

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

EDWARD ELWELL : CIVIL ACTION

v. :

PP & L : NO. 99-2716

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

November , 2001

INTRODUCTION

Plaintiff, Edward Elwell, (“Elwell”) filed this action against defendant PPL Electric Utilities Corporation (“PPL”)¹ for damages arising from a retaliation claim based upon a violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621 et seq., and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Stat. Ann. § 955(a). The Honorable Franklin S. Van Antwerpen referred this case to the undersigned for trial. (Doc. No. 27.)² On July 19th and July 20th, 2001, this court conducted a non-jury trial on the issue of liability and damages with respect to plaintiff’s retaliation claim. Thereafter, the parties

¹ PP&L is a Pennsylvania Corporation, duly registered as a public utility within the Commonwealth of Pennsylvania. (Pl.’s Complaint at ¶ 2.)

² Judge Van Antwerpen previously granted summary judgment in favor of defendant with respect to all of plaintiff’s age discrimination claims under the ADEA and the PHRA. (See Doc. Nos. 14, 18.) The only remaining claim is plaintiff’s claim for retaliation “insofar as it includes Plaintiff’s evaluation and resulting salary claim of retaliation.” (Order of the Honorable Franklin S. Van Antwerpen dated June 6, 2000, Doc. No. 14.)

submitted Findings of Fact and Conclusions of Law. (Doc. Nos. 31 & 32.)

After careful consideration of the entire record, the court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52:

FINDINGS OF FACT

1. Plaintiff has been employed by defendant PPL continuously since 1968. He currently holds the position of Senior Engineer. (July 19, 2001 Tr. at 24, Ex. D-4.)

2. Plaintiff held the position of Area Operations Manager (“AOM”) from April 1989 through May 1995. (July 19, 2001 Tr. at 33; D-4.)

3. In late 1994, a company-wide reorganization occurred at PPL. As a result of this restructuring, all of the AOM positions were eliminated. This necessitated plaintiff, as well as others in that position, to seek other positions in the company. (July 19, 2001 Tr. at 37-38.)

4. During the reorganization of PPL, plaintiff made unsuccessful bids for positions with the company. (July 19, 2001 Tr. at 38-39.) In May 1995, plaintiff was appointed to the position of Performance Analyst, a position graded lower than his former position as an AOM.(Id at 40-41.) Consistent with company policy, managers who were placed in a lower graded position were scheduled to receive progressive reductions in salary so that their pay ultimately would be consistent with the salary range for their new position. (July 19, 2001 Tr. at 194-95.)

5. According to the aforementioned policy, in 1996 plaintiff’s salary was adjusted downward from \$89,960 to \$86,320, a reduction of 4.05 percent. In 1997, the salary was once again adjusted downward from \$86,320 to \$79,820, a 7.53 percent reduction. (July 19, 2001 Tr. at 195-96; Ex. D-4.)

6. More than two and one-half years after the company’s reorganization and plaintiff’s

appointment to the Performance Analyst position, plaintiff filed a discrimination charge with the EEOC, alleging that he had been denied certain positions because of his age. This complaint did not mention plaintiff's supervisor, Michael Sobeck. (Ex. D-1.)

7. Mr. Sobeck has been employed by PPL for thirty-five years; he has been in a management position for twenty-seven years. (July 20, 2001 Tr. at 29.) In July 1997, Mr. Sobeck was appointed Projected Manager of PPL's Service Improvement Through Teamwork ("S.I.G.H.T.") project. At that time, plaintiff was working as a Team Leader on the Respond to Customer ("R.T.C") Section of the S.I.G.H.T. project. (Id. at 30.) Plaintiff later transferred to the Service Order Fulfillment ("S.O.F.") team, where Daniel Jones was team leader. (July 20, 2001 Tr. at 30-31.)

