

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

BLANCHE LYLES,
Plaintiff

CIVIL ACTION

v.

PENNSYLVANIA FEDERATION
OF TEACHERS, et al.,
Defendants

NO. 00-2064

MEMORANDUM AND ORDER

McLaughlin, J.

July 10, 2002

The present case arises out of an employment dispute between Blanche Lyles and her former long time employer, the Pennsylvania Federation of Teachers ("PaFT"), and her supervisor at the PaFT, Jack Steinberg. Lyles alleges that while employed at the PaFT, she was discriminated against in a number of ways on account of her age and her gender, and that she was eventually forced to retire under threat of wrongful demotion, all in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq. ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1) ("ADEA"), and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955 (a) ("PHRA"). Lyles also alleges that the defendants breached an oral contract with her regarding the terms of her retirement.

Currently pending before the Court is the defendants'

motion for summary judgment. Because the Court concludes that the defendants have articulated legitimate non-discriminatory reasons for taking the employment actions in question and because the plaintiff has failed to show that those reasons are pretextual, the Court will grant the defendants' motion for summary judgment on the Title VII, ADEA and PHRA claims. In addition, because the plaintiff has failed to show that she effectively accepted the defendants' retirement offer, the Court will grant the defendants' motion **for** summary judgment on the oral contract claim as well.

I. Background

Lyles was hired to work as a secretary for the PaFT in 1967. Plf.'s Ex. A, 12 ("Lyles Dep. ").¹ In 1972, she joined the Office and Professional Employees International Union ("OPEIU"),

¹ In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josev v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). Summary judgment **is** appropriate if all of the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgement as a matter **of** law. Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986).

and her job title was changed to clerk analyst/office manager. Id. at 13. As a member of the OPEIU, Lyles participated in the OPEIU pension plan, through which the PaFT contributed a flat weekly contribution on behalf of each employee.'

In 1981, Lyles unofficially assumed the duties of Administrative Coordinator of the PaFT. Id. at 14. At the time she assumed those duties, Lyles testified that Albert Fondy, the President of the PaFT, told her that she would be able to participate in the pension plan governing employees **of** the Federation **of** Teachers Staff Union ("FTSU"). Id. at 91. The FTSU pension plan required the PaFT to contribute around 18% of the employees' salary toward their pensions.³ Lyles never participated in the FTSU pension plan.

In 1983, Lyles was officially promoted to the position of Administrative Coordinator within the PaFT. Id. at 14. As the Administrative Coordinator, Lyles functioned as an assistant to Ann Lepsi, the Executive Director of the PaFT. Id. at 16. When Lyles took the position of Administrative Coordinator, she

² As of April 1999, the flat rate contribution was \$35.75 per week. Def.'s Ex. D, ¶ 5 (WhitehornAff.).

³ At the time Lyles filed her complaint, the contribution amount was 18%. At the time that Lyles was promoted to Administrative Coordinator, the contribution amount was 16% plus a flat rate amount. Lyles Dep. at 94-95. The total contribution at that time was about 18%. Id.

entered into an employment contract with the PaFT, the terms of which called for the PaFT to contribute 7.5% of Lyles' salary toward her pension. See Def.'s Ex. E, ¶ 4(b). After this initial contract expired in 1988, Lyles entered into a series of additional contracts with the PaFT. Lyles Dep. at 23-25. Each of these contracts provided that the PaFT would contribute 7.5% of Lyles' salary toward her pension. See id.; Def.'s Exs. F & G.

During her employment, Lyles had several run-ins with Steinberg, the Treasurer of the PaFT. In 1993 Lepsi complained to Steinberg that Lyles had failed to answer the phones as she was supposed to. Lyles Dep. at 41-43. Lyles was then summoned to a meeting with Steve Falcone, the Controller of the PaFT, at which she was instructed to report to Genevieve Jensen, the office manager, from that point forward. After this meeting, Lyles wrote a memo to Falcone, copied to Steinberg and Fondy, that was critical of the way the meeting was handled. Def.'s Ex. W. Steinberg responded in a memo dated March 17, 1993, stating that Lyles' memo "was negative, and contribut[ed] to a lowering of morale." Def.'s Ex. X.

In 1995, Lyles was called into Steinberg's office to discuss an altercation that she had with Paul Thomas, a PaFT staff member. The altercation occurred when Thomas questioned Lyles' presence in Lepsi's office shortly after Lepsi had died.

Def.'s Ex. EE, ¶ 3 (Thomas Aff.). Thomas asserts that Lyles yelled at him in response. Id. Lyles testified that Thomas abused her verbally. Lyles Dep. at 56. When Steinberg heard about this exchange, he called Thomas and Lyles into his office, where he asked Lyles if she had "berat[ed] his staff." Id. Lyles responded that Thomas had berated her. Steinberg called in witnesses to find out the truth. The next day, Steinberg told Lyles that he only wanted her to "get along." Id.

In 1996, Lyles missed work after she suffered a broken leg. When she returned to work, Lyles began to park at a meter across the street from the office rather than in the parking garage. Lyles Dep. at 51-54. Janet Ryder, the PaFT Legal Fund Administrator, complained to Steinberg about Lyles parking at the meter. Id. at 179-80. Ryder alleged that Lyles was leaving the office every two hours to feed change into the meter, and that this interfered with her work. Def.'s Ex. S (Ryder Aff.).⁴ Lyles was then informed that she would have to punch a time clock, and Steinberg told her that certain "work was not getting done" and that she "should have parked in the parking lot." Lyles Dep. at 53-54.

When Lyles' final contract expired in August 1996, the

⁴ Lyles testified that she never went to feed the meters, and that other employees did it for her. Lyles Dep. at 54-55.

PaFT declined to renew it, and Lyles became an at will employee. Lyles Dep. at 28. Steinberg informed Lyles of this decision. The PaFT asserts that Lyles' contract was not renewed because the Philadelphia office no longer needed an Administrative Coordinator after the death of Ann Lepsi in 1995 and the subsequent transfer of the Executive Director position to the Pittsburgh office.

Nonetheless, Lyles continued to work under the terms of her prior contract, including the 7.5% pension contribution. Id. at 28, 100 & 193. From 1996 to 1998, Lyles approached Steinberg several times to inquire about the renewal of her employment contract. Each time, she was told that she was an at will employee, and that her contract would not be renewed. Id.

