Stewart. To this end, they contend that, assuming that Liebel actually made the comments in question, they are innocuous and racially-neutral.

The Third Circuit Court of Appeals has recognized that comments such as "all of you" and

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[2]The standard for establishing an "intent to discriminate on the basis of race" is identical in the Title VI and Section 1981 contexts. *See e.g. Lewis v. University of Pittsburgh*, 725 F.2d 910, 915, n.5 (3d Cir. 1983).

"that one in there" and "one of them" may be "code words" for discriminatory animus. *See e.g. Aman v. Cort Furniture Rental Corp*., 85 F. 3d 1074, 1081 (3d Cir. 1996); *Abramson v. William Patterson College*, 260 F.3d 265, 278 (3d Cir. 2001). Moreover, as the Third Circuit has stated, "there are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination." *See Aman*, 85 F.3d. at 1083. In the present case, the court cannot say that a reasonable jury would be unable to find that the alleged statements at issue, coupled with the alleged physical altercation, sent a clear message and carried the distinct tone of racial motivations and implications. Thus, while the court disagrees with Stewart that the case for racial animus is as clear as he suggests, it is not prepared to divest him of his day in court on this ground.

The defendants next argue that Stewart has failed to demonstrate that a reasonable person in his place would have resigned. In support of this argument, they point out that it was Stewart's mother who decided that he would not continue to work for Wendy's. The defendants further argue that, at his deposition, Stewart acknowledged that he was "not sure" whether he wanted to go back. *See* Tr. of Stewart Dep. at 255. The court concludes, however, that what remains important for the resolution of the present motion is that Stewart did, in fact, resign, ostensibly as a result of Liebel's alleged actions. Additionally, given the allegations of racial animus and physical contact between Stewart and Liebel, the court is not persuaded to the defendants' point of view that no reasonable person in his position would have resigned.

B. Liebel's Individual Liability

The defendants next contend that, under Section 1981, a third party may only be liable if that

party "intentionally interferes, on the basis of race, with another's right to make and enforce contracts, regardless of whether the employer or anyone else may also be liable.'" *Cimino v. Delaware Dep't of Labor*, 2002 WL 265095, at *5 (D. Del. Feb. 25, 2002) (quotation and citation omitted). Their only support for this argument, however, is contingent on the court having first found that there is no evidence of racial discrimination. Because the court has already found that there is sufficient evidence of racial animus to deny the motion for summary judgment, and because it is Liebel's actions which gave rise to this case, the court concludes that Liebel may be held liable under Section 1981. *See Cardenas v. Massey*, 269 F.3d 251, 268 (3d Cir. 2001) (observing that the Third Circuit recognizes individual liability under Section 1981).

C. The Assault and Battery Claims are Preempted as to Wendover

Count II of the complaint seeks to hold Liebel and WenDover liable for intentional assault and battery. WenDover now argues that the exclusivity provision of the Delaware Workers' Compensation Act ("the Act") limits an employee's recovery for personal injuries arising out of, and during, the course of employment to the compensation provided under the Act.[3] *See* 19 DEL. C. § 2304; *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 938 (Del. 1996).

In response, Stewart maintains that the Delaware Supreme Court has effectively overruled its opinion in *Westvaco* with its more recent decision in *Schuster v. Derocili*, 775 A.2d 1029, 1037 (Del. 2001). He also argues that public policy dictates that his assault and battery claims should not be preempted because he was a minor at the time of the incident. For the following reasons, however, the court concludes that both of these argument must fail.

[3]It does not appear that Liebel has moved for summary judgment on this ground. *See e.g.* Defendants' Opening Brief (D.I. 36) at 18-19. Accordingly, the court will address preemption only as to WenDover.

Delaware courts have recognized that, " . . . an injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment, or as a reasonable relationship to it." *Westvaco*, 690 A.2d at 938. While subsection 2301(15)(b) excludes from coverage under the Act " . . . any injury caused by the willful act of another employee directed against the employee by reasons personal to such employee and not directed against the employee or because of the employee's employment," this exception does not apply in this case. Here, Stewart alleges that, while working for WenDover and removing trash from a trash can, Liebel approached him, criticized him for his trash removal, and allegedly pushed his head into either the trash can or the trash receptacle. As this case clearly concerns actions related to the conditions existing in, or created by, the workplace, the Act must apply. *See e.g. Westvaco*, 690 A.2d at 938-39 (holding that a claim for assault and battery stemming from alleged sexual harassment and sexual assault were not excluded from the coverage of the Act.); *see also Nelson v. Fleet National Bank*, 949 F. Supp. 254, 259 (D. Del. 1996) (holding that the plaintiff's claim for intentional infliction of emotional distress resulting from sexual harassment by a co-worker, where there was no relationship outside the workplace between the parties, was compensable under the Act).

