PHRA

Associate attorney of a law firm diagnosed with manic depression sued the law firm and two of its partners, alleging that her termination violated the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act (PHRA). Associate attorney also sued two of the law firm's partners for allegedly aiding and abetting the discriminatory practices of the employer law firm in violation of the PHRA.

Plaintiff was employed as an associate attorney from November 27, 2015 to April 26, 2016. Prior to commencing her employment with the law firm, Plaintiff was diagnosed as having manic depression. She did not inform Defendants of this diagnosis when she was hired.

On April 15, 2016, the defendant law firm placed Plaintiff on sixty days' probation for poor work performance, but assured her that no adverse action would be taken against her prior to expiration of the probationary period. One week into the probationary period, Plaintiff spoke privately with a partner in the defendant law firm regarding the firm's short and long term disability policies. Plaintiff did not disclose her medical condition at that time.

On April 24, 2016, Plaintiff was questioned extensively by another of the law firm's partners about her basis for requesting information on the disability policy. It was at this time that Plaintiff advised the partner of her manic depression, and also suggested that it may have been contributing to her poor work performance. Plaintiff also made certain work accommodation requests to the partner that would enable her to cope with her condition.

The following day, the second partner informed Plaintiff that her employment was terminated effective immediately due to poor work performance and notwithstanding the fact that her sixty day probationary period had yet to expire.

Plaintiff alleges that after Defendants learned of her disability, they engaged in a systematic and continuous pattern of discrimination, with the intent of depriving her of her employment.

Like the Americans with Disabilities Act, 42 U.S.C. § 12111, *et. seq.,* § 955(a) of the PHRA, 43 P.S., renders it unlawful for an employer to discharge an employee because of a non-job related disability. Under 43 P.S. § 955(e), however, the state statute goes a step further by forbidding:

> "... [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."

In this manner, § 955(e) of the PHRA differs from Title VII, which holds only employers liable for discrimination while exempting individual employees from liability.

Question: Are the two law partners liable as individual defendants under the PHRA?

Answer: Yes. The two law partners are supervisors for purposes of PHRA liability and that they aided and abetted the firm in unlawfully discriminating against Plaintiff on the basis of her manic depression.

Section 1981

Plaintiff, who is Hispanic, began working for Defendant, a car dealership, on July 28, 2014. On August 1, 2014, Plaintiff had just sold two cars when three of Plaintiff's co-workers, who are Caucasian, told Plaintiff to not sell any more cars or there would be consequences. Later that day, Plaintiff went to his manager, Defendant Smith, and told him what had happened. Defendant Smith did not take any action in response to Plaintiff's complaint.

On August 5, 2014, Plaintiff sold a vehicle to another customer and while they were speaking, one of Plaintiff's co-workers said, "That's the last car you will ever sell." Plaintiff was then called into the manager's office and accused of stealing customers from other employees.

On or about August 15, 2014, Plaintiff again complained to Defendant Smith about how he was being treated by some of his co-workers, such as: (1) being given racially-charged nicknames, such as "Ferguson," which referred to the case involving the death of an African-American teenager named Michael Brown in Ferguson, Missouri; (2) employees unplugged his computer, left trash on and in his desk, and rearranged his chairs right before a client came in; and (3) Plaintiff's car tires had been slashed twice. In response, Defendant Smith said the employees involved "were just joking" and did nothing to remedy the issues raised in Plaintiff's complaints.

On August 20, 2014, a new employee was hired. He told Plaintiff to go back to his own country and work in a factory, muted Plaintiff's phone so he did not know potential buyers were calling him, and attempted to steal potential buyers away from Plaintiff. In response, on August 23, 2014, Plaintiff again spoke with Defendant Smith and told him what was going on, but no corrective action was taken.

On September 9, 2014, an employee looked into Plaintiff's car and saw a pistol in plain sight. Plaintiff had a carry permit for the pistol, but forgot to put the gun away in his glove box. The employee who saw the pistol reported it to a manager, Mr. Ashley. Plaintiff was called into Mr. Ashley's office and written up for the incident. Mr. Ashley had a drawer full of rifle bullets, but was never reprimanded for this conduct.

