

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

YVONNE J. YON,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SEPTA and TRANSPORT WORKER'S	:	
UNION LOCAL #234,	:	NO. 01-5231
Defendants	:	NO. 01-5232

MEMORANDUM

Giles, C.J.

October ____, 2003

Introduction

Yvonne Yon brings this action against Southeastern Pennsylvania Transportation Authority (SEPTA) and Transport Workers' Union Local #234 (Union), seeking damages pursuant to 42 U.S.C. § 2000e, et seq., the Pennsylvania Human Relations Act, 43 P.S. 955, and the common law of Pennsylvania, to redress injuries suffered from her termination at SEPTA and related events. Now before the court are SEPTA's and the Union's Motions for Summary Judgment, pursuant to the Federal Rule of Civil Procedure 56(c). For the reasons that follow, both motions for summary judgment are granted.

Factual Background

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

SEPTA

Ms. Yon was hired by SEPTA on June 19, 1991, as a Student Bus Operator, and became a Bus Operator on July 24, 1991. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 3.) On November 1,

1992, Ms. Yon was transferred into the position of Rail Operator. (Id.) On January 1, 1994, Ms. Yon was transferred to the position of Surface Train Person, until on August 25, 1994, when she was transferred back to her former post as Rail Operator. (Id.) She held this position at the time of her discharge. (Id.)

During her employment tenure at SEPTA Ms. Yon alleges that she experienced numerous incidents of discriminatory treatment. On October 7, 1993, a female passenger assaulted Ms. Yon while she was operating a trolley. (Id. at 4.) Ms. Yon's supervisor, Frank Hargrove, a white male, arrived on the scene. (Id.) He asked Ms. Yon to complete an accident report, but she refused, preferring to first be treated for her injuries. (Id.) Ms. Yon does not allege that Mr. Hargrove's accident report request was the result of discrimination based upon race or gender. As a result of her injuries, Ms. Yon received workers' compensation from October 8, 1993 to May 9, 1994. (Id.) During this time, Ms. Yon received psychotherapy treatments and was put on various medications. (Id.) She returned to full duty on July 29, 1994. (Id.)

On November 29, 1994, when she was eight months pregnant, Ms. Yon began experiencing labor-like pains. (Id.) She telephoned the SEPTA office, but her supervisor, Jim Brown, a black male, refused to grant her the day off of work. (Id.) When Ms. Yon saw the doctor on November 30, 1994, she was told to cease working immediately but, even with this diagnosis, she was assessed two "points"¹ for an "Emergency at Home." She alleges this assessment was discriminatory, although she does not allege that it was contrary to the terms of the Collective Bargaining Agreement. (Id.)

¹ In the Collective Bargaining Agreement ("CBA") between SEPTA and the Union, an Attendance Point System was created "to provide an objective basis for the imposition of discipline for incidents of non-attendance." (See Pl.'s Ex. 8.)

A few days after Ms. Yon returned to work following her maternity leave, on February 23, 1995, she was required to arrive for a shift beginning at 5:00 a.m. (Id. at 5.) Ms. Yon alleges that she arrived at 4:55, and made her presence known; however, Mr. Brown asserted that she had arrived late, pointed his finger in her face and ordered her to sit down. He assessed her five “points” for “MLF - Missing Less than Four Hours.” (Id.)

Later on the same day, Ms. Yon was asked about the incident by SEPTA Instructor Joseph DeBreaux. (Id.) She refused to answer his questions. (Id.) Following her refusal, he told her that she had copied her run route incorrectly and told her to return to the station. (Id.) When it was discovered that Ms. Yon had correctly copied the route, Mr. DeBreaux admitted his mistake but allegedly told Ms. Yon that he had “covered [her] ass.” (Id.) SEPTA records indicate that Mr. DeBreaux filed a Report making negative remarks about Ms. Yon’s attitude. (Id.) Following the aforementioned events of February 23, 1995, Ms. Yon wrote a letter to the General Manager complaining about discriminatory treatment. (Id. at 6.)

On March 16, 1995, Ms. Yon alleges another incident occurred when she finished half of her route. (Id.) When she pulled her vehicle into the shop room two white male SEPTA employees, a revenue manager and a shop keeper, greeted her. (Id.) While she gathered her belongings, she heard one say to the other, “That’s a[] black ugly bitch isn’t it?,” to which the other replied, “Yes, it is.” (Id.) Ms. Yon wrote a second letter to the General Manager regarding this incident. (Id. at 7.)

On March 27, 1995, a meeting was held to discuss the February 23, 1995 incidents. (Id. at 6.) In attendance were Ronnie Nelms and Ronnie Adams (Union representatives), Jim Brown (dispatcher), Joe DeBreaux (instructor), Harold Perkins (supervisor), and Ms. Yon. (Id.) As a

result of the meeting an intra-office memo was sent by Mr. Perkins to the local Superintendent stating that the meeting produced satisfactory results. (Id.) However, Ms. Yon sent a letter in response to the memo denying that the results had been satisfactory and accusing SEPTA management of continued lies and false accusations. (Id.) At some point following that meeting, Ms. Yon claims that she was informed by Union representative, Ronnie Nelms, that SEPTA management was trying to get her fired. (Id.) She asked Mr. Nelms to file a grievance for her, but no such grievance was filed. (Id.) Following the sending of this letter, Ms. Yon alleges that she was assessed five more “points.” (Id.) However, review of her SEPTA point record shows that this allegation is not accurate. (SEPTA’s Ex. G, Point History Report.) The claimed five additional points were not assessed. (Id.)

On June 5, 1995, Ms. Yon was involved in a vehicular accident. She was injured and filed an Occupational Injury Report (OIR). She was approved for Workers’ Compensation benefits effective June 21, 1995. (Id.) Because she did not begin receiving payments until June 29, 1995, Ms. Yon asserts that SEPTA was in breach of the Collective Bargaining Agreement (“CBA”), which allegedly required benefits determinations to be made within thirteen days of filing. (Id.) However, no provision of the CBA is cited for that proposition and, in any event, Ms. Yon has not alleged that non-timely receipt of benefits was the result of her race or gender.

