

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

MELANIE METZ,

Civil File No. 4-92-392

Plaintiff,

v.

O R D E R

CITY OF MINNEAPOLIS, MINNEAPOLIS
FIRE DEPARTMENT, THOMAS DICKINSON,
individually and in his capacity as
Chief of the Minneapolis Fire Department,
RUSSELL PETERSON, individually and in
his capacity as Battalion Chief of the
Fourth District, ROCCO FORTE, individually
and in his capacity as Assistant Fire Chief,
JOHN NELSON, individually and in his capacity
as Fire Captain, PETER JOHNSON, individually
and in his capacity as Fire Captain,
MERRILL WISNER, individually and in his
capacity as Fire Motor Operator, and
GARY HYATT, individually and in his capacity
as Fire Motor Operator,

Defendants.

Christopher R. Walsh, Esq., appeared on behalf of Plaintiff.

William Foster, Esq., appeared on behalf of Defendant Merrill
Wisner.

Timothy Skarda, Esq., appeared on behalf of all other Defendants.

JONATHAN LEBEDOFF, United States Magistrate Judge

The above-entitled matter came on for hearing before the
undersigned Magistrate Judge of District Court on November 16,
1993, on Plaintiff's motion pursuant to Minn. Stat. § 549.191 for
leave to amend her Complaint to include claims for punitive damages
and to conform to the evidence. Plaintiff also moves for an
extension of time to amend the Complaint and bring this motion.

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A. Plaintiff's Motion for an Extension of Time to Amend the Complaint

All Defendants object to the Plaintiff's motion for leave to amend to add punitive damages on the grounds that it is untimely.

Plaintiff concedes that the deadlines for amendments to the pleadings and for dispositive and non-dispositive motions as set forth in the Pre-Trial Order governing this case have passed. However, Plaintiff asserts that by agreement the parties continued discovery past the technical discovery deadline for purposes of completing depositions due to the Defendants' delay in producing documents. In addition, Plaintiff avers that the Defendants moved for summary judgment in an "untimely" manner per the Pre-Trial Order. Plaintiff also asserts that as a practical matter it would have been impossible to move for leave to add punitive damages until discovery was complete. Furthermore, counsel for Plaintiff points out that the Complaint indicated that a motion for leave to add a claim for punitive damages would be made at an appropriate time, and that he informed Mr. Skarda by letter that Plaintiff would be so moving about the time of the summary judgment motion. Therefore, argues Plaintiff, Defendants can not claim prejudice. Finally, counsel for Plaintiff represents that he and Mr. Skarda reached an understanding that neither would raise arguments of untimeliness as to the others' motions.

The Court agrees that it would have been premature for Plaintiff to move for leave to amend her Complaint to add a claim for punitive damages prior to the actual completion of discovery.

This Court routinely denies without prejudice premature motions for such relief directing movants to renew their motions after the close of discovery.

The Court finds that under the different concessionary standard for adding claims for punitive damages Plaintiff's motion is timely. As such, Plaintiff's motion for an extension of time to amend the Complaint is granted.

B. Plaintiff's Motion for Leave to Amend the Complaint to Include a Claim for Punitive Damages

Counsel for Plaintiff has submitted an affidavit and documentary evidence which he believes establishes that all Defendants displayed, over a course of time, deliberate disregard and willful indifference to Ms. Metz's safety and her rights to be free from sexual harassment.

At the outset, the Court notes that Defendants moved for summary judgment on all claims but Plaintiff's assault and battery claims against Defendants Hyatt and Wisner. In a Memorandum Opinion and Order dated December 30, 1993, Chief Judge Diana E. Murphy granted the Defendants' motion for summary judgment on:

1) Plaintiff's claims against all Defendants for negligent retention, negligent supervision, intentional infliction of emotional distress and defamation; and 2) Plaintiff's claims for assault, battery and negligent infliction of emotional distress with respect to Defendants City of Minneapolis, Minneapolis Fire Department, Thomas Dickinson, Russell Peterson, Rocco Forte, John Nelson and Peter Johnson. See id. Judge Murphy denied Defendants' motion for summary judgment as to Plaintiff's claims for assault,

battery and negligent infliction of emotional distress against Defendants Merrill Wisner and Gary Hyatt, and denied the motion in all other respects but those listed above.

Hence, this Court will not address Plaintiff's arguments in support of her motion for leave to amend the Complaint to add a claim for punitive damages which pertain to the now-dismissed claims for negligent retention, negligent supervision, intentional infliction of emotional distress and defamation.

Defendant Wisner opposes Plaintiff's motion to amend to add punitive damages, asserting that there is no prima facie evidence demonstrating that Defendant Wisner acted in deliberate disregard for the rights or safety of Plaintiff.

