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

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| MARY M. CHISHOLM, | : | |
| | : | |
| Plaintiff, | : | CIVIL ACTION |
| v. | : | |
| | : | NO: 99-3602 |
| NATIONAL CORPORATION FOR HOUSING PARTNERSHIPS, et al., | : | |
| Defendants. | : | |

**GREEN, S.J.** **January _____, 2001**

**MEMORANDUM-ORDER**

Presently before the Court is Defendants'[1] Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff's Response, and Defendants' Reply. For the following reasons, Defendants' motion will be denied.[2]

## I. Factual and Procedural Background

On September 27, 1995, Mary M. Chisholm ("Plaintiff"), filed a claim with the Equal Employment Opportunity Commission, ("EEOC") following the termination of her employment

[1] The Defendants in the instant matter are National Corporation for Housing Partnerships, NHP Management Company, and Apartment Investment and Management Company. Defendants note that Plaintiff's Amended Complaint names, as a defendant, "NCHP Property Management, Inc.," but that this defendant changed its name, first to NHP Property Management, Inc., then to NHP Management Company. See **Defs.' Motion for Summary Judgment** at 1 n. 2. For practical reasons, all will be referred to collectively as "Defendants".

[2] At the end of Defendants' Reply Brief, Defendants have listed several "Evidentiary Objections." Insofar as these objections are an attempt to keep the Court from examining or relying on any of the questioned exhibits, the objections are moot, since the Court did not use any of the disputed exhibits in deciding the instant motion. Insofar as these objections are an attempt to preclude certain exhibits from trial or request Rule 11 sanctions, the objections are improperly made as part of the summary judgment Reply.

with Defendant National Corporation for Housing Partnerships ("NCHP"). The EEOC issued a Letter of Determination on September 30, 1998, concluding that the Plaintiff's discharge was motivated by age and gender discrimination and retaliation. See **Pl.'s Amended Compl.** ¶ 5. Thereafter, the parties entered into settlement negotiations. When the negotiations failed to resolve the dispute between the parties, the EEOC issued a "right to sue letter"on April 21, 1999.

Ms. Chisholm subsequently filed suit in federal district court on July 16, 1999, asserting federal discrimination, common law tort, and contract claims. On March 22, 2000, Counts III, IV and V of Plaintiff's Amended Complaint were dismissed. See Chisholm v. National Corporation for Housing Partnerships, 2000 WL 307245 (E.D. Pa. March 22, 2000). Defendants' instant summary judgment motion requests the dismissal of Plaintiff's remaining claims.

## II. Discussion

Defendants move pursuant to Rule 56 of the Federal Rules of Civil Procedure. To be successful, Defendants must prove that, in considering the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, . . . there is no genuine issue as to any material fact and that the [Defendants are] entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c). In deciding this motion, I must draw all reasonable inferences in favor of the party against whom judgment is sought. See American Flint Glass Workers, AFL-CIO v. Beaumont Glass Company, 62 F.3d 574, 578 (3d Cir. 1995). The substantive law controlling the case will determine those facts that are material for the purpose of summary judgment. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

Plaintiff claims that the Defendants discriminated against her in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §§ 621-634. See

**Pl.'s Amended Compl. ¶¶** 30-33. Plaintiff avers two distinct claims, one alleging discrimination and the other alleging retaliation.

A. Age Discrimination Claim

In examining whether a Plaintiff has produced evidence sufficient to establish a claim for age discrimination under the ADEA, a court must review not only the direct and indirect evidence proffered by the Plaintiff, but also any explanatory reasons proffered by the Defendants. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[3]

**1. "Indirect Evidence" Analysis**

Of assistance to the matter sub judice is the Supreme Court's line of cases beginning with McDonnell Douglas, which "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). "First, the plaintiff must establish a prima facie case of discrimination." See Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106 (2000). In considering whether the Plaintiff has made out a prima facie case of discrimination, a court will consider several factors, including whether the Plaintiff was a member of a protected class, was qualified for the position, suffered an adverse employment decision, or was replaced by a sufficiently younger person to create an inference of age discrimination. See, e.g., Reeves,

[3] Defendants argue that, in reviewing the parties' arguments under the guidance provided by the Price Waterhouse analysis, it is clear that Plaintiff should produce "direct evidence that an illegitimate criterion was a substantial factor in the decision" to terminate her. See Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring); See **Defs.' Motion for Summary Judgment** at 10. However, Plaintiff has not relied upon the "burden of persuasion" arguments authorized by Price Waterhouse. Therefore, it is not necessary to consider Plaintiff's claims under the "direct evidence" analysis discussed in Price Waterhouse.

