

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

KIM ANN WYCHOCK,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 01-3873
v.	:	
	:	
COORDINATED HEALTH SYSTEMS,	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

March 4, 2003

Presently before the Court are Defendant Coordinated Health Systems's Motion for Summary Judgment, Plaintiff Kim Ann Wychock's Response in Opposition thereto, and Defendant's Reply Brief. For the reasons set forth below, Defendant's Motion is granted.

I. BACKGROUND

Plaintiff, Kim Ann Wychock ("Plaintiff" or "Wychock"), was an employee of Defendant, Coordinated Health Systems ("Defendant," "CHS" or "hospital"), from April 15, 1991 until her employment was terminated on August 2, 1999. Pl.'s Compl. at ¶¶ 7, 17. While employed at CHS, Wychock befriended a co-worker by the name of Nicholas S. Harvilla, Jr. ("Harvilla"). Pl.'s Compl. at ¶ 11. Harvilla was terminated from employment with CHS on April 3, 1998. Harvilla's Equal Employment Opportunity Commission Charge, Def.'s Mem. in Supp. Am. Mot. Summ. J., Ex. H ("Harvilla's EEOC Charge"). Subsequently, he filed a charge of discrimination on August 24, 1998 with the Equal Employment Opportunity Commission

(“EEOC”) based on alleged age and disability discrimination by CHS. Pl.’s Compl. at ¶ 10. Thereafter, Harvilla filed a Complaint¹ with this Court on April 28, 1999, seeking damages associated with this alleged discrimination. Pl.’s Compl. at ¶ 12.

During his employment with CHS, Harvilla suffered from medical problems and became a patient at CHS. He was treated by doctors at CHS who eventually performed surgery on his knee. Harvilla’s EEOC Charge; Pl.’s Dep. at 35. As an employee of CHS during the time when Harvilla was a patient, Wychock had knowledge regarding Harvilla’s treatment. In addition to having access to his medical file, Wychock claims to have overheard a conversation between two CHS doctors, Dr. Weiss (“Weiss”) and Dr. Dilorio (“Dilorio”), and the district manager at CHS, Mary Anne Buck (“Buck”). According to Wychock, Buck said, “As long as Nick [Harvilla] is working here, he will never have surgery.”² Pl.’s Aff. at ¶ 6. Having heard this, Wychock became concerned that Harvilla was not receiving the best medical treatment possible. Pl.’s Dep. at 36-37.

Wychock contacted Harvilla by phone and informed him of what she overheard. They discussed whether Harvilla should continue treatment with the doctors at CHS, since she believed the doctors and managers at CHS held personal grudges against Harvilla. Pl.’s Dep. at 36-37, 40. Following this conversation, Wychock contacted Harvilla on other occasions in the weeks prior to Harvilla’s termination to discuss the way Harvilla was being treated as an employee at CHS. Wychock and Harvilla suspected that CHS was preparing to terminate

1. Civil Action No. 99-2221.

2. As noted above, despite this comment, Harvilla eventually was operated on by doctors at CHS.

Harvilla based upon the unusual actions of members of CHS management during these weeks preceding his termination. Pl.'s Dep. at 48.

When Plaintiff spoke with Harvilla on the phone to discuss his medical treatment and his treatment as an employee at CHS, his wife, Rose, was also on the phone listening to their discussions. Wychock alleges that she never discussed any matters, specifically Harvilla's medical condition, exclusively with Rose. Rose only participated on the occasions when Harvilla asked her to pick up the phone. Wychock claims that Harvilla was always on the phone for the entire conversation, and she never called to speak privately with Rose. Pl.'s Dep. at 36-38, 71. CHS, however, alleges that Wychock spoke with Rose privately about Harvilla's medical condition. CHS claims that this conduct constituted a breach of Harvilla's patient confidentiality. Def.'s Mem. in Supp. Am. Mot. Summ. J. at 7-8.