In October 2014, Plaintiff tried to buy a truck and thought he could get a discount if he bought a vehicle from Defendant. Plaintiff and his wife had to submit to a credit check in order to purchase the truck. When the Caucasian employees found out Plaintiff's credit score, which was poor, they told everyone in the office and made fun of Plaintiff and his wife.

On February 6, 2015, Plaintiff called Defendant car dealership around 10:20am to inform management he would be running late because his car battery had died. Plaintiff arrived at work around 12:15pm. That afternoon, a co-worker, Mr. Kovalchick, approached Plaintiff and said: "What, did your car get repo'd too? Were you not able to make the payments? Did you know 97% of cars that are repo'd belong to black and Latino people because they don't pay for anything including food stamps?" After Plaintiff told his co-worker to leave him alone, the co-worker responded, "Get the f**k out of America and go back to your country and you'll never see my face again." Later that day, Plaintiff went to Defendant Ashley's office to tell him that the co-worker was insulting him. Defendant Ashley told Plaintiff to not worry about the co-worker and then left the room. No remedial action was taken in response to Plaintiff's complaint.

On February 7, 2015, Plaintiff went to Mr. Kovalchick's office to ask him a question for a client, who was also Hispanic. Plaintiff asked Mr. Kovalchick if he could borrow a pen so he could write down the answer, to which Mr. Kovalchick replied, "Don't steal my pen, you immigrant. Is it true

you buy your papers illegally? You're just another illegal immigrant. Take your family and go back to your country." Plaintiff left Mr. Kovalchick's office, but had to return soon thereafter to ask a follow up question for the client, at which time Mr. Kovalchick stated: "Did this [explicative] guy buy his papers from the same place as you? All immigrants are fucking ignorant! You're in the wrong job. I'll tell you, you would look good carrying water buckets on a farm. That would be the perfect job for an immigrant."

On February 9, 2015, Plaintiff was talking to a co-worker about the truck he intended to buy. Defendant Kovalchick overheard the conversation and said he was going to go "talk to the boss" because Plaintiff "should not get the truck" because he would just fill it up with immigrants.

On February 21, 2015, Plaintiff went to Defendant Kovalchick's office to ask about an application that a client had submitted online. On his way, Plaintiff passed by the office secretary, and said hello. Defendant Kovalchick came out of his office and said, "Make sure he has his chain on. You know how animals are." Later that day, some employees were watching the film "Planet of the Apes" in the conference room. Defendant Kovalchick remarked to Plaintiff, "Look at your family on TV, that is never going to happen, you monkey."

On February 27, 2015, Plaintiff went to Defendant Kovalchick's office to ask him about a customer's application. Kovalchick told Plaintiff "that customer is garbage" and "to get the customer the [explicative] out of here and to get the [explicative] out of my office right away because every time you walk in my office it gets dark."

On February 28, 2015, Defendant Kovalchick passed by Plaintiff's office and said: "You haven't come by my office today, what are you doing, selling drugs?" Plaintiff told Kovalchick to leave him alone, to which Kovalchick responded, "This is America and you don't follow the rules, boy." Later that day, Plaintiff went to Kovalchick's office to ask him a question regarding a client's application, at which time Kovalchick asked Plaintiff, "Do you know where I can get crystal meth?" Plaintiff responded "No," as he did not use or sell drugs. Kovalchick told Plaintiff to "stop talking shit and call your family, someone must know where to get drugs from."

On March 7, 2015, Plaintiff again went to see Defendant Ashley to complain about Defendant Kovalchick's conduct towards him.

On March 10, 2015, Kovalchick told the managers to fire Plaintiff.

On March 15, 2015, Plaintiff texted Defendant Smith: "I don't feel safe anymore and I'm coming to collect my things," and thereafter resigned from his employment. Plaintiff asserts that he was subject to a constructive discharge.

Question: Is Kovalchick individually liable under the PHRA?

Answer: No, because he is not a supervisory employee.

Question: Can there be a cause of action under Section 1981 if the plaintiff is an at-will employee without an employment contract?