In October 1997, Lyles learned that the employment contracts of Steve Falcone and Michael D'Arcy, the Controller and Assistant Controller, respectively, of the PaFT and several related organizations,⁵ were being renewed. She also learned that there were plans to switch Falcone and D'Arcy from the 7.5%

⁵ Falcone served as the Controller of the PaFT, the Philadelphia Federation of Teachers ("PFT"), the PFT Health and Welfare Fund, the PFT Legal Services Fund and the 1816 Building Corporation. See Plf.'s Ex. B, 94-95 ("Steinberg Dep."); Lyles Dep. at 113-14. D'Arcy served as the Assistant Controller of those same organizations. See Steinberg Dep. at 94-95; Lyles Dep. at 113-14; Def.'s Ex. BB (D'Arcy Aff.).

pension plan into the FTSU pension plan. Lyles Dep. at 234-35; Def.'s Ex. H, ¶ VIII. Soon thereafter, Lyles became aware of an internal memo sent from Bernard Murray, Fondy's assistant, to Steinberg. Lyles Dep. at 239-40; Def.'s Ex. I. In that memo, Murray stated his concern that if Falcone and D'Arcy were placed in the FTSU pension plan while other non-OPEIU employees, including Lyles, were not, there was a risk **of** losing the plan's favorable tax status. Def.'s Ex. I. Murray also stated that the issue would require a legal opinion. Id.

After learning of this memo, Lyles contacted Murray, who told her that he did not believe that any of the PaFT's non-OPEIU staff should be in the FTSU pension plan, but that if Falcone and D'Arcy were placed in the plan, then all non-OPEIU staff, including Lyles, should be included. Def.'s Ex. C, ¶ 6 (MurrayAff.); Lyles Dep. at 240. It was later determined that neither Falcone nor D'Arcy were eligible to be placed in the FTSU pension plan because neither performed the duties of a PaFT field staff employee. Def.'s Ex. D, ¶¶ 3, 7 (WhitehornAff.). For that reason, neither Falcone nor D'Arcy ever participated in the FTSU plan, but remained at all times in the 7.5% plan. Id. at ¶ 8; Def.'s Ex. Z, ¶ 3 (FalconeAff.); Def.'s Ex. BB, ¶ 2 (D'ArcyAff.); Steinberg Dep. at 15.

On December 15, 1998, Lyles approached Steinberg about

having her contract renewed. Steinberg explained to Lyles that she was an at will employee, and that her contract would not be renewed. Lyles Dep. at 35-36. On the following day, Falcone informed Lyles that as of January 1, 1999, she was to be returned to the OPEIU bargaining unit at a supervisory pay scale, and that her salary would be "red circled" until everyone else in that classification reached her pay level.⁶ Id. at 189-90.

As a result of being returned to the **OPEIU** unit, Lyles would also lose certain benefits that she enjoyed under the terms **of** her last contract with the PaFT.⁷ Id. at 193. On December 19, 1998, **Lyles** went on a vacation that was scheduled to run through approximately January 5, 1999. Id. 191. Lyles never returned to work at the PaFT.

On December 29, 1998, Falcone called Lyles to find out if she was going to accept the assignment to the OPEIU bargaining unit. Id. at 195. Lyles asked what would happen if she decided to retire, and Falcone told her that the terms of her last

⁶ Jensen, whose office manager duties had been removed to Harriet Anderson, was also informed that her position was being returned to the OPEIU bargaining unit effective January 1, 1999.

⁷ The lost benefits included tuition reimbursement, participation in the 7.5% pension plan and company payment of life insurance premiums. Lyles Dep. at 192. Lyles would also have fewer vacation days, would not be offered 10% severance pay, would be forced to change health care plans, and would not have the benefits **of** health insurance until the age of 65 if she decided **to** retire at 55. Id.

contract would be honored. Id. On December 30, 1998, Falcone once again called Lyles, and told her that the contract would be honored if she chose to retire. Id. at 196. Lyles said that she had not made a decision, but that she would get back to Falcone. She never got back to him. Id.

On December 29, 1998, Lyles met with her lawyer, Paul Rosenberg. Id. at 199. The following day, Rosenberg sent a letter to Fondy, copied to Steinberg. Def.'s Ex. N. The letter alleged that Lyles and Jensen were being returned to the OPEIU unit to allow Falcone and D'Arcy to be placed in the FTSU plan, and noted that if Rosenberg did not hear anything from the PaFT by December 31, 1998, 'all avenues of recourse' would be pursued. Id. On January 5, 1999, Lyles telephoned Fondy to ask if he had gotten Rosenberg's letter. Lyles Dep. at 196-97. Fondy **told** her not **to** worry and that the situation would be straightened out. Id.

On January 8, 1999, Lyles sent a memo to Fondy, Steinberg and Ted Kirsch.' Def.'s Ex. L. The memo stated that because of the threat of being placed in the OPEIU bargaining unit, Lyles was being "forced to retire.," Id. In the memo,

⁸ Kirsch was the president of the PFT, which shared office space with the PaFT. It is unclear why he was included on this correspondence. Neither party attaches any significance to Kirsch's receipt of this memo.

Lyles reported that Falcone had informed her that the terms of her last contract would be honored, including a 10% severance payment, the continued payment of life insurance and health benefits until the age of 65, a rollover of her 401K, and the payment of accrued vacation and sick time. Id. at ¶ 2. Lyles then requested certain additional benefits, including: an extension of health insurance payments until the age of 75; continued tuition reimbursement payments; and a payment of the difference between the 7.5% pension benefits in her contracts and the 18% FTSU pension benefits, plus interest, retroactive to 1983. Id.

On February 10, 1999, Debbie Willig, an attorney representing the PaFT, had a telephone conversation with Rosenberg. See Def.'s Ex. O; Lyles Dep. at 208-10; Def.'s Ex. M. During that conversation, Lyles was offered a return to employment at the PaFT without being placed into the OPEIU bargaining unit. Id. Lyles rejected this offer. Def.'s Ex. II, 13 (Rosenberg Dep.); Def.'s Ex. M.

On February 16, 1999, Willig sent a letter to Rosenberg. Def.'s Ex. P. The letter stated that Rosenberg had informed Willig on February 12, 1999 that Lyles and Jensen had decided to retire from employment with the PaFT, and that they had waived "any and all claims." Id. On March 3, 1999 Rosenberg

wrote to Willig requesting documents outlining the terms of retirement, and suggested that Lyles and Jensen pick up their personal belongings on March 3, 1999. Def.'s Ex. Q.

On March 15, 1999, Lyles again wrote a memo to Fondy, Steinberg and Kirsh. Def.'s Ex. M. In that memo, Lyles stated that no rights of any kind have been waived, and that she was standing by her January 8 memo. Id. She again stated that she rejected the PaFT's offer of reinstatement without demotion to the OPEIU. Lyles wrote that she was retiring, and requested terms of retirement as outlined in the January 8 memo. However, as an alternative to retroactive reimbursement of the difference between the 18% pension plan and the 7.5% pension provided for in her contracts, Lyles offered to accept a payment of two years of her current salary. Id. Lyles also indicated that all claims would be waived only when the PaFT came into agreement with the terms of her retirement package. Id. On March 19, 1999, Rosenberg again wrote to Willig, stating that his clients had not waived any rights, and informing her that they preferred to retire. Def.'s Ex. R.

