

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

PATRICIA A. LAMACCHIA,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD H. RUMSFELD,	:	NO. 00-CV-1439
SECRETARY OF DEFENSE,¹	:	
Defendant	:	

MEMORANDUM AND ORDER

SCHILLER, J.

October , 2002

I. INTRODUCTION

Pro se Plaintiff Patricia LaMacchia brought suit against her former employer as a result of her demotion and alleged discrimination and harassment at the Philadelphia branch of the Defense Logistics Agency. Defendant has now moved for summary judgment on all of Plaintiff's claims. For the reasons set forth below, Defendant's motion is granted.

II. BACKGROUND

A. Procedural Background

On March 20, 2000, Plaintiff filed this action pro se. In her complaint, she listed sexual harassment, sex discrimination, age discrimination, disability discrimination, and retaliation without any factual allegations. In light of the events that have befallen her, the Court gave Plaintiff every opportunity to state her case. The Court diligently sought counsel to take up Plaintiff's case,

1. Secretary Rumsfeld succeeded William S. Cohen as defendant in this action pursuant to Federal Rule of Civil Procedure 25(d).

although its efforts were ultimately unsuccessful. At the initial conference pursuant to Federal Rules of Civil Procedure 16, the Court permitted Plaintiff to discuss her allegations with the Court at length and instructed Plaintiff on what she should accomplish during discovery, recommending that she attempt to depose former co-employees. Similarly, the Court directed the Assistant United States Attorney to provide Plaintiff with all documents in the Government's possession concerning Plaintiff's current complaint, and all of her prior EEO complaints as well. Thus, Plaintiff possessed the names of all potential witnesses. Finally, the Court allowed Ms. LaMacchia to restate her allegations in the form of a more comprehensive amended complaint.

In her amended complaint, Plaintiff outlined several incidents, discussed below, that she considered the basis of her claims against Defendant. As Plaintiff appears without counsel, the Court liberally construes her amended complaint to include claims even if the applicable law is not explicitly referenced. *See Higgins v. Beyer*, 293 F.3d 683 (3d Cir. June 12, 2002). Thus, reading Plaintiff's amended complaint liberally, the Court determines that Plaintiff seeks recovery under theories of sex discrimination, including sexual harassment, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"). Although a claim of disability discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., appears only in Plaintiff's original complaint, I will consider the merits of this claim as well.

B. Factual Allegations²

2. The factual allegations set forth are developed from the record before the Court, consisting of: Plaintiff's Complaint, Plaintiff's Amended Complaint with attached affidavit, Defendant's Motion for Summary Judgment and exhibits annexed thereto, Plaintiff's Objection to Summary Judgment, and Defendant's Reply with exhibits attached thereto. The exhibits attached to

(continued...)

Plaintiff Patricia LaMacchia worked for the Defense Logistics Agency (“DLA”), a sub-component of the United States Department of Defense. In 1966, Plaintiff began as a clerk typist. With training, she advanced to the level of a Government Service Level (“GS”) 12 Program Analyst. (Def. Mem. in Supp. of Mot. for Summ. J., Ex. A., LaMacchia Dep. at 12-19.) In or around January of 1993, Plaintiff was assigned to a particular supervisor, Joseph Graziola. Plaintiff alleges that Mr. Graziola had a “long -term history of improper behavior” towards her, including calling her “big-chested” and “scared cow.” (Pl.’s Am. Compl. ¶4.) In addition, Mr. Graziola stated to another male co-worker that he voted Plaintiff “best milk farm.” (*Id.*) Plaintiff alleges that in March 1993, Mr. Graziola lowered her performance appraisal. Allegedly, Mr. Graziola could only give one “exceptional” rating as required by a quota system. As a result, he was lowering “every woman’s performance appraisal.” (LaMacchia Dep. at 64.) At the same time, Ms. LaMacchia contends that Mr. Graziola lowered her performance appraisal because he decided to reserve the exceptional rating for Ms. Kathy Brydges. Plaintiff contends that Mr. Graziola and Ms. Brydges were having a sexual relationship at the time. (Pl.’s Am. Compl. ¶ 5.) Plaintiff asserts that Mr. Graziola asked her to refrain from saying that Ms. Brydges was not qualified for the position in exchange for an exceptional rating. As result of her refusal, Mr. Graziola threatened retaliation. Plaintiff complained to other supervisors and was thereafter labeled a “rat” in her department. During this time, Plaintiff

2. (...continued)

Defendant’s Motion for Summary Judgment and its Reply include Plaintiff’s Deposition, the Final Agency Decision of the Defense Logistics Agency in the Discrimination Complaints of Ms. Patricia LaMacchia, the Declaration of Martin Durlacher, the Declaration of William Ennis, an affidavit from Shannon McCarthy, Acting Clerk of the United States of America Merit Systems Protection Board, the Declaration of Charles McAleer, and the Declaration of James Brennan with exhibits.

alleges she was also passed up for a promotion over a lessqualified male employee. (Pl.'s Am. Compl. ¶¶ 5-8.)

