

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

JAVIER ACOSTA, : CIVIL ACTION
: :
Plaintiff, : :
: :
v. : :
: :
CATHOLIC HEALTH : NO. 02-1750
INITIATIVES, INC., : :
: :
Defendant. : :

MEMORANDUM

Giles, C.J.

January ____, 2003

I. Introduction

Before the court is the opposed motion for summary judgment of Catholic Health Initiative, Inc., (“CHI”). This action¹ arises from Javier Acosta’s (“Mr. Acosta”) allegations of employment discrimination made pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq. (“Title VII”) and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. §951, et seq.² (“PHRA”). He alleges hostile work environment, gender discrimination, and constructive discharge and seeks as relief back pay and front pay, compensatory damages, punitive damages, and attorney’s fees and costs. For the reasons discussed below, CHI’s motion for summary judgment is granted.

¹Mr. Acosta asserts exhaustion of all administrative remedies prior to bringing this action. He claims that a charge was timely filed with the Pennsylvania Human Relations Commission (“PHRC”) and the Equal Employment Opportunity Commission (“EEOC”) and that a Right to Sue Letter from the EEOC was received on or about February 18, 2002.

²The court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1343.

II. Factual Background

The facts in the light most favorable to the non-moving party follow:

CHI is a not-for-profit health care organization formed in May 1996 with national offices in Denver, northern Kentucky, and Minneapolis. (Def.'s Mem. Supp. Sum. J. at 2.) It was created in 1996 through the merger of the Catholic Health Corporation, Franciscan Health System, and Sisters of Charity Health Care Systems. (Hancock Decl. at ¶ 2.) Subsequently, another entity, the Sisters of Charity of Nazareth Health System became part of CHI. (Id.) Currently, CHI operates sixty-three (63) hospitals and serves sixty-four (64) rural and urban communities. (Id.)

In May 1996, after working for approximately two and a half years for VHA insurance company and based on a job opening tip from Christine Burke ("Ms. Burke"), who then worked for CHI, Mr. Acosta applied for a Claims Coordinator position at CHI's Aston, Pennsylvania Office. (Acosta Dep. at 7-13.) At the time, Ms. Burke was employed as a CHI Claims Coordinator. Ms. Burke and Mr. Acosta had worked together at Cigna Insurance in 1993. (Id.)

Mr. Acosta sent his resume to Steven Besack ("Mr. Besack"), who then held the position of Regional Director of Loss Control.³ He was hired in September 1996, and initially reported to Mr. Besack. (Acosta Dep. at 14-17; Pl.'s Mem. Opp'n Sum. J. at 2.) Claims Coordinators were responsible for administering claims brought against CHI's facilities. (Def.'s Mem. Supp. Sum. J. at 2.) Mr. Besack testified that, while under his supervision, Mr. Acosta was assigned to "the

³ As Regional Director of Loss Control, Mr. Besack was responsible for the supervision of Claims Coordinators and other clerical staff within his department. Mr. Besack reported directly to John West, Vice President of Claims who in turn reported to Mitch Melfi, Chief Risk Officer.

more complex cases . . . because he had the . . . experience and acumen to handle them.”

(Besack Dep. at 19.) The types of cases included professional liability, environmental and employment claims. (Def.’s Mem. Supp. Sum. J. at 2.)

Three years later in 1999, however, CHI underwent a wholesale reorganization of its Risk Management Operations to accomplish national uniformity in its claims administration and procedures. (Hancock Decl. at ¶ 5.) Bryan Hancock (“Mr. Hancock”), assumed the position of Assistant Vice President of Risk Management Operations and reported directly to Mitch Melfi (“Mr. Melfi”), Chief Risk Officer. (Id.) Because CHI was formed as a result of the merger of several health systems, certain aspects of its management had been handled differently in various parts of the country. (Id.) Mr. Hancock and Mr. Melfi restructured CHI’s operations so as to centralize management and handle claims uniformly across the country. (Id.)

As a result of the reorganization, Randy Gates (“Mr. Gates”) became Director of Liability Claims. (Hancock Decl. at ¶ 7.) Mr. Gates had oversight responsibility for all liability claims nationwide and became responsible for setting policies and procedures for the uniform management of claims. (Id.) Mr. Gates reported to Mr. Hancock. (Id.) Mr. Besack was removed from Risk Management Operations and was reassigned to the position of Risk Services Consultant,⁴ a non-management position. The reorganization plan created the new position of Claims Manager for the Aston, Pennsylvania Office. (Def.’s Mem. Supp. Sum. J. at 4.) The Claims Manager position was designed to supervise and oversee the work of the Claims

⁴ As a Risk Services Consultant, Mr. Besack supervised an administrative assistant that provided support. No other CHI employees reported directly to him. His duties were limited to administering the claims and relationship of a single outside account and handling some of CHI’s higher level claims upon delegation of that specific duty by upper management. (Hancock Dep. at 13.)

Coordinators and support staff in that office. (Id.)

Several CHI employees applied for the Claims Manager position, including three Claims Coordinators, Mr. Acosta, Ms. Burke, and Marie Johnson (“Ms. Johnson”). (Hancock Dep. at 8.) CHI management chose Ms. Burke for the position because it believed that she, more than the other candidates, would be the most loyal to the significant changes that were being made in operations. (Id. at 9.)

As Claims Manager, Ms. Burke reported directly to Mr. Hancock, the second in command of Claims Operations. Although Mr. Gates did not directly supervise Ms. Burke, by virtue of his position in claim handling management, he established procedures which Ms. Burke was required to follow. (Hancock Decl. at ¶ 7.) Mr. Acosta, a former applicant for the Claims Manager position, began reporting to Ms. Burke,⁵ his former colleague. (Def.’s Mem. Supp. Sum. J. at 3-4.)

