IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	:	**CIVIL ACTION**
v.	:	
VICTORIA'S SECRET STORES, INC.	:	**NO. 02-6715**

MEMORANDUM ORDER

Presently before the court is the Motion of Lauren Ellerson and her husband, Derrick Ellerson, to Intervene as Party Plaintiffs Pursuant to Fed. R. Civ. P. 24(a) in this racial and religious discrimination case brought by the Equal Employment Opportunity Commission ("EEOC") against Ms. Ellerson's former employer.

Ms. Ellerson is African-American and a practicing Baptist. The EEOC has charged that during her employment as a co-manager of a Victoria's Secret retail store, Ms. Ellerson was subjected to a hostile work environment when co-workers and the store manager made racially offensive remarks to her and when the manager refused to adjust her work schedule to allow church attendance.

Ms. Ellerson seeks to intervene to assert claims of discrimination under Title VII and the Pennsylvania Human Relations Act ("PHRA"), for violation of Article I, § 28 of the Pennsylvania Constitution and for intentional infliction of emotional distress. Mr. Ellerson seeks to assert a claim for loss of consortium.

Lauren Ellerson has an unconditional right to intervene in the Title VII action initiated on her behalf. See 42 U.S.C. § 2000e-5(f)(1); EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002). See also EEOC v. Rekrem, Inc., 199 F.R.D. 526, 528 (S.D.N.Y. 2001); EEOC v. DPCE, Inc., 1990 WL 54995 (E.D. Pa. April 25, 1990); EEOC v. West Co., 1986 WL 1239, *1 (E.D. Pa. Jan. 27, 1986).

The right to intervene presupposes the presentation of a cognizable claim which the intervenor would have standing to pursue. A motion to intervene will thus be denied where the proposed complaint-in-intervention fails on its face to state a cognizable claim. See Williams & Humbert Ltd. v. W. & H. Trade Marks, 840 F.2d 72, 75 (D.C. Cir. 1988); Solien v. Miscellaneous Drivers & Helpers Union, Loc. No. 610, 440 F.2d 124, 132 (8th Cir. 1971), cert. denied, 403 U.S. 905 (1971); Lucero v. City of Albuquerque, 140 F.R.D. 455, 457 (D.N.M. 1992); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 485 (S.D.N.Y. 1973); 7C Charles Alan Wright et al., Federal Practice and Procedure § 1914 (2d ed. 1986).

In the proposed complaint, movants fail to set forth a cognizable claim for discrimination in violation of Article I, § 28 of the Pennsylvania Constitution. This provision states that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex

of the individual." It is clearly inapplicable to a claim of racial or religious discrimination.[1]

To maintain a claim for intentional infliction of emotional distress, a plaintiff must allege facts which show she has suffered severe emotional distress as a result of intentional or reckless conduct by a defendant which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998). See also Rowe v. Marder, 750 F. Supp. 718, 726 (W.D. Pa. 1990) (noting cause of action limited to "diabolical" conduct and acts of extreme "abomination"), aff'd, 935 F.2d 1282 (3d Cir. 1991). The court must preliminarily determine whether the conduct alleged is so outrageous and extreme as to permit recovery. See Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (noting it is "extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress"). The conduct alleged by movants does not satisfy this stringent

[1]The provision also does not address purely private conduct which has not been ratified or sanctioned by governmental entities or officials, but rather "reaches sex discrimination under the law." Hartford Acc. & Indem. v. Insurance Comm'r, 482 A.2d 542, 549 (Pa. 1984). Pennsylvania provides a direct cause of action under the PHRA for gender, as well as racial and religious, discrimination.