Believing that Wychock had information regarding his claims, Harvilla referenced the conversation which Wychock overheard between Weiss, Dilorio and Buck, in his handwritten statement attached to his EEOC Charge. Harvilla did not initially list Wychock as a witness in his federal suit. However, he did call Wychock and ask whether she would be able to serve as a witness in his federal case, if he needed her. Wychock responded that she could do so and said, "if I was called for depositions I'd answer all questions honestly and to the best of my knowledge." Pl.'s Dep. at 58, 76-77. Wychock admits that she has no knowledge about whether any manager at CHS knew of her conversation with Harvilla, and she admits that she, personally, never spoke of this conversation with them. Pl.'s Dep. at 62. Although subpoenaed, Wychock was never actually deposed or provided any evidence in either Harvilla's EEOC charge or his federal claim. Pl.'s Dep. at 64.

On June 15, 1999, Plaintiff was given a work performance evaluation by her supervisors at CHS which reflected marks lower than her usual evaluations. In this evaluation, it was noted that Wychock “made it clear on more than one occasion that she [would] not fill in at the front desk or at the switchboard in the absence of her co-workers.” Addendum to Performance Review of Kim Wychock, Def.’s Mem. in Supp. Am. Mot. Summ. J., Ex. G. In her evaluation it was also noted that Wychock repeatedly failed to call or fax employers regarding treatment plans, despite being asked to do so on several occasions; failed to assist in patient scheduling; failed to timely file charts, resulting in clutter and disorganization around the nurses station; and, took longer lunches than the thirty minutes allotted to her. Mem. from Robert Sauers to Marianne Buck (July, 3, 1999), Def.’s Mem. in Supp. Am. Mot. Summ. J., Exh. G.

Almost a month later, on July 8, 1999, and then again on July 15, 1999, Plaintiff claims she was interrogated by management at CHS regarding Harvilla’s claims against CHS. In the meeting held on July 8, 1999, the questions asked of Plaintiff were in reference to whether she spoke with Rose regarding Harvilla’s medical condition without Harvilla also on the phone. Pl.’s Dep. at 68. When asked about what questions were asked of her at the July 15, 1999 meeting, Wychock responded, “I don’t remember specifically. The questions were so vague, but it would have been about patient confidentiality” Pl.’s Dep. at 69. Wychock did not indicate that any other topics were covered at these alleged interrogations. She did not claim in her deposition that she was asked anything about Harvilla’s age and disability discrimination claims against CHS. In fact, Plaintiff was never aware that Harvilla was making disability discrimination claims against CHS, and, although she is not certain, she does not believe she

knew about Harvilla's age discrimination claims until discovery began in accordance with the present action. Pl.'s Dep. at 25, 55-56.

CHS alleges that these meetings with Wychock were held to investigate whether she violated Harvilla's patient confidentiality. Def.'s Mem. in Supp. Am. Mot. Summ. J. at 7. CHS claims that Wychock was fired because she violated the hospital's confidentiality policy by speaking with Rose about Harvilla's medical condition, and because her work performance was poor. *Id.* at 6-7.

Wychock believes she was fired in retaliation for agreeing to tell the truth if she testified in Harvilla's case. Plaintiff alleges retaliation by CHS pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. § 621, et seq. As such, Plaintiff filed a charge of employment discrimination with the EEOC which issued to her a notice of right to sue. Pl.'s Compl. at ¶ 4. Subsequently, Plaintiff filed this action, upon which Defendant has now filed this Motion for Summary Judgment.

II. STANDARD OF REVIEW

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine "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). Since a grant of summary

judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted, is “whether reasonable minds may differ as to the verdict.” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 248.

III. DISCUSSION

Wychock alleges that CHS retaliated against her in violation of the ADA and the ADEA by terminating her employment. The anti-retaliation provision of the ADA provides that “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.” 42 U.S.C. § 12203(a). The anti-retaliation provision of the ADEA is nearly identical to that of the ADA. This provision of the ADEA provides:

[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

29 U.S.C. § 623(d).

The burden-shifting framework adopted by the Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) applies to retaliation claims. Walton v. Mental

Health Ass'n of Southeastern Pennsylvania, 168 F.3d 661, 667-68 (3d Cir. 1999). There are three stages to this framework. First, a plaintiff must establish a prima facie case of discrimination. If the plaintiff is able to establish such a case, the burden then shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” Id. at 802. Finally, if the defendant articulates a reason, the plaintiff is then given an opportunity to establish, by a preponderance of the evidence, that the defendant’s reason is really a pretext for discrimination. Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999).

