

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

BETTY A. TWYMAN : CIVIL ACTION
: :
v. : :
: :
CHARLES DILKS and UNIVERSITY : :
CITY SCIENCE CENTER : No. 99-4378

MEMORANDUM AND ORDER

J. M. KELLY, J.

SEPTEMBER , 2000

Presently before the Court is a Motion for Summary Judgment filed by the Defendants, Charles Dilks (“Dilks”) and the University City Science Center (“Science Center”) (collectively referred to as the “Defendants”). Also before the Court is a Motion for Partial Summary Judgment filed by the Plaintiff, Betty Twyman (“Twyman”). These motions arise from Twyman’s suit against the Defendants pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994) (“Title VII”), the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 1991) (“PHRA”), 42 U.S.C. § 1981 and the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (“FMLA”), for discrimination and wrongful termination. For the following reasons, the Defendants’ motion is granted in part and denied in part, and the Plaintiff’s motion is denied.

I. BACKGROUND

Accepting as true the evidence of the nonmoving party and all reasonable inferences that can be drawn therefrom, the facts of the case are as follows. The Science Center is a Pennsylvania non-profit corporation that operates a business park, leasing space to research facilities and other businesses. Twyman, an African American female, was employed by the Science Center beginning in 1983, working in a quasi-clerical position in the real estate group.

She was promoted in 1984 to the position of Real Estate Salesperson and then in 1989 to Marketing Manager.

According to the Science Center, the position of marketing manager was created out of the position formerly held by Gordon Carlisle (“Carlisle”), the Vice President of Real Estate at the time and Twyman’s first-level supervisor. Carlisle’s employment ended in 1989 and, because of a decline in the leasing economy and a consequent lack of real estate development, the Science Center decided not to hire a new vice president to replace him. Twyman disputes that real estate development was down during that time, noting that the Science Center leased more space for a greater value in 1991 than in any previous year.

During Twyman’s tenure as marketing manager, she was supervised by Dilks. From 1989 until 1995, she claims he told her she could not be a vice president because the Science Center did not have sufficient development work to justify such a position. He also informed her that she lacked the development experience necessary to be a vice president. In 1995, however, the Science Center committed to developing an office building, known as the “Flex” building. Rather than utilizing Twyman for the development and leasing work, the Science Center retained the services of Donald Richardson (“Richardson”), a white male.¹ He was given on-the-job training and was directly supervised by Dilks.

When Richardson was selected for this job, Twyman suspected Dilks had been using a lack of development as a pretext for discrimination. Therefore, in 1995, Twyman filed a charge

¹ At this time, Richardson was not employed by the Science Center but rather worked for Maurice Hertzfeld (“Hertzfeld”), a private real estate partner with the Defendant. Nonetheless, Dilks was listed as his “supervisor” and he routinely interacted with both the Science Center and Dilks.

with the Equal Employment Opportunity Commission (“EEOC”) alleging that the Science Center discriminated against her on the basis of her age, sex and race. Twyman claimed that she was being treated less favorably than Carlisle and Ken Brier, another former real estate vice president, because she performed the same functions that they had but was not herself a vice president. She further alleged that Richardson was hired to perform development work when the Science Center should have given it, and a change of title, to her.

Twyman also alleges that dating back to 1989, she experienced instances of discriminatory conduct by Dilks and other Science Center employees. She claims that Dilks had in his possession a pipe lighter with a confederate flag printed on it and seemed indifferent to its offensiveness to her when she saw it at a party. Also, sometime in 1989 or 1990, Hertzfeld once told her that Dilks could not relate to her husband and that “neighborhood girls” do not attend Wharton. She claims further that Dilks expressed surprise at one point that she could speak proper English and that another employee described Dilks as having a “plantation mentality” in explaining why he did not want Twyman promoted to a vice president position.

Soon after Twyman filed her 1995 charge, she claims Dilks began engaging in retaliatory conduct. For instance, in October of 1995, two months after the charge was filed, Dilks gave Twyman the most negative review she had ever received from him.² She further claims that he overzealously scrutinized her work and stated at one point, “well and least I didn’t fire you.”

Pl.’s Resp. to Defs.’ Mot. for Summ. J. Ex. 8, at 42. Dilks admitted during his deposition on this

² The Defendants argue that Twyman never disputed the accuracy of her 1995 review. The Court assumes that in doing so, they simply overlooked Plaintiff’s Exhibit 8 which, over the course of fifteen single-spaced pages, discusses each aspect of the review and highlights the reasons Twyman disagreed with the evaluation. See Pl.’s Resp. to Defs.’ Mot. for Summ. J. Ex. 8.

matter that he was “very upset” to learn Twyman had filed her charge and that he could no longer trust her. See id. Ex. 7, at 31 & 38.

