

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

ELLEN KEEN, :
 :
 Plaintiff, : CIVIL ACTION
 :
 v. : NO. 00-3758
 :
 D.P.T. BUSINESS SCHOOL, :
 :
 Defendant. :

MEMORANDUM

BUCKWALTER, J.

January 9, 2002

Plaintiff alleges discrimination in violation of the Age Discrimination in Employment Act ("ADEA") and retaliation in violation of Title VII of the Civil Rights Act of 1964. Presently before the Court is Defendant's Motion for Summary Judgment pursuant to Rule 56(c). For the reasons stated below, Defendant's Motion is granted.

I. FACTS

Ellen Keen ("Keen" or "Plaintiff") was hired by D.P.T. Business School ("DPT" or "Defendant") on November 24, 1997 for a full-time, grant-funded position as a Case Manager. DPT provides its students with the necessary technical and professional training to secure jobs in the business workplace. A major component of DPT's program is career counseling and job placement. Plaintiff was responsible for managing students who

received training at DPT and whose tuition was entirely paid for by an entity know as the Private Industry Council of Philadelphia ("PIC").¹ Plaintiff's position as a Case Manager was itself funded by PIC pursuant to a contract between DPT and PIC (the "DPT/PIC Contract"). Plaintiff retained this position for a period of approximately 20 months at which time she voluntarily resigned, citing the culmination of months of discrimination and retaliation perpetrated against her by Defendant.

According to Plaintiff, DPT discriminated against her when it passed her over for promotions twice in a two month period, at a time when she was 50 years old. The positions in question, Director of Career Services and Student Relations Coordinator, were awarded to two younger women, who arguably had less education, less relevant work experience, and who had worked for Defendant far less time than Plaintiff. The promotion for Director of Career Services was awarded to Karen Roberts in January 1999. Ms. Roberts was 32 years of age at the time. The Student Relations Coordinator position was awarded to Paula Sandusky in March 1999. Ms. Sandusky was in her early to mid-twenties at the time she received the promotion.

Neither position was posted by DPT. Therefore, Plaintiff did not apply for either position. In fact, Plaintiff

1. PIC receives funds from the Pennsylvania Department of Welfare, which in turn receives funds from the federal government pursuant to the Job Training Partnership Act. DPT is one of PIC's subcontractors.

did not become aware of the openings until after DPT had already selected Ms. Roberts and Ms. Sandusky to fill the positions.

Prior to the promotions in question, Plaintiff's performance at DPT as a PIC-funded Case Manager was, for the most part, viewed favorably by DPT and Plaintiff's direct supervisor, Doni Boyer. Boyer evaluated Plaintiff's early work performance in writing after Keen had been employed by DPT for 90-days. In this 90-day evaluation, Boyer described Plaintiff as a "strong communicator," who "has demonstrated good ideas;" as "reliable," "dependable," and willing to put in "extra time;" as "adventuresome," "resourceful," and "innovative;" as someone who displays "very good judgment," "a strong planner who respects and produces high-quality results;" "very proactive and solutions-oriented;" and whose "quality, attention to detail and accuracy are exemplary."

Despite the positive nature of Plaintiff's written evaluation, Keen chose to focus in on the few areas where her supervisor expressed criticism about her work performance. In the 90-day evaluation, Boyer noted that there was "still room for improvement;" that "there can never be enough positive attitude;" that Plaintiff would "develop more finesse as the position becomes more familiar;" and advised Plaintiff to "let the minor, unimportant things go." Plaintiff responded to the 90-day

evaluation in writing by stating, "I would have to say that, overall, I am disappointed with the results of my evaluation."

By June of 1998, approximately six months after Plaintiff was initially hired and six months prior to the subject promotions were awarded to Ms. Roberts and Ms. Sandusky, Keen's dissatisfaction with her job at DPT was apparent. Among other signs of discontent, Plaintiff engaged in a full-fledged job search for a new position at another place of employment. Between June 1, 1998 and the time of Plaintiff's resignation, Keen sent her resume to 47 different employers in response to job postings.

Plaintiff's dissatisfaction with her job at DPT appears to have stemmed from her disappointment with the 90-day evaluation given to her by Boyer. In addition, Plaintiff possessed a general mistrust of DPT, her direct supervisor, Doni Boyer, and the Director of Curriculum and Development, Gary Achilles. Plaintiff's discontent and distrust are well documented in a personal journal she started keeping a few weeks after she began working at DPT.