On July 28, 1999, Lyles filed charges of gender and age discrimination with the EEOC. The instant suit was filed on

April 20, 2000.⁹ Lyles alleges that the defendants discriminated against her on account of her age and gender when they declined to renew her employment contract in 1996, when they threatened to demote her to the OPEIU in 1998, and when she was forced to retire under the threat of demotion. Lyles also alleges that she was subjected to a hostile work environment, and that the defendants breached an oral contract with her regarding the terms of her retirement.

II. Discussion

A. Title VII, ADEA, and PHRA

The decision whether to grant or deny summary judgment in an employment discrimination action under Title VII is governed by the Supreme Court's burden-shifting analysis in McDonnell-Douglass v. Green, 411 U.S. 792 (1973), recently

⁹ The amended complaint filed by Lyles on May 3, 2000 contains seven counts. Lyles has conceded that Counts I (age discrimination under § 2000e-2(a) (1) of Title VII), II (age discrimination under § 2000e-2(a) (2) of Title VII), and III (gender discrimination under § 2000e-1 of Title VII) should be dismissed. Plf.'s Br. at 20-21. The remaining claims are Count IV (gender discrimination under § 2000e2(a)(2) of Title VII), Count V (age discrimination under the ADEA), Count VI (breach of oral contract), and Count VII (gender discrimination under the PHRA). Lyles has also conceded that Steinberg is an improper defendant for the Title VII, ADEA, and PHRA claims because there is no individual liability under those statutes. Steinberg remains as a defendant on the oral contract claim.

clarified in Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).¹⁰

Under this analysis, the plaintiff must first make out a prima facie case of discrimination. Reeves, 530 U.S. at 142. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the employment action at issue. Id. Because the ultimate burden must always rest with the plaintiff, the defendant is not required to show by a preponderance of the evidence that it was, in fact, motivated by this particular reason. Rather, the defendant must merely present a reason for the action, which, if believed, would be legitimate and non-discriminatory.

In order to survive summary judgment, the plaintiff must then present evidence which shows that the proffered explanation is "unworthy of credence," or, alternatively, that the real motivation was more likely than not discriminatory. Id. at 143; Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

¹⁰ Although this discussion focuses on the Title VII claim, the legal analysis is identical to that for Lyles' ADEA and PHRA claims. See Reeves, 530 U.S. at 142 (applying Title VII framework to ADEA claim); Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1083-84 (3d Cir. 1995) (PHRA applied consistently with Title VII); Hoy v. Angelone, 691 A.2d 476, 480 (Pa. Super. Ct. 1997), aff'd 720 A.2d 745 (Pa. 1998) (same).

1. Prima Facie Case Analysis

To establish a prima facie case, the plaintiff must establish that: (1) she belongs to a protected category; (2) an adverse employment action was taken against her; (3) she was doing satisfactory work at the time the adverse employment action was taken or was otherwise qualified for the position; and (4) that the circumstances give rise to an inference of unlawful discrimination, such as where similarly situated employees, not in the protected category, were not subjected to a comparable employment action. Simpson v. Kay Jewelers, 142 F.3d 639, 644 n.5 (3d Cir. 1998). See Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 347 (3d Cir. 1999).

The plaintiff's initial burden of establishing a prima facie case "is not intended to be onerous." Marzano v. Computer Science Corp. Inc., 91 F.3d 497, 508 (3d Cir. 1996) (citations omitted). The purpose of the prima facie case is to require the plaintiff to set forth "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." Morris v. G.E. Fin. Assurance Holdings, No. 00-3849, 2001 WL 1558039, at *5 (E.D. Pa. Dec. 3, 2001).

The defendants argue that Lyles has failed to meet the fourth prong of her prima facie case. Lyles asserts that she has

satisfied the fourth prong because the PaFT treated two similarly situated non-protected employees, Falcone and D'Arcy, more favorably than it treated her by renewing their contracts and instituting plans to elevate them to the **FTSU** pension plan.

In order to be similarly situated to the plaintiff, the individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. E.g. Bullock v. Children's Hosp. of Phila., 71 F. Supp.2d 482, 489 (E.D. Pa. 1999). In determining whether two persons are similarly situated, courts have considered factors including: the relative positions of the parties, (i.e., whether one was a supervisor or was tenured); the job responsibilities of the parties; the relevant knowledge of the parties; and the education, training or licensing requirements of the positions. See Blanding v. Pa. State Police, 12 F.3d 1303, 1309-10 (3d Cir. 1993); Grande v. State Farm Mut. Auto. Ins. Co., 83 F. Supp.2d 559, 565 (E.D. Pa. 2000); Johnson v. Diamond State Port Corp., No. Civ. A. 99-153-GMS, 2001 WL 873229, at *4 (D. Del. Aug. 2, 2001); Morris, 2001 WL 1558039, at *7-8; Stove v. Phila. Sch. Dist., 58 F. Supp.2d 598, 602 (E.D. Pa. 1999); Watkins v. Children's Hosp. of Phila., No Civ. A. 97-1510, 1997 WL 793518, at *2 (E.D. Pa. Dec. 3,

1997).

Lyles asserts that she is similarly situated to Falcone and D'Arcy because they were all "middle management" employees.¹¹ Lyles defines middle management employees as those who were not field staff representatives (and part of the FTSU pension plan) nor part of the OPEIU. These employees worked under individual employment contracts with the PaFT.¹² Lyles also asserts that her job duties were consistent with a managerial position.

Lyles testified that she performed the following functions as Administrative Coordinator: day-to-day work in running the office, answering phones, writing letters, answering inquiries from teachers about salary scales and available jobs,

¹¹ The only evidence offered by Lyles for the contention that she was a middle management employee is her deposition testimony and the affidavit of Genevieve Jensen. See Lyles Dep. at 83; Plf.'s Ex. I, ¶ 5 (JensenAff.). Although the defendants have not challenged that portion of the Jensen affidavit, they argue that other portions of the affidavit are not based on first hand knowledge and should be stricken. The defendants also argue that plaintiff's Exhibit I should be stricken. The Court notes that Lyles has not relied in her briefing on any of the challenged portions of Jensen's affidavit, nor does the plaintiff rely on the substance of Exhibit I. Therefore, the Court will not consider the challenged portions of the Jensen affidavit or Exhibit I.

¹² This definition **of** middle management employees is not completely convincing. While it is true that Lyles, Falcone and D'Arcy had individual employment contracts and were outside of the OPEIU, other clearly non-managerial employees admittedly had similar employment arrangements, including the building engineer and custodians. Lyles Dep. at 84-86, 102-103.

keeping track of personnel, ordering machinery, and performing office manager functions. Lyles Dep. at 15-16. She also testified that she ran the biennial state convention. Lyles sent out the convention call, contacted speakers, wrote letters, supervised office personnel about what had to be done, drafted the program, and met with the printers. Id. at 17.