test as it has been applied under Pennsylvania law. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (sexual harassment insufficient); Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989) (setting aside verdict for plaintiff who was defamed and falsely referred for prosecution); Cox, 861 F.2d at 395 (ill-motivated callous termination of employment insufficient); Sicalides v. Pathmark Stores, Inc., 2000 WL 760439, *11-12 (E.D. Pa. June 12, 2000) (offensive comments and harassment insufficient); Equal Employment Opportunity Comm'n v. Chestnut Hill Hosp., 874 F. Supp. 92, 96 (E.D. Pa. 1995) (racial discrimination insufficient); Motheral v. Burkhart, 583 A.2d 1180, 1190 (Pa. Super. 1990) (falsely accusing plaintiff of child molestation insufficient).[2]

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[2]Defendant notes with some force that this claim would be barred in any event by the Pennsylvania Workmen's Compensation Act which provides the exclusive remedy for work-related injuries. See 77 P.S. § 481(a). There is an exception to the general rule of exclusivity for intentional torts committed by third parties for "purely personal reasons." Kohler v. McCrory Stores, 615 A.2d 27, 31 (Pa. 1992). This so-called "personal animus" or "third-party attack" exception "applies in very limited circumstances." Fugarino v. Univ. Serv., 123 F. Supp. 2d 838, 843 (E.D. Pa. 2000). See also Durham Life Ins. Co. v. Evans, 166 F.3d 139, 160 & n.16 (3d Cir. 1999). Harassment arising from general racist attitudes or other forms of bigotry does not trigger the exception. See Fugarino, 123 F. Supp. 2d at 843. The offending conduct must be "motivated by personal reasons as opposed to generalized contempt or hatred, and [be] sufficiently unrelated to the work situation so as not to arise out of the employment relationship." Id. at 844. It appears from movants' allegations that the offensive comments and conduct in this case arose from the employment relationship, and would have been directed at any employee of movant's race or religious practice. See Durham Life, 166 F.3d at 160; Hicks v. Arthur, 843 F. Supp. 949, 958 (E.D. Pa. 1994).

A claim for loss of consortium arises from the marital relationship and is based on the loss of a spouse's services and companionship resulting from an injury. See Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1149 (Pa. 1997); Sprague v. Kaplan, 572 A.2d 789 (Pa. Super. 1990). Loss of consortium is a derivative claim. See Patterson v. American Bosch Corp., 914 F.2d 384, 386 n.4 (3d Cir. 1990); Wakshul v. City of Philadelphia, 998 F. Supp. 585, 590 (E.D. Pa. 1998); Stipp v. Kim, 874 F. Supp. 663, 666 (E.D. Pa. 1995); Little v. Jarvis, 280 A.2d 617, 620 (Pa. Super. 1971). It is limited to situations in which the other spouse may recover in tort. See Murray v. Commercial Union Ins. Co., 782 F.2d 432, 438 (3d Cir. 1986); Szydlowski v. City of Philadelphia, 134 F. Supp. 2d 636, 639 (E.D. Pa. 2001).

A spouse's right to recover under an employment discrimination statute does not support a loss of consortium claim. See Hettler v. Zany Brainy, Inc., 2000 WL 1468550, *7 (E.D. Pa. Sept. 27, 2000); Danas v. Chapman Ford Sales, Inc., 120 F. Supp. 2d 478, 489 (E.D. Pa. 2000) (dismissing loss of consortium claim alleged to derive from spouse's ADEA and PHRA claims); Stauffer v. City of Easton, 1999 U.S. Dist. LEXIS 11407, *1 (E.D. Pa. July 20, 1999). See also Quitmeyer v. Southeastern Pa. Transp. Auth., 740 F. Supp. 363, 370 (E.D. Pa. 1990) (no

spousal recovery for loss of consortium based on violations of other spouse's civil rights).

ACCORDINGLY, this day of January, 2003, upon consideration of the Motion of Lauren and Derrick Ellerson to Intervene (Doc. #3) and defendant's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to Lauren Ellerson's request to intervene in the Title VII action and to pursue a parallel PHRA claim, and the Motion is otherwise **DENIED.**

BY THE COURT:

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JAY C. WALDMAN, J.