By way of example, Plaintiff's first journal entry, dated 12/97, describes a discrepancy between the \$31,500 yearly salary PIC had earmarked for her position in the DPT/PIC Contract and the \$27,500 yearly salary DPT was actually paying Plaintiff. Plaintiff insists that DPT was billing PIC the full salary of

\$31,500 and pocketing the difference. According to Plaintiff, DPT was "stealing \$4,000 from [her] and defrauding the government via PIC." However, an exhibit attached to Plaintiff's motion opposing summary judgment establishes that DPT invoiced PIC \$36,879.65, representing 16 months of Plaintiff's salary at \$27,500 a year.

Plaintiff received her first annual evaluation from Boyer on December 4, 1998 and was again dissatisfied with the results. In her evaluation of Plaintiff, Boyer described Keen as "a role model" of reliability, who "enjoys learning and always asks clarifying questions." Boyer rated Plaintiff's job knowledge as "outstanding," and wrote of Keen, "Ellen is a stickler with her students - just as she is when it comes to the quality of her own work," and "Ellen has done a great job of growing into her position." However, Plaintiff was not appeased, characterizing Boyer's comments as "annoying," and stating that Boyer's "positive remarks were interlaced with patronizing, condescending ones."

Plaintiff also details events occurring the first week of July 1998 when she believed DPT pressured her to commit insurance fraud. The incident involved a DPT student who was injured when a chair she was sitting on in one of DPT's classrooms collapsed under the student's weight. Plaintiff alleges that Gary Achilles, the Director of Curriculum and

Development, and later Doni Boyer, Plaintiff's immediate supervisor, insisted that Keen change her written notes describing the incident to conform to an insurance form which Achilles was preparing. The requested change concerned referring to a replacement chair for the injured student as "supportive" as opposed to Plaintiff's chosen word of "sturdy." After Plaintiff expressed her concern over this request, both Achilles and Boyer dropped the matter with Plaintiff. Nonetheless, Plaintiff continued to be troubled by these events, writing in her personal journal that she was convinced that she would be fired for not complying with her supervisors' request.

The Court explains in some detail the events occurring prior to Plaintiff not being selected for promotion only to note that Plaintiff's many and varied complaints do not specify that age discrimination played a factor in the objectionable employment conditions to which Keen perceived she was subjected and which evidently caused her unhappiness at DPT. In short, Plaintiff's personal journal establishes that she was not happy at her job, distrusted her employers and never anticipated to remain at DPT long before she was ever passed up for the promotions in January and March 1999.

When Plaintiff first became aware that she had not been considered for the position of Director of Career Services in January 1999, she expressed her disappointment to Boyer. While

Plaintiff did not verbalize to Boyer her concerns of being passed over for promotion in favor of a younger employee, Keen noted in her personal journal, "Karen [Roberts] is much younger than I and, therefore, could not have as much qualifying experience as I. She has worked at DPT for less time than I. She has less education than I - a B.S. in Finance. I don't understand how with this kind of background, [DPT] could have thought she was more qualified than I, and I find it all very curious."

When Plaintiff became aware that she was not considered for promotion a second time, for the position of Student Relations Coordinator, Keen was so upset she lost sleep for several days. Plaintiff first learned the news through office gossip on Friday, March 25, 1999 and was officially informed by DPT the following Monday. Plaintiff's stronger reaction to not being selected a second time was due in part to the fact that Paula Sandusky, who was awarded that promotion, would become her immediate supervisor.² For Plaintiff, this meant that she would have to take direction from an individual in her mid-twenties, who Plaintiff perceived as less qualified than she.

On the Monday that Plaintiff was officially informed by Defendant that Ms. Sandusky would be assuming the Student Relations Coordinator position, Plaintiff was given a

2. The position of Student Relations Coordinator was previously held by Doni Boyer, Plaintiff's immediate supervisor. As a result of Paula Sandusky assuming Boyer's position, Ms. Sandusky would become Plaintiff's new supervisor.

disciplinary warning by the Head of Human Resources, Kathy Friant, and by Boyer, who would remain Plaintiff's immediate supervisor until Ms. Sandusky officially assumed her new position as Student Relations Coordinator. Friant and Boyer expressed concern that Plaintiff was violating the customer service environment at DPT because Keen had been closing her office door. In addition, Plaintiff was cited for "disrupting flow of work in other departments through excessive display of negative attitude" because Keen took "time away from staff and department heads by frequently discussing discontent with school and personal issues." Boyer and Friant asked Plaintiff to sign a "Disciplinary Warning Notice" and told Keen that she could reply in writing to DPT's charges.