From 1995 until 1997, Twyman’s charge remained pending. The Science Center claims they offered Twyman a vice president position if she agreed to move into property management, which she refused. The Defendant further claims that they tried to establish a consulting arrangement with Twyman whereby the Science Center would provide her assistance in starting her own real estate business, which she also refused.

In 1997, the Science Center hired a new President, Jill Felix (“Felix”). Upon learning of the outstanding charge, Felix met with Twyman to negotiate a resolution. According to the Science Center, Felix first offered the Plaintiff the position of Vice President of Government and Community Affairs. Twyman rejected the offer stating her view that a community affairs position was “a job that was traditionally a job for a minority with no future.” Defs.’ Mot. for Summ. J. Ex. B, at 183. Following further negotiations, Twyman accepted a settlement offer and executed a Settlement Agreement and General Release on August 4, 1997 (the “1997 Release”). Through the settlement, Twyman was to be promoted to Vice President of Real Estate Marketing and given a new job description that included real estate development, a pay raise and tuition reimbursement for previously taken courses. Furthermore, Dilks was removed from his position as head of the real estate department and was instructed to stay out of Twyman’s business.

The Science Center claims that during this time, Felix was engaged in an overall effort to streamline business operations. As part of that effort, Richardson was hired to oversee the entire department, including supervising Twyman. Felix also terminated two white males, William Kirsch (“Kirsch”) and former Chief Financial Officer Scott MacBean (“MacBean”), and

promoted two women, Julie Ford (“Ford”) to Vice President of Administration and Bernadine Hawes (“Hawes”), an African American female, to Vice President of Government and Community Affairs.

Twyman claims that despite her new title, the Science Center did not follow through on the remainder of the commitments made in the 1997 Release. She claims she was not given the promised development experience, nor was she given a new job description. Instead, all new development work was being assigned to Richardson, including projects in Chester County and the state of Delaware.

Then, on February 10, 1998, while walking between buildings at the Science Center, Twyman fell and severely injured her shoulder, arm and knee. The fall caused four fractures to Twyman’s shoulder for which she underwent surgery to insert a titanium brace on March 13, 1998. Afterwards, the Plaintiff completed four months of therapy and rehabilitation. From the time of her fall through rehabilitation, Twyman was on leave from work. All Science Center correspondence during this time referred to her utilizing sick leave or workers’ compensation and made no reference to FMLA leave. After a 23-week absence, Twyman was given medical clearance to return to work, and did so on July 21, 1998. When she arrived, she was immediately escorted to the personnel office and informed that her employment had been terminated. Her termination letter stated that the Science Center had “been concerned about the continued decrease in real estate marketing/leasing activity” at the Science Center and that her position could no longer be supported. Pl.’s Resp. to Defs.’ Mot. for Summ. J. Ex. 21.

Thereafter, Twyman filed the instant action against Dilks and the Science Center. Presently, the Science Center moves for summary judgment on all of the Plaintiff’s claims, and

Twyman has filed a cross-motion for partial summary judgment on her FMLA claims.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment “shall be rendered forthwith 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 a judgment as a matter of law.” Fed. R. Civ. P. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant’s favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

In her Complaint, Twyman alleges race and sex discrimination, retaliation and violation of the FMLA. The Science Center seeks summary judgment on all of these counts, arguing that certain of Twyman’s claims are barred by the 1997 Release and that as to the remainder, there are no genuine issues of material fact and Twyman has not produced sufficient evidence of

discrimination to withstand summary judgment.

A. Conduct Subject to Liability

The Science Center argues, essentially, that Twyman cannot assert any claims for actions which allegedly occurred prior to August 4, 1997 as this conduct is the subject of the 1997 Release. The Defendants correctly note that under Pennsylvania law, a valid release is an absolute bar to recovery for all claims included in the release. See Dorenzo v. General Motors Corp., 334 F. Supp. 1155, 1156 (E.D. Pa. 1971). They are incorrect, however, in their assertion that evidence of that conduct cannot nonetheless be used in the instant action.

It is well-settled that in discrimination cases, evidence of discrimination occurring outside an actionable time period or included in a previous settlement agreement may constitute relevant background evidence in determining discriminatory and retaliatory conduct. See United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082-83 (3d Cir. 1996); Glass v. Philadelphia Elec. Co., 34 F.3d 188, 195 (3d Cir. 1994); Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990). Background evidence can be critical to a jury's assessment of whether an employer's conduct was motivated by unlawful animus. See Glass, 34 F.3d at 195. The Defendants do not seem to recognize that this is entirely different from relying upon such evidence to form the basis of a claim based solely on that conduct. There is a clearly-established distinction between pursuing relief for pre-settlement discrimination and relying upon such conduct to support a claim of post-settlement discrimination. Accordingly, the Court as well as the jury may rely upon evidence of alleged discriminatory conduct that occurred prior to and was the subject of the 1997 Release in considering Twyman's discrimination claim based on her termination.