Prior to the reorganization and Ms. Burke’s becoming his immediate supervisor, Mr. Acosta enjoyed a collegial relationship with both Ms. Burke and Mr. Besack, his former boss, and was appreciated by outside hospital representatives. After the reorganization, he claims that he began experiencing difficulties in performing his job functions. (Pl.’s Mem. Opp’n Sum. J. at 3.) Indeed, both Mr. Gates and Ms. Burke reported to Mr. Hancock that they were having difficulties with Mr. Acosta’s job performance. (Hancock Decl. at ¶ 10.) Mr. Hancock spent a significant amount of time advising Ms. Burke on how to address Mr. Acosta’s performance

⁵ Although Ms. Burke’s position was newly created, the duties she assumed included, but were not limited to, responsibilities that were previously within the scope of Mr. Besack’s management when he served as Regional Director of Loss Control. (Besack Dep. at 39.) She also assumed reorganization strictures which had not been in place when Mr. Besack supervised Claims Coordinators.

issues. (Id.)

In August 1999, when Ms. Burke became his supervisor, Mr. Acosta was the only male working as a Claims Coordinator in the Aston Office. He asserts that she discriminated against him because of his gender by the way she supervised and evaluated his work. He contends that this mistreatment constituted a constructive discharge.

In support of his claims of hostile work environment, gender discrimination and constructive discharge Mr. Acosta claims the following: 1) that Ms. Burke on one occasion yelled at him in front of co-workers, thereby embarrassing him; 2) that Ms. Burke sent a “confidential” e-mail to a female CHI supervisor, outside of the Claims Operations hierarchy, seeking advice on how to grapple with Mr. Acosta’s conduct at a staff meeting, wherein she referred to him as a “typical man”; 3) that Ms. Burke generally treated him in a demeaning and condescending manner and unduly criticized his job performance; 4) that before Ms. Burke became his supervisor he overheard her engaged in “male bashing” sessions with female co-workers wherein she complained about her husband, other family members, and about Mr. Besack’s treatment of her, which she regarded as discriminatory based upon her gender; 5) that Ms. Burke gave preferences to female Claims Coordinators that she supervised; and 6) that Ms. Burke authored a job performance evaluation which he regarded as negative.

A. The Yelling Incident

In his deposition, Mr. Acosta recounts an incident involving Ms. Burke, where he discussed with her concerns he had with an outside law firm that was representing CHI’s interests in a litigation matter, to which he was assigned. (Acosta Dep. at 90-91.) He requested that Ms. Burke investigate an unpaid legal bill totaling more than a hundred thousand dollars

(\$100,000) because the firm was pressuring payment. He and Ms. Burke had a private discussion regarding the billing problems associated with that law firm. Ms. Burke told Mr. Acosta that she intended to solicit the aid of John Newton (“Mr. Newton”), In-House Counsel for CHI and Marybeth Grubb-Oberg (“Ms. Oberg”), Director of Human Resources, in resolving the matter. (Acosta Dep. at 93-94.) During their discussion, Mr. Acosta told Ms. Burke that in his opinion those CHI persons had conflicts because they were friends of the person billing for the law firm and they had had dinner together. (Id.) At Ms. Burke’s first staff meeting as Claims Manager, Mr. Acosta raised the legal bill as an issue both with the integrity of CHI’s In-House Counsel and the Director of Human Resources and as disagreement with Ms. Burke’s resolution strategy. He stated in the meeting that he had already telephoned Mr. Melfi, CHI’s Chief Risk Officer, about what he regarded as the “conflict” problem and that he disagreed with the proposed resolution strategy. He said he had expressed directly to Mr. Melfi his concerns because he did not think that much could get done if Mr. Newton and Ms. Oberg were involved in the process. (Acosta Dep. at 94.) Mr. Melfi was four levels above Mr. Acosta in CHI’s management hierarchy. Prior to the staff meeting, Mr. Acosta had not told Ms. Burke that he had spoken to Mr. Melfi. Mr. Acosta stated that prior to the reorganization he had had open door access to Mr. Melfi and saw nothing wrong in what he did. Ms. Burke saw it differently.

Following the meeting, Ms. Burke confronted Mr. Acosta in her office, and yelled at him pointing her “finger in his face” for contacting Mr. Melfi and “for going behind her back” on this issue without first informing her. She told him that he was wrong to have done what he did. Mr. Acosta diffused the situation by agreeing that he would handle the matter the way she had suggested. (Acosta Dep. at 97.) At his deposition, Mr. Acosta asserted that Ms. Burke’s

motivation for yelling at him was solely that he was a man. He described the encounter as humiliating and demeaning. (Acosta Dep. at 113-118.)

B. *The “Typical Man” E-Mail*

Following this staff meeting incident, Ms. Burke sought advice from Laura Daniels (“Ms. Daniels”), Director of Workers’ Compensation, on how to deal with the situation that had just happened between her and Mr. Acosta. Ms. Burke sent an e-mail to Ms. Daniels, updating her on the status of the situation. The e-mail read:

Thank you again for taking the time to listen to me today and I am really glad I approached you with my situation. I took your advice and a situation arose where it was an appropriate time for me and Jay to talk. I told him I thought there was more going on then [sic] legal stuff and we needed to really talk about the issues and he said (typical man) no there we [sic] no other issues. I reminded him that he said the problem is with our relationship and he said he had jumped the gun when he said that. Anyway I told him that my goal is to make my people happy and I explained that this was his company as much as mine. He comes in here every day and I want him to be happy coming in here and if I was doing something to make him unhappy I would like to resolve it. Anyway the conversation went well from that point on and hopefully things will slowly continue to get better.

One last question, since the issue is resolved do I bring it to Bryan’s attention or would I be wasting his time?