To establish a prima facie case of retaliation under the ADA and the ADEA, “a plaintiff must show (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee’s protected activity; and (3) a causal connection between the employee’s protected activity and the employer’s adverse action.” Krouse v. Am. Sterlizer Co., 126 F.3d 494, 500 (3d Cir. 1997).

A. Protected Activity

In the past, some courts have found that the anti-retaliation provisions of the ADA and the ADEA contain two separate clauses - the “opposition clause” and the “participation clause.”³ Robinson v. Southeastern Pennsylvania. Transp. Auth., 982 F.2d 892, 896 n.4 (3d Cir. 1993). If an act is covered by one of these two clauses, the act is protected for purposes of establishing a prima facie case of retaliation under the ADA and the ADEA.

The “opposition clause” prohibits retaliation because the employee “opposed any practice made an unlawful employment practice by [the ADA and the ADEA].” The “participation clause”

3. Many of these cases refer to violations of Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a). However, this Title VII provision is so similar to the anti-retaliation provisions of the ADA and the ADEA, that this Court will use the same analysis as was used in those cases. See Krouse, 126 F.3d at 500.

prohibits retaliation because the employee “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA and the ADEA].”

Id., citing Holden v. Owens-Illinois, Inc., 793 F.2d 745, 748-53 (6th Cir. 1986).

In the instant matter, Wychock has not established that she was engaged in protected activity under the opposition clause. In her deposition, Plaintiff indicates that she does not believe she was aware that Harvilla was making discrimination claims against CHS when she agreed she would testify if needed.⁴ Wychock was unaware that Harvilla was discriminated against. Therefore, she could not have opposed this alleged unlawful employment practice, because she did not know it was occurring. Wychock never spoke to an attorney for either party involved in Harvilla’s case or to any manager at CHS regarding her conversation with Harvilla in which she agreed to speak about what she knew regarding his claims. The fact that Wychock never actually testified also indicates that she did not engage in protected activity pursuant to the opposition clause. Since Plaintiff never actually made a statement or took any action to indicate that CHS engaged in discriminatory behavior, she was not opposing any of CHS’s alleged unlawful practices.

Furthermore, courts which acknowledge the distinction between the opposition clause and the participation clause note that the opposition clause is limited to situations where the employee’s opposition to the unlawful employment practice interferes with her job performance. Robinson, 982 F.2d at 896 n.4. Clearly, Wychock’s work performance and habits were unaffected by Harvilla’s claims, because Wychock never opposed any practice of CHS.

4. Wychock is somewhat unclear about whether she knew that Harvilla would be making an age discrimination claim when he told her he wished to sue. However, she provides no proof that she knew about his discrimination claims at any time before the present action was filed. Pl.’s Dep. at 55-56.

She was never asked to testify or speak about Harvilla's discrimination claims, and she never publically opposed CHS's alleged discrimination of Harvilla by her actions. Accordingly, Wychock is not entitled to any protection under the opposition clause of the anti-retaliation provisions of the ADA and the ADEA.

Wychock also did not engage in any protected activity pursuant to the participation clause. Wychock never participated in an "investigation, hearing, or proceeding," nor did she make a "charge, testif[y], assist[], or participate[]" in Harvilla's discrimination claims in any form. See Russell v. Strick Corp., No. 97-806, 1997 U.S. Dist. LEXIS 9562, at *10 (E.D. Pa. July 10, 1997) (testifying on behalf of a fellow employee at a workers' compensation hearing regarding racial discrimination alleged by that employee is not participation in a protected activity); Tuthill v. Conrail, No. 96-6868, 1997 U.S. Dist. LEXIS 13304, at *12-13 (E.D. Pa. Aug. 26, 1997) (holding that employees' participation in an internal investigation after a co-worker alleged sexual harassment was not participation in a protected activity). Plaintiff's only alleged proceeding in which she claims to have been interrogated about Harvilla's claims was an internal investigation conducted by management at CHS. Although Plaintiff now claims she was asked to discuss Harvilla's discrimination claims at this meeting, her deposition testimony indicates that she was only questioned about her conversations with Harvilla and his wife. Clearly, CHS staff held the meeting to determine whether Wychock breached Harvilla's patient confidentiality by speaking privately with Rose about his medical treatment. As noted above, Plaintiff never actually spoke with any attorney or CHS manager about the fact that she would be willing to testify or about what she allegedly knew regarding

Harvilla's case. Without such participation in Harvilla's case, Wychock's alleged acts are not protected.