Following the June 5, 1995 injury, she remained out of work for over a year and collected full Workers’ Compensation Benefits during this period. (Id. at 8.) While she was on medical leave, Ms. Yon claims that she experienced incidences of harassment. She alleges that SEPTA or its Workers’ Compensation agent hired a private investigator to take pictures of her. (Id. at 8.) Also, Ms. Yon’s locker was emptied as part of a general locker audit, and, although notice was

posted on her locker, Ms. Yon alleges this was discriminatory because no notification was sent to the homes of those on extended leave. (Id.)

On July 16, 1996, after receiving medical clearance from SEPTA physicians, Ms. Yon returned to work as a Rail Operator. (Id. at 9.) Ms. Yon alleges that she was forced to return to work, against her doctor's recommendation. (Id. at 8.) On July 25, 1996, Ms. Yon again filed for Workers' Compensation based on an injury of July 23, 1996. (Id. at 9.) She returned to temporary duty on July 28, 1996. (Id.)

On October 6, 1996, approximately thirty minutes before she was due to report to work, Ms. Yon called the Elmwood depot and asked to be excused for the day. (Id. at 9.) She claims that she was told that she would have to be put in the "sick book" if she failed to come in, which could have subjected her to a two point assessment or she would be marked "AWOL," which would mean a ten point assessment. (Id.) Despite her assertions, SEPTA's records show that Ms. Yon was told that she was excused for that day. (See SEPTA's Ex. G, Point History Report.) However, it is undisputed that Ms. Yon arrived at work on October 6, 1996, and had a verbal altercation with at least two SEPTA supervisors. (Id. at 10.)

Ms. Yon admits that when she arrived at the work place on October 6, 1996, she was carrying in her hand an automobile anti-theft device, the "Club," and was using profanity. (Id.) SEPTA claims that she was waving the Club at the employees present in the office in a threatening manner. (SEPTA's Mem. of Law in Supp. of Summ. Jud. at 3.) Ms. Yon asserts that she held the Club behind her back throughout the incident. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 10-11.) Ms. Yon acknowledges that the police were called by SEPTA during the altercation to render assistance. (Id. at 10.) SEPTA police arrived at the depot after Ms. Yon had

left the premises. (Id.)

Mr. Thomas,² Mr. Balsualdo,³ and Mr. DeGrasse each completed a Supervisor's Special Report concerning the incident on October 6, 1996. (Id. at 11.) Mr. Thomas and Mr. Balsualdo also completed Occupational Injury Reports related to the incident. (Id.) As a result of this incident, Ms. Yon was suspended from her job on October 7, 1996. (Id.) An informal investigation took place and it was recommended that Ms. Yon be terminated. (Id.)

A formal hearing was held on October 29, 1996. (Id.) Testimony was presented by Ms. Yon, SEPTA witnesses, and Ms. Yon's Union representatives. (Id.) On November 4, 1996, SEPTA permanently terminated Ms. Yon, retroactive to October 6, 1996, due to "Conduct Unbecoming a SEPTA Employee." (Id. at 12.) She was found to have violated a number of SEPTA's work rules by: 1) Possession of a Deadly Weapon; 2) Verbal Assault of a Supervisor; 3) Conduct Unbecoming of a SEPTA Employee; 4) Carrying a Deadly Weapon; and 5) Threats/Assaults. (SEPTA's Mem. of Law in Supp. of Summ. Jud. at 3.)

On February 6, 1997, a Labor Relations Step (Grievance) Hearing was held to review Ms. Yon's discharge. (Id.) Ms. Yon's discharge was sustained. It was determined that SEPTA management had just cause for the termination. (Id.) On May 27, 1997, Ms. Yon filed a complaint with the City of Philadelphia Commission on Human Relations ("PCHR"). (Id.) In this complaint, she asserted that SEPTA had discriminated against her on account of her race and/or color and/or sex and/or in retaliation for her opposition to SEPTA's unfair employment practices. (Id.) This charge was later also filed with the Equal Employment Opportunity

²Mr. Thomas is a white male.

³Mr. Balsualdo is a hispanic male.

Commission (“EEOC”). (Id.) SEPTA filed a formal response and, at the request of the PCHR, also provided requested additional information. After completing its investigation, the PCHR determined that Ms. Yon’s charges were not substantiated. (Id.) The EEOC adopted this finding. (Id.)

Union - Local 234

Ms. Yon also brings suit against the Union under Title VII and for Breach of the Duty of Fair Representation. She claims that before her termination she had encountered difficulties in receiving assistance from the Union. Ms. Yon alleges that Union representatives informed her, following the March 27, 1995 meeting, that SEPTA management wanted her fired. (Pl.’s Resp. in Opp’n to Union’s Mot. at 5.) She requested that grievances be filed concerning this allegation and the harassment she alleged that she was experiencing. However, no action was taken by the Union on her behalf. (Id. at 5-6.) Ms. Yon also requested assistance from the Union when her Workers’ Compensation checks were delayed, but no direct action was taken on her behalf. (Id.) Additionally, after discovering her belongings had been removed from her locker, Ms. Yon requested that a grievance be filed, but this filing was delayed for over ten months. (Id. at 7.) Ms. Yon also alleges that her Union representative, Ronnie Nelms, informed Ms. Yon that someone from SEPTA had called the Workers’ Compensation carrier, PMA Group, to have plaintiff followed while she was on disability. (Id. at 6-7.) Mr. Nelms of the Union believed that the surveillance action was undertaken to harass plaintiff. (Id. at 7.)

Ms. Yon was entitled, by the CBA between SEPTA and the Union, to be represented in any hearings that occurred as a result of the discipline she received. She was represented at her

formal hearing and at her Labor Relations Step hearing by Union representatives.⁴ (Id. at 9-10.)