The written job description of the Administrative Coordinator position confirms Lyles' testimony. See Plf.'s Ex. H. It also provides that the Administrative Coordinator would, when necessary, direct OPEIU personnel (and PaFT staff when needed in connection with the convention).¹³ Id. Lyles argues that these duties support the assertion that she was a middle management employee, similarly situated to Falcone and D'Arcy.

The differences, however, between the positions held by Falcone and D'Arcy and by Lyles are substantial. The responsibilities held by D'Arcy and Falcone were much greater than those of Lyles. They were required to manage the books and

¹³ The fact that Lyles may have supervised some staff does not necessarily establish that she was a "middle management" employee. Lyles testified that before her promotion in 1983, when she was still a member of the OPEIU, she supervised OPEIU personnel and had largely the same responsibilities that she had after the promotion. Lyles Dep. at 13-15, 22 (noting that as OPEIU member she was doing Administrative Coordinator tasks from 1981-1983); See Plf.'s Br. at 7 (noting that while in OPEIU she had responsibility for supervising OPEIU staff).

prepare for audits of several organizations, while Lyles worked only for the PaFT. See Steinberg Dep. at 55. In addition, the controller position required advanced training, a CPA, while the Administrative Coordinator position required no such advanced training.¹⁴ Id. at 14.

Further, Steinberg delegated to Falcone and D'Arcy some management authority over Lyles.¹⁵ For example, in 1996, it was Falcone who informed Lyles that she was working as an at will employee under the terms of her old contract. Lyles Dep. at 28. It was D'Arcy who first instructed Lyles to punch a time clock after the parking meter incident in 1996. Id. at 52. It was Falcone who later had a meeting with Lyles to discuss this issue. Id.

In addition, Falcone wrote several memos to Lyles regarding her job performance, informing her of possible

¹⁴ A review of the contractual salaries of Lyles, Falcone and D'Arcy supports the conclusion that Lyles was not similarly situated to D'Arcy or Falcone. Lyles' salary for 1996 was \$35,207, while D'Arcy's salary for 1997 was \$53,510, and Falcone's salary for the same period was \$64,293. See Def.'s Ex. G, ¶ 3 (Lyles Agreement); Def.'s Ex. AA, ¶ 2(a) (D'Arcy Agreement); Def.'s Ex. Y, ¶ 3(a) (Falcone Agreement). The fact that D'Arcy was slated to make a salary more than 50% greater than Lyles, and Falcone's salary was more than 80% greater than Lyles' suggests that they were not "similarly situated."

¹⁵ In fact, Lyles testified that Falcone was put in charge of the state office. Lyles Dep. at 42. See Def.'s Ex. W, 1-2 (Lyles memo to Falcone dated March 12, 1993) (stating that she had learned that Falcone was now her "employer").

suspension and dismissal, and giving her new work assignments. See Def.'s Ex. T & V. Lyles responded directly to Falcone, recognizing that he had the right, "as designee for [her] employer", to make job assignments. Def.'s Ex. W at 3.

Later, Falcone had discussions with Lyles regarding her return to the **OPEIU** bargaining unit. Steinberg Dep. at 97-98; Lyles Dep. at 189-90. Falcone also conducted retirement discussions with Lyles. Lyles Dep. 269. Lyles requested from Falcone a letter outlining the terms of retirement. Def.'s Ex. L. It is also clear from the record that Falcone directed Lyles to perform typing for him. Lyles Dep. at 242-43. These facts suggest that D'Arcy and Falcone exercised managerial authority over Lyles, and were therefore not similarly situated to her. See, e.g., Grande, 83 F. Supp.2d at 565.

Although the case for Lyles being similarly situated to Falcone and D'Arcy is decidedly weak, the Court is mindful that the plaintiff's initial burden of establishing a prima facie case "is not intended to be onerous." Marzano, 91 F.3d at 508. Moreover, the Third Circuit has stated that failure to establish the fourth prong is not necessarily fatal to an employment discrimination claim under the McDonnell-Douglass framework. See Pivirotto, 191 F.3d at 347; Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997). Although Lyles has

not attempted to point to circumstances otherwise giving rise to an inference of unlawful discrimination, and despite the Court's strong doubts that she has made out a prima facie case, the Court will assume that she has done so and will proceed to the next two steps in the McDonnell-Douglass analysis.

2. Pretext Analysis

Once the prima facie case has been established, the defendant **has** the burden of production to come forward with legitimate non-discriminatory reasons for the employment actions in question. Once the employer meets its burden of production, the plaintiff has the burden 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." Reeves, 530 U.S. at 143.

In other words, the "plaintiff may attempt to establish that [s]he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence." Id. The plaintiff can meet this burden by pointing to evidence 'from which a factfinder would 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." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 413 (3d Cir. 1999).

To satisfy her burden, Lyles may demonstrate that "the employer's articulated reason was not merely wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." Id. (quoting Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997) (en banc)). Alternatively, the "plaintiff [can] point to evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that [the protected characteristic] was a motivating or determinative factor in the employment decision." Simpson, 142 F.3d at 644-45. This can be done by showing that "the employer has previously discriminated against the plaintiff, that the employer has discriminated against other persons within the plaintiff's protected class or within another protected class, or that the employer has treated more favorably similarly situated persons not within the protected class." Id. at 645.

Lyles complains of three employment actions taken by the defendants. The first is the refusal to renew her employment contract in 1996. The second is the December 1998 threat to demote her to the OPEIU. Finally, Lyles argues that retirement was forced upon her by the threat to demote her.

a. Employment Contract

The defendants argue that the 1996 failure to renew Lyles' employment contract cannot serve as a basis for a Title VII claim because Lyles did not meet the statute of limitations for bringing such a claim. Under Title VII, a plaintiff must generally institute suit within 180 days *of* the alleged discrimination. See 42 U.S.C. § 2000e-5(e). If the plaintiff initially filed a complaint with a state or local agency with authority to adjudicate the claim, however, the plaintiff has 300 days from the date of the alleged discrimination to file suit. Id.¹⁶

This time period may be extended by the discovery rule or the doctrine of equitable tolling. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994). The discovery rule provides that the initial running of the limitations period can be delayed until the plaintiff becomes aware (or by exercising reasonable diligence, should have discovered): (1) that she has been injured; and (2) that this injury has been caused by another party's conduct. Id. at 1386.

¹⁶ Similar time frames are applicable under the ADEA and the PHRA. See 29 U.S.C. § 626(d) (EEOC charge under ADEA must be filed within 180 days, or within 300 days if initially filed in state forum); 43 Pa. C.S.A. § 959(h) (PHRA complaint must be filed within 180 days of alleged act of discrimination).

The requisite awareness is of the actual injury (the harm caused by the employment action), not the legal injury (knowing the employment action was motivated by discrimination). Id. at 1386-87; Jordan v. SmithKline Beecham, Inc., 958 F. Supp. 1012, 1023-24 (E.D. Pa. 1997).