B. Causal Connection

Even if Wychock's agreement to testify for Harvilla was considered protected activity, Wychock is still unable to establish a prima facie case of retaliation, because she has established no causal connection between her activity and CHS's termination of her employment. Proximity in time from an alleged protected act until an alleged retaliation can be considered as a factor in establishing a causal link. Shellenberger v. Summit Bancorp, Inc., No. 01-1215, 2003 U.S. App. LEXIS 1308, at *17 (3d Cir. Jan. 23, 2003). However, where such is the case, the plaintiff should be able to provide evidence of the possibility that the employer was aware the protected activity occurred.

As Wychock admits, she has no knowledge or proof that any member of management at CHS was aware that she agreed to testify for Harvilla if he needed her to do so. Furthermore, Wychock never told Harvilla or anybody else that her testimony would be favorable to Harvilla. Rather, she merely stated that she would speak honestly about what she knew to any attorney or member of CHS management that asked her about Harvilla's claims. In addition, Wychock's poor evaluation came prior to the July meetings which Wychock claims were where CHS learned that she wished to help Harvilla with his discrimination claims. Also, Plaintiff was not subpoenaed for a deposition until three or four months after her poor evaluation. Pl.'s Dep. at 99. Therefore, CHS management could not have considered her responses at the July meetings or the possibility that she would be deposed when giving her a poor evaluation. When considering all factors, including that Wychock cannot establish that any manager at CHS knew

she would testify, that Wychock never agreed to do anything more than speak honestly if she was asked to testify, that Wychock never actually spoke with anybody about Harvilla's case, and, that CHS provides sufficient non-retaliatory reasons for Wychock's termination, it is clear that Plaintiff has failed to demonstrate any causal link between Plaintiff's termination and her alleged protected activity.

C. Third-Party Retaliation Claim

In addition, Wychock is not entitled to relief pursuant to a third-party retaliation claim. Under the ADA, the third-party anti-retaliation provision reads:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b). This provision extends the scope of the first anti-retaliation provision of the ADA, 42 U.S.C. § 12203(a), and allows for a cause of action by an employee who did not engage in protected activity. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570 (3d Cir. 2002).

However, the only parties that are entitled to make a claim under this provision are those who are close relatives of an individual who did in fact engage in a protected activity. Id. Plaintiff has no familial relationship with Harvilla. As she described in her deposition, she and Harvilla were merely friends, who spoke at work when they saw each other, and spoke outside of work on occasion. As such, Plaintiff cannot sustain a claim under the third-party anti-retaliation provision provided for in the ADA.

As Plaintiff is unable to establish a prima facie case of retaliation, this Court need not address whether the remaining stages of the McDonnell-Douglas framework have been satisfied.⁵

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion is granted. An appropriate Order follows.

5. Defendant alleges that Wychock was fired because she breached CHS's confidentiality policy and because she performed some of her job responsibilities poorly. Wychock has presented sufficient evidence to create a material question of fact as to whether she actually did breach patient confidentiality and perform poorly on the job. However, since Wychock is unable to establish a prima facie case of retaliation, she cannot withstand Defendant's Motion for Summary Judgment.

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

KIM ANN WYCHOCK,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 01-3873
v.	:	
	:	
COORDINATED HEALTH SYSTEMS,	:	
Defendant.	:	

ORDER

AND NOW, this 4th day of March, 2003, upon consideration of Defendant Coordinated Health Systems's Amended Motion for Summary Judgment (Docket No. 33) and Memorandum in Support thereof (Docket No. 34), Plaintiff Kim Ann Wychock's Answer (Docket No. 39) and Brief in Opposition thereto (Docket No. 40) and Defendant's Reply Brief (Docket No. 42), it is hereby **ORDERED** that Defendant's Motion is **GRANTED**. Judgment is entered in favor of Defendant Coordinated Health Systems and against Plaintiff Kim Ann Wychock.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.