Under the CBA, if the Union is dissatisfied with the resolution of a grievance, it has the right to refer the dispute to a labor arbitration panel. (Id. at 10.) It took the position that Ms. Yon's termination was improper and voted to send her grievance to arbitration. (Id.) At least twice, arbitration was scheduled, but had to be delayed due to inaction by Ms. Yon. (Union's Mem. of Law in Supp. of Summ. Judg. at 5-6.) In both August and October of 1997, Ms. Yon failed to attend preparatory sessions necessary for her action to proceed to arbitration. Due to this failure, the hearing dates were delayed. (Id.)

On October 8, 1997, Ms. Yon expressed concern to the Union's legal counsel that its representation of her presented a conflict of interest because she had filed a charge of race discrimination against the Union. (Id. at 6.) In response to this concern, Ms. Yon was sent a letter by the Union, stating that they were willing to proceed on her behalf and that she also had the opportunity to be represented by an individual of her choosing, whether or not that person was an attorney. (Id.)

On November 21, 1997, Ms. Yon agreed to attend a preparatory session on December 17, 1997. However, she failed to appear for the meeting and the hearing again had to be postponed. (Id.) Following this, Ms. Yon informed the Union that she did not want Local 234 to represent her at the hearing, and that she was going to obtain her own advocate. (Id.) On January 5, 1998, the Union, through Mr. Bodner, advised Ms. Yon that the Union would reschedule the hearing once she selected an attorney to represent her. (Id. at 7.) Ms. Yon did not respond to this letter.

⁴At least two of of Ms. Yon's representatives, Willie Brown and Sabin Rich, are black men.

On August 7, 1998, Mr. Bodner wrote Ms. Yon and asked her to advise him of how to proceed. He advised her that her case would be withdrawn from arbitration if she did not respond by December 17, 1998. (Id.) On December 15, 1998, Mr. Bodner spoke to Ms. Yon by telephone and advised her that the hearing was rescheduled for January 8, 1999, and that a preparatory session was scheduled for January 6, 1999. (Id.) Ms. Yon did not appear at the session, and informed the Union that she “decided not to have anything to do with the union” and that she preferred to take her dispute “to the commissions.” (Id. at 8.) As a result, Local 234 withdrew from her case, and Ms. Yon was informed of this by a letter dated January 7, 1999. (Id.)

Legal Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper “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 summary judgment as a matter of law.” Celetox Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).⁵

⁵ Ms. Yon argues that plaintiff should be afforded a less stringent standard because her complaint was drafted when she was a *pro se* litigant. The summary judgement standard is not altered for *pro se* litigants. Regardless, Ms. Yon is currently represented and has been permitted extensive opportunities to amend her complaint, extend discovery, and present any arguments in oral and written form. She has suffered no prejudice as a result of her temporary *pro se* status.

Analysis

SEPTA

Employer Discrimination

Title VII and the PHRA⁶ provide plaintiffs with two theories of liability to seek recovery for discrimination—disparate impact and disparate treatment. Under a disparate treatment theory, an employer is required to have the intent to discriminate against a member or members of a protected class. Massarsky v. General Motors Co., 706 F.2d 111, 117 (3d Cir. 1983). Disparate treatment claims can be further subdivided into two categories—facial discrimination and pretextual discrimination. Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 131 (3d Cir. 1996).

Claims alleging disparate treatment must be analyzed under the burden shifting framework 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). Under these cases, a Title VII plaintiff initially must establish, 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

⁶ Discrimination claims brought under the PHRA are analyzed under the same standards as their federal counterparts. Connors v. Chrysler Fin. Corp., 160 F.3d 971, 972 (3d Cir. 1988).

true reasons, but were a pretext for discrimination.” Texas Dep’t of Comty. Affairs, 450 U.S. at 253.

In order to satisfy her initial burden and make out a prima facie case of discrimination Ms. Yon must offer sufficient evidence that she: (1) is a member of a protected class; (2) was qualified for the position that she held; (3) suffered an adverse employment decision; and (4) that she suffered an adverse employment action while persons not in the protected class were treated more favorably or there is some other evidence sufficient to support an inference of unlawful discrimination. See Pivrotto v. Innovative Systems, Inc., 191 F.3d 344, 352 (3d Cir. 1999); Burch v. WDAS AM/FM, No. 00-4852, 2002 WL 1471703, *6 (E.D. Pa. June 28, 2002). The prima facie case can be shown by direct evidence of discrimination, or “by indirect evidence whose cumulative probative force, apart from the presumption’s operation, would suffice under the controlling standard to support as a reasonable probability the inference” of discrimination. Iadimarco v. Runyon, 190 F.3d 151, 162 (3d Cir. 1999) (quoting Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir. 1986)). The determination of whether a prima facie case has been made is one for the court. Pivrotto, 191 F.3d at 347 n.1.

Ms. Yon alleges that she was suspended and then fired because she is black and/or a woman. To create an inference of discrimination, she relies upon numerous alleged instances of discrimination. She also contends that other SEPTA employees that were not members of a protected class in similar situations were administered substantially more lenient sanctions. SEPTA responds that Ms. Yon cannot establish a prima facie case of discrimination and, even if she could make such an initial inference, she cannot overcome SEPTA’s explanation that she was terminated because she threatened supervisors with a deadly weapon, and not because of her

race or gender. The court first addresses whether Ms. Yon has established a prima facie case of discrimination.

1. Ms. Yon's Prima Facie Case

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). It is undisputed that Ms. Yon satisfies the first three prongs of the test. As a black woman, Ms. Yon is a member of a protected class. There is also no contention that Ms. Yon was not qualified to perform her job functions. With regard to prong three, Ms. Yon suffered an adverse action when she was terminated by SEPTA. The parties disagree as to whether there is sufficient evidence to support an inference of unlawful discrimination concerning her termination from SEPTA.