B. Discrimination Claims

1. McDonnell Douglas Burden-Shifting Analysis

Twyman's claims first that her termination from the Science Center was the result of race and sex discrimination. The parties do not appear to dispute that this case should be analyzed under the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).³ Under the McDonnell Douglas test, in order for Twyman to prevail, she must first prove a prima facie case of unlawful discrimination. See id. at 802. This may be done by showing that: (1) she is a member of a protected class; (2) she was qualified for the job from which she was discharged; (3) she suffered an adverse employment decision; and (4) other employees not in the protected class were treated more favorably. See Lawrence v. National Westminster Bank, 98 F.3d 61, 65-66 (3d Cir. 1996); Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637-38 (3d Cir. 1993); Kelly v. Drexel Univ., 907 F. Supp. 864, 873 (E.D. Pa. 1995), aff'd, 94 F.3d 102 (3d Cir. 1996).

If the plaintiff succeeds, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the employment action. McDonnell Douglas, 411 U.S. at 802. The employer satisfies its burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993). It is not necessary that the employer prove that the tendered reason actually motivated its

³ Twyman's discrimination claim pursuant to § 1981 and state-law claim pursuant to the PHRA are appropriately analyzed under the same framework as her Title VII claim. See Weldon v. Kraft, Inc., 896 F.2d 793, 796 (3d Cir. 1990); Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983). All three, therefore, are included in the following analysis.

behavior; throughout the analysis, the burden of proving intentional discrimination remains on the plaintiff. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981).

Once the employer articulates a legitimate nondiscriminatory reason for the employment action, the plaintiff must then show that the employer's explanation is pretextual. See Hicks, 509 U.S. at 516-17. In doing so, the plaintiff must prove "both that the reason was false, and that discrimination was the real reason." Id. The plaintiff is not required, however, to establish that the illegitimate factor was the sole reason for the decision, only that it was a determinative factor in the adverse employment action. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993).

Applying this framework to a summary judgment motion, when the defendant answers the plaintiff's prima facie case with legitimate, nondiscriminatory reasons for its action, in order to defeat the motion, "the plaintiff must point to some evidence, either direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994); see Hicks, 509 U.S. at 515-17. Therefore, if the plaintiff has produced evidence sufficient to discredit the defendant's proffered reasons, the plaintiff need not produce additional evidence of discrimination beyond his or her prima facie case to withstand summary judgment. See Fuentes, 32 F.3d at 764; see also Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-24 (3d Cir. 1994).

In order for the plaintiff to rebut the employer's legitimate nondiscriminatory reasons on summary judgment, she need only proffer such evidence as would "allow a factfinder reasonably to infer that each of the employer's proffered nondiscriminatory reasons was either a post hoc

fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).” Fuentes, 32 F.3d at 764 (citations omitted). A plaintiff may do so by showing “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions” in the reasons proffered “that a reasonable factfinder could rationally find them ‘unworthy of credence.’” Id. at 765 (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992)). The plaintiff’s efforts at casting doubt, furthermore, need not be considered in a vacuum. See id. at 764 n.7. “If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast a substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder.” Id. The factfinder’s rejection of some of the reasons may sufficiently damage the employer’s credibility to cause the factfinder to disbelieve the remaining reasons, even without evidence undermining those rationales. See id.

2. Application to this Case

Applying these principles to the instant case, the Court finds that Twyman has produced sufficient evidence to establish a prima facie case and the Science Center has proffered several legitimate nondiscriminatory reasons for its action. Furthermore, Twyman has presented evidence sufficient that a reasonable factfinder could infer that the Science Center’s proffered nondiscriminatory reasons for terminating her were pretextual or that an invidious discriminatory reason was more likely than not a determinative cause of the Science Center’s action. Accordingly, the Science Center’s motion for summary judgment is denied as to this issue.

a. Prima Facia Case & Legitimate Nondiscriminatory Reasons

Viewing the facts in a light most favorable to Twyman, she clearly states a prima facia case of discrimination. First, she is a member of a protected class, namely she is black and female. Second, Twyman was qualified for her position as evidenced by her prior nine years of employment in the position with positive reviews. Third, she suffered an adverse employment decision in that her position was terminated. Fourth and finally, her duties were assumed by Richardson, a white male.

The Science Center has also met its burden and proffered several legitimate nondiscriminatory reasons for eliminating Twyman's position. Primarily, the Defendants state that they no longer had a need for a full-time marketing person due to a decrease in marketing and leasing activity. The Science Center also claims Twyman's position was eliminated pursuant to a "salvage plan," that there was not a sufficiently high turnover of leases to warrant such a position and that Twyman had performance problems necessitating her termination.

b. Pretext

Having found the first two steps of the McDonnell Douglas burden-shifting analysis to be met, the Court must now consider whether Twyman has offered sufficient evidence from which a jury could find the Science Center's proffered reasons are "unworthy of credence" or that an invidious discriminatory reason more likely than not was a motivating or determinative cause of Twyman's termination.