Plaintiff responded to DPT's disciplinary action the very next day, on March 30, 1999, by filing a formal complaint with the EEOC in the form of a letter alleging that DPT had engaged in age discrimination by passing Plaintiff over for two promotions. A copy of this letter was handed to Boyer by Plaintiff, who stated that it was in response to the disciplinary warning.

After Plaintiff filed her formal complaint with the EEOC, she continued to work as a Case Manager with DPT for a period of four months, a period of time during which Keen claims to have been subjected to retaliatory conduct by DPT. Plaintiff

submitted a second letter to the EEOC in May 1999 in which she complains that DPT retaliated against her on two occasions; first, when DPT accused Plaintiff of a huge overage in connection with Keen's use of DPT's photocopy equipment and second, when DPT verified an expense voucher Plaintiff had submitted to DPT.

In her brief filed in connection with the instant motion, Plaintiff alleges numerous other incidents of retaliatory conduct. For Plaintiff, the straw that broke the camel's back occurred during a faculty meeting when Karen Roberts, who received the first promotion in January of 1999, "proceeded to chew [Keen] out in front of everyone who was in attendance," concerning a difference of opinion the two women had over cancelling classes to accommodate a job fair for DPT students. Plaintiff was so distraught at Ms. Roberts' outburst, she returned to her office at the conclusion of the meeting and typed out her resignation.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "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). When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993,

994, 8 L. Ed. 2d 176 (1962). While all inferences are to be drawn in Plaintiff's favor, the Court need not indulge all possible inferences. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1082 (3d Cir. 1992) (citing Henn v. National Geographic Soc'y, 819 F.2d 824, 830 (7th Cir. 1987)).

III. DISCUSSION

The ADEA prohibits age discrimination in employment against an individual over age 40. 29 U.S.C. § 623(a)(1). "Because the prohibition against age discrimination contained in the ADEA is similar in text, tone, and purpose to the prohibition against discrimination contained in Title VII, courts routinely look to law developed under Title VII to guide an inquiry under the ADEA." Barber v. CSX Distrib. Servs., 68 F.3d 694, 698 (3d Cir. 1995) (citations omitted). Thus, the Court follows the evidentiary framework first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and subsequently refined in Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Under this framework, a prima facie case creates an inference of unlawful discrimination. The burden of production then shifts to the employer who can dispel the inference by articulating a legitimate, nondiscriminatory reason for its actions. If the employer meets this burden, the employee must then prove by a preponderance of the evidence that the

articulated reasons are a pretext for discrimination. Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 n.1 (3d Cir.2001).

A. Failure to Promote

1. Prima Facie Case

In order to make out a prima facie case of discrimination for failure to promote, a plaintiff must ordinarily show: 1) that he belongs to the protected class, 2) that he applied for and was qualified for the job, 3) that despite his qualifications he was rejected, and 4) that the employer either ultimately filled the position with someone sufficiently younger to permit an inference of age discrimination or continued to seek applicants from among those having plaintiff's qualifications." Barber, 68 F.3d at 698 (quoting Fowle v. C & C Cola, 868 F.2d 59, 61 (3d Cir. 1989)).

It is undisputed that Plaintiff was 50 years of age when she was not selected for the promotions in question and the successful candidates were in their early twenties and thirties. Therefore, Plaintiff has met prongs one and four of the prima facie test.

However, Defendant asserts that Plaintiff did not apply for either of the available promotions nor did Defendant consider her for either position. Furthermore, because Plaintiff did not apply for and was not considered for the subject promotions, Defendant did not reject Plaintiff as a candidate for the

positions in question. Therefore, Defendant argues, Plaintiff fails prongs two and three of the prima facie test.