Equitable tolling can also apply to toll the running of the statute of limitations. The doctrine is generally appropriate where (1) the defendant has actively misled the plaintiff respecting her cause of action; (2) the plaintiff in some extraordinary way has been prevented from asserting her rights; or, (3) the plaintiff has timely asserted her rights mistakenly in the wrong forum. Oshiver, 38 F.3d at 1387. In the employment discrimination context, it has been held that equitable tolling can excuse non-compliance with the statute of limitations where it appears that the defendant actively misled the plaintiff respecting the reason for her discharge and the deception caused the plaintiff's non-compliance with the limitations provision. Id. In that circumstance, the statute of limitations begins to run when "the facts which would support the plaintiff's cause of action are apparent, or should be apparent to a person with a reasonably prudent regard" for her rights. Id. at 1389.

Lyles' contract was not renewed when it expired in

1996. She knew that her contract would not be renewed at least as early as September 1996 when Steinberg told her so. Lyles Dep. at 28-29. Therefore she "discovered" that she had been injured by another party's conduct at that time. Lyles then learned in 1997 that Falcone and D'Arcy had negotiated to be part of the FTSU pension plan. Id. at 115-16; Def.'s Ex. H. Therefore, even if equitable tolling is applied, Lyles knew by late 1997 all of the facts supporting her cause of action based on the failure of the PaFT to renew her employment contract.

Lyles filed charges of gender and age discrimination with the EEOC on July 28, 1999, and filed this lawsuit on April 20, 2000. By the time of these filings, well over 300 days had passed since Lyles knew of the facts giving rise to her cause of action for the failure of the PaFT to renew her employment contract. Therefore, even considering the benefits of the discovery rule and the doctrine of equitable tolling, Lyles' claim based on the failure to renew her employment contract appears to be out of time.

Even if the Court considers the issue on its merits, Lyles has failed to show that the PaFT's reasons for refusing to renew her employment contract are unworthy of credence or that discriminatory reasons were more likely than not the motivating cause of the PaFT's decision.

The PaFT asserts that it did not renew Lyles' contract in 1996 because the Philadelphia office no longer needed an Administrative Coordinator after the death in 1995 of the Executive Director and the transfer of that position to the Pittsburgh office. This fulfills the defendants' burden to produce a legitimate non-discriminatory justification for the employment action.

Lyles argues that this reason is pretextual, and that the real reason that her contract was not renewed was to allow Falcone and D'Arcy (two younger males) to be retained and placed in the FTSU pension plan. Lyles argues that the assertion that the Administrative Coordinator position was no longer needed cannot be believed because: the PaFT retained her in that position for three years after the position had allegedly become defunct; she continued to carry out the responsibilities of Administrative Coordinator until her last day; and she would have been required to carry out the same duties even after being demoted to the OPEIU. Lyles also asserts that there is no record evidence other than Steinberg's deposition testimony that the position had become defunct, and that he never told her that this was the reason that her contract was not being renewed.

These arguments do not meet Lyles' burden of showing that the proffered explanation is unworthy of credence. First,

it is clear that the Administrative Coordinator position required Lyles to perform certain duties explicitly for the Executive Director. Lyles testified that she reported directly to Lepsi and that she was Lepsi's "assistant." Lyles Dep. at 16. Steinberg testified that Lyles was really acting as Lepsi's confidential secretary. Steinberg Dep. at 32-34. In addition, the written job description states that one of the Administrative Coordinator's duties is to "[p]rovide assistance to Executive Director on answering correspondence, PaFT mailings, phone calls, and general communication responsibilities", "including confidential matters." Plf.'s Ex. H, ¶¶ 20 & 22.¹⁷

Further, it is uncontroverted that Lepsi died in 1995 and that the Executive Director duties were ultimately transferred to John Tarka in the Pittsburgh office. See Lyles Dep. at 21; Steinberg Dep. at 33; Def.'s Ex. B, ¶ 6 (Fondy Dep.).

¹⁷ The written description of the position also contains numerous other job duties that would not have been removed by Lepsi's death. However, by the time that Lyles' contract was not renewed in 1996, she was no longer performing many of the listed duties. For example, the duties of communicating with hotels for the state convention, attending Executive Council meetings, and preparing the notice and agenda for such meetings were removed to Jensen in 1993, the task of ordering machinery for the office was removed to Falcone in 1995, and the duties of updating the PaFT health and welfare benefits booklets and updating the information on the health and welfare trustees was removed to Falcone and D'Arcy in 1995. See Plf.'s Ex. H, ¶¶ 2, 12, 15, 18, 26, 28; Lyles Dep. at 44-49, 104-105.

The defendant's proffered explanation for the failure to renew Lyles' contract in 1996, therefore, is plausible. Lyles has not shown that the defendants' articulated reason for not renewing her contract is unworthy of credence or is so plainly wrong that it could not have been the real reason. Jones, 198 F.3d at 413.

Moreover, Lyles' attempt to show that discrimination was more likely than not the real reason is unconvincing. First, Lyles points to the renewal of Falcone and D'Arcy's contracts as proof of pretext. However, Lyles' contract expired in August 1996 and was not renewed at that time. Def.'s Ex. G, ¶ 1 (Lyles 1993 Employment Agreement); Lyles Dep. at 28-30, 100-101, 116-118. It was not until June 1997 that the contracts of Falcone and D'Arcy expired, and it was not until October 1997 that their contracts were renewed. See Def.'s Ex. H, ¶ VIII. The fact that Falcone's and D'Arcy's contracts were renewed in 1997, while Lyles' contract was not renewed in 1996, before the contracts of D'Arcy and Falcone even came up for renewal, offers little support to Lyles' claim of discrimination.

In addition, "[i]n determining whether similarly situated nonmembers of a protected class were treated more favorably than a member of the protected class, the focus is on the particular criteria or qualifications identified by the employer as the reason for the adverse action." Simpson, 142

F.3d at 647. In this case, the criterion identified for the refusal to renew Lyles' employment contract was the death of Lepsi and the attendant reduction in duties ~~of~~ the Administrative Coordinator position. Because neither the Controller nor Assistant Controller positions were subject to a similar reduction in duties, neither Falcone nor D'Arcy are similarly situated to Lyles for purposes of the pretext analysis. In other words, no reasonable inference can be drawn from the renewal of Falcone and D'Arcy's contracts that the defendants' reason for not renewing Lyles' contract was pretextual. ~~See id.~~

Nor are Lyles' allegations regarding Steinberg's previous hostile treatment of her and other women in the office sufficient to establish that the defendants' reason is pretextual. Lyles points to four incidents which allegedly evidence Steinberg's discriminatory intent toward her.