Ms. Yon raises a litany of incidences of alleged mistreatment that occurred during her employment at SEPTA. However, these events fail, individually and collectively, to create any reasonable inference that her termination resulted from discrimination, race or gender.

a. Accident Report Demand

Ms. Yon alleges that, following an assault by a passenger on October 7, 1993, her SEPTA supervisor, Frank Hargrove, asked plaintiff to complete an accident report before she went to the hospital. Ms. Yon refused and went to the hospital for treatment. She does not allege that she was punished for her actions, and admits that she received full worker's compensation for approximately the next seven months. Ms. Yon fails to allege that the treatment she received was different because of her race or gender. Accordingly, the incident does not create any inference that Ms. Yon was discriminated against in her firing by other SEPTA officials, which

occurred years later. At best, it shows a lack of sensitivity by Mr. Hargrove, and is insufficient to support an allegation of discrimination, especially since there is no medical evidence physically that Ms. Yon could not have completed the report when requested.

b. Refusal to Excuse for Labor Pains

Ms. Yon cites the refusal of her dispatcher to excuse her when she was pregnant as evidence of unlawful sex discrimination. (Pl.'s Resp. in Opp'n to SEPTA at 24.) On November 24, 1994, Ms. Yon called the dispatcher, Jim Brown, and reported that she was experiencing labor pains. Mr. Brown refused to excuse her and Ms. Yon asserts that she was assessed two attendance deviation points, for an "emergency at home." Even after receiving a note from her physician, Ms. Yon alleges that Mr. Brown did not reinstate her points. She argues that the CBA required the points to be reinstated and that his failure to do so demonstrates discrimination.

Other than her own conjecture, Ms. Yon gives no explanation as to how she knows this incident was a result of discrimination by Mr. Brown. It is just as likely that an administrative error occurred, or that Mr. Brown habitually failed to follow this policy. Ms. Yon does not cite any evidence that would indicate that the treatment she received was worse than others who did not belong to a protected class. Further, Ms. Yon fails to demonstrate how Mr. Brown's mental state in November 1994 had any influence or impact upon her termination, as he was not one of the individuals involved in the termination decision. Isolated incidences of inappropriate or rude behavior that are by non-decision makers or are temporally remote from the adverse action are rarely adequate to make out a claim of discrimination. See Piviorotto v. Innovative Systems, Inc., 191 F.3d 344, 359 (3d Cir. 1999). To allege a prima facie case of discrimination, Ms. Yon must show by a *preponderance of the evidence* that her supervisors had an intent to discriminate.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Ms. Yon's alleged point deduction could have resulted from numerous benign, plausible explanations. Further, no connection is alleged between this incident and Ms. Yon's eventual termination. Thus, this alleged incident fails to create an inference that Ms. Yon's later termination was based upon discriminatory intent.

c. Point Deduction for Delayed Arrival

Ms. Yon was out on maternity leave from December 3, 1994 to February 21, 1995. On February 25, 1995, Ms. Yon was required to report for duty by 5:00 a.m. Ms. Yon alleges that she arrived at 4:55 a.m., and upon arrival she made her presence known to dispatcher Jim Brown and others in the depot. Later, Mr. Brown accused Ms. Yon of having reported late, at 6:47 a.m. Ms. Yon claims that when she attempted to explain that she was present, Mr. Brown pointed his finger at her, cursed at her, and told her to sit down if she wanted to work. (Yon Dep., 11/17/02 at 82.) When Ms. Yon reported the incident, Mr. Brown denied the events. He claimed that he did not write up Ms. Yon. However, Ms. Yon's record shows that she lost five points on February 23, 2003, for being "MLF - missing less than four hours." Ms. Yon claims this incident displays the discrimination she experienced at SEPTA.

Again, Ms. Yon fails to provide evidence that Mr. Brown's behavior was the result of race or gender discrimination. While she states that he acted rudely, she does not allege that he made comments about her race or gender, even when he was reprimanding her. Mr. Brown's actions may be explained as those of an abrupt person, or he could have had a personality conflict with Ms. Yon unrelated to race and/or gender. Ms. Yon does not cite instances where individuals who were not part of a protected class were treated more favorably by Mr. Brown.

Further, she fails to establish any link between Mr. Brown's conduct and her subsequent firing from SEPTA. Thus, the event fails to create any inference that her termination was the result of discrimination.

d. Treatment by Mr. DeBreaux

Ms. Yon alleges that, also on February 23, 1995, a SEPTA instructor boarded her vehicle and asked her about the incident earlier that day with Mr. Brown. Ms. Yon refused to answer. The instructor, Joseph DeBreaux, ordered her to return to the depot, accusing her of having copied her run incorrectly. Upon returning to the depot, it was clear that Ms. Yon had not made an error. Ms. Yon alleges that later Mr. DeBreaux admitted his mistake, but made a sarcastic remark to her. SEPTA reports indicate that Mr. DeBreaux filed a Light Rail Operation Follow-Up Report on Ms. Yon that made disparaging remarks about Ms. Yon's attitude.

Again, Ms. Yon does not demonstrate that this behavior was the result of discrimination. She admits that she refused to speak to him with regard to the earlier conflict with Mr. Brown when she may have had a duty to do so. Her refusal, therefore, has not been excluded as the reason for his negative remarks in her evaluation. Further, even if she could show discriminatory intent by Mr. DeBreaux, Ms. Yon fails to demonstrate how this had any impact on her subsequent termination in which Mr. DeBreaux had no role.