Chris Burke

(Pl’s. Mem. Opp’n Summ. J. Ex. G.) Mr. Acosta found a printed copy of the e-mail on the office printer that he shared with Ms. Burke. (Acosta Dep. at 207.) He testified that “it was scary to see something in writing like this” (Acosta Dep. at 211) but figured that he would just keep doing his job because he needed his job. (*Id.*) Mr. Acosta kept a copy but did not report any concerns to Human Resources nor did he discuss it with anyone in CHI’s Risk Management hierarchy. (Acosta Dep. at 207, 212.) He did discuss it with Mr. Besack, but by then Mr. Besack

was no longer a manager responsible for the Risk Management Department. Mr. Acosta does not allege that the e-mail contents were made known to anyone within his department, co-workers, or managers.

C. *Allegations of Demeaning and Condescending Treatment*

Mr. Acosta asserts that in claim review meetings⁶ held with CHI hospitals in the region, Ms. Burke did not exactly yell at him but would abruptly cut him off from answering when hospital Chief Executive Officers (“CEOs”) posed questions to him directly and would inject herself into those conversations. (Acosta Dep. at 120-21, 126-28.) Mr. Acosta considers this conduct as demeaning since he did not witness that she did this with other Claims Coordinators. (Id.)

Mr. Acosta alleges that Ms. Burke regularly adopted a condescending tone, an “attitudinal-type approach” of not wanting him involved in issues connected with the CEOs of the hospitals. (Acosta Dep. at 144.) He referenced two cases, “Ricci” and “Breedlove,” where hospital CEOs set up meetings with him and called him for his input directly. He claims that Ms. Burke “insinuated” to him that, instead of following the chain of command, he was the initiator of those calls and had contacted the CEOs directly, which he denied. (Acosta Dep. at 138-44.) He admits that Ms. Burke advised him that under the new administrative policy hospital risk managers should not call him directly. (Acosta Dep. at 138-144, 216.) Messrs. Hancock and Gates had directed that Claims Coordinators not go outside the chain of command when handling claims. (Hancock Decl. at ¶9.) Mr. Acosta contends that Ms. Burke unduly criticized his work

⁶ At Claim Review meetings, the Claims Department would present to hospital representatives within the CHI insurance program an analysis of all claims pending against the hospital. (Acosta Dep. at 121.)

in handling these cases (Id. at 228-30) and used a condescending tone in advising him that risk managers should call her directly and consult her, not him, when they sought advice. (Id. at 216-19.) Mr. Acosta admits, though, that hospital CEO's called him directly because that is what they commonly did before the reorganization and that Ms. Burke suspected that he had enticed them to do so contrary to CHI's reporting protocol.

D. *Allegations of Male Bashing*

Mr. Acosta alleges that Ms. Burke frequently conducted "male bashing" sessions with female co-workers. (Pl.'s Comp. at ¶ 9.)

He testified, that prior to her being promoted to Claims Manager, there were numerous occasions when she could be overheard "ranting and raving about men." (Acosta Dep. at 55.) Specifically, he described instances when Ms. Burke became angry during meetings with Mr. Besack and complained about him to co-workers saying that "men have it easy" (Acosta Dep. at 70), and that she "couldn't stand men, . . . that [Mr. Besack] was kind of chauvinistic or it was impossible to do what he requested and that she's going to report him or things of that nature." (Acosta Dep. at 46-47.) Mr. Acosta stated that Ms. Burke regularly made remarks about men and "even refer[red] to her husband as doing something dumb or, . . . referr[ed] to men in a condescending tone or sexist way." (Acosta Dep. at 73.) He stated that "she would talk about men in general, it wouldn't be specific . . .;" she would say "men are dumb, they do stupid things . . .;" (Id.) she referred to the opposite sex as "dominating . . . wanting to . . . exert[] control . . . over females." (Id. at 235.) Mr. Acosta acknowledged that Ms. Burke's comments were not made to him directly and admitted that he learned about the criticisms from conversations he overheard. (Acosta Dep. at 55-56.) Despite Ms. Burke's alleged conduct, Mr. Acosta admits

that he did not tell Ms. Burke about his dislike for her remarks. He did discuss her behavior with Mr. Besack, who was then their supervisor. (Id. at 76-79.) He does not allege that his and Ms. Burke's cordial co-worker relationship was affected in any way by what he overheard her say about men. Although Mr. Besack, was aware of Ms. Burke's criticisms of certain men or men, in general, he determined that such statements were not critical, or relevant, to her job performance, or the workplace environment, and omitted mention of them in her performance evaluations. (Besack Dep. at 15.)

Mr. Acosta testified that he believed Ms. Burke would regularly hold discussions in her office that demeaned men. However, he conceded that he did not hear any such conversations from where he sat. (Id. at 237.) Sometimes he would catch pieces of conversations in Ms. Burke's office when he went over to discuss claims issues but, admits that "those conversations were more non-work related discussions and not anything about 'male bashing' or anything like that." (Id.) Mr. Acosta admitted that he did not complain about "male bashing" to anyone in the management of the company after Ms. Burke became his supervisor.

E. *Allegations of Preferential Treatment*

Mr. Acosta alleges in his complaint that CHI refused to accord him the same considerations extended to female employees. At his deposition, he recounted several instances when he and Ms. Burke discussed claims issues and female Claims Coordinators would come into her office and, in his opinion, they were "immediately afforded her attention." (Acosta Dep. at 166.) He stated that when he was in with Ms. Burke "talking about a claim and trying to get [Ms. Burke's] attention, Marie or Diane, especially Diane would come in and, you know, it's like I wasn't there, and I would have to wait for them to finish their conversation." (Id.) On the other

hand, if Ms. Burke was already engaged in conversation with someone else and he needed to speak with her he would knock on her door “two, three times, [and] the conversation would continue.” (Id. at 167.) He had to wait until they were finished their discussion before she would acknowledge him. (Id.) It is his contention that these occurrences are reflections of unfair treatment.