Answer: Yes. Section 1981 prohibits race discrimination in the making and enforcing of contracts. *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 302 (1994). In order to state a claim under § 1981, a plaintiff must plead sufficient facts in support of the following elements: (1) plaintiff is a member of a racial minority; (2) defendant intended to discriminate on the basis of race; and (3) defendant's discrimination concerned one or more of the activities enumerated in the statute, which includes

the right to make and enforce contracts. *Brown v. Philip Morris Inc.*, 250 F.3d 789, 797 (3d Cir. 2001). Unlike claims brought under Title VII, private individuals can be held liable for violating § 1981, *see Cardenas v. Massey*, 269 F.3d 251, 268 (3d Cir. 2001), so long as there is "some affirmative link to causally connect the actor with the discriminatory action." *Jean-Louis v. Am. Airlines*, No. 08-CV-3898, 2010 WL 3023943, at *4 (E.D.N.Y. July 30, 2010) (citation omitted). However, "the substantive elements of a claim under section 1981 are generally identical to the elements of an employment discrimination claim under Title VII." *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009).

A right to relief under § 1981 can be shown by (1) purposeful racial discrimination; (2) a hostile work environment based on racial harassment; or (3) retaliation. Claims brought under § 1981 require proof of purposeful or intentional racial discrimination.

Question: Is there Defendant Smith individually liable under Section 1981?

Answer: Yes. Individual employees may be liable under § 1981 if they are personally involved in the discrimination ... and if they intentionally caused an infringement of plaintiff's section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct. Individual liability may lie regardless of whether the corporation may also be liable. Accordingly, employees may be held individually liable if they were "personally involved in the discriminatory conduct at issue, and either intentionally caused the infringement of the plaintiff's § 1981 rights or authorized, directed, or participated in the alleged discriminatory conduct. A supervisor may be found to have been personally involved with the discriminatory conduct if he was grossly negligent in the supervision of his subordinates who committed the wrongful acts or deliberately indifferent to the rights of the plaintiff by failing to act on information indicating that unconstitutional acts were occurring.

Plaintiff complained to Smith, a manager, three different times over the course of one month about being subject to harassment and discrimination based on his race. However, Smith failed to take any action in response to Plaintiff's complaints and told Plaintiff the employees were "just joking" around. Despite these multiple complaints of racial discrimination, Smith did nothing and allowed the discriminatory conduct to persist. Plaintiff alleges that this resulted in a hostile work environment and, ultimately, Plaintiff's constructive discharge. A manager's deliberate indifference to, or participation in, a subordinate's acts of racially-motivated conduct can satisfy the element of intent necessary to give rise to individual liability under § 1981. Smith failed to take action to prevent the hostile work environment from persisting. This is sufficient to allege personal involvement under section 1981.

Question: Are punitive damages available against an individual defendant under 1981?

Answer: Yes. A plaintiff may seek punitive damages from individual defendants for claims arising under 42 U.S.C. § 1981. The standard for punitive damages in a federal civil rights action does not require outrageousness: a jury may assess punitive damages in a civil rights action when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. A plaintiff may be entitled to punitive damages when his or her employer engages in discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual. In order to be subject to punitive damages for engaging in a discriminatory practice, a defendant must have knowledge that he or she may be acting in violation of federal law, not merely an awareness that he or she is engaging in discrimination.

Intentional Torts

Plaintiff filed discrimination claim with PA Human Relations Commission (PHRC), based on alleged sexual harassment by supervisor. After nine months, Plaintiff requested the PHRC transfer the complaint to the Equal Employment Opportunity Commission (EEOC). The EEOC ultimately dismissed the case and issued a Right to Sue letter. Employee filed suit.

Plaintiff alleged sexual harassment against her employer for her supervisor's physical touching of her breasts, demanding a sexual relationship and making lewd comments about her body characteristics. Plaintiff also raised claims of assault and intentional infliction of emotional distress based upon the same underlying acts.

Question: Did Plaintiff exhaust her administrative remedies under the PHRA?