8. Prior to July 1997, Mr. Sobeck interviewed plaintiff for the Manager of Business Support position. (July 20, 2001 Tr. at 30-31.) Mr. Sobeck indicated that plaintiff experienced difficulty during the interview, and repeatedly referred to binders containing information that he possessed during the course of the interview. (Id. at 32.) As a result of the interview, Mr. Sobeck concluded that plaintiff did not have strong communication skills. (July 20, 2001 Tr. at 32.)

9. In July 1997, Mr. Sobeck frequently observed plaintiff while he worked on the S.I.G.H.T. project. (July 20, 2001 Tr. at 31, 34-35.) Mr. Sobeck also counseled plaintiff regarding his developmental needs. (Id. at 33.) Mr. Sobeck informed plaintiff that he needed to improve his interviewing skills, and commented on the previous interview Mr. Sobeck had with the plaintiff. (Id. at 31-32.) Plaintiff never availed himself of Mr. Sobeck's offers of assistance. (July 20, 2001 Tr. at 33.)

10. After observing plaintiff during the latter half of 1997, Mr. Sobeck concluded that plaintiff possessed good technical skills, but was lacking in leadership skills and teamwork. (July 20, 2001 Tr. at 34-35.) Mr. Sobeck also concluded that plaintiff did not seem committed to achieving the goals of the S.O.F. team. (Id. at 35.)

11. Other members of the S.I.G.H.T. team provided feedback about plaintiff's performance on the project during the last half of 1997. (July 20, 2001 Tr. at 35-36.) Mr. Sobeck explained that while these individuals believed plaintiff had technological expertise, soliciting information from plaintiff was extremely difficult, "like pulling teeth." (July 20, 2001 Tr. at 36.)

12. Mr. Sobeck named Joseph Compierchio the S.O.F. Team Leader. Mr. Compierchio replaced Dan Jones. (July 19, 2001 Tr. at 58; July 20, 2001 Tr. at 37.) Plaintiff testified that Mr. Sobeck told him he needed a "strong leader" to hold the Team Leader position, and plaintiff inferred from that statement that Mr. Sobeck required a strong leader to fill this position. (July 19, 2001 Tr. at 232-33.) Plaintiff admitted that three months before he filed a charge of discrimination, Mr. Sobeck expressed to plaintiff, or plaintiff inferred from conversation, that Mr. Sobeck believed that plaintiff was not a strong leader. (Id. at 233.)

13. On January 13, 1998, plaintiff had a meeting with Mr. Sobeck. (July 19, 2001 Tr. at 189.) During that meeting, Mr. Sobeck told plaintiff he wanted to assist him in securing a position which corresponded with his skill level. (Id. at 64-65.) After these comments, plaintiff informed Mr. Sobeck about the EEOC complaint. Mr. Sobeck indicated that he had no knowledge of that complaint. (July 19, 2001 Tr. at 65.)

14. Plaintiff testified that Mr. Sobeck never made any statement suggestive of anger or

annoyance at plaintiff for the filing of the EEOC complaint. In fact, plaintiff acknowledged that Mr. Sobeck stated that despite the complaint, he still believed plaintiff could perform in higher level positions than the level seventeen position plaintiff held at the time of the aforementioned meeting. (July 19, 2001 Tr. at 190.) This was consistent with Mr. Elwell's recollection of his previous meeting with Mr. Sobeck when Mr. Sobeck indicated that plaintiff should do a presentation to show company executives that plaintiff was capable of performing in a higher level position. (July 19, 2001 Tr. at 53.) In addition, plaintiff testified that Mr. Sobeck had shown empathy and informed plaintiff that he was going to help him find another job. (Id. at 66.)

15. Mr. Sobeck began preparing plaintiff's annual evaluation at the end of December. (July 20, 2001 Tr. at 37-38.) After receipt of plaintiff's 1997 self-appraisal, Mr. Sobeck began working on plaintiff's 1997 performance evaluation. Mr. Sobeck either prepared or reviewed all evaluations for the members of the S.I.G.H.T. team. Since Mr. Jones no longer worked on the project, he did not prepare evaluations for anyone on the S.O.F. team, despite the fact that he led the team during 1997. (July 19, 2001 Tr. at 100-101; July 20, 2001 Tr. at 39.) Mr. Sobeck decided that Mr. Compierchio should not prepare the evaluations since he had only led the S.O.F. team for a few months in 1997. (July 20, 2001 Tr. at 37.)