The first is Steinberg's alleged refusal to enter Lyles in the FTSU pension plan after Fondy had agreed that she should be put in it after she assumed the Administrative Coordinator position. Lyles Dep. at 90-93. Although Fondy swore in his affidavit that he never made this promise, there is evidence that it was intended in 1983 that Lyles would be put in a contract with provisions in accordance with the FTSU contract. Def.'s Ex. B, ¶ 4 (Fondy affidavit); Plf.'s Ex. D, ¶ 2. However, Lyles

subsequently entered into a series of written employment contracts, each of which clearly provided that she would participate in the 7.5% pension plan rather than the FTSU plan. See Def.'s Exs. E, F & G at ¶ 4.b; Lyles Dep. at 24-27.

Further, when asked whether she believed that Steinberg did not put her into the plan because of her gender or age, Lyles testified that she had no idea why he did not put her into the plan. Lyles Dep. at 286-87. It is also uncontested that Lyles did not at any time perform the functions of a PaFT field staff employee, and thus was never eligible to be placed into the FTSU pension plan. Def.'s Ex. B, ¶ 5 (Fondy Aff.); Def.'s Ex. D, ¶ 3 (Whitehorn Aff.); Lyles Dep. at 99, 204-05.

Lyles also points to the incident following Lepsi's 1993 complaint that Lyles had failed to answer phones, the 1995 incident following Lyles' altercation with Paul Thomas, and the 1996 parking meter incident. These incidents, however, are not sufficient to establish that Steinberg had previously discriminated against Lyles because of her gender or age. At no point does Lyles suggest that during these incidents Steinberg was disciplining or punishing her on account of her gender or age. Nor do the circumstances surrounding these incidents **support such** an inference.

There was no connection made between Steinberg's

refusal to put Lyles in the FTSU plan and Lyles' gender or age.¹⁸ Also, despite the alleged **FTSU** promise, Lyles entered into four Employment Agreements which clearly provided for participation in the 7.5% pension plan rather than the FTSU plan. In addition, two of the three confrontations with Steinberg were prompted by complaints made to Steinberg by other women in the office. The other incident (the Thomas incident) did not result in disciplinary action, but concluded with Steinberg telling Lyles that he wanted her to "get along" with the other employees. Viewed in a light most favorable to Lyles, these incidents are not sufficient to show that Steinberg had "previously discriminated against" her on the basis **of** her gender **or** age. Simpson, 142 F.3d 645.

Nonetheless, Lyles appears to attempt to connect these incidents to discriminatory intent through her testimony that Steinberg treated men better than women. Lyles Dep. at 67-77. Lyles testified that Steinberg was "overbearing" and "quite definitive," and that "generally" it was women that he treated this way. Id. at 68. As an example, Lyles testified that at a convention in **1995**, Steinberg "holler(ed)" at her in front of people because she had set up a table incorrectly. Id. at 70-71.

¹⁸ In **1983**, Lyles was only 40 **or** 41.

Lyles testified that she never heard him raise his voice at any males. Id. at 71.

However, Lyles offered no testimony about specific incidents related to Steinberg's treatment of other women. Affidavits submitted by other women who worked in the Philadelphia office uniformly state that although Steinberg wanted things done right away, would get impatient, could be persistent, and his tone of voice announced when he was not pleased, he nonetheless treated everyone the same. See Def.'s Exs. S, ¶ 4 (Ryder Aff.), CC, ¶ 2 (Gramlich **Aff.**), DD, ¶ 2 (Papa Aff.), FF, ¶ 7 (Prisock Aff.). These assertions are supported by Fondy's affidavit, which states that "Mr. Steinberg's demeanor can be abrasive", but "he treats everyone the **same**, including me." See Def.'s **Ex. B**, ¶ 13.

Lyles also testified that Steinberg removed duties from women in the office. She testified that he removed check-signing duties from Lepsi before her death. Lyles also testified that certain of her duties were removed by Steinberg and transferred to Falcone, D'Arcy, and Jensen. Lyles Dep. at 44-49, 104-07. Lyles further testified that Steinberg transferred the office manager duties from Jensen to Harriet Anderson in 1997. Id. at 129. Lyles also made generalized allegations that it was common knowledge in the office that Dorothy Prisock had duties taken

away from her by Steinberg. Id. at 75-77.

This evidence is insufficient to create an inference that Steinberg was discriminating against these employees because of their gender or age. Although it is true that Lyles had duties taken from her, some of these duties were transferred to Jensen, another woman over fifty years old. Similarly, when the office manager responsibilities were taken from Jensen, they were transferred to Harriet Anderson, a woman who was about forty years old. Lyles Dep. at 46 & 129. Further, Prisock submitted an affidavit that refuted Lyles' claim that Steinberg had stripped her of duties, asserting that because she worked for the PFT rather than the PaFT, Steinberg had no authority over her. See Def.'s Ex. FF, ¶ 4.

In summary, the evidence of record is insufficient to establish that the PaFT's given reason for not renewing Lyles' employment contract, namely that her duties were reduced due to the death of Lepsi and the transfer of the Executive Director duties to the Pittsburgh, is a pretext for unlawful gender or age discrimination.

b. Demotion

In December of 1998, Lyles **was** informed that her position was being placed in the OPEIU bargaining unit. The

defendants argue that it had two legitimate reasons for this decision: (1) since the expiration of her contract in August 1996, Lyles had "continually harangued" the defendants for a contract and to be placed in the FTSU, notwithstanding the fact that she performed the same duties as the other OPEIU bargaining unit secretaries; and (2) earlier in December, Lyles once again demanded that her contract be renewed.

Lyles argues that these reasons are pretextual, and the real reason that she was being demoted to the OPEIU plan was to allow Falcone and D'Arcy to be retained and placed in the FTSU pension plan. In support of this argument, Lyles points to the minutes of the October 21, 1997 PFT Health and Welfare Fund meeting which indicated that Falcone and D'Arcy were **to be** moved into the FTSU pension plan as part of their contract extensions. Def.'s Ex. H, ¶ VIII. She also points to Murray's memos to Steinberg indicating his concern that unless all non-OPEIU employees were placed in the FTSU plan, placing only Falcone and D'Arcy in the plan could be problematic. Def.'s Exs. I & J. Finally, Lyles points to the fact that in November 1998, she was asked to type up documents that would have officially allowed Falcone and **D'Arcy** to be placed into the FTSU plan.¹⁹ Lyles Dep.

¹⁹ The PaFT's attorney has submitted an affidavit stating
(continued...)

at 243-45.