Ms. Yon argues that under Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), she is not required to make a showing of discrimination, and that a jury should be allowed to determine if discrimination occurred in any instance when it *might* have motivated an employer. (Pl.'s Resp. in Opp'n to Mot. By SEPTA at 26, quoting Price Waterhouse, 490 U.S. at 258.) Ms. Yon misunderstands Price Waterhouse. Plaintiff's burden of proof under McDonnell Douglas

has not been removed. Plaintiffs are required by a preponderance of the evidence to show that an employer had a discriminatory intent when the adverse employment action transpired.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Here, Ms. Yon merely speculates that discrimination *might* have motivated Mr. DeBreaux's behavior, which is insufficient to create such an inference and cannot survive SEPTA's motion for summary judgment.

d. Racial Comment by SEPTA Employees

Ms. Yon first alleges that on March 16, 1995, after pulling her vehicle into the shop she saw two white male SEPTA non-supervisory employees. As she gathered her belongings, she heard one say to the other, "That is a[] ugly black bitch, isn't it?," to which the other replied, "Yes, it is." Ms. Yon wrote a letter to the General Manager regarding this incident. She now alleges that this incident is proof that race and/or gender was involved in SEPTA's decision to fire her. SEPTA argues that Ms. Yon offers no evidence that the remark was directed at her, she only makes this assumption because there was no other black woman present. SEPTA further argues that, even if the comment referred to Ms. Yon, there is no showing that either individual had control or influence over her job.

The comment alone is insufficient to create a material fact that could lead to a conclusion that Ms. Yon was discriminated against by SEPTA management. First, Ms. Yon cannot demonstrate that the comment referred to her. While she was the only black woman in the room, it could have been made in reference to a picture, in a magazine or newspaper, or it could have been part of a larger conversation that Ms. Yon did not hear. Even if the isolated comment was directed at her, Ms. Yon fails to present any evidence that indicates her SEPTA managers and

supervisors considered race or gender in the termination decision. Ms. Yon has not alleged that either individual she heard on March 23, 1995 was in a superior role to her, or had any influence over those who were responsible for her termination in October 1996. Those in supervisory positions are not assumed to know, much less agree with, the sentiments and attitudes of those below them. To automatically impute those that fired Ms. Yon with the same mental state as the men commenting would be inaccurate and improper.

The third circuit has refused to find a prima facie case was established from stray remarks, even when they are “crude and unprofessional.” Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992). “Stray remarks by non-decision makers or decision makers that are unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision.” Pivrotto v. Innovative Systems, Inc., 191 F.3d 344, 359 (3d Cir. 1999) (quoting Ezold, 983 F.2d at 545). Because Ms. Yon cannot connect the event in any way to her termination, she fails to demonstrate an issue of material fact.

e. Delay in Workers’ Compensation Payments

In June of 1995, plaintiff was involved in a vehicle accident. Plaintiff filed an Occupational Injury Report on June 5, 1995, however, she did not begin receiving payments until late June. Her payments were not received within the prescribed thirteen days, as required under the Union and SEPTA’s CBA. Ms. Yon was obviously frustrated by the delay in receiving payments while she was injured. However, she fails to allege that the delay resulted from discrimination. Further, Ms. Yon’s workers’ compensation payments were being processed by PMA Group, an outside agent. She does not allege that any delay caused by PMA relates in any way to her subsequent contested termination. Thus, this incident is irrelevant to the termination,

and cannot create any inference of discrimination.

f. Harassment while on Workers' Compensation

Ms. Yon alleges that while she was out on leave as a result of her injuries, a SEPTA or PMA Group agent harassed her by hiring a private investigator to follow her and photograph her. Further, she alleges that her Elmwood District locker was opened and emptied, without notice to her. Ms. Yon fails to allege that either of these incidents were the result of discrimination.

With regard to the investigator, she fails to present any evidence, except her own allegations, that she was ever followed or photographed. Though she alleges that a Union representative, Mr. Nelms, told her she was followed at the direction of SEPTA, this allegation is inadmissible hearsay and cannot be considered by the court to overcome a summary judgment motion. Rule 56(e) states:

When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). Ms. Yon has not presented an affidavit corroborating what she alleges Mr. Nelms said to her. She merely alleges the content of a prior conversation with him. Allegations that would not be admissible at trial are inadequate to create an issue of material fact. Even if she could demonstrate such treatment, she does not have any evidence to demonstrate that she was specifically targeted because of her race and/or gender.

With regard to her locker, all the lockers in the Elmwood District were audited while Ms. Yon was on medical leave. She was given eight weeks notice of the audit, the same notice given to all employees. While Ms. Yon may not have received this notice at home, she was notified in

the same manner as every other employee with a locker at Elmwood. She admits that no notice was given to any of the employees who were out of work due to disability or other reason, thus admitting that the treatment was not a result of discrimination based on race and/or gender.

f. Return to Work

Ms. Yon alleges that she was forced to return to work before her doctor recommended that she was ready. Before she returned she was approved by SEPTA doctors as not needing any accommodation. Approximately a week after she returned, Ms. Yon was re-injured. After receiving this injury she left work early and was assessed two attendance deviation points by Ed Thomas. While Ms. Yon raises these events, she does not allege that any of the treatment was improper or not part of the standard SEPTA protocol. Further, she fails to allege that any of the actions resulted from discrimination, or that other employees in non-protected classes received better treatment. Thus, these events do not create an inference of discrimination on the part of SEPTA or its employees.

g. October 6, 1996

On October 6, 1996, Ms. Yon called work and asked to be excused due to back pain. What occurred next is disputed. Ms. Yon alleges that Mr. Degrasse and Mr. Thomas refused to excuse her, told her she would be assessed points if she did not arrive for her shift, and threatened that she would be fired if she did not report to work. Mr. Degrasse claims that he told Ms. Yon he would excuse her from work. SEPTA records indicate that Ms. Yon was told she was excused, and did not have to report. Ms. Yon states that she never heard Mr. Degrasse excuse her.