1. *Allegations of Denial of Requests for Time Off*

Mr. Acosta alleges that Ms. Burke denied him time off to attend his son’s medical emergency. However, in his deposition, Mr. Acosta conceded that Ms. Burke never denied him requested time off. (Id. at 193.)

In June 2000, he put in a request to Ms. Burke for vacation during the Christmas holidays for it was his custom to reserve his vacation for Summer or Christmas time. (Acosta Dep. at 168.) However, when his son was diagnosed in August 2000 with hypertrophic cardiomyopathy and the doctors recommended surgery to implant a pacemaker he hoped to schedule the procedure in December, especially since he had already submitted a vacation request for that time period. (Acosta Dep. at 168-69.) Scheduling conflicts developed within the department and all department staff were required to resubmit their vacation requests. Mr. Acosta contends that the process of resubmitting vacation requests was solely precipitated by female employees asking for time off. Two female Claims Coordinators were vying for the same vacation time slot he requested. He recalled that “Marie was getting a baby and was up in the air whether she was going to get that baby at that time. There was also an issue of Diane Skinner wanting to take some time off, too.” (Acosta Dep. at 171.) To him, the process threw everything into an upheaval and potentially jeopardized his own vacation request. (Acosta Dep. at 194-95.)

During his deposition, Mr. Acosta admitted that on another occasion he took leave from work, without prior authorization from Ms. Burke, to take his son to a medical appointment in Delaware. (Acosta Dep. at 172.) He stated that, on the morning in question, he left a message for Ms. Burke informing her that he would be taking a couple of hours off to be with his son and would report to the office when he was done. (Id.) He said that he would make up the time by working through his lunch hour and that if she wanted him to charge the time off to personal vacation time to leave a message to that effect on his voice mail. (Id.) Mr. Acosta reported to work at approximately 2:00 or 3:00 p.m. in the afternoon and left for home at about 5:00 or 5:30 p.m. (Id.) He contends that working through lunch and, not hearing from Ms. Burke, justified him not charging the time away from work as personal time off. (Id.)

F. *The American Society of Healthcare Risk Management Conference in New Orleans*

In November 2000, CHI's Risk Management Department attended the American Society of Healthcare Risk Management ("ASHRM") conference in New Orleans. (Hancock Decl. at ¶ 11.) During that conference, CHI held a mandatory meeting on the morning of November 2. (Id.) Early on, Mr. Hancock noticed that Mr. Acosta failed to arrive for the meeting. (Id.) Mr. Hancock asked Ms. Burke where he was and she did not know. (Id.) At the direction of Mr. Hancock, Ms. Burke called Mr. Acosta during a break in the meeting to determine why he was not present. (Id.) He testified that she called up his hotel room that morning and said "you're late for the meeting, you better get here, Randy [Gates] and Bryan [Hancock] don't like it." (Acosta Dep. at 294.) He stated that he told Ms. Burke that he was not there because he was waiting on a call from his HMO regarding the scheduling of his son's medical procedure. (Id. at

188.) Mr. Acosta claims that he eventually arrived at the meeting and was late by maybe an hour. (Id. at 294.) It is his contention that Ms. Burke demanded that he show up and attend the meeting as soon as possible. He claims that she did not afford him any latitude on the matter and did not excuse his attendance even though he was undergoing stress related to his son's condition. (Acosta Dep. at 190-92.)

Mr. Acosta also alleges that Ms. Burke accused him of abusing CHI's reimbursement policy. (Acosta Dep. at 295-97. He testified that while in New Orleans and on the night before the mandatory meeting at the ASHRM conference, he bought a round of drinks for the Risk Managers and Ms. Burke. (Id.) Mr. Acosta testified that during the evening Ms. Burke told him to expense those drinks on his reimbursement report to the company, which he did. (Id.) That expense is not at issue. Later that night, he engaged in extra-curricular drinking which he billed to CHI. After the Risk Managers and Ms. Burke had left, Mr. Acosta bought drinks for Mr. Besack and some private attorneys with whom he worked. (Id.) When he returned to Pennsylvania he submitted reimbursement vouchers for those drinks along with vouchers for the authorized libations. Ms. Burke approved all the expenses. She forwarded them to Mr. Hancock for his approval. However, Mr. Hancock took exception to a receipt that was time stamped 1:00 a.m. in the morning as not being a proper business expense. (Id.) Ms. Burke was required to discuss with Mr. Hancock this questioned submission. He instructed Ms. Burke to note in Mr. Acosta's upcoming evaluation that the voucher was questioned. (Burke Dep. at 76.)

G. *The November 2000 Evaluation*

Mr. Acosta claims that the "final and telling blow" against him by Ms. Burke was her November 2000 evaluation of his work. (Pl.'s Mem. Opp'n Sum. J. at 5.) He alleges that the

evaluation is evidence of criticism of his work, totally without justification and, therefore, suspect of gender discrimination. (Acosta Dep. at 220-21.)

Mr. Hancock testified in his deposition that while Mr. Acosta was technically competent and was always interested in the best outcome for CHI's hospitals, at times he demonstrated difficulty in changing from the way things were done under Mr. Besack, and in adhering to those hierarchical changes that CHI had instituted as part of the reorganization. (Hancock Dep. at 27.) In light of the numerous issues surrounding Mr. Acosta's performance, Mr. Hancock determined that these issues should be noted in Mr. Acosta's upcoming performance review, which was scheduled to take place in November. (Hancock Decl. at ¶ 12.) He directed Ms. Burke to revise Mr. Acosta's evaluation to include specific references to incidents as to which there were concerns about Mr. Acosta's job performance. (Id.) Mr. Hancock reviewed and revised several drafts of the evaluation before he approved the final version that was given to Ms. Burke. (Id.) Mr. Gates also contributed to the preparation of the final version of the evaluation. (Hancock Dep. at 34.)