16. Mr. Sobeck based plaintiff's evaluation on personal observations, as well as on comments and information he received from other team members including: John Bowen, Joe Compierchio, Kathleen Heffelfinger, and Peter Klosiewicz. (Ex. D-15.) This process was essentially the same as the one he employed when he prepared approximately one hundred written evaluations during his management career with PPL. (July 20, 2001 Tr. at 45-46.) At trial, plaintiff conceded that it was appropriate for a manager to rely on input from other

individuals. (July 19, 2001 Tr. at 231.) 17. Mr. Sobeck rated plaintiff as a “3” or “Good”, a category which is defined as:

Accomplishments consistently met position requirements and performance expectations. This is the norm for satisfactory performance by an experienced and conscientious individual.

(Ex. D-9 at 2095.)

18. Plaintiff testified that this review contained both positive and negative comments which reflected developmental needs. (July 19, 2001 Tr. at 210). Plaintiff acknowledged that this evaluation was complimentary of his technical skills. However, Mr. Elwell did not consider that his strong suit. (Id. at 77.)

19. Plaintiff admitted that his review from the previous year, which was not prepared by Mr. Sobeck, scored him as a “3”, and contained both positive and negative comments. (July 19, 2001 Tr. at 210; Ex. D-6.) Mr. Elwell conceded that a hiring manager might also have some concerns over comments in the 1996 evaluation. (July 19, 2001 Tr. at 207-08.) Out of the twenty-three appraisals plaintiff received between 1971 and 1997, he received a “3” rating or its equivalent twelve times, and a rating lower than “3” on three occasions. (July 19, 2001 Tr. at 212-13; Ex. D-5.)

20. The evaluation prepared by Mr. Sobeck contained positive comments such as:
- a. Ed has been able to ad[d] value to the methodology used in the automated processes. His diligence in problem solving made a difference in the success we are seeing in the SOF performance we are seeing today.” (Ex. D-9 at 2088.)
 - b. Ed’s experience and his diligence in pursuit of methodologies for problem resolution are Ed’s strong suit. His business sense makes him an asset to the teams he has participated on. (Id.)
 - c. Work prepared by plaintiff was characterized as “the link that allowed PP&L to determine if progress was actually being made on critical issues.” (Id.)
 - d. A project completed by plaintiff was described as a “breakthrough in the

- technology application” which was pursued to a “much more satisfactory conclusion than would have been provided by the vendor.” (Ex. D-9 at 2089.)
- e. “Ed is very conscious of safe work practices...” (Ex. D-9 at 2092.)
 - f. “Ed has a very quick mind and is able to absorb and become proficient in the new technology.” (Id.)
 - g. “Ed has the ability to translate concepts into practice with great facility. He thinks logically, tests assumptions and is generally a great problem solver.” (Id.)
 - h. “Ed’s work is always accurate and timely. Ed takes responsibility for his work and is recognized for the quality of work he turns out.” (Ex. D-9 at 2092.)
 - i. “Ed has excellent writing skills. Ed’s oral communication skills are good.” (Ex. D-9 at 2093.)
 - j. “I have found Ed’s interpersonal skills to be excellent. He is an excellent team player.” (Id.)
 - k. “Ed has taken initiative to improve the way certain aspects of the project are done. One prime example is the loading of the MDT’s. Very good job Ed.” (Id.)
 - l. “Ed is a very organized individual. He brings this trait along with him in his team participation. . .His organization and planning skills in completing job assignments are excellent.” (Id.)
 - m. Ed has represented the company in a professional manner. He strives to satisfy customer needs and has had numerous testimonials from clients commenting on the quality of the work Ed performed for them.” (Ex. D-9 at 2094.)
 - n. “I have observed that Ed is a very bright capable individual and could perform well in a variety of positions.” (Id.)