Ms. Yon arrived at the Elmwood Depot at 7:00 p.m., and clocked in. The exact events

following her arrival are also disputed. She claims that she went by Mr. Degrasse, heading towards the dispatcher window to make certain she was not marked “AWOL.” SEPTA supervisors claim that Ms. Yon argued with the dispatcher, used profanity, racial slurs, and insults, and waved around an anti-theft automobile device, the “Club.” Ms. Yon admits that there was a verbal altercation, that she used profanity and that she was in possession of the Club during that time. She denies making racial remarks, and claims that she held the Club behind her back through the entirety of the argument. SEPTA supervisors called the police to render assistance. Before they arrived Ms. Yon left the premises and drove off.

In recounting these events, Ms. Yon alleges that she her SEPTA supervisor’s refusal to dismiss her was the result of race and/or gender discrimination. However, SEPTA records show that she *was* actually excused for the night in question and Ms. Yon has no evidence to the contrary. Thus, she cannot demonstrate any discriminatory treatment.

h. Similarly Situated

A plaintiff may demonstrate an inference of racial discrimination by presenting evidence that similarly situated individuals not members of the plaintiff’s protected class received more favorable treatment. Anderson v. Haverford College, 868 F. Supp. 741, 745 (E.D. Pa. 1994); Robertson v. Ashcroft, No. 00-5728, 2002 WL 109624 (E.D. Pa. Jan. 28, 2002). In order to be considered “similarly situated” for the purpose of Title VII cases, “the plaintiff must prove that all of the relevant aspects of [her] employment situation are nearly *identical* to those of the . . . employees whom [she] alleges were treated more favorably.” Miller v. Delaware, Dept. of Probation and Parole, 158 F. Supp. 2d 406 (D. Del. 2001) (citation omitted); Anderson, 868 F. Supp. at 745 (plaintiff must show that she and the other individual “engaged in the same conduct

without such differentiating or mitigating circumstances that would distinguish [her] conduct or the employer's treatment of them for it.").

Ms. Yon raises several situations that are sufficiently similar to hers that she can demonstrate discrimination. SEPTA argues that none of plaintiff's comparable cases can be considered similarly situated, and Ms. Yon has not met her burden.

1. Excusal of Worker on October 6, 1996

Ms. Yon claims that another worker was given an excused absence for October 6, 2003, the night Ms. Yon claims that she believed her supervisor refused to excuse her, but that she received the excusal without argument or resistance from SEPTA. (Yon Dep. 9/30/02 at 147-50.) However, this employee was also a black woman. Because she is a member of the same protected class as Ms. Yon, her excusal does not raise the inference that the treatment Ms. Yon received was a result of her race and/or gender. Further, SEPTA records show that Ms. Yon actually was excused for her shift on October 6, 1996, thereby rebutting all inference of differential treatment.

2. Robert Justice

Ms. Yon alleges that a white male SEPTA employee, Robert Justice, assaulted a SEPTA supervisor in the subway and was able to continue employment at SEPTA.⁷ (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 31.) Ms. Yon admits that her knowledge of these events is hearsay, and would be inadmissible in court. Her allegations alone are insufficient to overcome a motion

⁷ Ms. Yon also alleges that she witnessed Mr. Justice driving SEPTA vehicles while he was inebriated and that despite this behavior he retained his job. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 31.) However, as no part of Ms. Yon's situation involved driving while inebriated, her situation is not similar and cannot be relied upon for an inference that her termination was the result of discrimination.

for summary judgment. See Fed. R. Civ. Proc. 56(c). Discovery was reopened to permit Ms. Yon to gather any evidence to support her allegations concerning Mr. Justice. Despite a lengthy extension of discovery, Ms. Yon has produced no evidence that substantiates her claims concerning Mr. Justice. As mere hearsay is insufficient to sustain her burden of proof, she has not presented adequate information to create an issue of material fact.

3. George Garner

Ms. Yon claims that she is similarly situated to George Garner, a SEPTA employee that spit on a female passenger. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 29.) Initially Ms. Yon alleged that Mr. Garner had spit on a passenger and had not been disciplined or barred from work.⁸ (Id. at 29.) Mr. Garner's subsequent deposition revealed that he had been severely reprimanded. (Garner Dep. at 35.) He was charged with "conduct unbecoming a SEPTA employee" and was suspended from work without pay pending investigation and SEPTA ruling on the incident. (Id. at 47-54.) Thus, Ms. Yon's contention that Mr. Garner was treated more favorably is incorrect.

4. Dirk Shuster

Ms. Yon claims that another white male operator, Dirk Schuster, with the same tenure as she, was allowed to call out from work on short notice. (Yon Dep. 9/30/02 at 113-15, 119-23.) These unsubstantiated allegations cannot create an inference of discrimination since they do not

⁸ Ms. Yon also alleged that Mr. Garner assaulted a passenger. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 29.) This incident does not give rise to an inference of discrimination, as Mr. Garner was suspended for the alleged conduct. (Garner Dep. at 17-18.) However, when no evidence was presented by the passenger to substantiate the allegation, and no charges were filed against Mr. Garner, he was re-instated and granted back pay. (Id. at 16-29.) To date, there is no evidence confirming that Mr. Garner did assault the passenger, and Mr. Garner has consistently denied engaging in such inappropriate conduct. (Id.)

allege circumstances similar to those surrounding Ms. Yon's discharge. Further, the allegations are based solely on hearsay and were not substantiated by admissible evidence despite a discovery extension.

5. Linda Angotta

Ms. Yon claims that SEPTA treated its white employees better during their pregnancies than its black employees. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 27-28.) She alleges that Linda Angotta, a white woman, was reassigned to the main office when she was pregnant and allowed to do desk work. (Id.) Ms. Yon claims that other black female operators were required to continue making runs, attending night shifts, and performing physical labor such as repairing trolley poles. (Pl.'s Resp. in Opp'n to SEPTA's Mot. at 28.) Ms. Yon claims that, as a result of this labor, many black female operators miscarried and lost their children. (Id.)