The remaining Defendants assert that: 1) Plaintiff cannot obtain punitive damages under Title VII; 2) punitive damages under Minn. Stat § 363.071, Subd. 2, are limited to \$8,500 as against a political subdivision; and 3) Plaintiff cannot obtain punitive damages against individual Defendants in their "official capacities" but may only obtain punitive damages against individual Defendants in their "individual capacities". Furthermore, these Defendants contend that Plaintiff has failed to present clear and convincing evidence of deliberate disregard for the rights of the Plaintiff by Defendants in their individual capacities.

The pleading of punitive damages in a diversity action in federal court is governed by the pleading requirements of Minn. Stat. §§ 549.191 and 549.20. Zeelan Industries, Inc. v. de Zeeuw, 706 F.Supp. 702, 705 (D. Minn. 1989); Kuehn v. Shelcore, Inc., 686

F.Supp. 233, 234-235 (D. Minn. 1988); Fournier v. Marigold Foods, Inc., 678 F.Supp. 1420 (D. Minn. 1988). Under Minnesota law, a plaintiff may not assert a punitive damages claim in her complaint in the first instance, but rather must seek leave of court to amend her pleading pursuant to Minn. Stat. § 549.191.

Under section 549.191, the motion to amend must set forth prima facie evidence in support of the motion, must allege the "applicable legal basis under section 549.20", and must be supported by one or more affidavits showing the factual basis for the claim. The "applicable legal basis" found in section 549.20, reads as follows:

Subd. 1(a). Punitive damages should be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant showed deliberate disregard¹ for the rights and safety of others.

Subd. 1(b). A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

- (1) Deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

¹ Prior to the 1990 revision of the statute, Minnesota allowed punitive damages only upon clear and convincing evidence that a defendant acted with "willful indifference" to the rights or safety of others. Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 812 (Minn. Ct. App.). The amended statute applies to the portions of Plaintiff's claims which arose on or after May 4, 1990. Some of Plaintiff's claims in the present case relate back to events which occurred prior to May 4, 1990, and thus the "willful indifference" standard also comes into play.

- (2) Deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

The Court finds that Plaintiff has established a prima facie showing of clear and convincing evidence that the acts of the Defendants showed a deliberate disregard as well as willful indifference for the rights and safety of others, including the Plaintiff Melanie Metz. The Court notes that for purposes of summary judgment, Defendants conceded that Fire Motor Operators (FMO) Defendants Merrill Wisner and Gary Hyatt committed battery when they had unwanted sexual contact with Ms. Metz at her workplace.

Plaintiff has submitted testimonial and documentary evidence that shows that Defendants Chief Thomas Dickinson, Battalion Chief Russell Peterson, Captain and now-Assistant Chief Rocco Forte, Fire Captains John Nelson and Peter Johnson (all supervisors) were aware or should have been aware of repeated incidents of verbal and physical harassment by male fire fighters against Plaintiff Metz. See Exhibit 12 to Plaintiff's current motion - Peterson Deposition - at pp. 38-42. Metz testified that she and other female fire fighters were subjected to obscene comments and pornography in the workplace. See Exhibit 9, Metz Deposition, at pp. 161-164. Most significantly, Judge Murphy found, in denying Defendants' motion for summary judgment on Plaintiff's claims for sexual harassment, retaliation and aiding and abetting discrimination, that there is sufficient evidence from which a fact finder could find that Plaintiff was subjected to a

hostile work environment and quid pro quo harassment and was transferred in retaliation for her complaints. See December 30, 1993, Memorandum Opinion and Order, at 12. In addition, Judge Murphy found there is evidence that suggests the Defendants aided in maintaining a hostile work environment. Id.

Plaintiff has also submitted evidence which she believes shows that the City of Minneapolis' sexual harassment policy was not followed by Defendants Dickinson, Peterson, Forte and Nelson. See Exhibits 16 at p. 43; 12 at pp. 30-36; 13 at 76-79, 80-81. Plaintiff points out that rather than suspending, transferring, or discharging Defendant Wisner as the policy recommends, Wisner was given verbal and written reprimands. Instead, Plaintiff was transferred out of Fire Station 11.

In sum, the Defendants' actions and/or lack thereof show a deliberate disregard and/or deliberate disregard for the rights and safety of others, including the Plaintiff Melanie Metz. See Swanlund v. Shimano Industrial Corp., Ltd., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990). Plaintiff's motion to amend her Complaint to include a claim for punitive damages and to conform to the evidence is granted.

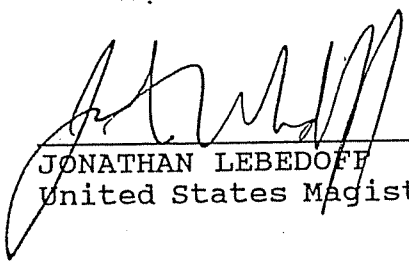
Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY ORDERED that:

- 1) Plaintiff's motion for an extension of time to amend her Complaint is GRANTED; and
- 2) Plaintiff's motion for leave to amend her Complaint

to include a claim for punitive damages and to conform to the evidence is GRANTED.

Dated: January 7, 1994.



JONATHAN LEBEDOFF
United States Magistrate Judge