120 S. Ct. at 2106; Simpson v. Kay Jewelers, 142 F.3d 639, 644 n. 5 (3d Cir. 1998). If the Plaintiff is not able to produce evidence sufficient to make out a prima facie case, the Defendants are entitled to judgment as a matter of law. See, e.g., Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 352 n. 4 (3d Cir. 1999). If the Plaintiff offers sufficient proof, the burden of production then shifts to the Defendants, "who must then offer evidence that is sufficient, if believed, to support a finding that [they] had a legitimate, nondiscriminatory reason" for the action. See Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). If the Defendants carry this burden, the Plaintiff then must submit evidence "from which a reasonable factfinder could reasonably either disbelieve the" Defendants' articulated reasons, or "believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the" Defendants' action. See Keller, 130 F.3d at 1108 (citations omitted). "Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the [Defendants] intentionally discriminated against the [P]laintiff remains at all times with the [P]laintiff." Reeves, 120 S. Ct. at 2106 (citations and internal quotations omitted).

**a. Prima Facie Case**

The Supreme Court has not "squarely addressed whether the McDonnell Douglas framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1), also applies to ADEA actions." Reeves, 120 S. Ct. at 2105. As such, it is clear that the McDonnell Douglas framework is not the only way in which a Plaintiff may prove a prima facie case, and it does not preclude the Plaintiff from establishing a prima facie case in other ways.

Defendants argue that Plaintiff cannot prove a prima facie case, averring that Plaintiff was not replaced by a "sufficiently younger person to create an inference of discrimination." See **Defs.' Motion for Summary Judgment** at 13. Defendants' argument fails for two reasons. First, Plaintiff need not be held to a rigid test in order to prove a prima facie case. In order to determine if Plaintiff has developed sufficient evidence to allege a prima facie case of age discrimination, a court should look at the Plaintiff's entire work history, and not just the limited circumstances involving her termination. Second, Plaintiff disputes Defendants' allegation that Plaintiff was not replaced by a "sufficiently younger person," arguing that Plaintiff's replacement did not last, and, ultimately, Plaintiff was replaced by a younger person. See **Pl.'s Brief in Opposition** at 15. So, assuming arguendo that the rigid test proffered by Defendants is controlling, I conclude that there is a genuine dispute of material fact regarding this issue, and summary judgment is therefore inappropriate.

Plaintiff has produced sufficient evidence, which, on this summary judgment record, makes out a prima facie case of age discrimination. Plaintiff may decide to use examples from her entire employment history as evidence for her claim that she was discriminatorily terminated. An example of Defendants' allegedly discriminatory actions towards Plaintiff is Plaintiff's demotion, which, if it were a distinct claim in this case, would clearly meet even the most rigid test for proving a prima facie case of age discrimination.[4] In addition to her demotion, Plaintiff also proffers that her performance evaluations evidence her acceptable work product, and ability

[4] Plaintiff was demoted late in 1994, and the circumstances of her demotion, standing alone, evince evidence sufficient to prove a prima facie case of age discrimination: (1) she was a member of a protected class; (2) she was qualified for the position she lost; (3) she suffered an adverse employment decision by being demoted; and (4) she was replaced by a "significantly younger person," Luis Martinez. See **Pl.'s Brief in Opposition** at 5-6.

to perform the work given to her by Defendants. Plaintiff may also contend that her supervisor made discriminatory comments indicating an animus towards age. See **Pl.'s Brief in Opposition** at 5, 7.

Plaintiff is over 40 years of age, and is thus a member of a protected class. See 29 U.S.C. § 631(a); **Defs.' Motion for Summary Judgment** at 2. She has produced evidence of adverse employment actions, and that she was qualified for the position she held. See **Pl.'s Brief in Opposition** at 5-7. Reviewing the evidence in a light most favorable to the Plaintiff as the non-moving party, I conclude that, on this summary judgment record, the totality of the evidence regarding Plaintiff's employment history is sufficient to establish a prima facie case. Therefore, it would be inappropriate to grant summary judgment on this issue.