When the Science Center terminated Twyman, they informed her that her position was being eliminated because of concern over "the continued decrease in real estate marketing/leasing activity" at the Science Center. Pl.'s Resp. to Defs.' Mot. for Summ. J.

Ex. 21. Therefore, according to the Science Center, there was no justification for a full-time marketing person and Twyman's duties were best assumed by Richardson as the Plaintiff would have been unable to manage both positions. The Science Center, however, offers no evidence that establishes any kind of decrease in marketing or leasing activity. Additionally, Felix, the author of the termination letter, testified in her deposition that at the time Twyman was terminated, the marketing and leasing businesses were "doing fine." Id. Ex. 2, at 103-04. Furthermore, according to a Science Center financial statement, net profits from real estate operations as of June 30, 1998 – three weeks before Twyman was fired – had increased more than \$400,000 from the year before. See id. Ex. 3. Finally, Felix testified that at the time Twyman was terminated, three developments were underway that would add new buildings to the Science Center, in addition to the Science Center's acquisition of more than 100,000 square feet of space from a former financial partner. See id. Ex. 2, at 33.

The Science Center argues in response that the decrease in leasing and marketing activity was caused by high occupancy and a low turnover of tenants and leases. Twyman points out, however, that prior to her termination, a high occupancy rate and low turnover of leases and tenants were deemed positive achievements for the Science Center. The Defendants also argue that by saying leasing and marketing activity were decreasing, they meant that while the real estate department was "doing fine," the Science Center as a whole was in a tenuous financial position. Significantly, though, Twyman's termination letter refers only to the continued decrease in marketing and leasing activity, not the performance of the Science Center as a whole. A jury could reasonably find that the reasons proffered by the Science Center for Twyman's termination were sufficiently inconsistent and unsupported by the evidence to deem them

unworthy of credence.

The same is true of the Science Center's remaining reasons for terminating Twyman. The Defendants argue in the instant motion that Felix took certain steps, including firing Twyman and Kirsch and promoting Ford and Hawes, to streamline the real estate department and cut costs, as set forth in a "salvage plan" authored by an outside consultant. The salvage plan, however, was not completed until February of 1999, after both Twyman and Kirsch were fired.

The final reason proffered by the Science Center for Twyman's termination is that she had "documented performance problems" and was otherwise not able to handle the consolidated real estate position. Defs.' Mot. for Summ. J., at 12. Her supervisor, Richardson, testified, however, that he did not believe Twyman's performance warranted her termination. See Pl.'s Resp. to Defs.' Mot. for Summ. J. Ex. 9, at 111-12. Additionally, Twyman's performance problems were not "documented" until after she was fired and then not until counsel for the Defendants directed such. See. id. at 191-94.

The Science Center has also proffered inconsistent explanations for who made the decision to terminate Twyman. In their interrogatory answers, the Defendants stated that "[t]he decision to eliminate Plaintiff's position which resulted in her termination" was made by Felix. See id. Ex. 20, at 3. In her deposition, however, when asked who made the decision to eliminate Twyman's job, Felix testified that it was the management executive committee, consisting of herself, Ford, Hawes, MacBean, Hal Smolinski ("Smolinski") and Dilks. See id. Ex. 2, at 59-60. She later stated in her declaration attached to the instant motion, however, that she presented her decision to terminate Twyman to the executive committee and that she chose to retain Richardson and eliminate Twyman's position. See Defs.' Mot. for Summ. J., Decl. of Jill

Felix ¶¶ 16-17, at 4.

Furthermore, while Dilks testified that he did not play any role in the decision to terminate Twyman, MacBean recalled a meeting between himself, Dilks and Smolinsky where Twyman's termination was discussed. See Pl.'s Resp. to Defs.' Mot. for Summ. J. Ex. 1, at 16-19. He also recalled that Dilks revealed he had maintained a notebook documenting Twyman's performance at the Science Center and stated that he thought she was a "poor performer." See id. at 9-19. Although alone the Science Center's inconsistent explanations may not be sufficient to raise a genuine issue of material fact, when taken in conjunction with Twyman's other evidence, the Court finds a reasonable jury could conclude the Defendants' proffered legitimate nondiscriminatory reasons are unworthy of credence.

Twyman has also presented evidence from which a reasonable jury could conclude that discriminatory animus motivated the Science Center's actions. First, a Science Center manager described Dilks as having a "plantation mentality" in explaining why he did not want Twyman promoted to vice president. See id. Ex. 5, at 271. Second, at a Science Center social event, Dilks brandished a confederate flag pipe lighter and was seemingly indifferent to its offensiveness to Twyman. See id. at 156-57. Third, on one occasion, Dilks expressed surprise over the fact that Twyman could speak proper English. See id. at 94-95. Fourth, Twyman claims that within the Science Center generally and the real estate department specifically, blacks and females are disproportionately unrepresented among executives, trustees and highest paid employees. See id. Ex. 7, at 125-25; id. Ex. 22. Fifth and finally, two other black female employees of the Science Center testified that they felt sex and race discrimination against them from the Defendant. See id. Ex. 27, at 43-46; id. Ex. 24, at 44-45.