21. At the time the evaluation was completed by Mr. Sobeck, plaintiff was still subject to the salary reductions mandated by PPL policy to bring him in line with the salary range for the Performance Analyst position, a level nineteen category. (Ex. D-3.) Mr. Sobeck was sympathetic to Mr. Elwell’s economic situation, and treated plaintiff as a “high 3” for his salary determinations. Mr. Sobeck used the salary range from the level seventeen position to set plaintiff’s salary, despite the fact that plaintiff was in a level nineteen position. This resulted in a smaller salary reduction. (July 20, 2001 Tr. at 65-66.) Mr. Sobeck chose this method of calculation so plaintiff’s base salary would be higher and he would be in a better compensation position in the event he changed positions in the future. (July 20, 2001 Tr. at 66.) In addition, Mr. Sobeck provided plaintiff with a lump sum payment that equated to ninety dollars per week,

a sum greater than the sixty dollar per week base pay reduction that plaintiff received. (July 20, 2001 Tr. at 74-5; Ex. D-34.)

22. Regardless of the rating received on his performance evaluation, plaintiff's total compensation package, i.e., his base pay plus an annual lump sum, would not have changed. (July 20, 2001 Tr. at 77; Ex. D-34.) The lump sum payment was calculated as the amount of the salary reduction plus the thirty dollar lump sum provided to others who were similarly situated, so that a smaller base pay shortfall precipitated by a higher rating, would result in a smaller lump sum payment. A larger base pay shortfall caused by a lower rating would result in a larger lump sum payment. (*Id.* at 75-78.) Accordingly, no matter what the rating, plaintiff's total annual compensation for 1998 would have been \$81,380.00. (Ex. D-34.)

23. Mr. Sobeck calculated the salary range of two other employees who were also outside of the salary range for their grade level using the same methodology described above. (July 20, 2001 Tr. at 75-76; Ex. D-35.) In reality, plaintiff's base salary reduction of thirty-six percent of the shortfall determined by a computer formula was the smallest of the three employees. (July 20, 2001 Tr. at 126; Exs. D-4, 35.) This same methodology was employed to calculate plaintiff's pay the year preceding his filing of the EEOC charge. (July 19, 2001 Tr. at 199-201.)

24. In January 1998, Mr. Sobeck reviewed his initial compensation determinations at a meeting with his superior, Mr. Robert Geneczko and other department managers. No one questioned the salary arrangements Mr. Sobeck made for plaintiff. (July 20, 2001 Tr. at 42-43.)

25. On March 9, 1998, Mr. Sobeck met with plaintiff to discuss plaintiff's evaluation. (July 19, 2001 Tr. at 74; Ex. D-15.) Plaintiff was not satisfied with his "3" rating. On April 2, 1998, Mr. Sobeck gave plaintiff a revised review during a meeting with plaintiff. (July 19, 2001

Tr. at 124; Ex. D-19.) Mr. Sobeck removed the following section:

[Oral communications skills] is an area that Ed could include in his Personal Development plan. At times I have observed the delivery in an oral presentation to be somewhat slower than the audience would anticipate. A refresher course with emphasis on delivery technique will enhance Ed's presentation skills.

(Ex. D-9 at 7.) This language was replaced with the following section:

Team members and staff perceived Ed's presentation skills to be good. They believe Ed's presentation to the executive sponsors was well done. They feel that Ed devotes time to the preparation of his presentation and presents the subject matter as an expert on the topic.

(Ex. D-10 at 7.) Mr. Elwell testified that he had no problem with this change. (July 19, 2001 Tr. at 219.)