In late November 2000, Ms. Burke met with Mr. Acosta in her office for evaluation purposes. (Acosta Dep. at 311-12.) The evaluation set forth management's problems with Mr. Acosta's performance that had arisen since the organizational changes at CHI. (Pl.'s Mem. Opp'n Sum. J. Ex. J.) The evaluation referenced Mr. Acosta's failure to adhere to risk management policy, his struggle with following CHI's risk management decisions when they conflicted with his proposed resolution of claims, inappropriate settlement discussions with hospital risk managers or defense counsel, his disrespect for the role of the Claims Manager such that he had circumvented the chain of command to secure authority on claims, and his lack of

respect for CHI's management as a whole. According to the evaluation, it specifies that this lack of respect was manifested by Mr. Acosta scheduling meetings with facility CEOs without prior authorization, his absence from the mandatory meeting at the New Orleans ASHRM conference, the submission of a questionable expense reimbursement receipt, and his taking unscheduled leave and not documenting the time as personal time off. (Id.)

In pertinent part, the evaluation reads as follows:

The following is essentially Jay's self-evaluation. I have made some additions to the review by adding specific goals to be targeted in the upcoming year.

Jay appears to be an extremely hard worker who makes competent claims decisions. As he has stated, he has handled, and concluded numerous complex claims issues. It is clear that Jay is very interested in working well with the facilities and defense counsels and I know they are very appreciative of his efforts. Jay, however, is very much a contradiction at times. He is very experienced and appears very dedicated, yet at times has conflicted with internal risk management policy and I think a concerted effort must be made in the future to work collaboratively with the CHI team. Several times in the past year Jay's proposed resolution of claims and risk management issues has conflicted with CHI's decisions and this appears to be a great struggle for Jay and has at times gotten him into difficult situations. Most recently a situation arose in which there was a resolution conflict issue and, although outwardly it appeared that Jay accepted CHI's decision, he actually appeared to lose interest in the claim when he took unscheduled time off during a key day in the case. Several times Jay has discussed settlement value with a Risk Manager or defense counsel before he had authority to do so. This will not happen again. It also appears at times that Jay takes direction from defense counsel instead of managing and evaluating a claim on his own. I suggest Jay be open to discussing issues with the CHI team and, if he is not in agreement with the decisions made, he should continue to talk through the issue until an understanding can be reached. If ultimately [sic] the final decision is not what Jay would have hoped he should, to the outside world, appear confident in CHI's decision and support the resolution. Jay also does not seem to respect the role of the manager and has on two occasions by-passed the chain of command to secure authority on claims. In addition, in one instance the manager only

learned of the request via the Director of RM, Jay never reported that he had requested authority to settle a claim. There have been several instances during this past year when Jay has either promised, or set up meetings with facility CEO's without prior authorization. There is also suspicion that Jay has a lack of respect for CHI management as a whole. This has been reflected when he missing [sic] a key meeting at ASHRM, submitting [sic] a questionable receipt on an expense account, and taking [sic] an unscdeduled [sic] 6 hour absence and arriving at work late in the afternoon, working 2 hours, and not docuemtning [sic] the day as a PTO day. Jay must be aware of everyone's role in the department and be cognizant to the fact that individual roles were developed for specific reasons and he must work within the boundaries set by CHI. Jay appears to be most comfortable working individually and I think it would help if Jay would envision the department as a team. This can only enhance his work. In addition, Jay's experience could also have a great impact on lesser experienced team members. Overall, I think Jay is a very hard, dedicated and determined worker who does have the good of the facilities at heart, but I also believe that Jay continues to be frustrated over the department changes that were made over 1 year ago and appears to have difficulty letting go of the past.

Jay's Response: [left blank]

Mr. Acosta contends that the evaluation signaled the end of his time with CHI. (Acosta Dep. at 317.) After receiving the evaluation, Mr. Acosta complained to Rosanne Frank, Human Resources Manager, that he was unhappy with the performance evaluation. (Acosta Dep. at 314.) He requested that he not be required to sign his evaluation and asked to speak with Sister Peggy Egan ("Sister Egan"), Vice President of Missions and Healthy Community. Sister Egan spoke with him and offered some counseling relative to Ms. Burke and asked whether Mr. Acosta wished to speak with Dan Sinnot ("Mr. Sinnot"), CHI's regional CEO. The record does not show that Mr. Acosta accepted the offer to meet with Mr. Sinnot.

Within a few weeks, Mr. Acosta resigned his position at CHI and began work with St. Paul Fire and Marine Insurance Company. (Acosta Dep. at 319.) His last day with CHI was

January 5, 2001.

III. Legal Standard for Summary Judgment

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate “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 is deemed to exist where “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

“[A] party seeking summary judgment always bears the initial responsibility of demonstrat[ing] the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party has carried this burden, the burden shifts to the non-moving party who “may not rest upon the mere allegations or denials of [its] pleading[s], but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

The non-moving party must do more than “simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing summary judgment must “come forward with specific facts showing that there is a genuine issue for trial.” Id. at 587 (quoting Fed. R. Civ. P. 56(e)). If the non-moving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. Celotex Corp., 477 U.S. at 322.

In deciding a summary judgment motion, the court must “draw all reasonable inferences in favor of the non-moving party.” Cardenas v. Massey, 269 F.3d 251, 254 (3d Cir. 2001).

However, when the record taken in its entirety would not lead a rational trier of fact to find for the party opposing summary judgment, entry of summary judgment is proper against the opposing party. Hankins v. Temple University (Health Sciences Ctr.), 829 F.2d 437, 440 (1987); Matsushita, 475 U.S. at 587; Anderson, 477 U.S. at 249 (“[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.”).