The Court accordingly finds there to be a genuine issue of material fact as to whether the Science Center's proffered reasons for terminating Twyman were pretextual. A reasonable jury could find the proffered reasons to be sufficiently inconsistent and factually unsupported to be unworthy of credence and/or motivated by invidious discriminatory animus. The Science Center's motion is therefore denied as to Twyman's Title VII, § 1981 and PHRA discrimination claims.

C. Retaliation Claim

1. Retaliation Analysis

Twyman also alleges that her termination was the result of retaliation for her prior discrimination complaint against the Science Center and Dilks. Title VII, the PHRA and § 1981 make it unlawful to retaliate against an employee for making a charge of discrimination. See 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; 43 Pa. Cons. Stat. Ann. § 955(d). Retaliation claims brought under a pretext theory are examined under the McDonnell Douglas burden-shifting analysis set forth above. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). To state a prima facie case of discrimination, the plaintiff must show: (1) she was engaged in a protected activity; (2) she was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the discharge. See id.; Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir. 1991). If the plaintiff succeeds, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for the action and then back to the plaintiff to show pretext, in the same manner as discussed above. See Woodson, 109 F.3d at 920 n.2.

2. Application to this Case

a. Prima Facia Case and Legitimate Nondiscriminatory Reasons

Instantly, the parties do not dispute that the first two elements of Twyman's prima facia case are met. She filed a discrimination charge against the Science Center and Dilks in late 1995 and was later terminated. The Defendants dispute that there is a causal link between the two events, arguing Twyman's termination lacked temporal proximity to her earlier discrimination charge.

The Third Circuit has held consistently that while temporal proximity between the protected activity and the adverse employment action is sufficient to establish a causal link, "the 'mere passage of time is not legally conclusive proof against retaliation.'" Id. at 920 (quoting Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 894 (3d Cir. 1993)). In cases lacking temporal proximity, a plaintiff can still establish a causal link if the employer engaged in a pattern of antagonism in the intervening period. See id. at 920-21.

The Science Center correctly notes that Twyman's protected activity, namely filing complaints with the EEOC and PHRC in August 1995, is temporally remote from her termination on July 21, 1998. Nonetheless, viewing the facts in a light most favorable to the Plaintiff, the Court finds there to be sufficient evidence from which a reasonable jury could find a pattern of antagonism during this interim period. Dilks testified at his deposition that he was "very upset" and "disappointed" that Twyman had filed her discrimination charge. See Pl.'s Resp. to Defs.' Mot. for Summ. J. Ex. 7, at 31. He further stated that his view of Twyman as an employee may have changed as a result of her complaint. Finally, when asked whether he felt at the time that he could not trust her anymore, Dilks responded, "I would say that I was concerned,

yes, about how reliable she would be in having taken that action.” Id. at 38.

Two months after Twyman filed her discrimination charge, Dilks gave her her poorest performance review since being employed by the Science Center. See id. Ex. 12. According to the evaluation, Twyman’s work “met some standards.” Id. The Science Center argues this was a good rating and therefore it is unreasonable to conclude that it was the product of retaliatory animus. A reasonable jury, however, could conclude that ratings one step above “unsatisfactory,” compared with prior exceptional ratings, constitute a poor evaluation resulting from Twyman’s discrimination charge.⁴ This is particularly so when considered with Twyman’s allegation that in a conversation between herself and Dilks regarding that performance review he stated, “well, at least I didn’t fire you.” Id. Ex. 8, at 42 (recounting statement in contemporaneous memorandum by Twyman disputing accuracy of 1995 evaluation). That Dilks’ 1996 review of Twyman was more positive may undermine the Plaintiff’s argument, but it certainly does not make the inference of retaliation unreasonable.

Furthermore, in settling her charge, the Science Center promised to promote Twyman to Vice President of Real Estate Marketing, giving her a new job description, enhanced duties including real estate development and a pay raise. She alleges, however, that she never received a new job description, and that her responsibilities actually decreased as a result of the promotion. For instance, when Twyman was out on medical leave due to her arm injury, the Science Center’s insurance provider asked for her job description. The Science Center simply

⁴ The Science Center incorrectly states that Dilks rated Twyman as having “‘met’ all expectations” for her position. The evaluation form clearly designates “MA” as the symbol for “Meets All Standards,” while “MS” is the symbol for “Meets Some Standards.” In the evaluation, Dilks gave Twyman six MS’s, one MA and one ES, denoting “Exceeds Some Standards.” Pl.’s Resp. to Defs.’ Mot. for Summ. J. Ex 12.

took a job description for Twyman's position as marketing manager, crossed out the title, and inserted "Vice President of Real Estate Marketing." Id. Ex. 15. She testified that she was similarly denied the promised opportunities to participate in real estate development. See id. Ex. 5, at 252-55. Instead, Richardson was being assigned to handle the development of new projects at that time. See id. Furthermore, Twyman's new position was indisputably eliminated within one year of its creation. Finally, MacBean testified that during a meeting where Twyman's termination was discussed, Dilks stated she was a "poor performer" and revealed he had been maintaining notes of her performance, despite instructions to stay out of the matter. See id. Ex. 1, at 19.