26. Plaintiff also informed Mr. Sobeck that he had concerns regarding the "Management Skills" section of his evaluation. Plaintiff explained that he did not believe he was required to complete this section because he had not supervised anyone during 1997. (July 19, 2001 Tr. at 81.) Mr. Sobeck revised this section to include plaintiff's explanation. (Ex. D-10 at 5.) Mr. Sobeck indicated that he had discovered that "in the past not all personnel were expected to complete this section" and therefore, "the comments provided are ment [sic] to provide feedback in the area of management skills. Ed can then structure his personnel development plan to include this important area of development." (Id.)

27. Plaintiff testified at trial that Mr. Sobeck's comment regarding his role as co-manager of the S.O.F. project suggested that Mr. Sobeck felt plaintiff was responsible for the project being "flat and going south." However, plaintiff conceded that he never raised this with Mr. Sobeck, complained about it to anyone prior to trial, or included it in his March 9, 1998 e-mail. (July 29, 2001 Tr. at 234-5; Ex. D-15). Mr. Sobeck explained at trial that this comment was intended to

demonstrate that plaintiff stepped into a leadership role at the time when the project needed assistance. (July 20, 2001 Tr. at 47-48.)

28. Mr. Sobeck informed plaintiff about the methodology employed to calculate plaintiff's compensation. Mr. Sobeck explained that he treated plaintiff as a high "3" in a grade level seventeen, and that Mr. Sobeck made up for plaintiff's base pay reduction through the variable pay award. (July 19, 2001 Tr. at 198-99; July 20, 2001 Tr. at 79-81.)

29. Because plaintiff continued to believe that the 1997 evaluation would have a negative effect on his ability to secure another position for which he applied within PPL, Mr. Sobeck agreed not to file the evaluation with human resources until decisions had been made on the positions for which plaintiff had applied. Mr. Sobeck agreed to this arrangement despite his belief that the evaluation was a good one. Plaintiff appreciated Mr. Sobeck's decision to withhold the evaluation. (July 19, 2001 Tr. at 134; Ex. D-20.)

30. Mr. Sobeck identified those individuals from whom he had received feedback in preparing his evaluation. (Ex. D-15.) Plaintiff expressed surprise that some of the negative comments had been attributed to Peter Klosiewicz, a consultant who had worked on the S.I.G.H.T. project. However, plaintiff was told by Mr. Klosiewicz that he had indeed made the comments in question. (July 19, 2001 Tr. at 227; Ex. D-21.)

31. Still unsatisfied with his evaluation, plaintiff distributed written questionnaires to his co-workers to ascertain whether they agreed with certain comments in the evaluation. (July 19, 2001 Tr. at 146.) Plaintiff sought feedback from Mr. John Bowen and Mr. Compierchio. (July 20, 2001 Tr. at 3; Ex. P-39 at 2356, 2368-69.) Mr. Bowen provided written comments which corresponded with Mr. Sobeck's evaluation. Mr. Bowen's comments about plaintiff included:

“tends to present information at detailed level only;” “did not seek work to be done;” and “seemed indifferent to project success or outcome (regardless of project manager).” (July 20, 2001 Tr. at 4-5; Ex. P-39 at 2356.) In a meeting with the plaintiff, Mr. Compierchio explained that many of the statements sounded as if they had come from him. Mr. Compierchio completed plaintiff’s questionnaire and agreed with the majority of the statements contained within the evaluation. (Ex. P-39 at 2367-69.)

32. Mr. Sobeck responded to plaintiff’s concern that Mr. Jones had not been asked to provide feedback for plaintiff’s evaluation. Mr. Sobeck explained that he initially did not seek input from Mr. Jones since Mr. Jones had certain weaknesses in his management skills which prevented him from providing a candid assessment of plaintiff’s strengths and weaknesses. (July 20, 2001 Tr. at 39-40.) At trial, Mr. Jones testified that it was not a “hard and fast” rule that a supervisor be asked for input regarding an employee whom he no longer supervised. (July 19, 2001 Tr. at 99.) Eventually Mr. Sobeck consulted with Mr. Jones who expressed a different opinion regarding plaintiff’s management skills, but did share some of Mr. Sobeck’s views of plaintiff in other areas. (July 20, 2001 Tr. at 107-08, Ex. P-35.)