Answer: No. Plaintiff's request to transfer her case to EEOC was request to close her case with the PHRC prior to the minimum one-year period, which operated as a failure to exhaust administrative remedies under the PHRA.

Question: Are Plaintiff's intentional tort claims under the exclusive remedies of the PHRA?

Answer: No. Plaintiff's interests seek to protect by her claims for assault and intentional infliction of emotional distress are fundamentally different from the interests she seeks to protect in her claim for sexual discrimination under the PHRA, as are the remedies sought. Further, preventing Plaintiff from bringing her common law claims in the common pleas court actually frustrates the purpose of the statute, the prevention and remediation of discrimination.

Question: Are Plaintiff's intentional tort claims under superseded by the PA Worker's Compensation statute?

Answer: No. Nothing in the language of the PA Worker's Compensation Act itself or in the expressed legislative intent shows that the Legislature intended to extinguish common law rights. If it is determined that an injury to an employee is "caused by an act of a third person intended to injure the employe because of reasons personal to him and not directed against him as an employee or because of his employment," 77 P.S. § 411(1), liability for the injury is not covered by 77 P.S. § 481, the exclusive remedy provision of the PA Worker's Compensation Act.

Section 1983

Plaintiff, former middle school teacher for Defendant School District of the City of Allentown, brings numerous § 1983 claims against Defendants alleging he was suspended, defamed, constructively terminated, and officially terminated by Defendants, the school district, board members, and administrators, through an unconstitutionally biased process based on Plaintiff's support of former President Donald Trump and attendance at the January 6, 2021 rally at the Washington Monument" where he was more than 1 mile away from the Capitol Building at all times. Plaintiff brings claims against the School District ("School District" and the Board of School Directors of the City of Allentown ("School Board" or "Board"), along with two categories of "Individual Defendants": the "District Officer Defendants" and the "Board Member Defendants." Plaintiff's claims against all Individual Defendants are brought against them in their individual and official capacities. The Individual "District Officer Defendants" consist of: the Superintendent, the Interim Superintendent, the subsequent Superintendent, the Assistant Superintendent; and the Executive Director of Human Resources. Plaintiff claims that all Individual Defendants, described as "left wing politically," engaged in and approved of a series of investigations of Plaintiff, made and facilitated false public statements regarding Plaintiff, and suspended and ultimately terminated Plaintiff, all in violation of his Constitutional rights, and due to his conservative political beliefs and support of former President Donald Trump.

Plaintiff, a self-described conservative Republican who supported Donald Trump in the 2020 Presidential Election, was employed as a Middle School social studies teacher when he attended the January 6, 2021 rally at the Washington Monument to hear then-President Donald Trump speak. Plaintiff listened to the speeches, got a hot dog and then boarded a bus back home. He was at all times more than 1 mile away from the Capitol Building and the infamous riot that took place. Plaintiff made several social media posts that day: (1) early in the morning he posted a picture of himself stating "doing my civic duty"; (2) "[a]t 1:45 pm ... he posted a picture of himself getting a hot dog near the Washington Monument. The post said 'Waiting for a hot dog during (what hopefully CNN will call) a 'mostly peaceful protest' while at the Capital!' "; (3) "On a post by another user he commented 'This!' to a meme which stated: don't worry everyone the Capitol is insured"; and (4) "He also commented" stating "Wrong on so many levels, but hilarious none the less" to "a meme posted by another user. The meme was a picture of the absurd Viking man who sat on the dias in the Capitol Building, and captioned 'Protestor Challenges Pelosi for speaker of house via trial by combat circa 2021.' "

The next day, on January 7, 2021, without prior notice, Defendants suspended Plaintiff from work indefinitely. The assistant superintendent e-mailed him that morning advising he was suspended with pay pending an investigation into Plaintiff's conduct on January 6, 2021, as social media postings had raised concerns regarding Plaintiff's involvement in the civil unrest that occurred on January 6, 2021. Also on January 7, the superintendent published an allegedly false press release on social media that does not identify Plaintiff by name, but states "On January 7, 2021, the School District was made aware of a staff member who was involved in the electoral college protest that took place at the United States Capitol Building on January 6, 2021." The January 7, 2021 Press Release states "[b]ecause of the emotion and controversy stirred by the events of [ ] January 6, 2021, the teacher has been temporarily relieved of his teaching duties until the School District can complete a formal investigation of his involvement." *Id.* Plaintiff claims the "false facts" in the Press Release were that: (1) Plaintiff was at the US Capitol Building on January 6, 2021, and (2) he was involved in and participated in the protest at the Capitol Building.