DPT readily admits that it did not post either position and acknowledges that Plaintiff was not aware of the positions in question until after other, younger candidates had been selected. It appears that DPT used no formal procedures for posting notice of available promotions or for determining who was to be offered such promotions. The Third Circuit recognizes that such informal and secretive procedures are suspect, both because important information may not be available to those individuals who are members of a protected class and because such procedures place no check on individual biases. Therefore, a relaxation of the application element of the prima facie case is appropriate when an employer's promotion procedures are informal, secretive and subjective. See EEOC v. Metal Serv. Co., 892 F.2d 341, 350 (3d Cir. 1990); see also Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 797 (11th Cir. 1988) ("when the failure to promote arises out of an informal, secretive selection process . . . a plaintiff may raise an inference of intentional, racially-disparate treatment without proving he technically applied for, and failed to obtain, the promotion."); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133 (11th Cir. 1984) ("a plaintiff makes out a prima facie case -- that is, he creates a presumption of discrimination and forces the employer to articulate legitimate

reasons for his rejection -- as long as he establishes that the company had some reason or duty to consider him for the post"). Thus, given that DPT did not post notice of the availability of the promotions at issue, Plaintiff is not required to have applied for the promotions as part of her prima facie case.

Similarly, the fact that DPT did not formally reject Plaintiff for the subject promotions because DPT did not consider her for the positions in question, will not defeat Plaintiff's prima facie showing. There is no discernable reason why Defendant should have considered Karen Roberts, who was promoted to Director of Career Services, and Paula Sandusky, who was promoted to Student Relations Coordinator, but not considered the Plaintiff. Despite DPT's argument that Keen was not qualified for either promotion because Plaintiff lacked marketing and sales experience, the record arguably supports Plaintiff's position that she possessed relevant work experience and superior academic credentials to that of Ms. Roberts and Ms. Sandusky, who both possessed less seniority than Plaintiff. Accordingly, the Court finds that Plaintiff has made out a prima facie case of failure to promote age discrimination.

2. Legitimate Nondiscriminatory Reason

Once a plaintiff establishes a prima facie case, the law creates a presumption of unlawful discrimination, and the defendant employer must articulate a "legitimate

nondiscriminatory explanation for the employer's adverse employment action." Seman v. Coplay Cement Co., 26 F.3d 428, 432 (3d Cir. 1994). If the employer puts forth a legitimate business explanation, "then the presumption of discriminatory intent created by the employee's prima facie case is rebutted and the presumption simply 'drops out of the picture.'" Id. (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993)).

Defendant asserts that its primary reason for not considering Plaintiff for the promotions was that Keen was performing well as a PIC-funded Case Manager pursuant to a contract with PIC that did not expire until May 1999, long after the two positions that Plaintiff claims she should have been considered for were filled in January and March 1999. The DPT/PIC Contract was a lucrative endeavor that earned DPT substantial amounts of money. DPT believed that Plaintiff's performance as Case Manager of PIC-funded students was important to the continued success of DPT's PIC-funded programs and did not wish to disrupt Plaintiff's ongoing management of PIC-funded students by moving her to a different position.

The Court notes that Plaintiff was not a party to any contract between DPT and PIC. Subsequent to the hiring of Plaintiff, however, DPT did name Keen as the Case Manager responsible for managing PIC-funded students in a new contract

DPT had proposed to PIC and PIC later approved. PIC required the names of all DPT staff providing services under the contract before invoices would be paid for PIC-funded salaries.

Defendant also maintains that the individuals ultimately selected for the promotions were the best candidates for the job and cite several arguably legitimate considerations that it maintains factored into the determination. According to DPT, both the Director of Career Services position and the Student Relations Coordinator position required sales and marketing experience, experience which Defendant asserts Plaintiff was lacking.

3. Pretext

In this final stage, Plaintiff now has an opportunity to show that the legitimate reasons proffered by the employer were pretexts for what, in reality, was a discriminatory motivation. See Simpson v. Kay Jewelers, 142 F.3d 639, 644 n.5 (3d Cir. 1998); see also Jackson v. University of Pittsburgh, 826 F.2d 230, 232 (3d Cir. 1987). In the context of summary judgment, this means the plaintiff must present evidence "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).

As noted above, in its brief moving for summary judgment, Defendant has articulated two reasons for not considering Plaintiff for promotion: (1) DPT did not wish to disrupt Plaintiff's ongoing management of PIC-funded students by moving her to a different position; and (2) Plaintiff did not possess the requisite sales and marketing experience necessary for either position. In addition, Plaintiff has combed the record and extracted two more reasons that Defendant appears to have asserted for failing to promote Plaintiff: (3) Plaintiff is at fault because she did not create a new position for herself; and (4) Plaintiff's negative attitude precluded her from consideration.

a. Necessity of Keeping Plaintiff as PIC-funded Case Manager

Plaintiff criticizes Defendant's assertion that she was not promoted because DPT needed her to continue as a PIC-funded Case Manager in order to ensure the success of the DPT/PIC Contract. First, Plaintiff distorts Defendant's articulated reason and asserts that it is DPT's position that Plaintiff was doing such a good job in her capacity as a PIC-funded Case Manager that there was no reason to promote her. Next, in order to demonstrate that Defendant's articulated reason, as characterized by Plaintiff, is not credible, Plaintiff argues that DPT did not in fact believe Keen was performing well as a PIC-funded Case Manager, pointing to the 90-day and annual

performance evaluations, which according to Plaintiff, were not excellent. Plaintiff also points to a memorandum entitled "Inappropriate/Unprofessional behavior witnessed and supported by DPT personnel" in which Doni Boyer noted that "Ellen only received a 4% raise due to negative attitude - She has some very good qualities for her position. Had she exhibited a positive, professional, attitude with flexibility, she would have received the full 5% raise."

Plaintiff contends that it is totally incongruous that she could be so good at her job, and at the same time, have such a negative attitude. Therefore, Plaintiff argues, because the evaluations and the memorandum are inconsistent with Defendant's position that Plaintiff's work as a PIC-funded Case Manager was valued and part of the reason for the success of the DPT/PIC Contract, DPT's articulated reason is not worthy of credence.

The Court notes that Plaintiff's characterizations, although seemingly innocuous, appear to be an attempt by Plaintiff to create a false discrepancy. Defendant never maintained that Plaintiff performed her job with perfection. By the same token, Defendant never declared that Plaintiff's job performance was substandard. Rather, Defendant merely did not want to move Plaintiff from the position of a PIC-funded Case Manager because she was doing a fine job in that capacity and DPT "needed to keep her right there doing that." According to

Defendant, Case Managers were difficult positions to fill and retain and Plaintiff was part of the reason for the success of the DPT/PIC Contract and that is the reason that Plaintiff was not considered for either promotion.

In short, the fact that Plaintiff was personally dissatisfied with her performance evaluations and received a 4% as opposed to a 5% salary increase because of a negative attitude does not "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for [the asserted] non-discriminatory reasons." Fuentes, 32 F.3d at 765 (internal quotation omitted).

b. Plaintiff's Lack of Sales and Marketing Experience

Plaintiff also questions Defendant's assertion that she lacked essential sales and marketing experience necessary to obtain either promotion. In the fields of career counseling and job placement, "marketing" relates to promoting students to prospective employers and "sales" refers to placing students in permanent positions. Ultimately, sales and marketing skills were essential to ensure that DPT students were happy and satisfied so that they would refer other people to DPT for training.

Plaintiff does not dispute that sales and marketing experience were necessary preconditions to obtaining the promotions in question. Rather, Plaintiff asserts that she has a wealth of experience doing the precise type of sales and marketing that Defendant required for the subject promotions.

DPT reserves for itself the power to decide whether an employee possesses sufficient sales and marketing experience to handle the career counseling and job placement functions important to the promotions in question. The Third Circuit has stated that "barring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to a certain position." Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 527 (3d Cir. 1992) (citations omitted).

"When an employer relies on its subjective evaluation of the plaintiff's qualifications as the reason for denying the promotion, the plaintiff can prove the articulated reason is unworthy of credence by presenting persuasive comparative evidence that non-members of the protected class were evaluated more favorably, i.e., their deficiencies in the same qualification category as the plaintiff's were overlooked for no apparent reason when they were promoted[.]" Ezold 983 F.2d at 531.

Here, Plaintiff offers her resume in comparison with the resumes of Ms. Roberts and Ms. Sandusky, those ultimately chosen for the promotions, to establish that the criterion relied upon by DPT was merely a pretext for discrimination. Plaintiff's resume indicates that she "counseled academically and/or economically disadvantaged adults and youth regarding career decision-making." Keen also had experience in "screen[ing] applicants for referral to appropriate training and/or employment." The experience Plaintiff acquired at DPT included largely administrative skills involved with the management of students secured through PIC funding, including completing of all paperwork, attending PIC meetings, and taking daily attendance. Although job responsibilities of the PIC Case Manager position included counseling and job development aspects, Plaintiff was not primarily responsible, if at all, for promoting DPT students to prospective employers and placing students in permanent positions, an essential function of the promotions in question.

Karen Roberts' experience included employment at Olsten Financial Staffing where she was responsible for recruiting, screening, interviewing, evaluating, and placement of para-professional and professional financial candidates. At Olsten Financial Staffing, Roberts placed as many as 100 clients in positions of employment. Paula Sandusky's experience included employment as a Placement Specialist at Contemporary Staffing

Solutions where she recruited potential applicants through resume screening, job fairs and internet searches; interviewed candidates for administrative and clerical positions; managed employee job placement, and maintained an active database through reactivation of and continuous contact with registered employees.

Based upon this evidence, Plaintiff has not shown that she compares favorably in the category of sales and marketing with either of the two successful, younger candidates, and therefore has failed to show that DPT did not pass her over for the legitimate reason it asserted. Consequently, she loses the benefit of the inference of unlawful discrimination that arises when the employer's legitimate articulated reason is shown not to be the real reason for the employer's discriminatory action. Absent that inference, Keen cannot prevail unless she has produced direct evidence independently sufficient to show discriminatory animus, and this, Plaintiff has not done.

c. Plaintiff's Failure to Create a New Position

Plaintiff tries to reinforce her claim of pretext by relating a discussion occurring between herself and her supervisor, Doni Boyer, in which Boyer told Plaintiff that it was Plaintiff's own fault she was still at the same entry-level position for which she had been hired, because she had failed "to create a new position" for herself. This conversation took place immediately after Plaintiff became aware that Karen Roberts was

promoted to the Director of Career Services position, when Plaintiff met with Boyer to discuss her disappointment at not being considered for the promotion. In her brief in opposition to summary judgment, Plaintiff identifies four DPT employees who were successfully promoted by Defendant without having to create new positions for themselves. Plaintiff argues that this disparity evidences DPT's unfair treatment toward her.

There is no indication that the comments by Boyer were a policy pronouncement of DPT. Rather, Boyer's inadequate response to Plaintiff's inquiry as to why she did not receive the promotion in question merely explained to Plaintiff how Boyer, herself, advanced at DPT. Accepting that Boyer told Keen that she must create a new position in order to receive a promotion at DPT does not demonstrate that Defendant's other articulated reasons (i.e., that DPT needed to retain Keen in the capacity of a PIC-funded Case Manager pursuant to the DPT/PIC Contract or that Plaintiff lacked sales and marketing experience) are pretextual. Plaintiff is attempting to bring oranges into the apple cart by extracting miscellaneous statements from the record to show weaknesses in the Defendant's proffered legitimate reasons. It has never been Defendant's position that Plaintiff was not promoted because she failed to create a new position for herself. Plaintiff testified at her unemployment compensation hearing that aside from Boyer's offhanded comment, no one at DPT

had ever told her that she would need to create a new position in order to advance in the company. Boyer's remark, standing alone does not call into question DPT's articulated reasons for passing Plaintiff over for promotion.

d. Plaintiff's Negativity

Plaintiff also pulls from the record Doni Boyer's deposition testimony in which Boyer stated that Plaintiff's negativity, her lack of a "can-do" attitude and her failure to give 150 percent were all reasons why Boyer would not recommend Plaintiff for a promotion into any position anywhere in the company. Plaintiff asserts that Boyer's statement is in direct contradiction to DPT's previously articulated reason that Keen was not promoted because she was doing such a good job as a PIC-funded Case Manager that Defendant would not consider moving her from that position and disrupting her work in the midst of managing the DPT/PIC Contract. Thus, Plaintiff argues, this contradiction warrants the inference that Keen's age was a factor in DPT's failure to promote her.

From the early stages in Plaintiff's employment with DPT, Boyer counseled Plaintiff that there was "still room for improvement;" and that "there can never be enough positive attitude." Boyer later issued an official disciplinary warning notice to Plaintiff citing Keen's "excessive display of negative attitude." It is evident from the record, that Plaintiff's

negative attitude proportionally increased as her job satisfaction decreased.

The fact that Plaintiff's immediate supervisor would not recommend Plaintiff for a promotion because of her negative attitude does not translate into an act of age discrimination, nor does it corroborate Plaintiff's theory of pretext . Boyer's comment merely expresses Boyer's opinion that Plaintiff was a chronic complainer and lacked a can-do attitude, and therefore, that Plaintiff was not a good candidate for a promotion. Furthermore, although Boyer was Plaintiff's immediate supervisor, she had no direct decision making authority with respect to who received promotions at DPT. This was particularly so in the case of the Director of Career Services, a position in a different department than for which Boyer had supervisory responsibilities.

In short, Plaintiff does not point to direct or circumstantial evidence from which a fact finder would reasonably disbelieve Defendant's articulated reasons that it did not want to disrupt Plaintiff's ongoing management of PIC-funded students and the lucrative contract thereunder or that Plaintiff lacked the requisite sales and marketing experience. Furthermore, Plaintiff has not established that an invidious discriminatory reason was more likely than not the determinative cause of its actions. Therefore, Plaintiff's claim of discrimination in violation of the ADEA is dismissed.

B. Retaliation

In order to make out a prima facie case of retaliation, Plaintiff must show (1) that she opposed unlawful employment practices or engaged in activity protected by the ADEA; (2) that Defendant took adverse action against her; and (3) that a causal link exists between the protected activity or opposition and the employer's adverse action. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997).

1. Protected Activity

Defendant does not contest that Plaintiff engaged in a protected activity when she filed an administrative complaint with the EEOC. However, Plaintiff asserts that her discussion with her then supervisor, Doni Boyer, in January 1999, in which Plaintiff raised concerns at being passed over for the position of Director of Career Services, constituted an informal protest of discriminatory employment practice entitled to protection under the ADEA. This designation is important because, if warranted, all conduct engaged in by DPT after January 1999 would be analyzed to ascertain whether Plaintiff was subjected to adverse employment action as opposed to considering only the events occurring after March 30, 1999, when Plaintiff filed her first EEOC complaint.

The ADEA provides that a person has engaged in "protected conduct" when she opposes discrimination on the basis

of age. See 29 U.S.C. § 623(d). When Plaintiff complained to Boyer after not being selected for the position of Director of Career Services, Plaintiff expressed that she felt unappreciated, under-utilized and under-compensated for what she knew and for what she was capable of accomplishing. However, this conversation does not explicitly or implicitly allege that age was the reason for the alleged unfairness. "A general complaint of unfair treatment does not translate into a charge of illegal age discrimination." Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995). Accordingly, Plaintiff's conversation with Boyer cannot constitute the protected activity for which after occurring adverse employment actions are measured. Therefore, only DPT's conduct occurring after the filing of Plaintiff's EEOC complaint will be analyzed with respect to Plaintiff's allegations of retaliation.

2. Adverse Employment Action

To be adverse action, conduct must be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment[.]" Robinson, 120 F.3d at 1300. "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. (citations omitted). Plaintiff claims that she was

the victim of numerous acts of retaliation in response to her filing a formal complaint of discrimination with the EEOC, none of which the Court finds rise to the level of adverse employment action.

First, Plaintiff complains that an administrative employee called her on May 6, 1999 concerning more than 7000 copies charged to her photocopy machine code in a week's period. Plaintiff's position is that she did not make the copies and that the overage and subsequent accusation of misusing her photocopy privileges was a purposeful act engaged in by DPT in retaliation for filing her EEOC complaint. However, there is nothing to suggest that the matter was not entirely dismissed after Keen explained that she did not and could not have made the copies in question because she was out of the office at the time the copies were made.

Plaintiff also complains that, on the same day as the photocopy incident, Doni Boyer returned an approved expense reimbursement form, with the name "Mike," the word "Unity," and the number symbol written on the bottom of the expense reimbursement form. Plaintiff assumed that Boyer had called someone named Mike at Unity District CAO, where Plaintiff had spent the day recruiting, to verify her whereabouts as claimed on the voucher. Plaintiff argues that DPT had never before verified her whereabouts and did so on this day to humiliate her as a form

of retaliation for filing her EEOC complaint. However, Plaintiff subsequently admitted in her deposition that she had no basis for her assumptions other than speculation. Plaintiff never knew why the word "Mike," the word "Unity" and the number symbol appeared at the bottom of her expense reimbursement form. Defendant claims that it was not checking up on Plaintiff but that Boyer had used Plaintiff's expense reimbursement form to jot down a phone number while she was on the phone. However, even if Defendant was checking up on Plaintiff, there is nothing in the record which indicates that DPT acted inappropriately. The expense voucher was approved by Plaintiff's supervisor in a timely manner.

Plaintiff next complains that DPT relocated her office from the school's Northeast Philadelphia location to its campus in Center City, Philadelphia, effective June 6, 1999. According to the record, DPT was experiencing difficulty in recruiting a full class to attend DPT's Northeast campus at this time. If recruitment efforts remained unsuccessful, the new PIC contract would remain unexecuted and Plaintiff's position as the PIC-funded Case Manager would be eliminated. In an effort to save the PIC group contract, and consequently Plaintiff's job, DPT proposed relocating the PIC group program to DPT's Center City campus, which also meant that Plaintiff would be relocated.

Plaintiff was opposed to the transfer because of the distance and cost of commuting to Center City, Philadelphia. Despite the fact that DPT agreed to pay Plaintiff's \$225 monthly commuting expense, Plaintiff still felt that she was subjected to adverse employment conditions because DPT was placing her in a position where she had to accept charity. Plaintiff argues that the relocation and the subsequent rejection of her request to be transferred to a comparable position at the Northeast campus constituted retaliation on the part of DPT.

Changes in location may constitute adverse employment action under Title VII. See Collins v. Illinois, 830 F.2d 692, 703 (7th Cir. 1987). However, Plaintiff presents no evidence which supports a finding that the Center City campus was a less desirable location to perform her duties as Case Manager than the Northeast campus location. Furthermore, there is ample evidence which indicates that Plaintiff would have lost her job entirely if she was not willing to relocate to Center City because DPT was unable to recruit enough PIC-funded students to maintain a new class at the Northeast campus, a motive which Plaintiff does not dispute.

Plaintiff fails to establish how any of the above incidents, altered her compensation, terms, conditions, or privileges of employment. Plaintiff's myriad of other complaints

of retaliation similarly fail to meet the standard of adverse employment action. These include:

1) when Doni Boyer spoke loudly during a telephone conversation in which she allegedly told some unidentified person about matters discussed during the confidential meeting when Keen received her disciplinary warning, an act that Plaintiff claims was intended to humiliate her;

2) when Doni Boyer circulated an article entitle "Live the Law of the Farm" which propounds the principal "you reap what you sow," an article which Plaintiff claims was designed to make her uncomfortable;

3) when Kathy Friant stated at a meeting that people that had received promotions gave 150%, a comment which Plaintiff believes was directed toward her alone, despite the fact that there were six other people present at the meeting;

4) when Doni Boyer turned the thermostat down to between 65 and 69 degrees one afternoon in May causing Plaintiff's office to become freezing cold;

5) when Plaintiff was assigned "the hottest office" in the Center City Campus building, an office, which, due to a design flaw, did not contain an air-conditioning unit, and Keen's office reach a temperature of 85 degrees during a heat wave in July;

6) when Karen Roberts, who was not even aware of Plaintiff's EEOC complaint, "chewed out" Keen over a professional difference of opinion concerning whether classes should be cancelled to accommodate a job fair that DPT was sponsoring.

Thus, because Plaintiff was not subjected to any adverse employment action by Defendant following the filing of her EEOC complaint, Plaintiff has failed to make out a prima facie case of retaliation and said claim is dismissed.

C. Constructive Discharge

Constructive discharge requires a finding "that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). Plaintiff contends that she was compelled to submit her resignation citing the same alleged adverse employment actions that she uses to support her claims of discrimination and retaliation.

The Court finds that no inference could reasonably be drawn that Plaintiff had been harassed and then forced out of her job. "The employment discrimination laws require as an absolute precondition to suit that some adverse employment action have occurred. They cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1083

(3d Cir. 1992) (citing Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985)). Because the Court has already determined that Defendant's reasons for not selecting Plaintiff for promotion were legitimate and not a pretext for discrimination and that Plaintiff suffered no other adverse employment action, Plaintiff's constructive discharge claim must also be dismissed.

IV. CONCLUSION

Plaintiff has not shown that Defendant's articulated reasons for not considering her for promotion are pretextual. Furthermore, Plaintiff has not stated a prima facie case of retaliation, since her subjective perceptions with respect to her treatment at DPT do not rise to the standard of an adverse employment action. For the same reasons, Plaintiff's constructive discharge claim also fails. Accordingly, Defendant's Motion for Summary Judgment is granted.

An appropriate order follows.

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

ELLEN KEEN, :
 :
 Plaintiff, : CIVIL ACTION
 :
 v. : NO. 00-3758
 :
 D.P.T. BUSINESS SCHOOL :
 :
 Defendant. :

ORDER

AND NOW, this 9th day of January, 2002, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 15), Plaintiff's Amended Brief in Opposition thereto (Docket No. 25) and Defendant's reply (Docket No. 26) it is hereby **ORDERED** that Defendant's motion is **GRANTED**.

Judgment is entered in favor of Defendant D.P.T. Business School and against Plaintiff Ellen Keen.

This case is marked **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.