33. During the spring of 1998, Mr. Sobeck assisted plaintiff in his quest for a new position within the company. These included the positions of Project Manager and Manager of Compensation. (July 19, 2001 Tr. at 192-94; July 20, 2001 Tr. at 81-5; Ex. D-18.) Plaintiff expressed his gratitude to Mr. Sobeck for his assistance in an e-mail dated March 31, 1998. (Ex. D-17.)

34. In May 1998, plaintiff was promoted to a Senior Engineer position, a level seventeen position, and he testified that he has not been retaliated against since that time. (July 19, 2001

Tr. at 190-91.) Mr. Sobeck was instrumental in this selection process, and in structuring the position so it could be characterized as a level seventeen position. (July 20, 2001 Tr. at 82-83; Ex. D-20.)

35. Mr. Sobeck did not submit plaintiff's 1997 evaluation to human resources until December 1998, approximately six months after plaintiff accepted his new position. (July 19, 2001 Tr. at 134; Ex. P-42.) This resulted in the failure of Mr. Geneczko, Mr. Sobeck's supervisor, to sign the review. (July 20, 2001 Tr. at 41-42.)

36. Mr. Sobeck had several other conversations regarding plaintiff's 1997 evaluation. On one occasion, plaintiff presented Mr. Sobeck with a 179-page rebuttal to the comments made by Mr. Klosiewicz. (July 19, 2001 Tr. at 143; Ex. P-39.) Mr. Sobeck informed plaintiff that he had considered his concerns, investigated them and concluded that he had given plaintiff a good and fair evaluation. Accordingly, Mr. Sobeck decided that he would not make any further revisions to the evaluation, nor would he spend additional time reviewing the lengthy submissions of plaintiff. (July 20, 2001 Tr. at 110.)

37. Plaintiff testified that despite the fact that there were several management positions available at the company since May 1998, he did not apply for any of these positions. (July 20, 2001 Tr. at 17-18.)

38. Plaintiff conceded that he has no evidence that the 1997 evaluation had any negative impact on his ability to obtain another job at PPL. (July 19, 2001 Tr. at 190-91.) Defense counsel posed the following question to plaintiff: "Do you have any evidence whatsoever that the appraisal, the performance appraisal that Mr. Sobeck did on your performance in 1997 had any negative impact whatsoever on your ability to get another job within the company?" Plaintiff

responded: “I do not.” (July 19, 2001 Tr. at 191.)

39. Plaintiff did not experience any further salary reductions in 1999. He received a two percent base salary increase in 2000 and a three and one-third percent increase in 2001. (Ex. D-3.) He received a lump sum variable pay award of \$7,770 in 1999, \$10,000 in 2000, and \$7,250 in 2001. Id.

CONCLUSIONS OF LAW

1. Prima Facie Case of Retaliation.

Plaintiff avers that he was retaliated against in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Stat. Ann. § 955(a). The ADEA provides:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d). The PHRA provides that it shall be unlawful

For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

43 Pa. Cons. Stat. Ann. § 955(d).

To establish a prima facie case of retaliation under the ADEA³ a plaintiff must show that:

³ Courts analyze retaliation claims arising under the PHRA in the same fashion as retaliation claims arising under Title VII or the ADEA. See Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir.1996). Hence, the following analysis applies to plaintiff’s PHRA retaliation claim.

(1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action. Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000); Krouse v. American Sterilizer Co., 126 F.3d 173, 177 (3d Cir. 1997); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

If plaintiff establishes a prima facie case, a defendant must articulate a legitimate, nondiscriminatory reason for its actions. A plaintiff must then present sufficient evidence of pretext to rebut defendant's articulated, non-retaliatory reasons, prove that the stated reasons are false, and that the retaliation had a determinative effect on the actions of the defendant. See Krouse, 126 F.3d at 501.