From these facts, the Court finds a reasonable jury could conclude that there was a pattern of antagonism between the time Twyman filed her discrimination charge and her termination. See Woodson, 109 F.3d at 924 (holding jury could reasonably conclude defendant's antagonistic behavior, placement of plaintiff in poorly performing division and termination of plaintiff through questionable ranking procedure constituted unlawful retaliation). Accordingly, the Plaintiff has set forth sufficient evidence of a prima facie case to withstand summary judgment. Similarly, as discussed previously, the Science Center has proffered several legitimate nondiscriminatory reasons for Twyman's termination, thereby meeting its burden.

b. Pretext

Twyman can withstand the instant summary judgment motion provided she can produce evidence from which a reasonable jury could conclude the Science Center's proffered reasons are "unworthy of credence" or that an invidious discriminatory reason more likely than not was a motivating or determinative cause of Twyman's termination. See Fuentes, 32 F.3d at 764. The

Court's previous analysis discusses each of the Science Center's proffered reasons for terminating Twyman. As above, the Court finds there to be a genuine issue of material fact as to whether the Science Center's proffered reasons for terminating Twyman were pretextual. The Science Center's motion is therefore denied as to Twyman's retaliation claims pursuant to Title VII, § 1981 and the PHRA.

D. Dilks' Liability

In addition to bringing suit against the Science Center, Twyman sued Dilks in his individual capacity pursuant to the PHRA and § 1981. Dilks moves for summary judgment, arguing there is no evidence of his personal involvement in the decision to terminate Twyman or otherwise of discrimination on his part.

A supervisory employee may be held individually liable where he or she, acting in concert with the employer, aided or abetted the employer in discriminating against the plaintiff. See Cohen v. Temple Physicians, Inc., 11 F. Supp. 2d 733, 737 (E.D. Pa. 1998); Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). As discussed previously, Twyman has produced evidence that Dilks made several discriminatory comments to Twyman and others. Additionally, he supervised her up until the settlement of her first discrimination claim, giving her a comparatively poor evaluation immediately after she filed that charge. Finally, Dilks sat on the executive committee that reviewed Felix's proposal to eliminate Twyman's position. The Defendants argue that while he was on the committee, he had nothing to do with its decision with regard to Twyman. MacBean, however, testified that Dilks was in fact involved in meetings where Twyman's termination was discussed. Clearly, then, there is a genuine issue of material fact as to whether Dilks aided and abetted the Science Center in discriminating against Twyman

and his motion is accordingly denied.

E. FMLA Claim

Finally, Twyman alleges that her rights pursuant to the FMLA were violated because she was terminated upon returning from a 23-week medical leave of absence. She claims first, that because the Science Center did not notify her that twelve of the twenty-three weeks she was out qualified as FMLA leave, she was entitled to an additional twelve weeks. Secondly, Twyman claims that contrary to the provisions of the FMLA, the Science Center refused to reinstate her following her leave and decided to terminate her, in part, because she took FMLA leave. The parties have filed cross-motions for summary judgment on Twyman's FMLA claims. The Defendants' motion is granted in part and denied in part, and the Plaintiff's motion is denied.

1. Failure to Notify Plaintiff that Leave Constituted FMLA Leave

The Science Center concedes that it did not formally designate any of Twyman's 23-week leave as FMLA leave. Twyman argues, accordingly, that, pursuant to Department of Labor ("DOL") regulations, she never used her twelve weeks of FMLA leave and therefore was wrongfully denied restoration of her position upon returning to work on July 21, 1998. Because the Court finds the DOL regulations on this matter to be invalid, the Plaintiff's motion is denied.

a. Chevron Standard of Review

In reviewing agency regulations that apply or interpret a statute that the agency administers, the Supreme Court has set forth a two-part test. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). First, the Court must determine whether Congress' intent is clear from the plain language of the statute. See id. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue,

as well as the language and design of the statute as a whole.” K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). When an analysis of the statute reveals a clear congressional intent, a contrary agency interpretation is not entitled to deference. See Chevron, 467 U.S. at 845. But, if the language of the statute is ambiguous and there is no clear congressional intent apparent from the legislative history, the court must defer to a reasonable agency interpretation of the relevant provision. See id. Ultimately, however, the reviewing court remains the final statutory interpreter. See id. at 843 n.9.

b. The FMLA & DOL Employer Notice Regulations

The FMLA provides that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . (D) [b]ecause of a serious health condition . . .” 29 U.S.C. § 2612(a)(1). The parties do not dispute that Twyman is an “eligible employee” as she worked at least 1250 hours during the preceding twelve months for the Science Center, a qualifying employer. See id. § 2611(2)(A)(ii); id. § 2611(4)(A). After an employee has taken FMLA leave, he or she is entitled to full restoration of his or her prior position or one equivalent thereto. See id. § 2614(a)(1). The statute does not, however, set forth specific requirements for employer notification to employees regarding the interaction between employer-provided and FMLA leave.