Without addressing the veracity of plaintiff's contentions, this information is deemed irrelevant to Ms. Yon's claims of discrimination. When one attempts to create an inference of discrimination another "similarly situated" employee who was treated more favorably, the plaintiff must show that the relevant aspects are nearly identical. Miller v. Delaware, Dept. of Probation and Parole, 158 F. Supp. 2d 406 (D. Del. 2001). Here, Ms. Yon contests her termination, alleging that it was the result of race and/or gender discrimination. If true, Ms. Angotta's treatment may be relevant to a claim addressing discrimination of placement within the SEPTA system when pregnant. However, it is irrelevant to Ms. Yon's termination. Ms. Yon would need to show a situation where an employee, not a member of a protected class, threatened or attacked a supervisor and was treated more favorably. Information that one pregnant woman was assigned to desk work, does not imply that Ms. Yon was terminated as a result of

discrimination after she had threatened supervisors verbally and with a dangerous weapon. Ms. Angotta's treatment is simply unrelated to the situation at hand and, thus, cannot be used by Ms. Yon to establish her prima facie case of discrimination.

2. Legitimate, Non-Discriminatory Reason for Termination

Ms. Yon fails to establish a prima facie case. However, even if she were able to provide sufficient information for a prima facie case, SEPTA has proffered a legitimate, non-discriminatory reason for her termination. Therefore, a plaintiff bears the burden of showing that the circumstances encountered by the supervisors on the night of the Club incident were a pretext for race or gender discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Here, SEPTA states that Ms. Yon was barred from returning to work because she allegedly threatened or assaulted a supervisor. The SEPTA work rules state that an employee shall be barred from reporting to work and/or discharged for "threatening and/or assaulting a supervisory person, passenger, and/or other employee or non-employee. . ." (SEPTA's Ex. G, CBA at PH00234.) At her outburst on October 6, 1996, Ms. Yon admits that she used profanity and had in her hands a device that could have been wielded as a dangerous weapon. The three supervisors present—Mr. Thomas, Mr. Balsualdo, and Mr. DeGrasse—filed Supervisor's Special Reports concerning the incident. Mr. Thomas and Mr. Balsudo also filed Occupational Injury Reports. In their Supervisor's reports, Mr. Balsudo and Mr. Thomas stated that Ms. Yon used foul language, made racial slurs, and threatened each with the Club by waving it at them.

The following day plaintiff learned that she had been barred from reporting to work. On October 8, 1996, Ernie Pronkowitz, the Director of Transportation at the Elmwood District,

conducted an informal investigation and recommended that Ms. Yon be discharged. On October 29, 1996, Kevin O'Brien, the Chief District Officer at the Elmwood District, conducted a formal hearing. At the hearing Ms. Yon was assisted by Union representatives and both Ms. Yon and SEPTA were allowed to present witnesses. As a result of this hearing, Mr. O'Brien, who is not associated with any claims of discrimination, recommended that Ms. Yon be discharged for conduct unbecoming a SEPTA employee on November 3, 1996. On that date plaintiff was discharged and she ceased receiving Workers' Compensation payments.

The undisputed evidence shows that Ms. Yon entered the supervisors' office on October 6, 1996, while angry, that she carried a Club and used inappropriate and hostile language. This evidence provides a legitimate, non-discriminatory reason for Ms. Yon's discharge. By barring her from work following the submission of the Supervisors' Reports, SEPTA acted in compliance with the CBA. Informal and formal investigations were conducted pursuant to proper procedure. The third circuit has stated that an employer has a "relatively light burden" to produce a legitimate reason for the adverse employment action suffered by an employee. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). SEPTA's reliance upon Ms. Yon's outburst, where she threatened SEPTA supervisors by possessing a dangerous instrument, is more than adequate to satisfy their burden of showing the termination was for reasons that were not discriminatory.

Following such a showing, "the burden of production rebounds to the plaintiff, who must show by a preponderance of the evidence that the employer's explanation is pretextual." Fuentes, 32 F.3d at 763. A plaintiff may survive summary judgment only by submitting evidence from which a factfinder could reasonably either: 1) disbelieve the employer's articulated legitimate reasons; or 2) believe that an invidious discriminatory reason was more likely than not

a motivating or determinative cause of the employer's action. Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). Thus, to meet this burden, Ms. Yon must proffer sufficient evidence that would allow a fact finder to reasonably believe the nondiscriminatory reasons were either fabricated, implausible, or not the actual motives for the suspension and termination. Fuentes, 32 F.3d at 764. Ms. Yon has not met this burden. She is unable to establish an inference of discrimination sufficient to support a prima facie case. Even if able to produce such a showing, she has failed to produce any evidence that would discredit SEPTA's reason for suspension and termination, or that would demonstrate that discrimination was more likely than not a determinative factor underlying these actions.

Retaliation

Finally, Ms. Yon alleges that her termination was the result of SEPTA retaliating against her asserting her rights. "To establish a prima facie case of retaliation, a plaintiff must show that he/she is engaged in protected activity, that the employer took an adverse employment action against him/her, and that there is a casual connection between the protected activity and the adverse employment action." Goosby v. Johnson & Johnson, 228 F.3d 313, 323 (3d Cir. 2000). The only arguable protected activity that Ms. Yon was engaged in was writing letters to the SEPTA General Manager. However, there is no evidence to link the writing of these letters to her termination. While Ms. Yon claims that, following the writing of these letters, she was informed by a Union representative that SEPTA management was trying to get her fired there is no corroboration of this claim. Without evidence, properly considerable under summary judgment rules, of a linkage between the letters and her termination, Ms. Yon fails to establish a

prima facie case of retaliation.