2. Protected Activity.

With respect to the first element, plaintiff's filing of a complaint with the Equal Opportunity Employment Commission ("EEOC") in December 1997 was a protected activity. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Moreover, defendant PPL does not dispute that plaintiff engaged in a protected activity by filing this charge (Def.'s Findings of Fact, Conclusions of Law, at 14.) Thus, this court finds that plaintiff has established the first element of a prima facie case of retaliation.

3. Adverse Employment Action.

The second element of a prima facie case of retaliation requires that plaintiff's protected activity was followed by an actionable adverse action by PPL. See Krouse, 126 F. 3d at 500. Retaliatory conduct, other than discharge or refusal to rehire, is adverse "only if it alters the

employee's compensation, terms, conditions, or privileges of employment, or deprives him or her of employment opportunities.” Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). “Not everything that makes an employee unhappy qualifies as retaliation, for otherwise minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.” Id. Only employment decisions that have a material adverse impact on the terms or conditions of employment are actionable. Id.

In Weston v. Commonwealth of Pennsylvania, 251 F.3d 420 (3d Cir. 2001), the court discussed what constitutes a materially adverse employment action. In that case, the plaintiff contended that written reprimands placed in his personnel file for six months had been prepared in retaliation for his complaint of sexual harassment. Id. at 430. The district court previously found that since the reprimands were written and kept in the plaintiff's file, they were actionable because of their “presumed” effect on the terms and conditions of employment. The appeals court reversed, and held that the plaintiff failed to establish how the written reprimands effected a material change in the conditions of employment. The court further reasoned that the plaintiff did not produce evidence which demonstrated that he was “denied any pay raise or promotion as a result of these reprimands.” Id. at 431.

In the case sub judice, plaintiff contends that the evaluation prepared by Mr. Sobeck was an adverse employment action. In the evaluation, Mr. Sobeck rated plaintiff as a “3”, or “Good”, a score which is defined as “accomplishments consistently met position requirements and performance expectations. This is the norm for satisfactory performance by an experienced and conscientious individual.” (Ex. D- 9.) Unlike the inherently negative written reprimand which the Third Circuit declined to characterize as an adverse employment action in Weston, plaintiff's

evaluation contained many positive statements regarding his work habits. (See citations to evaluation in Finding of Fact No. 20.) In addition, the 1997 evaluation was consistent with plaintiff's 1996 review, wherein he received a "3" rating and similar comments were made about his performance. (See Ex. D-6.) As noted in finding No. 19, plaintiff received a "3" rating or lower on fifteen of his performance evaluations while employed by PPL. Accordingly, plaintiff has not demonstrated that the 1997 evaluation was negative.⁴

Moreover, plaintiff has failed to produce evidence that his 1997 evaluation had any negative effect on the terms and conditions of his employment. The score plaintiff received did not effect his compensation for 1998. (Ex. D-34.) Mr. Sobeck testified that plaintiff's compensation would have remained the same regardless of the score. (July 20, 2001 Tr. at 77.) In reality, Mr. Sobeck took steps to mitigate plaintiff's base salary reduction which had been mandated by PPL policy. (July 19, 2001 Tr. at 198-99; July 20, 2001 Tr. at 79-81.) More importantly, Mr. Sobeck did not file the 1997 evaluation with Human Resources until the end of 1998, approximately six months after plaintiff had accepted a Senior Engineer position in May 1998. (July 19, 2001 at 134; Ex. P-42.) At trial, plaintiff testified that he had not suffered any discrimination or retaliation since that time. (July 19, 2001 Tr. at 190-91.) In response to questioning by defense counsel, plaintiff conceded that he possessed no evidence that the 1997 evaluation had any impact on his ability to find another job. (See Finding of Fact No. 38; July 19, 2001 Tr. at 191.)