In or around June of 1994, a Reduction in Force ("RIF") took place that affected Plaintiff's position. Plaintiff alleges that Mr. Graziola's conduct, specifically the lowering of her performance appraisal, affected her position when the RIF took place. (LaMacchia Dep. 61-63.) Despite these feelings, she was offered and voluntarily accepted a GS-7 Management Assistant position with the Industrial Analysis Support Office ("IASO"). (LaMacchia Dep. at 52-53; Def. Mem. in Supp. of Mot. for Summ. J., Ex. D, Ennis Decl. ¶ 11-12, 16.)

Plaintiff claims that she made "informal complaints" regarding the harassment, discrimination and subsequent downgrade to Mr. Nick Verna, a manager in charge of implementing the RIF. Plaintiff contends that she requested that Mr. Verna file an Equal Employment Office ("EEO") complaint on her behalf. (Pl.'s Am. Compl. ¶ 9; LaMacchia Dep. 28-37.) Plaintiff did not, however, contest her downgrading before the Merit Systems Protection Board. (Def. Mem. in Supp. of Mot. for Summ. J., Ex. E., McCarthy Decl. ¶ 1.) Plaintiff also claims that Mr. Verna "deceived" her into believing that her EEO complaints would be filed and that she would be placed in the first available higher grade position. Plaintiff claims that the RIF decision that demoted Plaintiff to a GS-7 was age and sex based discrimination. (LaMacchia Dep. at 30-34.) In August of 1994, Plaintiff discovered that Mr. Verna had left government employment and had not filed her EEO complaints. Despite encouragement from a supervisor and the EEO office, Plaintiff did not file a formal complaint regarding the harassment, discrimination, or the RIF decision. (LaMacchia Dep. at 30, 35-40, 61; Durlacher Decl. ¶6; McAleer Decl. ¶10.)

While working at the IASO, Plaintiff worked as a Management Assistant. Plaintiff was aggrieved at the clerical nature of her position and sought to upgrade her duties and her GS-level. (Pl.'s Am. Compl. ¶ 3.) Plaintiff contends that she asked supervisors for training and an upgrade of her position. (*Id.*) Additionally, Plaintiff contacted union representatives and her Congressman regarding her demotion. (Pl.'s Compl. at 1.) In December of 1994, Plaintiff alleges that Ms. Brydges was selected for a GS-12/13 position. Plaintiff claims that she was qualified for the position for the position and had applied for it. (Pl.'s Am. Compl. ¶ 16.) She also alleges that she told Mr. Charles McAleer, Deputy Director of the IASO, that she was going to file an EEO complaint because she was not considered for this position. In April 1995, Plaintiff learned that William Ennis, the Director of the IASO, was giving another Management Assistant, Rose Veteri, who is ten years younger than Plaintiff, "job duties and TDY assignments" that she was not getting. (Def. Memo, Ex. B, Final Agency Decision of the Defense Logistics Agency in the Discrimination Complaints of Ms. Patricia A. LaMacchia ("DLA Decision") at 3.) On June 14, 1995, the Deputy Director Charles McAleer, allegedly said to Plaintiff, "[y]ou should quit and go to work for your cousin at his produce stand," and, "[y]ou better look around for a job because there is no chance for you around here." (*Id.*) On another occasion, Mr. Ennis was angered by the lack of phone coverage in the office. At a meeting to address this issue, Plaintiff alleges that she was singled out and humiliated by Mr. Ennis. (Pl.'s Am. Compl. ¶ 23.) Plaintiff became very upset by Mr. Ennis and talked to Mr. McAleer about her treatment. During this conversation, Plaintiff alleges that Mr. McAleer "began inappropriately touching his private parts," but said he would speak to Mr. Ennis. (*Id.* ¶ 24.)

On July 20, 1995, Plaintiff attended a training session conducted by Thomas Corey. Mr. Corey allegedly rapped Plaintiff on the shoulder with a rolled up pamphlet to get her attention.

Later, when she complained of this incident, she was approached Mr. Corey's supervisor. Mr. Corey's supervisor allegedly asked Plaintiff if she had a "hard on" for Mr. Corey. (*Id.*) Shortly thereafter, Plaintiff overheard Mr. Corey making remarks, as well as kissing and smacking sounds, at another female employee. (*Id.*) Later that month, Plaintiff alleges that Charles Pagliotti, a co-worker, verbally abusive to her when he was showing her how to fix her computer, saying "I am talking to you . . . [t]urn around. . . [l]ook at me." (LaMacchia Dep. at 197.) On another occasion, Plaintiff alleges that the Director said in a loud voice to the supervisor while gesturing toward Plaintiff, "I thought I told you to get this thing out of here and under control." Later, Plaintiff's supervisor, Mr. Martin Durlacher, told her that co-workers saw her walking in areas where she did not work and that her team members were afraid of her.

On October 13, 1995, Plaintiff was denied access to the front office computers where she worked, after she saw an e-mail message put out by Mr. Ennis, telling Plaintiff's supervisor and team leaders not to discuss any matters about Plaintiff to the visiting personnel management. (DLA Decision at 3-5.) Later that month, Plaintiff's temporary supervisor changed her work priorities and assigned her to make Xerox copies and distribute by 3 p.m. While she was completing this task, several co-workers made comments such as, "[y]ou're the highest paid Xeroxer in DLA," "[h]ere's the Xerox lady again," and, "[a]re you being punished again?" (*Id.*) Her temporary supervisor also told her that she could not meet with her EEO Counselor that day. (*Id.*) Although her team leader informed her at the 1994 performance rating session that she was going to get more meaningful assignments, she was never given any. On November 22, 1995, she filed a formal EEO complaint for sexual harassment and reprisal regarding the incident with Mr. Corey. In December 1995, her

performance rating came out with a “minimally acceptable” rating and her team leader began questioning her about the amount of time spent on her EEO complaint.