IV. Discussion

The legal standard for determining employer liability under PHRA is identical to that under Title VII. Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001) (stating that Pennsylvania courts have construed the protections of Title VII and the Pennsylvania Human Relations Act interchangeably); Knabe v. Boury Corp., 114 F.3d 407, 410 n.5 (3d Cir. 1997) (“Employer liability under the Pennsylvania Human Relations Act follows the standards set out for employer liability under Title VII.”). Hence, this court’s analyses of plaintiff’s Title VII claims, and conclusions reached thereof, are equally applicable to his PHRA claims.

A. Hostile Work Environment Claim

To establish a claim of hostile work environment under Title VII, Mr. Acosta must show the following five elements: (1) that he suffered intentional discrimination because of his sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected him; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability. Weston, 251 F.3d at 426; Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). To be cognizable under Title VII the

“harassment must be so severe or pervasive that it alters the conditions of the victims’ employment and creates an abusive environment.” Weston, 251 F.3d at 426 (citing Meritor Savs. Bank FSB v. Vinson, 477 U.S. 57, 67 (1986)).

In assessing whether a hostile or abusive environment exists in the workplace the Supreme Court has directed courts to apply a totality of the circumstances approach. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). Factors that are relevant to the “totality of the circumstances” inquiry are: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee’s work performance.” Id.

Mr. Acosta has not met his burden of coming forward with any evidence that his “workplace [was] permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of . . . his employment and create an abusive working environment.” Harris, 510 U.S. at 21.

The court concludes that Mr. Acosta’s complained of conditions, which are discussed in more detail above, do not, and cannot, evidence harassment that rises to the level of unlawfulness proscribed by Title VII. The incidents alleged amount to no more than “ordinary tribulations of the workplace, [where] . . . the sporadic use of abusive language, gender-related jokes, and occasional teasing” and do not fall within the purview of Title VII. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). More than a few “offhanded comments” and “isolated incidents” are necessary to establish that CHI engaged in severe and pervasive discrimination that would detrimentally affect a reasonable person of the same sex in Mr. Acosta’s position. Id. at 788. The court recognizes that there are instances when encounters between superiors and their

subordinates will give rise to feelings of resentment in a subordinate or leave the subordinate feeling offended, however, “mere utterance of an . . . epithet which engenders offensive feelings in an employee, does not sufficiently affect the conditions of employment to implicate Title VII.” Harris, 510 U.S. at 21 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

Mr. Acosta claims that Ms. Burke treated him disrespectfully because of his gender and argues that this treatment included Ms. Burke yelling at him in front of co-workers. Despite his assertions as to Ms. Burke’s motivation, he cannot contend that he did nothing at the meeting capable of giving Ms. Burke some reason to reprimand him. Whether he realized it, then or now, he was suggesting in the presence of non-management persons that the In-House Counsel and the Director of Human Resources had conflicts of interests; that such conflicts arose because he knew the attorneys had meals with them; that Ms. Burke was wrong in her approach and that he had to go over her head because it was a good idea to give Mr. Melfi a “heads up” on what might percolate up to his level, if it were not handled in a way that Mr. Acosta thought was appropriate. (Acosta Dep. at 102-03.)

The only reasonable inferences for motivation for Mr. Acosta’s actions at the meeting are that he: (1) innocently believed that In-House Counsel and the Director of Human Resources would be disloyal to CHI and could not be trusted to do their jobs and Ms. Burke would not appreciate what Mr. Acosta regarded as their conflict of interest and that Mr. Melfi needed to be forewarned; or (2) was trying to undermine staff’s and top management’s confidence in Ms. Burke.

Each possible inference of motivation could properly be characterized as being disrespectful of management, that is, Mr. Newton and Ms. Oberg, and of Ms. Burke, in

particular. Ms. Burke was clearly upset by his actions, chastised him and challenged him to explain his otherwise inexplicable conduct.

She told Mr. Acosta that she believed that more was behind his conduct than a concern about “legal stuff.” Mr. Acosta declined to explain his actions beyond saying that the problem was with their relationship. He then said that he had “jumped the gun” when he said the problem stemmed from their relationship, so he offered no explanation in the end. He offered no apology although he agreed to handle the matter in the way she had suggested and agreed that she was the manager and said that he had no problem with that. (Acosta Dep. at 94-97.)

The incontrovertible evidence shows that there was a work related basis attributable to Mr. Acosta’s own words and conduct toward Ms. Burke. This accounted for her reaction to him following the staff meeting, in the presence of subordinates, to whom she reasserted her role as manager. Condemning Mr. Acosta’s behavior was a response well within the supervisory powers vested in her title of Claims Manager. A jury cannot regulate an appropriate exercise of managerial authority and company protocol. On this occasion, it can only be said that Mr. Acosta’s feelings of embarrassment were, in essence, self-inflicted.

Mr. Acosta gives great weight to the “typical man” comment made in an e-mail; however, when the e-mail is considered as a whole, the only reasonable reading is that it was an attempt on Ms. Burke’s part to solicit advice on how to deal with Mr. Acosta’s conduct that surfaced at the staff meeting and his refusal thereafter to explain his motivation for his actions, and to flesh-out whether she had a duty as a supervisor to report to her boss that which she regarded as employee misconduct. The single reference to “typical man” could only be understood as a reference to any man who refuses to explain otherwise inexplicable action to another, perhaps a woman

supervisor. The phrase signaled the additional care and attention needed to draw out Mr. Acosta's perceptions and opinions. Whatever "typical man" meant, it can only be understood in the context of Ms. Burke trying to bring, through conversation, Mr. Acosta into a harmonious working relationship with her as opposed to excluding him from such a relationship. The court finds that Ms. Burke's "typical man" remark is illustrative of the "genuine but innocuous differences in the ways men and women routinely interact with members of the same and opposite sex," Faragher, 524 U.S. at 788, and does not trigger the imposition of Title VII protections. No reasonable jury could find that this e-mail taken as a whole scared Mr. Acosta into resigning his employment.