On January 8, 2021, Defendants suspended Plaintiff.

On April 9, 2021, Defendants served Plaintiff with his First *Loudermill* Notice, which stated a hearing would be held concerning his social media posting on January 6, 2021.

Plaintiff's First *Loudermill* Hearing was held on May 5, 2021.

On July 16, 2021, the School District sent Plaintiff a "Reinstatement Letter" advising that "[a]fter fully investigating your involvement in the events of January 6, 2021, in Washington D.C., the district has concluded that your presence in the January 6th gathering did not violate School Board policy 419 relating to teacher non-school activities." The Reinstatement Letter stated Plaintiff would be removed from his position at Raub Middle School to a "new position and location" to be determined later.

Plaintiff rejected the offer in the Reinstatement Letter.

On September 1, 2021, Plaintiff's pay was stopped.

On September 9, 2021, Plaintiff filed suit, alleging among other claims, First Amendment Retaliation for Political Affiliation.

To state a First Amendment political affiliation retaliation claim, a Plaintiff must (1) "establish that 'she was employed at a public agency that does not require political affiliation"; (2) "show that she engaged in conduct protected by the First Amendment"; and (3) "prove that the constitutionality-protected conduct was a substantial or motivating factor for the adverse employment action." The Third Circuit has elaborated that there is an implicit requirement in the third prong that the plaintiff 'produce sufficient evidence to show the defendant knew of plaintiff's political persuasion.'" *Gayles v. Hillside Bd. of Educ.*, 2022 WL 1094089 at *5, 2022 U.S. Dist. LEXIS 67293 at *12 (D. N.J. Apr. 11, 2022) (quoting *Goodman v. Pa. Turnpike Comm'n*, 293 F.3d 655, 664 (3d Cir. 2002)).

On October 12, 2021, Defendants issued a "Statement of Charges" to Plaintiff. A due process hearing occurred over the next several months. On July 28, 2022, Defendants terminated Plaintiff.

Question: Did Plaintiff engage in protected political activity?

Answer: Yes, the First Amendment protects political demonstrations and protests.

Question: Did Defendants' actions (i.e., one day after he engaged in the protected activity, Defendants suspended him and issued false statements on social media, the web, and to the press suggesting he was involved in violent and criminal activity) rise to the level of retaliation?

Yes, Although the nature of the retaliatory acts committed by the public employer must 'be more than *de minimis* ... the threshold is 'very low.' " *Baloga*, 927 F.3d at 758 (quoting *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006)). "Indeed,' the Third Circuit has recognized "an act of retaliation as trivial as failing to hold a birthday party for a public employee when intended to punish her for exercising her First Amendment right may suffice." *Id.* (quoting *Suppan v. Dadonna*, 203 F.3d 228, 234 (3d Cir. 2000)).

Question: Could the District Officer Defendants be individually liable?

Answer: Yes. The Superintendent Defendants were personally involved in the knowing violation of Plaintiff's constitutional rights, in that the Superintendents had involvement in the suspension, allegedly sham reinstatement, and/or constructive termination of Plaintiff. The Executive Director of Human Resources, who allegedly informed Plaintiff of his suspension on January 7, 2021, attended and questioned him at the Zoom meeting on January 8, 2021, and demonstrated "malice and animosity" toward Plaintiff. The actions of an individual with policymaking authority at the school district can much more fairly be said to constitute the actions of the school district itself, as opposed to the actions of a school district employee with no authority to make or issue school district policy.

Question: Could the Individual School Board Members be individually liable?

Answer: Yes, but only the Board Member Defendants who were voting members of the Board as of July 28, 2022 knowingly violated Plaintiff's constitutional rights by voting 9-0 to terminate him from employment.