The defendants do not contest that in 1997, when Falcone and D'Arcy negotiated their contract extensions, plans were made to place them in the FTSU pension plan as an alternative to giving them the substantial pay raises that they sought. Steinberg Dep. at 14-15.²⁰ However, this provision of the contracts was to be included only "if the law firm determined that it was legal for the Federation to do so." Def.'s Ex. Z (Falcone Aff.); Steinberg Dep. at 15. In his memos, Murray also cautioned that the issue required a legal opinion. Def.'s Ex. I. In early 1999, the PaFT's legal advisors definitively concluded that neither Falcone nor D'Arcy were eligible to be part of the FTSU plan because they did not perform the functions of PaFT field staff employees. Def.'s Ex. D, ¶¶ 3 & 7 (Whitehorn Aff.). Neither Falcone nor D'Arcy ever participated in the FTSU plan, but remained at all times in the 7.5% plan. Id. at ¶ 7; Def.'s Ex. Z, ¶ 3 (Falcone Aff.); Def.'s Ex. BB, ¶ 2 (D'Arcy Aff.);

¹⁹(...continued)
that the November 1998 documents related to changes made to the FTSU plan in order to preserve the plan's tax status, and that the changes had nothing to do with expanding plan eligibility to include Falcone and D'Arcy. Def.'s Ex. D.

²⁰ In fact, copies of the contracts for Falcone and D'Arcy commencing on June 23, 1997, include a provision allowing participation in the FTSU pension plan. Def.'s Exs. Y, ¶ 4(c) (Falcone Agreement) & AA, ¶ 6 (D'Arcy Agreement).

Steinberg Dep. at 15.

Lyles relies on White v. Westinghouse Electric Co., 862 F.2d 56 (3d Cir. 1989) for the proposition that because her demotion came "just months" after her conversation with Murray regarding PaFT's attempt to put Falcone and D'Arcy in the FTSU plan, it can be inferred that the defendants' reasons for demoting her are pretextual. See Plf.'s Br. 29-30. This argument is unconvincing for two reasons.

First, the Third Circuit has recognized that the "rationale behind White was rejected by the Supreme Court" in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 669 (3d Cir. 1999). It is no longer permissible to draw an inference of discrimination from the timing of an employment action alone. Rather, to consider the timing of an employment action as evidence of discrimination, "there must be some logical connection between the timing or treatment and the possibility of the particular discrimination at issue." Id. Therefore, absent evidence that the defendants were motivated by Lyles' age or gender in planning to return her to the OPEIU bargaining unit, the proximity of the announced demotion to the plan to put Falcone and D'Arcy into the FTSU pension plan carries little weight.

Second, the timing does not justify an inference of discriminatory motive. Lyles contacted Murray to challenge the placement of Falcone and D'Arcy into the FTSU plan after learning of Murray's November 1997 memo. Lyles was informed of her demotion in December of 1998. These events are not so proximate in time that it is proper to draw an inference between them. Further, there is no record evidence that after Lyles was informed that she was being placed in the OPEIU unit there was any attempt to formally put Falcone or D'Arcy in the FTSU plan. To the contrary, in early 1999, it was determined that Falcone and D'Arcy were ineligible to be placed in the FTSU plan.²¹

²¹ After briefing in this case was completed, Lyles submitted an affidavit from Murray stating that on December 9, 1998 Steinberg stated at a meeting that it was his opinion that Falcone and D'Arcy were eligible for the FTSU plan. Steinberg also reportedly stated that if Lyles or "the other woman" (referring to Jensen) had a problem with it, they would be fired. The defendants have moved to strike this affidavit, stating that it is untimely and contradictory of Murray's previously submitted affidavit. The Court concludes, however, that the substance of the affidavit, even if considered, does not affect the outcome of this case. First of all, neither Jensen nor Lyles were fired. Second, there is no evidence that after December 9, 1998, Lyles complained about Falcone and D'Arcy being placed into the FTSU plan. Lyles only testified that on December 15, 1998, she confronted Steinberg demanding a new contract. Lyles Dep. at 35-36. There was no suggestion that the issue of FTSU eligibility was brought up at that time. Moreover, as noted above, neither Falcone nor D'Arcy were ever placed in the FTSU plan because they were deemed ineligible by the PaFT's lawyers. For that reason, the December 9, 1998 statement by Steinberg does not give rise to an inference that the employment actions in question were

(continued..)

Further, the timing surrounding Lyles' demotion supports the PaFT's explanation for the move. Lyles was informed of her demotion on December 16, 1998, the day after she once again confronted Steinberg about being given a new contract. The close timing of these events supports the explanation given by the defendants; it neither gives a rise to an inference of gender or age discrimination, nor suggests that the given reason is a pretext for such discrimination.

c. Retirement

Lyles alleges that she was forced to retire by the December 16, 1998 threat of being placed in the OPEIU bargaining unit. The defendants counter that Lyles was offered reinstatement under the same terms of her previous employment, and that this offer removed any threat of demotion, rendering Lyles' decision to retire voluntary. The facts support the defendants' argument.

On February 10, 1999, the PaFT presented to Lyles an offer to return to her employment at the PaFT without being returned to the OPEIU bargaining unit or suffering the loss of benefits that such a move would precipitate. This offer was

²¹(...continued)
motivated by a discriminatory purpose.

communicated via telephone by the PaFT's attorney to Lyles' attorney. This offer was then communicated to Lyles. Def.'s Ex. M. Lyles rejected this offer. See Def.'s Ex. II, 13 (Rosenberg Dep.); Def.'s Ex. M.

Because the threat of demotion was removed by the PaFT's offer to return Lyles to her position without demoting her to the OPEIU, it cannot be said that the threat forced Lyles to retire. Lyles chose to reject the PaFT's reinstatement offer, instead choosing to retire and demanding certain terms of retirement. For that reason, there was no forced retirement that constitutes an adverse employment action for the purposes of Title VII, the ADEA, or the PHRA.²²

²² Lyles does not assert that her retirement constituted a constructive discharge. A constructive discharge can constitute an adverse employment action to satisfy a plaintiff's prima facie case. See, e.g., Duffv v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001). Courts employ an objective test to determine whether an employee can recover on a claim of constructive discharge. Id. The determination is whether "a reasonable jury could find that the [employer] permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign." Id. (citations omitted). The Third Circuit has stated that common factors that might give rise to constructive discharge include threats of discharge, demotion, reduction in pay or benefits, and suggestions that the employee resign or retire. See Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993).

Although Lyles was "threatened" with demotion, the offer of reinstatement without being placed in the OPEIU bargaining unit removed that threat. In addition, Lyles has not pointed to other evidence in the record establishing that the
(continued...)

B. Hostile Work Environment

A hostile work environment exists when a workplace is "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, which may include the frequency and severity of the discriminatory conduct, whether it is threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employees' work performance. Id. at 22.

In order to establish a hostile work environment claim, Lyles must show that (1) she suffered intentional discrimination because of her gender or age; (2) the discrimination was pervasive and regular; (3) it detrimentally affected her; (4) it would have detrimentally affected a reasonable person of the same protected class in her position; and, (5) there is a basis for

²²(...continued)

PaFT's discriminatory conduct created a work environment that was objectively so "unpleasant or difficult" that a reasonable person would be compelled to resign. For that reason a constructive discharge claim would appear to be unavailing.

vicarious liability. See, e.g., Cardenas v. Massey, 269 F.3d 251, 260-61 (3d Cir. 2001); Martin v. Healthcare Bus. Res., No. 00-3244, 2002 WL 467749, at *7-8 (E.D. Pa. Mar. 26, 2002); Maher v. Assoc. Servs. for the Blind, 929 F. Supp. 809, 813 (E.D. Pa. 1996).