Mr. Acosta alleges that Ms. Burke's use of a condescending tone implicates Title VII, however, a review of the parties' depositions on this subject shows, at best, Ms. Burke asserting her managerial role wherever she thought Mr. Acosta was deviating from the chain of command or into her managerial prerogatives. The court views the complaints of condescending tone of voice used when Ms. Burke asserted herself in such situations as too subjective and speculative for any finding of gender bias. They do not, and cannot, raise a triable issue of fact. Mr. Acosta has not shown, and cannot show, that the referenced actions of Ms. Burke were beyond her authority in ensuring compliance with CHI's newly adopted claims administration policy.

Mr. Acosta argues that Ms. Burke frequently conducted "male bashing" sessions with female co-workers before she was promoted and that such conduct evidences a workplace environment permeated with hostility toward him because of his gender. The court finds that this claim lacks merit on the very rudimentary principal that Ms. Burke's alleged pre-supervisory employee "male bashing," has no evidentiary significance as to supervisory conduct.

Although Mr. Acosta has asserted in his deposition that the private “male bashing” conversations with females in the department continued after Ms. Burke became his supervisor,⁷ (Acosta Dep. at 235) he has presented no evidence to support the assertion. He proposed to call as a supportive witness, Cathleen Stratford (“Ms. Stratford”), a female employee who participated in some “female only” discussions in the workplace. In her deposition, she adopted plaintiff’s counsel’s phrase, “male bashing,” as being appropriate to describe women’s comments about men who mistreated or discriminated against women. (Stratford Dep. at 9-14.) Moreover, nothing in Ms. Stratford’s deposition evidences that any comments about men referenced Mr. Acosta.

Mr. Acosta alleges that Ms. Burke did not accord him the same considerations that were extended to his female counterparts. He argues that Ms. Burke gave preferences to his female co-workers when it came to discussions on claims resolutions and personal leave. However, Mr. Acosta cannot make out a claim of gender discrimination based on Ms. Burke’s decision not to interrupt on-going conversations with others or interrupt other things that occupied her attention to accommodate his desire to talk to her, especially where the evidence shows that she did talk to him when she was ready to talk to him. (Id. at 166.) He does not claim that when she was free, Ms. Burke refused to talk to him, or meet with him, or discuss with him claims administration matters.

Similarly, Mr. Acosta has not alleged that it was within Ms. Burke’s authority or control

⁷ In addition to Mr. Acosta, Ms. Burke supervised Claim Coordinators Diane Skinner, Cathy Stratford and Marie Johnson, as well as two female Claim Representatives and one male Claims Assistant. (Pl.’s Mem. Opp’n Sum. J. at 3.)

to set vacation policy or that Ms. Burke set or controlled the company policy on unexcused time. The undisputed facts demonstrate that Mr. Acosta did not charge time away from work against his personal leave account and that he failed to present evidence showing that he was treated differently from females with respect to charging personal leave time.

During his deposition Mr. Acosta stated that Ms. Burke did not excuse his attendance from the ASHRM conference in New Orleans even though he was undergoing stress related to his son's procedure. Nevertheless, it is undisputed that Mr. Acosta knew the special purpose and importance of the CHI meeting in New Orleans. He has not alleged nor can he prove that Ms. Burke had authority to excuse him from the meeting. He does not allege that the attendance demands made upon him and communicated to him by Ms. Burke were hers and not Ms. Burke's superiors. There is no evidence that Ms. Burke had authority to grant him an excuse from the meeting. The un rebutted evidence shows just the opposite. Mr. Hancock noticed during the meeting that Mr. Acosta was not present. (Hancock Decl. at ¶ 11.) He told Ms. Burke to determine why he was not present. (*Id.*) She relayed an emphatic message, "you're late for the meeting, you better get here Randy [Gates] and Bryan [Hancock] don't like it." (Acosta Dep. at 294.) This direction made it clear to Mr. Acosta that his presence was required by Mr. Gates and Mr. Hancock and that he would have to answer to them, not Ms. Burke, for his absences or tardiness. Moreover, there is no evidence that Ms. Burke refused to, or did not, pass on to her superiors the reason for Mr. Acosta's absence as he relayed it to her.

Mr. Acosta has produced no evidence to show that he telephoned either Mr. Hancock, Mr. Gates or Ms. Burke to seek permission to be excused from, or to be late to, the meeting prior to its scheduled start time. Mr. Acosta had been with Ms. Burke and Risk Managers at a

celebratory event the night before the meeting. He has not shown that he asked for and was denied, permission to make a timely call to his HMO, or receive a timely call from his HMO, at the conference meeting site.

Mr. Acosta also argues that Ms. Burke accused him of abusing CHI's reimbursement policy. (Acosta Dep. at 295-97.) Notwithstanding, he does not allege that the accusation was without foundation. Not only does the uncontradicted evidence show that there was a questionable voucher submitted by Mr. Acosta, but that Ms. Burke had approved the expense item, not disapproved it, and that she was required to review the matter with Mr. Acosta.

Mr. Acosta contends that his November 2000 evaluation is evidence of the deep-rooted animus Ms. Burke harbored against him because of his gender. However, Mr. Acosta has presented no evidence that the evaluation was done by Ms. Burke alone. The unrebutted evidence presented by the defense is that the evaluation was the result of a collaboration between Mr. Hancock, Mr. Gates and Ms. Burke and that Mr. Hancock approved the final version of the evaluation presented to Mr. Acosta for his review and comments. (Hancock Dep. at 31, 34-35.)

When Ms. Burke presented the evaluation to Mr. Acosta, he had the opportunity to write his comments, approval or disagreement in response. He did not write a response although he strongly voiced disagreement and refused to sign the evaluation.