The DOL, pursuant to its authority under the FMLA, has filled this gap and issued regulations requiring that an employer provide an employee with notice that leave is being counted as FMLA leave. See id. § 2654; see also 29 C.F.R. § 825.208 (2000). Should the employer fail to give the employee prospective notice that the leave is being counted as FMLA leave, the leave does not count as FMLA leave and the employer is required to give an additional

twelve weeks of leave from the time such notice was given. See 29 C.F.R. § 825.208(c); id. § 825.700(a). In situations where the employee’s leave is paid, the regulations state:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee’s 12-week FMLA leave entitlement.

Id. § 825.208(c). The regulations extend this principle to situations where the employee takes unpaid leave as well stating, “[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” Id. § 825.700(a).

The Science Center argues that these regulations are an impermissible interpretation of the FMLA and are therefore invalid. The Third Circuit has yet to address this issue, and those courts that have come to differing conclusions. Compare Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 937 (8th Cir. 2000) (striking down regulations because they improperly expand substantive guarantees of statute), McGregor v. Autozone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999) (same), Schloer v. Lucent Techs., Inc., No. CIV. 99-3392, 2000 WL 128698, at *1 (D. Md. Jan. 21, 2000) and Neal v. Children’s Habilitation Ctr., No. 97-C-7711, 1999 WL 706117, at *2 (N.D. Ill. Sept. 10, 1999) (same), with Plant v. Morton Int’l, Inc., 212 F.3d 929, 935 (6th Cir. 2000) (upholding regulations as valid exercise of power), Ritchie v. Grand Casinos of Miss., Inc., 49 F. Supp. 2d 878, 881 (S.D. Miss. 1999) (same), Chan v. Loyola Univ. Med. Ctr., No. 97-C-3170, 1999 WL 1080372, at *10 (N.D. Ill. Nov. 23, 1999) (same),

and Voorhees v. Time Warner Cable, No. CIV. A. 98-160, 1999 WL 673062, at *3 (E.D. Pa. Aug. 30, 1999). Following an examination of the FMLA in light of the Chevron principles, the Court agrees with those courts that have held the regulations are an improper expansion of the substantive guarantees of the statute.

First, the plain language of the FMLA is clear: all eligible employees are entitled to a total of twelve weeks of leave per every twelve months. See 29 U.S.C. § 2612. Therefore, the FMLA sets both a minimum standard of leave for employers to provide to employees as well as a statutorily-required maximum, thereby ensuring that neither the employer nor the employee is disadvantaged. See S. Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6 (noting FMLA “accommodates the important societal interest in assisting families by establishing a minimum standard for leave”) (emphasis added). This is evident in the FMLA’s treatment of the relationship between FMLA leave and employer-provided paid leave. The statute provides:

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee . . . for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2612(d)(2)(B). Under this provision, the employee can take advantage of paid employer-provided leave that he or she would be entitled to regardless of the FMLA, while the employer is protected from having to provide more leave than provided for in its leave policy or the FMLA, whichever is greater. See id. § 2612(d)(1) (“If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave . . . may be provided without compensation.”). Furthermore, an employer may provide more than twelve weeks of leave, but

there is no “indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer’s leave plan already provides for twelve weeks of FMLA qualifying leave.” Ragsdale, 218 F.3d at 939 (citing 29 U.S.C. § 2612(a)(1) and § 2612(d)(1)). Therefore, the statute’s clearly expressed intent is to provide employees with a minimum and a maximum of twelve weeks of statutorily-required leave, without interfering with an employer’s decision to give more.

The DOL regulations, however, effectively create an entitlement to an additional twelve weeks of leave whenever the employer fails to prospectively notify the employee that he or she is using FMLA leave. This is directly inconsistent with the statute’s express language as the FMLA does not even suggest that the twelve week entitlement may be extended. Furthermore, where Congress intended to include explicit notice provisions with significant consequences for their violation, it provided for them in the language of the statute. See 29 U.S.C. § 2612(e)(1) (detailing notice obligations of employees to employers when employee requests qualifying FMLA leave); id. § 2614(b)(1)(A)-(B) (allowing employer to refuse to restore “highly compensated employee” to former position if holding such open would cause “substantial and grievous economic injury to the operations of the employer” so long as employer gives notice of such to employee “at the time the employer determines such injury would occur”); id. § 2619 (assessing monetary penalties on employers who do not post notices on premises explaining FMLA rights). Finally, the DOL regulations are inconsistent with Congress’ explicit purpose in enacting the statute. Congress expressly stated one purpose of the FMLA was to “balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers.” 29 U.S.C. § 2601(b)(1)-(3). To require an employer who

already provides more than the required twelve weeks of leave to give an employee an additional twelve weeks of leave or face liability hardly seems to fairly accommodate the interests of both parties.