On January 24, 1996, she became aware that a new position of Budget Analyst, GS-560-09, for the IASO Support Team had been created and filled by the Director, IASO. The Director allegedly placed Rose Veteri into this positions without advertising it through a Job Opportunity Announcement (“JOA”). (*Id.*) On February 13, 1996, her team leader, James Brennan, yelled and was enraged when he caught Plaintiff sitting at his desk and looking at his e-mail. (*Id.*) In or around May 15, 1996, the building was evacuated because of a bomb scare. Employees were told to leave the building and try to return by 1:00 p.m. Plaintiff did not return until about 3:00 p.m. On May 16, 1996, Mr. Brennan told Plaintiff that she would receive a letter of reprimand because of her absence from her job without permission. Plaintiff alleges that other male employees were absent for this time but were not similarly reprimanded. (*Id.*)

After the May 16, 1996 incident, Plaintiff took sick leave because of the alleged emotional distress that she suffered from the discrimination. (Pl.’s Am. Compl., attached Pl.’s Aff. at 35.) In June of 1996, Plaintiff filed another formal EEO complaint claiming that between April, 1995 and May 16, 1996, she was subjected to: (1) reprisal; (2) sex discrimination, including sexual harassment; and (3) age discrimination regarding the promotion of Rose Veteri. The DLA consolidated her two formal complaints, investigated, and rendered a final decision. Thereafter, Plaintiff filed her suit pro se against her former employer.

III. DISCUSSION

Defendant moves for summary judgment on all of Plaintiff's claims. First, Defendant asserts that several of Plaintiff's claims are barred because they are untimely. Second, Defendant argues that Plaintiff fails to make a prima facie case on the remainder of her claims. For the reasons stated below, I grant summary judgment on all of Plaintiff's claims.

A. The Standard for Summary Judgment

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine issue" of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Materiality of the facts at issue is determined by the substantive law. *Id.* In making this determination, the non-moving party is entitled to all reasonable inferences and the evidence is viewed in the light most favorable to that party. *See Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

The party moving for summary judgment has the initial burden of showing the basis for its motion by identifying those portions of the record that it believes shows the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party has the burden of proof on a particular issue at trial, the moving party meet its burden by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. Once the moving party meets this burden, the non-moving party bears the burden of demonstrating that there are disputes of material fact that should proceed to trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In order to meet this

burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, general denials, or vague statements in the pleadings. *See Celotex*, 477 U.S. at 324, *see also Calter v. Henderson*, Civ. A. No. 99-5736, 2001 WL 1496450, 2001 U.S. Dist. LEXIS 19187, at *4 (E.D. Pa. 2001) (citing *Trap Rock Indus., Inc. v. Local 825*, 982 F.2d 884, 890 (3d Cir. 1992)). Summary judgment will be appropriate if the non-moving party fails to make a factual showing “sufficient to establish an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322.

In this case, Plaintiff, the non-moving party, proceeds pro se. Courts generally give pro se plaintiffs more leeway in their pleading requirements. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even allowing for a less stringent standard, however, a non-moving party proceeding pro se must still “adduce through affidavits or otherwise ‘more than a scintilla of evidence’ that a material fact remains in dispute” and “point to some affirmative evidence in the record that substantiates his claim” in order to overcome a motion for summary judgment. *See Astree v. U.S. Dep’t of Justice, Bureau of Prisons*, Civ. A. No. 98-188, 1999 WL 94621, 1999 U.S. Dist. LEXIS 112, at *14-17 (E.D. Pa. Jan. 8, 1999) (quoting *Pearson v. Vaughn*, 984 F. Supp. 315, 316 (E.D. Pa. 1997)); *Keshaw v. Aspin*, Civ. A. No. 94-216, 1994 WL 683384, at *2 (E.D. Pa. Dec. 5, 1994) (holding that pro se plaintiff must “com[e] forth with some evidence to rebut defense affidavits that refute her claims” to withstand motion for summary judgment); *cf. Jackson v. Dana Corp.*, Civ. A. No. 98-5431, 1999 WL 1018241, at *5 n.6, 1999 U.S. Dist. LEXIS 17380 (E.D. Pa. Nov. 9, 1999) (stating that less stringent construction of pro se litigant’s opposition to summary judgment is unnecessary for summary judgment motion because court views facts in light most favorable to non-moving party).