Union - Local 234

Duty of Fair Representation

Under Pennsylvania law governing the duty of fair representation, a public employee claiming that her union has breached its duty of fair representation must show that the Union's processing of a grievance was arbitrary, discriminatory, or based on bad faith. See Hughes v. Council 13, Am. Fed'n of State, County and Mun. Employees, 629 A.2d 194, 195-96 (Pa. Comm. Pl. 1993) (citing Vaca v. Sipes, 386 U.S. 171 (1967)). The union enjoys "broad discretion to receive, pass upon and withdraw grievances." Id. (citing Falsetti v. Local Union 2026, 161 A.2d 882 (Pa. 1960)). Absent evidence of arbitrariness, discrimination, or bad faith, a plaintiff cannot prevail in her claim. Id. A claim does not exist for negligence in processing a grievance. Findley v. Jones Motor Freight, Division Allegheny, 639 F.2d 953, 960 (3d Cir. 1981).

There is a two-year statute of limitations applicable to claims for breach of the fair duty of representation. The Union asserts that Ms. Yon did not file within this time period and, thus, her claim should be dismissed as untimely. The Union asserts that it actively pursued her claims until January 7, 1999, when the Union agent wrote to Ms. Yon and informed her that her grievance was being withdrawn from arbitration. Ms. Yon did not file her claim until October 17, 2001, two and a half years later, and accordingly it must be dismissed.

Even if Ms. Yon's claim was timely, Ms. Yon presents no evidence that the Union's conduct was arbitrary, discriminatory, or in bad faith. Without evidence in her favor there is no issue of material fact as to whether the Union breached its duty. The Union acted appropriately

while assisting Ms. Yon, even going beyond its required actions by allowing her to hire an independent attorney at the Union's expense.

Ms. Yon alleges that her claim of breach of duty of fair representation is a result of treatment not of her discharge, but of events that occurred during her employment—the emptying of her locker, her delayed workers' compensation payments, and her reassignment to light duty. Ms. Yon alleges that her claims were not properly processed due to gender discrimination.⁹ In support of her gender discrimination claim, Ms. Yon cites to a note she obtained that was passed between Union representatives during a preparation session for her arbitration claim, which allegedly demonstrates gender discrimination. (Pl.'s Resp. in Opp'n to Union's Mot. at 23; Pl.'s Ex. 7, PH 00333.) Ms. Yon's exhibit contains what is alleged to be a copy of the note. (Pl.'s Ex. 7, PH 00333.) The second page of the note reads: “She just lost her case,” “PMS,” “defience” (sic), and “harmon embalance” (sic). (Id.) Ms. Yon alleges that the two men who were writing the note were Rich Sabin and Willie Brown. (Id.)

This note was written during a meeting preparing to challenge her termination. The Union diligently pursued claims surrounding Ms. Yon's termination. Ms. Yon does not even claim that any of the Union's conduct regarding her termination proceedings violated her right to fair representation. Despite its timing, she believes that the comments indicate a gender bias, and further such discrimination could have caused the Union to inadequately represent her on prior

⁹ Ms. Yon also alleges that failure the file grievances on her behalf was due to race discrimination, as she claims that the Union was hesitant to file claims based upon race discrimination. (Pl.'s Resp. in Opp'n to Union's Mot. at 23.) However, she fails to present any evidence to support this contention. Without evidence, Ms. Yon cannot satisfy her burden of showing that any failure was based upon discrimination and, thus, her allegation is insufficient to overcome the Union's Motion for Summary Judgment.

occasions. (Pl.'s Resp. in Opp'n to Union's Mot. at 23.)

First, passing references to PMS and hormones, coming after the statement that "She just lost her case" do not create an inference of gender discrimination. The representatives may have been, upon hearing Ms. Yon speak, making determinations of her credibility or how her testimony would be considered by a fact-finder. Whatever the meaning of the note, there is no dispute that the Union diligently pursued Ms. Yon's improper termination claim. Further, the comments have no probative value concerning the Union's prior treatment of Ms. Yon. Ms. Yon alleges that she repeatedly told Mr. Nelms to pursue grievances for her. He is not alleged to be involved in writing the note, and any thoughts of the writers cannot be imputed to him or to the Union decisions generally. As stated, a union enjoys "broad discretion to receive, pass upon and withdraw grievances." Hughes v. Council 13, Am. Fed'n of State, County and Mun. Employees, 629 A.2d 194, 195-96 (Pa. Comm. Pl. 1993). This note, written significantly after the period of time Ms. Yon alleges that the Union did not properly represent her, and written by individuals not previously involved in her claims, does not establish any proof of discrimination on the part of the Union.

Title VII Labor Organization Standard

In order to prove a prima facie violation under Title VII against a labor organization, a plaintiff must prove that: 1) the organization committed a violation of the CBA with respect to the plaintiff; 2) that the Union permitted that breach to go unrepaired, thus breaching its own duty of fair representation; and 3) that there was some indication that the Union's actions were motivated by some discriminatory animus. Bugg v. Int'l Union of Allied Workers of America, 674 F.2d 595, 598 n.5 (7th Cir. 1982); Bell v. Glass, Molders, Pottery, Plastics, and Allied

Workers Local Union #246, No. 00-1693, 2002 WL 32107218 (W.D. Pa. Aug. 19, 2002).

Ms. Yon alleges that the Union discriminated against her by failing to properly represent her, mainly that they failed to file grievances on her behalf on numerous occasions. (Pl.'s Resp. in Opp'n to Union's Mot. at 14.) The Union states that they pursued Ms. Yon's grievances for a period in excess of two years, and therefore there is no dispute regarding its representation of Ms. Yon was adequate. In her deposition, even Ms. Yon could think of no facts that supported that any alleged failings of the Union had been a result of racism/sexism. As stated above, the note Ms. Yon allegedly recovered is not probative of any gender discrimination against Ms. Yon.

Ms. Yon argues that Goodman v. Lukens Steel Co., 777 F.2d 113, 126 (3d Cir. 1985), governs this case. Under Goodman the deliberate failure to process grievances, as Ms. Yon alleges, can constitute a Title VII violation. While Goodman may remain good law, Ms. Yon has failed to present evidence that any delay caused by the Union was deliberate.

An appropriate order follows.