Lyles has failed to proffer evidence that gender or age were substantial factors in her allegedly discriminatory treatment.²³ As discussed above, Lyles has not shown that either the 1993 reprimand, the 1996 reprimand, the 1996 failure to renew her contract, or the plan to place her in the OPEIU bargaining unit were motivated by her gender or her age.

Even had Lyles shown that these incidents were motivated by her gender or age, they do not establish that the discrimination was "pervasive and regular." Four incidents over a period of five years does not establish that the harassment was pervasive and regular. See, e.g., Saidu-Kamara v. Parkway Corp., 155 F. Supp.2d 436, 439-40 (E.D. Pa. 2001) (four incidents over eighteen months not pervasive or regular); Bonora v. UGI Utilities, Inc., No. Civ. A. 99-5539, 2000 WL 1539077, at *4-5 (E.D. Pa. Oct. 18, 2000) (ten incidents over two years not

²³ A showing that gender was a substantial factor in the discrimination would establish the first prong of the five-prong test outlined above. See Hitchens v. Cty. of Montgomery, No. 01-2564, 2002 WL 207180, at *2 (E.D. Pa. Feb. 11, 2002).

pervasive or regular); Cooper-Nicholas v. City of Chester, Pa., No. Civ. A. 95-6493, 1997 WL 799443, at *3-4 (E.D. Pa. Dec. 30, 1997) (eight incidents over nineteen months not pervasive or regular). Nor *is* the alleged conduct, which did not involve unwelcome touching, threats, innuendo, inappropriate comments directed toward Lyles based on her gender or age, or otherwise inappropriate behavior, severe enough to create a hostile work environment. See, e.g., Saidu, 155 F. Supp.2d 437 (listing cases); Cooper-Nicholas, 1997 WL 799443, at *7-8.

Lyles is left with her generalized testimony regarding Steinberg's demeanor and how he was overbearing towards females. However, to meet the elements of showing a hostile work environment, Lyles must produce evidence that the environment was objectively hostile. See Harris, 510 U.S. at 21; Andrews v. City of Phila., 895 F.2d 1469, 1483 (3d Cir. 1990) (noting that factor 4 is an objective standard).

Lyles offers no evidence in support of her testimony that Steinberg **was** "overbearing" and "quite definitive," and that "generally" it was women that he treated this way. Plf.'s Ex. A, 68 (Lyles Dep.). In contrast, the affidavits submitted from other female workers indicate that they observed and experienced the same behavior by Steinberg, but that he treated everyone the same way and that they did not take it personally or **feel**

discriminated against by Steinberg's demeanor. See Def.'s **Ex. S** (Ryder Aff.); Def.'s Ex. CC (Gramlich Aff.); Def.'s Ex. DD (Papa Aff.). In light of this evidence, Lyles' generalized testimony regarding Steinberg's demeanor is insufficient to establish that her work environment was objectively hostile. Therefore, summary judgment will be granted to the defendants on Lyles' hostile work environment claim. See, e.g., Saidu-Kamara, 155 F. Supp.2d at 440 (plaintiff's generalized testimony regarding derogatory comments insufficient to establish that her treatment was patently offensive or severe).

C. State Law Breach of Contract

Lyles asserts that the PaFT breached an oral contract allowing her to retire under the terms of her expired employment contract. It is apparent, however, that Lyles never unconditionally accepted any offer to retire under the terms of her previous contract.

"In order to form a contract, there must be an offer, acceptance, and consideration or mutual meeting of the minds." Yarnall v. Almy, 703 A.2d 535, 538 (Pa. Super. Ct. 1997). It is a "basic principle of the law of contracts that an acceptance must be unconditional and absolute." Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc., 764 A.2d 587, 593 (Pa.

Super. Ct. 2000). Further, a "reply to an offer which purports to accept it, but changes the conditions of the offer, is not an acceptance but is a counter-offer, having the effect of terminating the original offer." GMH Assocs., Inc. v. The Prudential Realty Group, 752 A.2d 889, 899 (Pa. Super. Ct. 2000); Yarnall, 703 A.2d at 539. See Webb v. City of Phila., No. Civ. A. 98-2261, 2000 WL 502711, at *2 n.4 (E.D. Pa. Apr. 27, 2000).

Lyles claims that when Falcone spoke with her on December 29, 1998, he informed her that Steinberg had authorized her to retire under the terms of her previous contract. Assuming that Falcone's statement was an offer from the PaFT, Lyles never unconditionally and absolutely accepted the terms of the offer. Lyles testified that after Falcone made the offer, she told him that she would get back to him, but she never did. Then, in her January 8 memo, Lyles requested additional terms of retirement that were not included in her expired contract. Her request for these additional terms is properly construed as a counter-offer, which effectively terminated the original offer.

The conclusion that the parties had not reached a meeting of the minds regarding the terms of Lyles' retirement is also evidenced by the fact that the correspondence between Willig and Rosenberg never mentioned retirement under the terms of the 1996 contract. Rather, Willig's February 16 letter stated that

Lyles would remain on the payroll until the end of the month and that she would receive payment for accumulated and unused vacation time. Def.'s Ex. P. In addition, Rosenberg testified that although he and Willig spent time negotiating the terms of Lyles' retirement, they 'never came to agreement.'" Def.'s Ex. II (Rosen Dep.) .

Further, in her March 15 memo, Lyles once again requested retirement terms that differed from those provided for in her 1996 contract. Lyles also made it clear that the parties had not reached a meeting of the minds regarding what the terms of her retirement would be. She wrote that she would waive her claims only when the two sides could "come into agreement to the terms of her retirement package." Def.'s Ex. M.

Lyles never properly accepted the offer to retire under the terms of the 1996 contract. Instead, she made a series of counteroffers which terminated the original offer. For that reason, summary judgment will be granted to the defendants on the oral contract claim.

An appropriate Order follows.

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

BLANCHE LYLES,
Plaintiff

CIVIL ACTION

v.

PENNSYLVANIA FEDERATION
OF TEACHERS, et al.,
Defendants

NO. 00-2064

ORDER

AND NOW, this ⁺10 day of July, 2002, upon consideration of the defendants' Motion for Summary Judgment (Docket #13), the plaintiff's Opposition thereto, and all supplemental filings by the parties, IT IS HEREBY ORDERED that the Motion is GRANTED **for** the reasons given in a Memorandum of today's date. Judgment is HEREBY ENTERED in favor **of** the defendants and against the plaintiff.

BY THE COURT:

Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

Faxed 7/10/02:

A. Moody, Esq.
M. Martin, Esq.