However, given the admitted conduct by Mr. Acosta, he cannot show that the evaluation was materially inaccurate or negative. The evidence shows that he initiated behavior cited in the evaluation. The undisputed facts are that he made the comments in the staff meeting; he circumvented the chain of command and called Mr. Melfi; he chose not to charge time off to his accrued personal leave account; and it was he who decided not to request authorization for late

arrival to the meeting in New Orleans.

Contrary to Mr. Acosta's allegations that the evaluation was totally negative, the evidence shows that the evaluation recognized his talents and appreciation was expressed for his good works by management. Moreover, everything that was cited as a need for improvement in the evaluation was easily within Mr. Acosta's power to correct by simply not repeating the incidents cited.

Further, he cannot show that it would have been futile to try to cause justified corrections to be made to the evaluation through Ms. Burke's male management superiors, or the Human Resources Department. Indeed, the evaluation was not a final warning that continued behavior in this vein would result in termination.

The undisputed facts indicate that multiple levels of upper management, who were all male, played a controlling role in shaping the final version of Mr. Acosta's performance review. Mr. Hancock directed Ms. Burke to revise Mr. Acosta's review and include specific references to incidents in which there were concerns as to Mr. Acosta's job performance. Mr. Hancock contributed materially to the evaluation. He reviewed and revised several drafts of the evaluation with input from Mr. Gates before it was given to Mr. Acosta in its final form. Given Mr. Hancock's level of involvement and the contributions made by Mr. Gates, the evaluation does nothing to support Mr. Acosta's claim of a hostile work environment motivated by gender bias. At best, the evaluation evidences a common workplace situation where an employee exhibits difficulty in shifting from familiar procedures to new procedures.

The alleged circumstances of Mr. Acosta's employment at CHI have been considered in the aggregate and this court concludes that he has produced no evidence from which a reasonable

fact finder could characterize Ms. Burke's conduct and comments toward him as motivated by gender bias, and certainly not as being pervasive and severe. Accordingly, summary judgment in favor of CHI is warranted on the claim of hostile work environment.

B. *Gender Discrimination Claim*

Mr. Acosta claims that CHI engaged in gender discrimination that resulted in his constructive discharge as a Claims Coordinator.

Claims alleging discrimination must be analyzed under the familiar burden shifting framework first articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and later crystallized in Texas Dep't. of Comty. Affairs v. Burdine, 450 U.S. 248 (1981). These often quoted cases make clear that a Title VII plaintiff must satisfy its initial burden and demonstrate by a preponderance of the evidence a prima facie case of discrimination. Texas Dep't of Comty. Affairs, 450 U.S. at 252-53; McDonnell Douglas Corp., 411 U.S. at 802. Once the plaintiff has made such a showing the burden then shifts to the defendant to demonstrate a "legitimate non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp., 411 U.S. at 802. Should the defendant prevail in carrying this burden the plaintiff must then be afforded an opportunity "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dep't of Comty. Affairs, 450 U.S. at 253.

In order to satisfy his initial burden and make out a prima facie case of discrimination Mr. Acosta must offer sufficient evidence that he: "(1) is a member of a protected class; (2) is qualified for the position; (3) suffered an adverse employment decision; and (4) that an otherwise similarly situated person outside of the protected class received more favorable treatment."

Riding v. Kaufmann's Dep't. Store, 220 F. Supp. 2d 442, 449 (2002) (citing Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410-11 (3d Cir. 1999)); Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 318-19 (3d Cir. 2000). To survive a motion for summary judgment the evidence set forth must be "sufficient to convince a reasonable fact finder to find all of the elements of the prima facie case." Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001).

Mr. Acosta has failed to state a prima facie case of discrimination. The evidence in the light most favorable to him fails to satisfy the adverse employment decision prong.

It is undisputed that Mr. Acosta is male. It is also undisputed that he is reasonably knowledgeable and experienced in the risk management field. For example, his evaluation states, "Jay appears to be an extremely hard worker who makes competent claims decisions . . . as he has . . . handled, and concluded numerous complex claims issues." However, with regard to prong three, an adverse employment decision, the evidence cannot support a finding by a reasonable fact finder that Mr. Acosta's resignation was the result of discriminatory conduct so severe as to force a reasonable person of reasonable sensibilities to relinquish employment, in belief that a person of his gender would not be tolerated in the workplace by all levels of management.

Mr. Acosta argues that his resignation was forced due to the conditions that prevailed at CHI and was an adverse employment action. An adverse employment action is "one which is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Cardenas, 269 F.3d at 263. To establish a constructive discharge claim a plaintiff must show that the defendant knowingly permitted conditions of discrimination that

were so intolerable that a reasonable person subject to those conditions would resign. Id.; Aman, 85 F.3d at 1084; Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). An objective test is employed in determining whether an employee was constructively discharged. Gray v. New York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992) (“The law does not permit an employee’s subjective perceptions to govern a claim of constructive discharge”). Id. at 1083.

Contrary to Mr. Acosta’s assertions, on its face, the evaluation was an attempt at corrective action, not threatened termination. The evidence shows that neither Ms. Burke nor Mr. Hancock told Mr. Acosta that he should resign. Rather, management expressly looked forward to Mr. Acosta being a team player who was already hard working and capable of making competent decisions on complex claims issues. He was not subject to termination but was expected to make improvements, all within his capabilities. The evaluation pointed out what he should do to improve, that is, follow company policy in the handling of claims through established chains of command and to be respectful of that chain of command. As a matter of law, an employee’s decision to resign rather than do that, can only be described as being completely voluntary.

Continued analysis under the McDonnell Douglas/Burdine legal framework for gender discrimination is not required inasmuch as Mr. Acosta has failed to state a prima facie case.

V. Conclusion

An appropriate order follows.