Accordingly, the Court finds the DOL regulations to be invalid. By creating an entitlement to an additional twelve weeks of leave where the employer fails to prospectively notify the employee that his or her leave is being counted as FMLA leave, they create rights which the statute clearly does not confer. “To find that [an employer’s] technical violation of the designation regulations functions as a denial of [the employee’s] FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA.” Ragsdale, 218 F.3d at 940. Because Twyman received significantly more than the twelve weeks guaranteed by the FMLA, the Science Center’s motion as to this aspect of her FMLA claim is granted and the Plaintiff’s motion is denied.

2. Interference with Rights Under FMLA and Retaliation

Twyman also claims that the Science Center interfered with her rights under the FMLA in that the Defendant refused to reinstate her when she returned from her leave and that the decision to terminate her was made, in part, because she was on leave. The Court rejects the Plaintiff’s first argument in accordance with its previous analysis. Because Twyman’s employer-provided leave ran concurrently with her FMLA leave and because she was absent for more than the protected period of time, she did not have a right to be restored to her prior or similar position. See McGregor, 180 F.3d at 1308. The Science Center’s motion is therefore granted as to this issue, and the Plaintiff’s motion is denied.

There is a genuine issue of material fact, however, as to whether the Science Center

impermissibly decided to terminate Twyman because she was out on FMLA leave, or in other words, whether the Science Center retaliated against the Plaintiff for taking FMLA leave. It is generally agreed that the McDonnell Douglas burden-shifting analysis described above is the appropriate framework in which to analyze FMLA retaliation claims. See Voorhees, 1999 WL 673062, at *3; see also Chaffin v. John H. Carter Co., 179 F.3d 316, 319 (5th Cir. 1999); Morgan v. Hilti, Inc., 108 F.3d 1319, 1325 (10th Cir. 1997).

Here, Twyman was engaged in a protected activity, namely FMLA leave and she was later terminated from her position. She has also produced ample evidence of a causal connection between the two events, including statements by Felix and MacBean that they realized while Twyman was on leave that her position was no longer needed. The Science Center has proffered the same legitimate nondiscriminatory reasons as with regard to Twyman's discrimination claims: Twyman would have been terminated regardless of her leave because of economic and business necessity. Therefore, the issue is whether these reasons were a pretext for discrimination. As above, the Court finds there to be a genuine issue of material fact as to the Science Center's motivation in eliminating Twyman's position and terminating her employment. The parties' cross-motions for summary judgment are accordingly denied as to this issue.

IV. CONCLUSION

In sum, the Science Center's motion for summary judgment is denied as to Twyman's Title VII, § 1981 and PHRA claims for discrimination and retaliation. Dilks' motion with regard to the PHRA and § 1981 claims is similarly denied. Concerning Twyman's FMLA claims, the Science Center's motion is granted with regard to the Plaintiff's notice and reinstatement claims, but denied with regard to the retaliation claim. The Plaintiff's motion for summary judgment on

her FMLA claim is denied.

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

BETTY A. TWYMAN	:	CIVIL ACTION
	:	
v.	:	
	:	
CHARLES DILKS and UNIVERSITY	:	
CITY SCIENCE CENTER	:	No. 99-4378

ORDER

AND NOW, this day of September, 2000, in consideration of the Motion for Summary Judgment (Doc. No. 19) filed by the Defendants, Charles Dilks and University City Science Center, the responses of the parties thereto, the Motion for Partial Summary Judgment as to Liability Under the Family and Medical Leave Act (Doc. No. 18) filed by the Plaintiff, Betty Twyman, and the responses thereto, it is ORDERED:

- (1) The Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.
 - (A) The motion is DENIED with regard to the Plaintiff's claims pursuant to Title VII, 42 U.S.C. § 1981 and the PHRA against University City Science Center.
 - (B) The motion is DENIED with regard to the Plaintiff's § 1981 and PHRA claims against Charles Dilks.
 - (C) The motion is GRANTED with regard to the Plaintiff's notice and reinstatement claims pursuant to the Family and Medical Leave Act.
- Judgment is ENTERED in favor of the Defendants and against the Plaintiff on these claims.

(D) The motion is DENIED with regard to the Plaintiff's retaliation claim pursuant to the Family and Medical Leave Act.

(2) The Plaintiff's Motion for Partial Summary Judgment is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.