B. Timeliness of Claims

In her amended complaint, Plaintiff alleges discrimination spanning more than a three year period. First, Plaintiff claims that from as early as 1993, she was subjected to a sexually hostile work environment as a result of Mr. Graziola's treatment, passed up for a promotions because of her sex, and subsequently RIFed in connection with her prior treatment by supervisors. Additionally, Plaintiff claims that the RIF decision was also based impermissibly on age. While Plaintiff makes these claims in her amended complaint, she did not, at the time, avail herself of the procedural and administrative remedies available to her as a federal employee. Second, Plaintiff claims that after the RIF decision, she was further discriminated against while at the IASO. While at the IASO, Plaintiff made two formal EEO complaints about the alleged discrimination she suffered. Defendant argues that the only issues that are properly before the Court are those raised by Plaintiff in her formal EEO administrative complaints and accepted for investigation by the agency.³

1. Exhaustion of Administrative and Procedural Remedies

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), delineates the exclusive remedy for federal employees that allege discrimination in the workplace. *See* 42 U.S.C. § 2000e-

3. Defendant raises this defense for the first time in its motion for summary judgment. Failure to exhaust administrative remedies is an affirmative defense in the nature of a statute of limitations, which defendant bares the burden of pleading and proving. *See Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997) (citing *Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997)). Thus, the argument could be made that this defense has been waived. The Third Circuit, however, "has taken the position that whether an affirmative defense that must be pleaded in the answer is waived will be depend on whether the defense was raised 'at a pragmatically sufficient time' and the plaintiff was prejudiced in the ability to respond." *Pro v. Donatucci*, 81 F.3d 1283, 1286 n.2 (3d Cir. 1996) (quoting *Charpentier v. Godsif*, 937 F.2d 859, 864 (3d Cir. 1991)). In this case, Plaintiff had ample time to respond to this defense in her opposition to this motion. Therefore, I do not find that this defense has been waived.

16(c) (2002); *see also Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997). Discrimination based on a person's sex is prohibited under Title VII, 42 U.S.C. 2000e-2(a) (2002). Similarly, the United States Supreme Court has held that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" based on sex. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Before proceeding to a federal court, a federal employee who brings suit under Title VII must first exhaust all administrative remedies as outlined in the EEOC regulations, 29 C.F.R. §1614 (2002). *See Robinson*, 107 F.3d at 1020 (citing *McKart v. United States*, 395 U.S. 185, 193 (1969)); *see also Ren v. Dalton*, Civ. A. No. 97-4777, 1997 WL 786442, 1997 U.S. Dist. LEXIS 19228, at *5 (E.D. Pa. Nov. 24, 1997). Under these EEOC regulations aggrieved federal employees believing that "they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor" within forty-five days of the effective date of the action, prior to filing a complaint. 29 C.F.R. § 1614.105(a). This administrative step is required in order to try to informally resolve the matter. *Id.* After meeting with an EEO Counselor, a federal employee should receive a notice of a right to file a formal charge. *See* 29 C.F.R. § 1614.105(d), (e), and (f) (designating circumstances in which notice of right to file formal charge is issued). Once the notice is received, the employee has fifteen days to file a formal complaint. *See* 29 C.F.R. 1614.106(a).

Age discrimination is prohibited pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). The ADEA is the exclusive remedy for a federal employee alleging age discrimination. *See Brown v. General Serv. Admin.*, 425 U.S. 820, 832-35 (1976); *Putrill v. Harris*, 658 F.2d 134, 137-38 (3d Cir. 1981). A federal employee bringing suit under the ADEA

may proceed through the administrative process described above or they may immediately bring a judicial action. *See* 29 U.S.C. §§ 633(b) & (c) (1994 & Supp. V. 1999); *see also Fallon v. Ashcroft*, Civ. A. No. 00-5258, 2002 U.S. Dist. LEXIS 12202, at *10-11 (E.D. Pa. Jan. 25, 2002) (citing *Stevens v. Dep't of Treasury*, 500 U.S. 1, 6 (1991)). If a federal employee decides to proceed directly to the courts, “the individual must notify the EEOC of the intent to do so within one hundred and eighty days of the alleged unlawful practice, and thirty days before filing his law suit.” *See* 29 C.F.R. §1614.201(a). A federal employee must notify the EEOC before he or she can commence an action in federal court. *See id.*, *see also Fallon*, 2002 U.S. Dist. LEXIS 12202, at *12.

Finally, the federal regulations allow a federal employee the right to appeal a RIF decision to Merit Systems Protection Board. *See* 5 C.F.R. § 351.901 (2002). Title 5 C.F.R. section 351.901 states that “[a]n employee who has been. . .demoted by a reduction in force action may appeal to the Merit Systems Protection Board.” The United States Court of Appeals for the Third Circuit has held that timely exhaustion of such a remedy is required before a party may seek judicial relief from any supposed injury. *See Goodrich v. U.S. Dep't of Navy and MSPB*, 686 F.2d 169, 177 (3d Cir. 1982). The purpose of the exhaustion requirement is to afford administrative officials and agencies “the opportunity to consider issues and claims and to exercise discretion before the matter is submitted to the courts.” *See id.* (citations omitted). Requiring exhaustion of this remedy, however, is within the discretion of the court and can be waived when application of this doctrine would be unjust. *See id.*

2. Equitable Doctrines

The exhaustion of administrative remedies is akin to a statute of limitations. *See Oshiver v. Levin, Fishbein, Sedran, & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994). Thus, a plaintiff that does

not follow these administrative steps is barred from bringing suit. *See Robinson*, 107 F.3d at 1020. A court, however, can use its equitable power to stop the statute of limitations from running where the claim's accrual date has already passed. *See Oshiver*, 38 F.3d at 1387. There are two equitable doctrines that a court can use to stop the running of claims. First, a court could use the doctrine of equitable tolling. *Id.* Equitable tolling is typically used in three situations: "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Id.* (citations omitted). Where a defendant has actively misled the plaintiff, "the statute of limitations will not begin to run, that is, will be tolled until the facts which would support the plaintiff's cause of action are apparent, or should be apparent to a person with a reasonably prudent regard for his or her rights." *Id.* at 1389.

Second, a court could use the similarly related theory of "continuing violation" to allow plaintiffs to pursue otherwise time-barred claims. *See Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 480 (3d Cir. 1997) (articulating continuing violation theory). "The application of the continuing violation doctrine permits Plaintiff to pursue. . .time barred claims if he can demonstrate that the alleged wrongful conduct is part of an ongoing pattern and practice of discrimination by Defendant[]." *Fallon*, 2002 U.S. Dist. LEXIS 12202, at *19-20 (citing *Rush* 113 F.3d at 480-81). In determining whether a plaintiff has shown a continuing violation, a court should apply a three factor analysis. *See Rush*, 113 F.3d at 480-81 (quoting *Berry v. Bd. of Supervisors of La. State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983)).

As the Third Circuit has instructed, the first factor for a court to address is subject matter, considering whether the “alleged acts involve the same type of discrimination, tending to connect them in a continuing violation.” *Id.* The second factor is frequency. For this factor, a court must determine whether the “alleged acts recurring. . .or more in the nature of isolated work assignments or employment decision.” *Id.* Finally and most importantly, the third factor is the degree of permanence. To determine the degree of permanence, a court must consider whether the acts were such that they “should trigger an employee’s awareness of and duty to assert his or her rights.” *Id.* If a reasonable person should have been aware of her duty to assert her rights, then the continuing violation doctrine has no application. *See Fallon*, 2002 U.S. Dist. LEXIS 12202, at *21 (citing *Berry*, 715 F.2d at 981-82)).

In this case, Plaintiff did not file a formal EEO charge complaining of the sexually hostile work environment and the failure to promote based on sex discrimination that occurred prior to the RIF decision. Plaintiff also did not formally contest the RIF decision through the EEO or the Merit Systems Selection Board. (LaMacchia Dep. at 30, 61.) In looking at the facts in the light most favorable to the Plaintiff, it seems that she was deceived into believing that she had filed a formal EEO complaint regarding these actions with Mr. Verna. This fact suggests that she was misled by Defendant. In August 1994, Plaintiff discovered that her EEO complaint was never filed. The EEO Office told her, however, that she was still within the time to file a formal EEO complaint. Despite discussing her potential complaint with a member of the personnel department, Plaintiff elected not to file a formal EEO complaint regarding these events. (LaMacchia Dep. at 35-40.) Thus, I find that the doctrine of equitable tolling and the continuing violation doctrine are not applicable in this case because Plaintiff was admittedly aware that she could file a timely formal complaint, but declined

to do so. (LaMacchia Dep. at 35-40.) As a result, I find that her pre-RIF claims of sex discrimination and sexual harassment under Title VII are barred because she failed to exhaust her administrative remedies.

Similarly, with regard to the RIF decision, Plaintiff had many procedural and administrative remedies that she failed to pursue. As discussed above, to the extent that Plaintiff claims that the RIF decision was based on unlawful sex discrimination, she failed to exhaust her administrative remedies by not filing a formal EEO complaint. To the extent that the RIF decision was based on the ADEA, however, Plaintiff did file a formal EEO complaint or notify the EEOC her intention to file suit within 180 days of the action. The RIF decision occurred in or around July of 1994. At this time, Plaintiff allegedly discovered that the decision was based on her age.⁴ Plaintiff did not file the instant action until March 20, 2000, well in excess of 180 days. Finally and most importantly, Plaintiff did not appeal the RIF decision with the Merit System Selection Board. Although Plaintiff discussed this possibility with a supervisor and was encouraged by him to do so, she declined to appeal the RIF decision. (Durlacher Decl. ¶6.)

Although Plaintiff in her opposition to summary judgment contends that she exhausted her administrative remedies, she did not produce any evidence to support this contention. Plaintiff did not attach any affidavits to her opposition or provide affirmative evidence to rebut Defendant's supported assertion that she did not file a formal complaint regarding the alleged unlawful conduct from 1993 up to and including 1994 RIF decision. *See Pearson v. Vaughn*, 984 F. Supp. at 316

4. In her deposition, Plaintiff states that Mr. Verna told her the RIF decision was based on her age. (LaMacchia dep. at 31 (“Q: You think the position that you got as a result of the RIF was the result of age discrimination?” “A: Well, that’s what [Mr. Verna] told me. . . . He said your seniority hurt you.”)

(holding that plaintiff cannot resist summary judgment based on bare assertions of timeliness). Thus, I find that Plaintiff's claims under the ADEA and Title VII regarding the RIF decision are also barred because Plaintiff failed to exhaust her procedural and administrative remedies. To allow her to proceed on these claims over eight years later would be unjust to the Defendant in light of the fact that witnesses have died and Defendant's records of the RIF are unavailable.⁵ (Def. Reply Memo. in Supp. of Summ. Jud. at 8.) Therefore, I grant summary judgment on the pre-RIF claim of sex discrimination and the RIF decision claims of sex and age discrimination.

C. Claims Properly Before the Court

After the RIF, while Plaintiff was working as a Management Assistant, Plaintiff filed two formal EEO complaints that were accepted for investigation. Plaintiff exhausted her procedural and administrative remedies for the claims that she brought to the EEO, and, as a result, summary judgment can be decided on the merits.⁶ The parameters of what is properly before the Court are "defined by the scope of the [EEO] investigation which can reasonably be expected to grow out the charge of discrimination, including new acts which occurred during the pendency of proceedings. . . ." *Howze v. Jones & Laughlin Steel*, 750 F.2d 1208, 1212 (3d Cir. 1984) (quoting *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398-99 (3d Cir. 1976)). The scope of the investigation by the

5. Under federal regulations, the registers and records related to the reduction in force must be retained for at least one year after the government issues a specific reduction in force notice. *See* 5 C.F.R. § 351.505(f).

6. Although the record before the Court does not delineate the administrative steps exhausted by Plaintiff for her post-RIF claims, Defendant has not raised these grounds for summary judgment for the post-RIF claims. Thus, looking at the facts in a light most favorable to Plaintiff, the Court will assume that Plaintiff has exhausted her administrative remedies with respect to the claims accepted by the DLA for investigation.

EEO encompassed a time period from April, 1995 to May 16, 1996.⁷ During this time, Plaintiff claims that she was subjected to sexual harassment, discriminated against based on sex and age, and subjected to retaliation for filing EEO complaints. Defendant moves for summary judgment on these claims as well. Each of these claims will be examined separately.

1. Sexual Harassment Under Title VII

Plaintiff asserts that while she was employed at the IASO, she was sexually harassed by co-workers and supervisors, and subjected to a hostile work environment. Specific incidents that Plaintiff alleges constitute a hostile work environment include: being tapped on the shoulder by a co-worker, Mr. Corey, during a presentation; being told by a supervisor that she had a “hard on” for Mr. Corey; and overhearing Mr. Corey make kissing sounds in reference to another female employee. More generally, Plaintiff alleges she was treated poorly and verbally abused because she is a female.

Under Title VII, there are two forms of actionable sexual harassment: quid pro quo and hostile work environment. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 59 (1986). In order to prove a hostile work environment, a plaintiff must show that (1) he or she suffered intentional discrimination because of his or her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability. *See Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir. 1999). The factors that

7. Thus, Plaintiff’s claim that she was passed up for promotion in December of 1994 is untimely. Because the record does not reflect that she exhausted her procedural and administrative remedies regarding this claim, the Court will not address it on its merits and summary judgment should also be entered on this claim.

must be considered with respect to whether an environment is hostile include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *see also Weston v. Pennsylvania*, 251 F.3d 420, 425 (3d Cir. 2001) (quoting same). To determine whether an environment is hostile or abusive, a court must look “at all the circumstances,” *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 715 (3d Cir.1996) (citing *Harris*, 510 U.S. at 23); *Vinson*, 477 U.S. at 68; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990), and should not take “an individualized, incident-by-incident approach.” *Konstantopoulos*, 112 F.3d at 715 (citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 756 (3d Cir. 1995)).

Verbal harassment and mistreatment do not create a sexually hostile work environment under Title VII unless it is motivated by the plaintiff's gender. *See Koschoff v. Henderson*, 109 F. Supp. 2d 332, 346 (E.D. Pa. 2000) (citing *Oncala v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998)), *aff'd*, 35 Fed. Appx. 357 (3d Cir. 2002); *Gharzouzi v. Northwestern Human Servs. of Pa.*, Civ. A. No. 01-192 , 2002 WL 987993, 2002 U.S. Dist. LEXIS 8621, at *55-56 (E.D. Pa. May 6, 2002). While plaintiffs are not “required to include sexual overtones in every instance,” it is ““necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner.”” *Andrews v. Philadelphia*, 895 F.2d 1469, 1485 (quoting *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n. 4 (3d Cir. 1977)). Although a court should look at whether there is hostile work environment by the totality of circumstances, it is permissible to see whether “the alleged [individual] events can be said

to have been motivated by discriminatory reasons.” *See Koschoff*, 109 F. Supp. 2d at 347, *see also Gharzouzi*, 2002 U.S. Dist. LEXIS 8621, at *57.

In this case, Plaintiff may have been subjected to hostilities by co-workers and superiors, but she has not shown enough evidence for the Court to infer that the mistreatment was because of her gender. *See Calloway v. E.I. Dupont De Nemours & Co.*, Civ. A. No. 98-669, 2000 WL 1251909, 2000 U.S. Dist. LEXIS 12642, at *17 (D. Del. Aug. 8, 2000) (holding summary judgment is appropriate where there is no evidence that “facially gender-neutral conduct was based on perceptions about womanhood or gendered stereotypes of appropriate female behavior rather than factors individual to plaintiff”), *aff’d*, 29 Fed. Appx. 100 (3d Cir. 2002). Although Plaintiff does not have to come forth with direct evidence of discriminatory motivation, there must be enough evidence from the facts so that a reasonable factfinder could infer that there was a discriminatory motivation. Plaintiff has shown no evidence of differential treatment of women and men. As Defendant asserts, the tasks given to Plaintiff were not motivated by gender. Rather, men and women alike were expected to answer the phones at the IASO. (Durlacher Decl. ¶ 16; Ennis Decl. ¶ 22; McAleer Decl. ¶ 12.) Clerical duties such as answering phones, faxing, and photocopying were part of the job duties of a Management Assistant. Similarly, the verbal abuse was motivated by personality conflicts, not because of Plaintiff’s gender. Specifically, Mr. Vilante was not only verbally abusive to Plaintiff; rather he yelled at many people at the IASO, including his male supervisor. Plaintiff also complains of verbal abuse that she contributed to. It is understandable that a supervisor would be upset upon finding an employee looking through his private e-mail at his desk. While yelling may not have been the best course of action, there is evidence that it was not motivated by her gender. With respect to Mr. Corey’s conduct, it may have been imprudent to rap on Plaintiff’s arm to get her

attention, but the evidence suggests neither that he did this because she was a woman nor that he would not have treated a man in this way.

In viewing these incidents in a light most favorable to Plaintiff, three of the incidents did have sexual connotations. However, the fact that Mr. McAleer was inappropriately touching himself, Mr. Corey was making kissing sounds at another female employee, and someone asked the Plaintiff if she had a “hard on” for Mr. Corey, does not raise the inference that all Plaintiff’s mistreatment was because of her gender.⁸ “Although plaintiff alleges instances of unprofessional . . . behavior on the part of her co-workers and supervisors, her allegations are devoid of any incidents wherein she was confronted with negative, gender-related comments.” *See Calloway*, 2000 U.S. Dist. LEXIS 12642, at *17. Additionally, Plaintiff does not come forth with any evidence that derogatory language relating to women generally or to herself. *Id.* Even looking at the record as a whole and in the light most favorable to Plaintiff, the Court finds no evidence from which a reasonable jury could infer that the unfortunate mistreatment Plaintiff suffered was motivated by Plaintiff’s gender. Thus, I grant summary judgment on Plaintiff’s sexual harassment claim.

2. Retaliation and Discrimination Based on Sex and Age

a. Prima Facie Case

8. Similarly, these three incidents alone cannot support a finding of pervasive and regular harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (holding that Title VII does not “protect an individual from occasional teasing, sporadic use of abusive language, . . . or isolated or single incidents of harassment.”)

Defendant asserts that summary judgment is appropriate on Plaintiff's claim of age and sex discrimination because Plaintiff has failed to provide evidence sufficient to establish a prima facie case of retaliation or discrimination. To establish a prima facie case of unlawful discrimination under Title VII, Plaintiff must show that she is (1) a member of a protected class; (2) qualified for the position; (3) suffered an adverse employment action; and (4) nonmembers of the protected class were treated more favorably. *See Ezold v. Wolf, Block, Schorr, & Solis-Cohen*, 983 F.2d 509, 522 (3d Cir 1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981)). Once the plaintiff has established a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the action taken against the plaintiff. *See id.* If defendant produces this evidence, "plaintiff must prove, by a preponderance of the evidence, that the defendant's proffered reasons were a pretext for discrimination." *Id.* In order to prove pretext, "plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could 'reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" *See Jackson v. Dana Corp.*, 1999 WL 1018241, at *6 (citing *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).

The prima facie case to prove discrimination based on age and gender are essentially the same. *See Simpson v. Kay Jewelers*, 142 F.3d 639, 643-44 (3d Cir. 1998), *see also Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1108 (3d Cir. 1997). In order to make out a prima facie case in an ADEA case, however, plaintiff must establish "that she (1) is a member of the protected class, i.e. at least 40 years of age, 29 U.S.C. § 631(a), (2) is qualified for the position, (3) suffered an adverse

employment decision, and (4) in the case of a demotion or discharge, was replaced by a sufficiently younger person to create an inference of age discrimination, (citation omitted).” *Simpson*, 142 F.3d at 644. Similarly, to prevail on her claim of retaliatory discharge, Plaintiff must show that she: (1) engaged in a protected activity; (2) Defendant took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997).

b. Adverse Employment Action

As a threshold matter, Plaintiff must prove that she suffered an adverse employment action to succeed on her claims of discrimination and retaliation under Title VII and the ADEA. *See Ezold*, 983 F.2d at 522 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Burdine*, 450 U.S. at 252-56 (1981)), *see also Simpson*, 142 F.3d at 643-44 (holding that ADEA jurisprudence and Title VII jurisprudence essentially analogous for prima facie claim); *Robinson*, 120 F.3d at 1299.

“An adverse employment action is an action by an employer that is serious and tangible enough to alter Plaintiff’s compensation, terms, conditions, or privileges of employment or to deprive him of employment opportunities, or adversely affect her status as an employee.” *See Fallon*, 2002 U.S. Dist. LEXIS 12202, at *37 (citing *Robinson*, 120 F.3d at 1300 and 29 U.S.C. § 623(a) (“Mere idiosyncracies of personal preference are not sufficient to state injury.” (citations omitted))). The Supreme Court has interpreted this language to include “significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits.” *Weston*, 251 F.3d at 430-31 (citing *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 749, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998)).

While it is unclear from her amended complaint and attached affidavit what specific employment action she takes issue with, the Court will assume that Plaintiff attempts to claim that she was denied a promotion, received a written reprimand, negative performance appraisal, and a change in her job duties, and was constructively discharged. Defendant contends that Plaintiff shows an adverse employment action in only one instance, and that the rest of her allegations do rise to the level of a significant change in employment status for her to maintain claims under the ADEA and Title VII.

A determination of whether an adverse employment action has been taken is an issue of fact that can only be resolved by a motion for summary judgment where the issue is not fairly contestable. *See Danas v. Chapman Ford Sales, Inc.*, 120 F. Supp. 2d 478, 485 (E.D. Pa. 2000) (citing *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 273-74 (7th Cir. 1996)). Except for the failure to promote, the issue of the other actions taken are not fairly contestable. First, Plaintiff presents no evidence that the written reprimand regarding the bomb scare had any effect on the terms and conditions of her employment. In fact, as Plaintiff admits in her deposition, the letter of reprimand was never official and she never suffered a demotion, suspension and her duties were not changed. (LaMacchia Dep. at 149.) *See Weston*, 251 F.3d at 431 (holding written reprimand without evidence of its affect on terms and conditions of employment is not adverse employment action). Second, Plaintiff contends that she was punished by the amount of clerical duties such as copying that she was assigned. As a Management Assistant, however, clerical duties were admittedly part of her job duties. (LaMacchia Dep. at 195.) Plaintiff did not provide any evidence that other people in her position were given less copying or clerical duties. Third, the fact that plaintiff received a negative performance appraisal alone it not enough to support a finding of an adverse action. *See*

Weston, 251 F.3d at 431 (requiring plaintiff to show how action affected material change in terms and conditions of employment).

Four, in her affidavit attached to her amended complaint, Plaintiff asserts that she was ordered out on sick leave by her psychiatrist because of the discrimination against her, but she does not provide evidence to prove a constructive discharge. Constructive discharge can be found “if an 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). In this case, there is no evidence that Plaintiff resigned or that a reasonable person would have resigned. Rather, Plaintiff alleges that she was forced out on sick leave and admits in her deposition that she took disability retirement as a result of a preexisting condition. (LaMacchia Dep. at 173.) As a result, except for the failure to promote, there is no evidence that Plaintiff suffered a change in her terms and conditions of employment such that a reasonable jury could find that Plaintiff suffered an adverse employment action.⁹

c. Failure to Promote

While Plaintiff has come forth with a sufficient showing that Defendant’s failure to promote her is an adverse employment action, Plaintiff still cannot prove that age discrimination was the reason for this action. Plaintiff alleges that Defendant discriminated impermissibly against her under the ADEA by giving Ms. Veteri budget duties and ultimately, promoting her to Budget Analyst.

9. Even assuming Plaintiff demonstrated some evidence that she suffered some tangible, detriment to the terms and conditions of her employment, Plaintiff fails to meet the prima facie elements of retaliation or sex discrimination claims. Plaintiff does not come forth with any evidence, absent her own conclusory assertions and affidavit, to prove the elements of the prima facie case. *See Pearson v. Vaughn*, 984 F. Supp. at 316 (citing *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871, 889 (1990) (“Conclusory statements in affidavits about the existence of facts do not provide the kind of evidence required to successfully oppose summary judgment.”)).

First, Plaintiff cannot make out a prima facie case because other than her bare assertion that she was qualified, Plaintiff has not come forth with any evidence that she was qualified for budget duties. *See Wragg v. Comcast Metrophone*, 18 F. Supp. 2d 524, 530 (E.D. Pa. 1998) (holding summary judgment is appropriate where plaintiff only offers affidavit stating he is qualified); *see also Kershaw*, 1994 WL 683384, at *4 (holding that court cannot accept generic conclusions on summary judgment motions). Thus, I find that summary judgment should be granted on this claim as well.

D. Disability Discrimination

Finally, in her complaint, Plaintiff listed disability discrimination as one of her claims. Her amended complaint, however, does not present any facts referencing disability discrimination. Although in her deposition Plaintiff talks about a preexisting condition, Plaintiff has failed to plead or show any evidence that would entitle her to relief under the American with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq. (LaMacchia Dep. at 129.) At a minimum, a Plaintiff must show she is a disabled person within the meaning of the ADA. *See* 42 U.S.C.S. § 12102(2). Disability can be proved by either showing (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C.S. § 12102(2). As Plaintiff has failed to show any evidence regarding her alleged disability, I grant summary judgment on this claim as well.

IV. CONCLUSION

For the foregoing reasons, summary judgment is entered for Defendant on all of Plaintiff's claims. An appropriate order follows.

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

PATRICIA A. LAMACCHIA	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD H. RUMSFELD, SECRETARY OF DEFENSE	:	NO. 2000-CV-1439
	:	

ORDER

AND NOW, this day of **October, 2002**, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff Patricia LaMacchia's response thereto, and Defendant's Reply, it is hereby **ORDERED** that:

1. Defendant's Motion for Summary Judgment (document no. 43) is **GRANTED**.
2. Summary Judgment is entered in favor of Defendant and against Plaintiff.
3. The Clerk of Court is directed to close this case.

BY THE COURT:

Berle M. Schiller, J.