**b. "Legitimate Nondiscriminatory Reason"**

Defendants submit that Plaintiff was discharged "because she was insubordinate and demonstrated a bad attitude." See **Defs.' Motion for Summary Judgment** at 14. Defendants aver that Cooper Winston, the Regional Vice President who terminated Plaintiff, took this action based on his observations, his review of reports from Plaintiff's supervisor regarding Plaintiff's activities, his review of several instances where Plaintiff questioned her supervisor's orders, and, finally, his review of complaints filed by residents of the property which Plaintiff managed. See **Defs.' Motion for Summary Judgment** at 14-15.

In reviewing Defendants' proffered reason, the Court must not make any "credibility assessments." See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993). Taking the Defendants' evidence at face-value, it is clear that Defendants' have met their burden of production.

**c. "Pre-text" Analysis**

The Plaintiff must now be given the chance to prove, by a preponderance of the evidence, that Defendants' reason for her termination is not legitimate, but, rather, a pre-text for discrimination. See Reeves, 120 S. Ct. at 2106. "[A]lthough the presumption of discrimination drops out of the picture once the [Defendants meet their] burden of production, the trier of fact may still consider the evidence establishing the [P]laintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the [Defendants'] explanation is pretextual." Reeves, 120 S. Ct. at 2106 (internal quotations and citations omitted). If proven by Plaintiff, the falsity of the Defendants' explanation could let the factfinder decide that the Plaintiff carried her ultimate burden of persuasion. See Reeves, 120 S. Ct. at 2106.

Reviewing the evidence in a light most favorable to the Plaintiff, it is clear that on a trial record, the Plaintiff may be able to convince the factfinder to disbelieve the Defendants' proffered reason, and to believe that the Defendants' discriminated against the Plaintiff based on her age. Therefore, summary judgment is inappropriate.

B. Retaliation Claim

As in the age discrimination claim, the Plaintiff can attempt to establish discrimination with either "direct evidence" or "indirect evidence". As stated above, Plaintiff has not produced any direct evidence that her discharge was in retaliation for her filing of the EEOC complaint. Therefore, I will proceed only with an analysis of the "indirect evidence" of discrimination.

**1. "Indirect Evidence" Analysis**

The framework for establishing a claim of discriminatory retaliation under the ADEA mirrors the analysis employed for age discrimination: Plaintiff must present a prima facie case,

then Defendants have the burden of production of a legitimate nonretaliatory reason for the alleged actions, and, finally, the evidence proffered by Plaintiff must be sufficient to show that Defendants' reason should either be disbelieved or that a retaliatory reason was more likely than not a motivating cause of Defendants' action. See, generally, Barber v. CSX Distribution Services, 68 F.3d 694, 701 (3d Cir. 1995) (noting that the "procedural framework in ADEA retaliation cases also follows that of Title VII disparate treatment cases as set forth in McDonnell Douglas").

**a. Prima Facie Case**

"[T]o establish a prima facie case of retaliation, a plaintiff must show: (1) that he engaged in protected conduct; (2) that he was subject to an adverse employment activity; and (3) that a causal link exists between the protected activity and the adverse action." Barber, 68 F.3d at 701. Defendants concede the first two issues, but argue that Plaintiff "cannot prove a causal connection between her protected activity and [Defendants'] decision to terminate her employment." See **Defs.' Reply Brief** at 8.

Defendants synthesize Plaintiff's retaliation claim into two distinct arguments: first, that Plaintiff alleges retaliation for her 1987 discrimination charge, and second, that Plaintiff alleges retaliation for writing a memorandum dated April 18, 1995 to the Defendants complaining about age discrimination. See **Defs.' Reply Brief** at 8-11. Plaintiff argues that, looking at the totality of the circumstances, the evidence will show that beginning with the settlement of her previous discrimination case in 1989 and ending with her termination in 1995, Plaintiff was the victim of persistent age discrimination.

Reviewing the evidence in a light most favorable to the Plaintiff, I conclude that, on a

proper record, Plaintiff can produce evidence sufficient to show a causal connection between her protected activity and her adverse employment action. The burden now shifts to the Defendants to produce a legitimate nondiscriminatory reason for Plaintiff's termination.

**b. "Legitimate Nondiscriminatory Reason"**

As in Plaintiff's discrimination claim, Defendants submit that Plaintiff was discharged "because she was insubordinate and demonstrated a bad attitude." See **Defs.' Motion for Summary Judgment** at 14. Without repeating the discussion above, I conclude that Defendants have met their burden of production in this regard.

**c. "Pre-text" Analysis**

At this stage, it must be determined whether Plaintiff has submitted evidence sufficient for a factfinder to conclude that Defendants' "legitimate nonretaliatory reason" is a pre-text for retaliatory animus. See, generally, Krouse v. American Sterilizer Co., 126 F.3d 494, 501 (3d Cir. 1997) (outlining Title VII retaliation framework). To do this, the Plaintiff can attempt to show "that the [Defendants'] proffered explanation is unworthy of credence." See Reeves, 120 S. Ct. at 2106. Along with disproving the Defendants' proffered explanation, the Plaintiff may submit evidence to show that retaliatory animus was the true catalyst for the termination. See Krouse, 126 F.3d at 501.

Plaintiff alleges that in January of 1995, she was told by her supervisor, Luis Martinez, that he "wished he had all young girls working for him." See **Pl.'s Brief in Opposition** at 7. She reported the comment to her supervisor, Judy Prendergast, but did not file a formal report. See **Pl.'s Brief in Opposition** at 7. Plaintiff alleges that, on April 17, 1995, she was given an unsatisfactory performance review which was full of "inaccuracies and misstatements of fact."

See **Pl.'s Brief in Opposition** at 7. Realizing that she could no longer "survive under these circumstances much longer," Plaintiff formalized her complaint to Mrs. Prendergast. See **Pl.'s Brief in Opposition** at 8. Shortly thereafter, on May 1, 1995, she was terminated. See **Pl.'s Brief in Opposition** at 8.

Standing alone, the temporal proximity of Plaintiff's formalized complaint and her termination is sufficient circumstantial evidence for a factfinder to believe that Defendants possessed retaliatory animus. But, the Defendants argue that the "decisionmaker", Cooper Winston, had no knowledge of Plaintiff's formalized complaint, and that Winston fired Plaintiff due to her insubordination and tenant complaints; therefore, the Plaintiff's complaint is not causally related to Plaintiff's termination. See **Defs.' Reply Brief** at 10-11.

However, on a trial record, Plaintiff may be able to show that two of her supervisors, Judy Prendergast and Luis Martinez, knew of the complaint, and that Mrs. Prendergast was present in the meeting where Plaintiff was fired. Also, Plaintiff may produce evidence that her work to that point had been satisfactory or better, and that her termination was related to the filing of the complaint. Finally, Plaintiff argued in front of the EEOC, and may argue at trial, that there is only one documented tenant complaint dated April 15, 1995, for which the Plaintiff "was not counseled verbally or in writing." See **Pl.'s Brief in Opposition** Exhibit S at 4. In sum, Plaintiff may be able to convince a fact-finder, like she did the EEOC, that Defendants' actions were taken in retaliation for the filing of her discrimination complaint.

Viewed in a light most favorable to the Plaintiff, it is clear that there is a genuine issue of material fact regarding the existence of retaliatory animus. Such issues of fact preclude a finding of summary judgment at this time.

## III. Conclusion

The matter before the Court is replete with "genuine issues of material fact." As such, I conclude that summary judgment is inappropriate at this time for Plaintiff's age discrimination claim relating to her discharge, and for Plaintiff's retaliation claim. An appropriate order follows:

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| MARY M. CHISHOLM, | : | |
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| Plaintiff, | : | CIVIL ACTION |
| v. | : | |
| | : | NO: 99-3602 |
| NATIONAL CORPORATION FOR | : | |
| HOUSING PARTNERSHIPS, et al., | : | |
| Defendants. | : | |

**ORDER**

**AND NOW**, this _____ day of January, 2001, after consideration of Defendants'[5]

[5] The Defendants in the instant matter are National Corporation for Housing Partnerships, NHP Management Company, and Apartment Investment and Management Company. Defendants note that Plaintiff's Amended Complaint names, as a defendant, "NCHP Property Management, Inc.," but that this defendant changed its name, first to NHP Property Management, Inc., then to NHP Management Company. See **Defs.' Motion for Summary Judgment** at 1 n.

Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff's Response, and Defendants' Reply, **IT IS HEREBY ORDERED** that Defendants' Motion is **DENIED**.

BY THE COURT:

_____

CLIFFORD SCOTT GREEN, S.J.

2. For practical reasons, all are referred to collectively as "Defendants".