⁴ Recently, our Court of Appeals stated that an employer should not be "dissuaded from making what he believes is an appropriate evaluation by a reason of fear that the evaluated employee will charge that the evaluation was retaliatory." The court recognized that "some employees do not recognize their deficiencies and thus erroneously may attribute negative evaluations to an employer's prejudice." Shaner v. Synthes, 204 F.3d 494, 505 (3d Cir. 2000).

Finally, the mere presence of the evaluation in plaintiff's file does not constitute an adverse employment action. As noted above, the evaluation labeled plaintiff a good employee, who met expectations. This court finds that this commentary would not adversely affect plaintiff's future employment opportunities. Moreover, as the court stated in Weston, the presumed or speculative effect of an evaluation, without a showing of actual harm, is insufficient to demonstrate an adverse employment action. See Weston, 251 F.3d at 430-31. In this case, plaintiff has not presented any evidence that the evaluation caused him to lose any employment opportunities or that it caused him any specific harm. As stated above, upon questioning from this court, plaintiff conceded that he had no evidence that the evaluation prevented him from securing another position in the company. (July 29, 2001 Tr. at 190-91.) Plaintiff testified that he had not applied for a single job since his promotion to Senior Engineer in May 1998, despite his knowledge that there were positions for which he could have applied. (July 20, 2001 Tr. at 17-18.)

After a thorough review of the record, this court finds that plaintiff has failed to make out a prima facie case of retaliation, since he failed to meet the second prong of the test.⁵

⁵ Even assuming arguendo that plaintiff's evaluation constituted a materially adverse employment action, this court finds that plaintiff failed to show a causal link between the issuance of the evaluation and the filing of the EEOC charge. As stated above, Mr. Sobeck had no knowledge of claimant's EEOC charge prior to his meeting with plaintiff in January 1998. Mr. Sobeck is not identified in the charge, and there is no evidence that Mr. Sobeck acted negatively toward plaintiff after he had filed the charge. On the contrary, Mr. Sobeck's conduct toward plaintiff was consistent both prior to and subsequent to the filing of the charge of discrimination. In November 1997, Mr. Sobeck informed plaintiff that he should be in a higher level position. (July 19, 2001 Tr. at 53, 190.) In addition, Mr. Sobeck gave plaintiff a favorable compensation package, which put him in a better position than two employees who were also subject to salary restrictions, and who had not filed EEOC charges. (July 20, 2001 Tr. at 75; Ex. D-35.) Furthermore, issues addressed by Mr. Sobeck in the 1997 evaluation had been raised prior to the filing of the EEOC charge. Plaintiff testified that the reason he was not selected for

Accordingly, this court holds that Judgment shall be entered in favor of defendant PPL and against plaintiff, Edward Elwell.

An appropriate Judgment Order follows.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

the S.O.F. Team Leader position in October 1997 was because of Mr. Sobeck's belief that plaintiff was not a strong leader. (July 19, 2001 Tr. at 232-33.) Prior to the charge, Mr. Sobeck had conversations with plaintiff about his performance in interviews and presentations. (July 20, 2001 Tr. at 33-34.) Accordingly, the post-filing comments do not demonstrate an assessment which differs from Mr. Sobeck's pre-filing opinion. Furthermore, Mr. Sobeck presented plaintiff with a revised version of the evaluation after discussing plaintiff's concerns about the initial review. Mr. Sobeck also agreed to delay filing the review with the Human Resources Department to allay plaintiff's concern that the evaluation would negatively impact plaintiff's future employment opportunities within PPL. (Ex. D-20.) Finally, Mr. Sobeck advocated to get plaintiff placed in a higher level position. Mr. Sobeck recommended plaintiff be interviewed for a Manager of Compensation position, and had considerable involvement in plaintiff's selection for the Senior Engineer position. (July 20, 2001 Tr. at 81-5; Ex. D-20.) Plaintiff failed to establish a causal link between the filing of the EEOC charge and the 1997 evaluation prepared by Mr. Sobeck. For this additional reason, plaintiff's claim must fail, since he did not make out the requisite elements to prove the retaliation charge.