Although Stewart argues that the Delaware Supreme Court's opinion in *Schuster* mandates a different conclusion, *Schuster* is not even arguably analogous. In that case, the court reviewed whether the plaintiff had articulated a public policy violation that permitted her to proceed on her claim of breach of the covenant of good faith and fair dealing. *See Schuster*, 775 A.2d at 1038. Rather than holding that a public policy violation exception applied to the exclusivity provision of the Act, the court actually noted that the "Delaware Workers' Compensation Statute is an ideal example of the General Assembly's intention to preclude common law claims, when it chooses to

do so . . . . Exceptions have been found only where the claim is based on a bad faith breach of contract . . . ." *Id*. at 1038. More persuasively still, the *Schuster* court specifically noted that the issue before it concerned a breach of contract claim, not a tort claim. *See id*. at 1033, n.11 (citing the *Westvaco* case for the proposition that the Act precludes an employee from asserting a common law tort claim against her employer for a claim of sexual harassment.). Thus, the court finds Stewart's argument that *Schuster* controls the present issue to be unpersuasive.

Finally, as to Stewart's second argument that public policy dictates that the court should not apply the Act, that argument too is unpersuasive. Stewart has cited to no case law which would permit the court to supplant the clear language of the Act merely because he is a minor. Thus, the court concludes that Stewart's state law claims against WenDover are barred by the exclusivity provision of the Act.

D. Issue Preclusion

Stewart claims that Liebel is barred from relitigating the essential issue of his criminal trial, namely, "whether he mistreated Bryan on the day in question in a manner which would offend any reasonable person." In response, Liebel argues that the charge of "offensive touching" does not involve issues identical to those required to establish civil assault or battery. For the following reasons, the court must agree.

"The doctrine of issue preclusion . . . derives from the simple principle that 'later courts should honor the first actual decision of a matter that has been actually litigated.'" *Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227, 1231 (3d Cir. 1995). The doctrine ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different

cause of action involving a party to the prior litigation." *Id*. When a party seeks to rely upon a state court judgment to preclude relitigation of the same issue in federal court, federal courts must look to the law of the state to determine whether the state would give the judgment preclusive effect in its own courts. *See Bailey v. Ness*, 733 F.2d 279, 281 (3d Cir. 1984).

In the State of Delaware, the test for applying the issue preclusion rule "requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment." *Messick v. Star Enterprises*, 655 A.2d 1209, 1211 (Del. 1995). Moreover, a criminal conviction may be given preclusive effect in a subsequent civil action if the question raised in the civil suit was "distinctly put in issue and directly determined in the criminal prosecution." *See Emich Motors Corp. v. General Motors, Corp.*, 340 U.S. 558, 568-69 (1951).

The crime of offensive touching is set forth in Title 11 of the Delaware Code, Section 601(a)(1). That section states that a person is guilty of offensive touching when the person "[i]ntentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such person." *See* 11 DEL. C. § 601(a)(1). In contrast, civil assault is the "attempt by a person, in a rude and revengeful manner, to do an injury to another person, coupled with the present ability to do it." *See Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 672 (D. Del. 1999) (*quoting St. Anthony's Club v. Scottsdale Ins. Co*., 1998 WL 732947, at *3 (Del. Super. Ct. July 15, 1998)). Civil battery is the intentional, unpermitted contact upon the person of another, which is harmful or offensive. *See Brzoska v. Olson*, 668 A.2d 1355, 1360 (Del. 1995). Lack of consent is an essential element of battery. *See id*.

In the present case, Stewart cannot make a colorable argument that, because Liebel was found guilty of offensive touching, he is thereby precluded from now arguing that he is not guilty

of assault and battery, nor does the court understand Stewart to make such an argument. Thus, as the elements for these various offenses are clearly different, the court concludes that Liebel is not collaterally estopped from litigating the assault and battery claims simply because he was previously found guilty of offensive touching. To the extent that Liebel wishes to argue that the offensive touching conviction, or findings related thereto, should not be admissible into evidence in the present case, that issue is more properly the subject of a motion in limine.

V. CONCLUSION

After considering the parties' arguments, the court concludes that Stewart has adduced sufficient evidence to withstand a motion for summary judgment on his Section 1981 claim, including his claim against Liebel individually. Although Stewart's assault and battery claim against WenDover is barred by the Delaware Workers' Compensation Act, the issue preclusion rule will not bar Liebel from litigating Stewart's assault and battery claim against him in the present case.

For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. The Defendants' Motion for Summary Judgment (D.I. 36) is GRANTED in part, and DENIED in part.

Dated: April 21, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE