

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

SONDRA L. DEAN,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
KRAFT FOODS NORTH AMERICA, INC., doing	:	NO. 02-8609
business as KRAFT-NABISCO,	:	
and NABISCO, INC.,	:	
Defendants.	:	

MEMORANDUM & ORDER

YOHAN, J.

July ____, 2005

Plaintiff Sondra Dean brings this race discrimination and retaliation case under 42 U.S.C. § 1981. Dean, who is African-American, claims that her former employers, defendants Nabisco, Inc. (“Nabisco”) and Kraft Foods North America, Inc. (“Kraft”), denied her performance reviews and pay increases, denied her a promotion, and discharged her because of her race and in retaliation for her complaints about racial discrimination. Presently before the court is Kraft’s motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). For the reasons set forth below, I will grant the motion in part.¹

I. FACTUAL BACKGROUND²

¹Dean’s responsive brief is in flagrant and egregious violation of the court’s scheduling order limiting briefs to twenty-five pages in length. Any future briefs filed in violation of the scheduling order will be automatically stricken.

²The following account contains undisputed facts and Dean’s factual allegations because on summary judgment courts must view all facts and inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986).

A. Dean's Employment with Kraft-Nabisco

Plaintiff Sondra Dean began working at defendant Nabisco³ in 1996 as a training manager at its Philadelphia bakery. (Tr. of Dep. of Sondra Dean (“Dean Dep.”) at 52.) In 1998, Dean became the Philadelphia bakery’s employee relations manager. (Dean Decl. at ¶ 10.) As employee relations manager, Dean was responsible for labor and employee relations, employee grievances, and employee investigations and discipline. At the time, Dean was the only African-American manager at the Philadelphia bakery. (Decl. of Sondra Dean, (“Dean Decl.”) at ¶ 4.)

Between 1997 and 1998, Dean received no performance reviews, which left her ineligible for salary increases. (*Id.* at ¶ 4.) Dean was the only Nabisco employee who did not receive performance reviews over this period. (*Id.*) In 1999, Nabisco discovered the discrepancy between Dean’s salary and other managers in an internal audit prompted by an upcoming audit by the Office of Federal Contract Compliance Program.⁴ (Dean Dep. at 279.) After discovering the discrepancy, Dean was reviewed and given retroactive salary increases that covered the period between 1997 and 1998. (Dean Dep. at 279–80.) After the audit, Dean’s performance was reviewed annually and she has received periodic salary increases. (*Id.* at 280.)

The internal audit revealed other disparities in the hiring, assignments, pay, compensation, promotion, and discipline of minorities at Nabisco.⁵ (Decl. of Sondra Dean,

³In 2000, Kraft acquired Nabisco.

⁴As a federal contractor, Nabisco was subject to audits by the Office of Federal Compliance Program to ensure compliance with federal nondiscrimination laws and regulations. *See* 41 C.F.R. § 60-1.20(a).

⁵These issues are currently the subject of a pending class action lawsuit, which Dean is party to. *See Davis v. Kraft Foods N. Am., Inc.*, No. 03-6060 (E.D. Pa.).

(“Dean Decl.”) at ¶ 7.) Dean contends that throughout her employment, she criticized Kraft’s treatment of minority workers and sought to rectify the inequalities originally identified in the audit. (*Id.*)

In 2001, the human resources manager position became available at the Philadelphia bakery, which was now operated by Kraft. Dean asked three Kraft managers to consider her for the position, but ultimately Kraft hired Kelly Wojokowski, who is white. (Dean Dep. at 484–85.) Wojokowski held the same position with two other companies prior to her employment with Kraft. (Tr. of Dep. of Kelly Wojokowski (“Wojokowski Dep.”) at 165–69.) Lawrence Campbell, the manager of the Philadelphia bakery, explained that Dean was not selected for the position because “[t]here were some specific issues with [her] performance . . . that would not allow [him] to consider her for that position.” (Tr. of Dep. of Lawrence Campbell (“Campbell Dep.”) at 79.) According to Campbell, in her role as employee relations manager, Dean had failed to develop an effective training program and had left a “huge backlog” of employee grievances. (*Id.* at 93–94, 99.)

After Wojokowski became Dean’s supervisor, Dean claims that she was only assigned to employee grievances and complaints involving minority workers. (Dean Decl. at ¶ 19.) Dean alleges that Wojokowski managed all investigations that involved at least one white employee. (*Id.* at ¶¶ 22, 24.)

In April 2002, in the course of a grievance investigation, Dean learned that Debra Davis,⁶ an African-American employee at Kraft, allegedly called another employee “an Uncle Tom, Nazi, sellout, faggot.” (*Id.* at ¶ 40.) After hearing this allegation, Wojokowski discharged Davis

⁶Davis is the named plaintiff in the pending class action.

without consulting Dean. (*Id.* at ¶ 42–43.) When Dean learned about Davis’s termination, she accused Wojokowski of harboring a racial bias and said, “Why do you always feel you have to pin something on somebody who is black?” (*Id.* at ¶ 45.)

B. Dean’s Termination

Along with her other duties as employee relations manager, Dean also assisted Alvin Clark, the manager for safety and security at the Philadelphia facility. (Dean Decl. at ¶ 10.) In the summer of 2002, Clark was promoted to regional manager for safety and security. Upon receiving his promotion, Clark wrote an email to all bakery security personnel designating Dean the “go to person” on security matters. (Tr. of Dep. of Alvin Clark (“A. Clark Dep.”) at 140.)

All of the security personnel at Kraft’s Philadelphia bakery are employees of a subcontracting firm. (Dean Dep. at 134–35.) John Clark, who was an employee of the security firm, was the security captain at the Philadelphia bakery when Dean assumed responsibility for security matters. (*Id.* at 134.) Dean learned from other security officers that John Clark was regularly absent from work. (Dean Decl. at ¶ 58.) When she raised her concerns about John Clark with Alvin Clark, he told her that John Clark was no different from any other employee and “if he is not doing what he is supposed to be doing, . . . he has to go.” (Decl. of James Allen (“Allen Decl.”) at ¶ 17.) Next, Dean contacted Brain Wolfle, the regional director of the security firm, about her problems with John Clark. On August 21, 2002, Dean told Wolfle “that things were just not working out with John Clark” and asked him to remove Clark from the Philadelphia bakery. (Dean Decl. at ¶¶ 60–61.) Wolfle told Dean that he would remove John Clark from the Kraft site by the end of the week. (*Id.* at ¶ 61.)

On August 23, 2002, Dean and Wolfle met at a diner to discuss John Clark. Wolfle

explained that because there was no documentation to justify John Clark's termination and because there were no additional positions for him at other companies, he wanted to characterize Clark's departure from Kraft as a lay off due to budget restructuring at Kraft rather than a termination for cause.^{7, 8} (Dean Dep. at 171–72.) Dean told Wolfle that before she agreed to anything, she had to discuss the matter with Alvin Clark, who continued to manage the budget for security matters. (*Id.* at 172.) After she left the diner, Dean left a message for Alvin Clark. (Dean Decl. at ¶ 66.)

Later that morning, John Clark called Wojokowski to complain about his removal from Kraft. (Wojokowski Dep. at 25.) He told Wojokowski that he was removed from Kraft at the request of Dean. (*Id.* at 28–29.) Wojokowski, who had no knowledge of Clark's removal, immediately asked Dean about Clark's whereabouts. (*Id.* at 48.) Dean replied that Clark was not at Kraft that morning because of a "restructuring" at the security firm. (Dean Decl. at ¶ 67.) After her conversation with Wojokowski, Dean called Wolfle and told him to expect a call from Wojokowski and Campbell. (*Id.* at ¶ 68.) Soon after, Wojokowski and Campbell called Wolfle for an explanation. Wolfle told Wojokowski and Campbell that he had removed Clark from the Philadelphia bakery at the request of Dean. (Tr. of Dep. of Brian Wolfle ("Wolfle Dep.") at 81.)

Following their conversation with Wolfle, Wojokowski and Campbell met with Dean in

⁷The parties dispute whether Dean or Wolfle proposed this characterization of Clark's termination. (*Compare* Dean Dep. at 171–72 *with* Wojokowski Dep. at 92–93.) Nonetheless, because I must accept the evidence in the light most favorable to the non-moving party, I will accept Dean's testimony and assume that Wolfle proposed the story. *See Anderson*, 477 U.S. at 255.

⁸Apparently, Dean and Wolfle wanted to characterize Clark's removal as a lay off to ensure that he would remain eligible for unemployment benefits. (Dean Decl. at ¶ 65.)

Campbell's office. When Campbell asked about John Clark, Dean again said that his absence was due to a "restructuring" at the security firm. (*Id.* at ¶ 70; Dean Dep. at 245.) Campbell told Dean that he had received a different story from Wolfle and asked Dean whether she had asked to have John Clark removed. (Dean Dep. at 249; Wojokowski Dep. at 86–87.) Initially, Dean denied contacting the security firm, but eventually she admitted that she called the security company to request Clark's removal. (Dean Dep. at 245–47.) Campbell told Dean that she had "overstepped her bounds" and that she would be suspended pending an investigation. (Dean Decl. at ¶ 71.)

Next, Wojokowski and Steve Gallagher, Kraft's regional manager of human relations, solicited information from Wolfle and various Kraft employees about Dean's role in John Clark's removal. In an email, Wolfle explained that Dean asked him to remove Clark immediately and to cover it up to look like the security company offered Clark another position elsewhere. (Ex. D to Def.'s Mot. for Summ. J.) Wolfle also asserted that immediately before he spoke with Campbell and Wojokowski about John Clark, Dean called and asked him to "keep her name out of [the] matter and . . . falsify the story to make it appear as his position was being eliminated as a cost-savings initiative to Nabisco." (*Id.*)

Alvin Clark also described the situation in an email. Clark acknowledged that at the time of John Clark's removal, Dean had "taken more of a direct rol[e] of assisting in the security effort . . ." (Ex. B to Def.'s Mot. for Summ. J.) However, according to Alvin Clark, when Dean called him to complain about her problems with John Clark, he told her not to request his removal without "checking with [Wojokowski] and . . . [Campbell]" and she said "'now you tell me.'" (*Id.*)

Gallagher also interviewed Dean about the incident. According to Gallagher's notes from the interview, Dean admitted that she told Wolfle to have John Clark removed immediately. (Ex. F. to Def.'s Mot. for Summ. J.) Dean denied asking Wolfle to "cover up" Clark's termination, but she admitted that she wanted his removal to look like the security company transferred him. (*Id.*) Dean also admitted that she initially told Wojokowski and Campbell that John Clark was removed "at the behest of the security company." (*Id.*)

At the interview, Dean asked Gallagher to speak to James Allen, a security technician for Kraft, and Jean Szigeti,⁹ a security officer, who were both familiar with John Clark's allegedly poor performance. (Dean Decl. at ¶ 74.) Wojokowski interviewed Allen. However, according to Allen, when he began describing Clark's absences, Wojokowski abruptly ended the interview. (Allen Decl. at ¶ 20.) No one from Kraft ever contacted Szigeti about Dean. (Dean Decl. at ¶ 75; Decl. of Jean Szigeti ("Szigeti Decl.") at ¶ 23.)

On August 29, 2002, after her interview with Gallagher, Dean sent James Norman, Kraft's Director of Diversity, a letter requesting a transfer out of the Philadelphia bakery. (*See* Ex. 2 to Pl.'s Opp. to Def.'s Mot. for Summ. J.) She asserted that her suspension was the result of "discrimination." (*Id.*) She also alleged that "there [were] major racial issues and inconsistencies . . . within the Philadelphia Plant. . . . [that] [had] become so institutionally entrenched that they [had] [become] everyday policy." (*Id.*)

Two weeks later, on September 12, 2002, Gallagher terminated Dean's employment. He explained that his investigation found that she "knowingly mislead and misrepresented [herself]

⁹Dean's memorandum of law refers to a security guard named "Jean Sacchetti." (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 20.) Dean has also submitted a declaration from a security guard named "Jean Szigeti." I will assume that this is the same person.

and [her] intentions to [Kraft] and outside parties.” (Ex. 14 to Pl.’s Mem. of Law in Opp. to Def.’s Mot. for Summ. J.)

II. STANDARD OF REVIEW

A court may only grant a motion for summary judgment, “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 judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted).

When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, “[a]ll justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* “Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which she bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”

Matsushita Elec. Inuds. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citations omitted).

III. DISCUSSION

A. Dean's race discrimination claims

Section 1981 provides that “all person within . . . the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white persons” A plaintiff may prove racial discrimination under § 1981 with either direct or circumstantial evidence. *Dandy v. UPS*, 388 F.3d 263, 272 (7th Cir. 2004); *Norris v. Lee*, No. 93-441, 1995 U.S. Dist. LEXIS 10142, at *10 (E.D. Pa. July 14, 1995). When a plaintiff seeks to establish a cause of action under § 1981 with circumstantial evidence, courts apply the same burden-shifting framework that was designed to assess racial discrimination cases brought under Title VII on the basis of circumstantial evidence. *See Pamintuan v. Nanticoke Mem'l Hosp.*, 192 F.3d 378, 386 (3d Cir. 1999) (“We analyze section 1981 claims under the familiar *McDonnell Douglas* shifting burden framework used in Title VII discrimination cases.”) (citations omitted). Under this framework, which was set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the plaintiff must first establish a prima facie case of discrimination. *Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000) (citations omitted). If the plaintiff successfully establishes a prima facie case, the burden of production shifts to the defendant to “articulate some legitimate, nondiscriminatory reason” for the unfavorable treatment. *McDonnell Douglas*, 411 U.S. at 802. Once the employer comes forward with a legitimate, nondiscriminatory reason, to survive summary judgment, the plaintiff must

demonstrate by a preponderance of the evidence “that the employer’s articulated reason was not the actual reason, but rather a pretext for discrimination.” *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 n.5 (3d Cir. 1998).

1. *Kraft’s failure to promote Dean*¹⁰

Dean contends that Kraft failed to promote her to human resources manager in 2001 because she is African-American. For the purposes of this motion, neither party disputes that

¹⁰Dean also suggests that Nabisco’s failure to give her performance reviews and salary increases in 1997 and 1998 establishes an additional violation of § 1981. (Pl.’s Mem. of Law in Opp. to Def.’s Mot. for Summ. J. at 1.) I need not apply the *McDonnell Douglas* framework to this claim because Dean admits that she received retroactive pay increases to compensate her for this period and thus suffered no adverse employment action. *See Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998) (“[W]hen an employee loses pay or an employment benefit from a delayed promotion, courts have held that the employment action is not adverse only when the action is rescinded and backpay is awarded.”) (citation omitted); *Crompton v. Potter*, 305 F. Supp. 2d 465, 475 (E.D. Pa. 2004) (concluding that an employee did not suffer an “adverse employment action” because “he was given back-pay.”). Further, even if Dean could show that she suffered some adverse action as a result of Nabisco’s failure to review her performance and grant pay increases, this claim would probably be barred pursuant to § 1981’s four-year statute of limitations. *See Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 382–83 (2004) (determining that § 1981 claims that arise from conduct that occurred after the formation of a contract are subject to 28 U.S.C § 1658’s four-year statute of limitations because they were made possible by the Civil Rights Act of 1991, a post-1990 enactment). Dean filed the instant suit on November 22, 2002. She alleges that she was denied performance reviews and pay increases in 1997 and 1998. Thus, any claim arising out of a performance review that should have been conducted before November 22, 1998 is time-barred. Finally, in her memorandum of law, Dean herself admits that “any claim for emotional distress arising out of [the performance reviews] is now time-barred.” (Pl.’s Mem of Law in Opp. to Def.’s Mot. for Summ. J. at 62.) For these reasons, I will enter judgment in favor of Nabisco and Kraft with respect to Dean’s claim for denial of performance reviews and pay increases.

Dean has established a prima facie case of racial discrimination^{11, 12} and Kraft has articulated a legitimate nondiscriminatory reason for its employment decision. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 27; Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 67.) Hence, whether Dean's claim will survive summary judgment turns on whether Dean can proffer evidence from which a reasonable jury could find that Kraft's nondiscriminatory reason was a pretext for discrimination.

To survive summary judgment, a plaintiff may show pretext in one of two ways. She must point to some direct or circumstantial 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." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Under the first approach, "the plaintiff cannot simply show that the employer's decision was wrong or mistaken" *Fuentes*, 32 F.3d at 765. Instead, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons. . . that a reasonable factfinder could rationally find them unworthy of credence." *Id.* (citation omitted). Under the second approach, a plaintiff must show that notwithstanding the employer's legitimate nondiscriminatory reason, discrimination was "more

¹¹A prima facie case of racial discrimination for failure to promote requires proof of the following four elements: (1) that the plaintiff applied for and (2) was qualified for an available position; (3) that despite her qualifications, the plaintiff was rejected; and (4) that after the plaintiff's rejection, the employer continued to seek applicants for the position. See *McDonnell Douglas Corp.*, 411 U.S. at 802.

¹²Kraft does not concede that Dean was qualified for the human resources manager position, but it chose not to argue this point in the instant motion. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 27.)

likely than not” the motivation behind the employer’s actions. *Simpson*, 142 F.3d at 644. The plaintiff may satisfy this burden by showing “that the employer has previously discriminated against her, 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 (citation omitted).

Kraft asserts that it did not promote Dean because the candidate it eventually hired, Kelly Wojokowski, was better qualified for the position. (Def.’s Mem. of Law in Supp. of Mot. for Summ. J. at 28.) Kraft observes that unlike Dean, Wojokowski had prior experience as a human resources manager. (*Id.*) Further, Kraft argues that it did not promote Dean because she struggled in certain areas in her role as a employee relations manager. (*Id.*)

Dean counters that Kraft’s explanation is a pretext because Wojokowski’s prior experiences as a human resources manager were at small facilities, whereas Dean had many years of experience in the human resources department at large facilities, including Kraft’s Philadelphia bakery. (Pl.’s Mem. of Law in Opp. to Def.’s Mot. for Summ. J. at 69.) While this evidence arguably suggests that Dean may have been more qualified for the job, it would not lead a rational trier of fact to find that Kraft’s explanation was so implausible or incoherent that it is “unworthy of credence.” *See Fuentes*, 32 F.3d at 765 (“[T]he plaintiff cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.”) Additionally, Dean fails to respond to Kraft’s claim that her mediocre performance as an employee relations manager precluded her from consideration for the promotion. Hence, Dean has failed to proffer sufficient evidence that Kraft’s nondiscriminatory

explanation is “unworthy of credence.” *Id.*

Nonetheless, Dean has come forward with sufficient evidence of past discrimination by Kraft against Dean and other African-American employees to suggest a finding of pretext under the second method outlined in *Fuentes*. *See Simpson*, 142 F.3d at 644–45. Dean has presented evidence that over the two years when she was the only African-American manager at Nabisco, she was also the only employee who did not receive annual performance reviews and the corresponding opportunity for a salary increase. Further, Dean has testified that the internal audit at Nabisco revealed pervasive disparities in the treatment of minorities at the Philadelphia bakery, which Kraft has failed to remedy.

Kraft dismisses these allegations of previous discrimination by arguing that Dean cannot sustain an independent § 1981 claim on the basis of these facts.¹³ (Def.’s Mem. of Law in Supp. of Mot. for Summ. J. at 22–25.) This ignores the mechanisms by which an employee may show pretext. Evidence need not form the basis of an independent discrimination claim to be used as evidence of pretext. *McDonnell Douglas* only requires the employee to come forward with sufficient evidence to permit a reasonable jury to infer that the employer’s explanation was a pretext for illegal, racially motivated discrimination. Here, Dean has come forward with evidence that “the employer has previously discriminated against [Dean], that the employer has previously discriminated against other persons within [Dean’s] protected class, [and] that the employer has treated more favorably similarly situated persons not within the protected class.”

¹³As I discussed above, Dean cannot state a claim arising from the denial of performance reviews because she received retroactive pay increases and because § 1981’s four-year statute of limitations has likely elapsed since the time when Nabisco allegedly failed to review Dean’s performance.

Simpson, 142 F.3d at 645. This evidence is sufficient to permit a jury to conclude that discrimination was “more likely than not” the reason why Kraft chose not to promote Dean.¹⁴ See *Harry v. City of Philadelphia*, No. 03-661, 2004 U.S. Dist. LEXIS 11695, at *28–*30 (E.D. Pa. June 18, 2004) (denying the defendants’ motion for summary judgment even though the plaintiff did “not explicitly argue that defendants’ proffered reasons for their decisions [were] pretextual” because there was substantial evidence of past discrimination). Because Dean has come forward with sufficient evidence of past discrimination to rebut Kraft’s nondiscriminatory explanation, I will deny Kraft’s motion for summary judgment with respect to Dean’s failure to promote claim.

2. *Dean’s termination*

Dean also argues that Kraft terminated her in 2002 because of her race. Neither party

¹⁴Kraft also argues that Dean’s evidence of past discrimination is too “remote” to permit an inference of pretext. (Def.’s Reply in Supp. of Mot. for Summ. J. 1–2.) In support of this argument, it relies on two district court cases from outside of this district: *Taylor v. Div. of State Police*, No. 03-252, 2004 U.S. Dist. LEXIS 11121 (D. Del. June 15, 2004) and *Farmer v. Camden City Bd. of Educ.*, No. 03-685, 2005 U.S. Dist. LEXIS 7339 (D.N.J. Mar. 28, 2005). In *Taylor*, the court concluded that generalized evidence of past discriminatory conduct by the plaintiff’s employer was not persuasive evidence of discriminatory treatment of the plaintiff because the misconduct was remote in time from the events at issue and did not involve the same decision makers. 2004 U.S. LEXIS 11121, at *20. In *Farmer*, the court found that evidence of five random adverse employment actions against the plaintiff that occurred over a sixteen-month span were “too remote in time from one another” to suggest age discrimination. 2005 U.S. Dist. LEXIS 7339, at *49–*50. In contrast, although Dean’s evidence of past discrimination occurred two years before she was denied the promotion, she has come forward with evidence of prolonged, unequal treatment of herself by Kraft, not random evidence of past discrimination against others. Because this evidence gives rise to an inference that Kraft has discriminated against Dean in the past on the basis of race, a reasonable jury might determine that unlawful discrimination was “more likely than not” the reason why Dean did not receive the promotion. *Simpson*, 142 F.3d at 644.

disputes that Dean has establish a prima facie case of racial discrimination¹⁵ and Kraft has come forward with a legitimate nondiscriminatory reason for its employment decision. So again, the disposition of this claim will turn on whether Dean can establish that Kraft's explanation for her discharge is a pretext for discrimination.

Kraft claims that it fired Dean because she lied to Wojokowski and Campbell about John Clark's removal.¹⁶ (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 17.) Dean contends that this explanation is a pretext for discrimination because the investigation into her allegedly wrongful conduct was a "sham." (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 54–57.) Dean claims that Kraft was not interested in learning the true version of the events surrounding John Clark's termination and the only purpose of the investigation was to concoct a seemingly legitimate justification for Dean's discharge. To support this claim, Dean proffered evidence that Kraft failed to interview Jean Sziegti, who would have confirmed that John Clark was often absent from work. (Sziegti Decl. at ¶ 11.) Dean also presented evidence that Wojokowski deliberately avoided hearing a version of the facts that would have been favorable

¹⁵To establish a prima facie case for discriminatory discharge, the plaintiff must demonstrate that: "(1) [s]he belongs to a racial minority; (2) [s]he was qualified for the position; (3) [s]he was discharged; and (4) other employees not in a protected class were treated more favorably." *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993).

¹⁶Although Kraft's memorandum of law states that Kraft discharged Dean because she lied and because she overstepped her authority, the evidence suggests that ultimately Kraft took action solely because it found that Dean lied about her actions. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 17.) Initially, when Kraft suspended Dean, Campbell told her that she had "overstepped her bounds," (Dean Decl. at ¶ 71), but when Gallagher made the final decision to terminate Dean's employment, he explained that his decision was based on his finding that she "knowingly mislead and misrepresented [herself] and [her] intentions to [Kraft] and outside parties," (Ex. 14 to Def.'s Mot. for Summ. J.) Additionally, in their depositions, members of Kraft's management agreed that Dean was fired because she lied. (*See* Tr. of Dep. of Stephen Gallagher ("Gallagher Dep.") at 99); Wojokowski Dep. at 220.)

to Dean by abruptly ending her interview with Allen when he began to describe Dean's history of problems with John Clark. (Allen Decl. at ¶ 20.)

Generally, courts do not require that "the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998). Before it decided to terminate Dean, Kraft's management reviewed emails from Wolfle and Alvin Clark and interviewed Dean. According to Wolfle, Dean attempted to cover-up the fact that she orchestrated John Clark's discharge and asked Wolfle to "falsify the story."¹⁷ (Ex. D to Def.'s Mot. for Summ. J.) Further, in her interview with Gallagher, Dean admitted that she lied to Wojokowski and Campbell because she told them that John Clark's absence was due to a "restructuring" at the security firm rather than her request to have him removed.¹⁸ (Ex. F. to Def.'s Mot. for Summ. J.) Hence,

¹⁷Dean disputes that she told Wolfle to "falsify the story." (Dean Decl. at ¶ 69.) Although this creates an issue of fact, it does not create an issue of material fact because there is no dispute that Wolfle made this claim in his email to Wojokowski. *See Ideal Dairy*, 90 F.3d at 743 ("Facts that could alter the outcome are 'material' . . .") (citation omitted). Here, I need not determine whether Kraft properly resolved the factual disputes in its investigation of Dean. *See Fuentes*, 32 F.3d at 765 ("[T]he factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is 'wise, shrewd, prudent or competent'") (citation omitted). Instead, I need only decide whether Kraft made a "reasonably informed and considered decision" before taking action. *Smith*, 155 F.3d at 807; *see also Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991) ("[O]ur inquiry in this case is not whether the alleged acts actually occurred. Rather, our inquiry is limited to whether the employer's belief was honestly held.").

¹⁸Dean suggests that it was not dishonest to tell her supervisors that John Clark was removed due to a "restructuring" because she had a benevolent reason for the lie. (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 47.) Dean claims that she and Wolfle decided to characterize Clark's removal as a lay off due to "restructuring," rather than a termination, to ensure that Clark would be eligible for unemployment benefits. (*Id.*) At this stage, Dean's explanations for her dishonesty are irrelevant. She admits that she lied about the reason for

Kraft had substantial evidence that supported its finding and its ultimate decision to terminate Dean. After Kraft reviewed this evidence and gave Dean an opportunity to explain her actions, Kraft was capable making a “reasonably informed and considered decision” and there was little reason to seek additional evidence. *Smith*, 155 F.3d at 807.

With respect to Dean’s claim that Kraft failed to interview Sziegti and avoided hearing Allen’s version of the facts, Dean has failed to show that either witness would have contradicted management’s ultimate finding. In their declarations, Sziegti and Allen both confirm that John Clark was habitually absent. (Sziegti Decl. at ¶ 11; Allen Decl. at ¶ 15.) This suggests that Dean had a good reason to ask for Clark’s removal. Additionally, Allen states that “everyone in security understood that Ms. Dean had become the new Kraft representative in terms of administering the [contract with the security firm].” (Allen Decl. at ¶ 14.) This arguably suggests that Dean may have believed that she was authorized to request Clark’s removal without authorization from her superiors. However, neither witness disputes the fact that Dean lied to her superiors about Clark’s removal. Hence, because neither Sziegti nor Allen could have provided testimony that would have affected Kraft’s ultimate finding that Dean misrepresented her actions to her superiors, the fact that Kraft failed to properly interview these witnesses is insufficient to permit a reasonable jury to infer that Kraft’s investigation was inadequate and calculated to lead to Dean’s dismissal. *See Braithwaite v. The Timken Co., et al.*, 258 F.2d 488, 494–95 (6th Cir. 2001) (rejecting the plaintiff’s claim that the employer performed an inadequate investigation into the plaintiff’s alleged transgressions by ignoring certain employees’ statements because the employees’ testimony “did not contradict the management’s finding”).

Clark’s removal and thus Kraft had a valid reason for its employment decision.

Dean also contends that Kraft's nondiscriminatory explanation is pretextual because Kraft gave different explanations for its actions over the course of the investigation.¹⁹ (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ J. at 57.) Initially, when Campbell placed Dean on suspension, he told her that she had "overstepped her bounds." (Dean Decl. at ¶ 71.) However, after Kraft completed the investigation, Gallagher informed Dean that she was discharged because she "knowingly misled and misrepresented [herself] and [her intentions] to Kraft and outside parties." (Ex. 14 to Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J.) These different explanations do not necessarily suggest that Kraft's ultimate explanation for Dean's discharge is "unworthy of credence." First, Kraft did not actually give different explanations for the same employment action. Campbell *suspended* Dean because he believed that she "overstepped her bounds," whereas Gallagher ultimately *fired* Dean because he found that she lied to her supervisors. Further, Kraft's two explanations are not truly inconsistent because they both stem from the same chain of events. *See Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1077 (9th Cir. 2003) ("[D]ifferent justifications for an adverse employment action will not defeat summary judgment if those reasons are 'not incompatible.'") (citation omitted). Finally, the fact that Kraft changed its explanation actually suggests that Kraft performed a thorough investigation and "made a considered decision" before taking action. *Smith*, 155 F.3d at 807. After reviewing Alvin Clark's email in which he confirms that he had designated Dean the "go to person" on security matters, Kraft may have determined that contrary to Campbell's initial conclusion, Dean

¹⁹Dean claims that "Kraft has offered at least nine explanations for the termination." (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 57.) However, upon closer review, these allegedly different explanations are all variations on the two justifications provided by Kraft: (1) that Dean exceeded the scope of her authority (2) and that she was dishonest with her supervisors.

did not knowingly overstep her authority. However, as I described above, the investigation also clearly showed that Dean lied to Wojokowski and Campbell and Kraft had good reason to terminate her employment. Hence, by changing its explanation, Kraft chose to rely on the justification for its employment action that was supported by the facts it learned in its investigation. For these reasons, the fact that Kraft gave two explanations for Dean's suspension and discharge does not give rise to an inference that Kraft's explanations were a pretext for unlawful discrimination.

Dean also argues that Kraft's explanation is "unworthy of credence" because Kraft failed to discharge another white employee who engaged in similar conduct. (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 59–60.) A plaintiff may demonstrate pretext "by producing evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Braithwaite*, 258 F.3d at 497 (citation omitted); *see also Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 322 (3d Cir. 2000) ("A violation of company policy can constitute a pretext for unlawful discrimination if others similarly situated also violated the policy with no adverse consequence.") To prevail under this theory, Dean must show that the "similarly situated" employee who allegedly received preferential treatment "'dealt with the same supervisor, [was] subject to the same standards and . . . engaged in the same conduct without . . . differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Campetti v. Career Educ. Corp.*, No. 02-1349, 2003 U.S. Dist. LEXIS 12202, *24 (E.D. Pa. June 25, 2003) (citations omitted). Dean presented evidence that two or three years before her termination, Kraft chose not to terminate a

white employee who submitted a falsified time sheet. (Campbell Dep. at 245–46.) This evidence alone is insufficient to support an inference of pretext because Dean fails to show that the white employee “dealt with the same supervisor,” “[was] subject to the same standards,” or “engaged in the same conduct.” *Campetti*, 2003 U.S. Dist. LEXIS 12202, at *24. Dean does not allege that Wojokowski or Campbell played any role in the investigation into the white employee’s conduct. Nor does she allege that she and the white employee held similar positions. Further, although submitting a false time sheet is an act of dishonesty similar to Dean’s alleged wrongful conduct, there are significant differences that may explain why the white employee was ultimately retained. Unlike Dean, who admittedly lied to her supervisors, there is no element of insubordination involved in submitting a false time sheet. For these reasons, Dean’s evidence is insufficient to permit a reasonable jury to disbelieve Kraft’s proffered reasons for Dean’s termination.

Even though Dean has failed to discredit Kraft’s nondiscriminatory explanation, she can show pretext with evidence of Kraft’s past discrimination. *See Simpson*, 142 F.3d at 644; *Fuentes*, 32 F.3d at 764. As I described above, the internal audit at Nabisco revealed pervasive disparities in Nabisco’s treatment of minorities, including the fact that Dean, the only African-American manager at the time, had not received a performance review in two years. Further, according to Dean, after Kraft hired Wojokowski, Dean was only assigned to employee grievances involving minority workers. This evidence of past discrimination is sufficient to permit a reasonable jury to infer that Dean’s discharge was motivated by racial discrimination. *See Simpson*, 142 F.3d 644–45. Hence, I will deny Kraft’s motion for summary judgment on Dean’s discriminatory discharge claim.

B. Dean's retaliation claim

Section 1981 protects employees from retaliation by their employers for opposition to racial discrimination in the workplace, including opposition to discrimination against others.²⁰ *See Evans v. Kansas City Sch. Dist.*, 65 F.3d 98, 101 (8th Cir. 1995) (“Although ‘section 1981 has no specific retaliation provision,’ we have recognized that it does encompass ‘allegations of retaliatory conduct’ in a racial discrimination context.”) (citation omitted); *Schatzman v. Martin Newark Dealership, Inc.*, 158 F. Supp. 2d 392, 400 (D. Del. 2001) (“In order to prevail on a retaliation claim [under § 1981], a plaintiff need not prove that the complained of conduct was taken on account of the plaintiff’s race, but rather, that it was taken on account of the plaintiff engaging in protected activity which, in this case, was Plaintiff complaining about [a co-worker’s] racially derogatory comments.”) (citation omitted). Courts also use the *McDonnell Douglas* burden-shifting framework to assess § 1981 retaliation claims. *Jin Ku Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997); *Owens v. Comcast Corp.*, No. 02-1240, 2004 U.S. Dist. LEXIS 23498, at *8 & *9 n.3 (E.D. Pa. Nov. 18, 2004).

1. *Dean's prima facie case*

To establish a prima facie case of retaliation, “a plaintiff must show that: (1) the employee engaged in a protected employee activity; (2) the employer took an adverse

²⁰There is some question as to whether employees have standing to sue under § 1981 when they have been retaliated against for opposing racial discrimination against others. *See Little v. United Techs., Carrier Transcold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) (rejecting the plaintiff’s retaliation claim under § 1981 where he was allegedly retaliated against for opposing a fellow employee’s discriminatory comments about African-American employees because there was no evidence that “the retaliation allegedly levelled against [the plaintiff] was due to his race”). Nonetheless, because Kraft has not raised this issue, I will assume that Dean may state a claim under § 1981 based on her allegation that she was discharged in retaliation for her complaints about the treatment of other minority employees.

employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action."

Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000).

Dean contends that she was discharged from Kraft in retaliation for (1) her complaints about Kraft's treatment of Debra Davis and (2) her August 29, 2002 letter in which she alleged that her suspension was the result of racial discrimination and again complained about "major racial issues and inconsistencies . . . within the Philadelphia Plant." (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 72.)

Dean can easily establish the first two elements of the prima facie case. Her letter and her protests to Wojokowski about Davis's termination certainly constitute "protected activity," see *Hartman v. Sterling, Inc.*, No. 01-2630, 2003 U.S. Dist. LEXIS 18140, at *26-*27 (E.D. Pa. Sept. 11, 2003) ("An acceptable form of protected activity under Title VII are informal protests of discriminatory employment practices, including making complaints to management.") (citation omitted), and Kraft undoubtedly "took an adverse employment action" when it fired her.

However, there is little evidence of causation to link Dean's termination to her complaints about discrimination. The timing of her discharge arguably suggests that Dean was fired because of her complaints. Dean was fired on September 12, 2002, only two weeks after she accused Kraft of racial discrimination in her letter. (Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 73-74.) On its face, this fact strongly suggests a "causal link" between the letter and her discharge. However, Dean sent the letter after Kraft had placed her on suspension and commenced an investigation into the actions that eventually led to her termination. The Supreme Court has made clear that where an employer contemplates an adverse employment action prior

to the plaintiff engaging in a protected activity, the employment action itself provides “no evidence whatever of causality” for the purposes of a retaliation claim. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001)); *see also Cichon v. Exelon Generation Co., LLC*, 401 F.3d 803, 811 (7th Cir. 2005); *Windfelder v. May Dep’t Stores Co.*, 93 Fed. Appx. 351, 355 (3d Cir. 2004) (non-precedential). If this was not the case, employees who suspect that they may be fired could create a valid retaliation claim by merely alleging discrimination before their employers have had a chance to take action. *See Windfelder*, 93 Fed. Appx. at 355 (observing that a holding contrary to *Breeden*’s “might impede employers from permissible terminations and encourage employees aware of an impending termination to attempt to create their own ‘severance package.’”). Hence, Dean’s letter probably cannot establish the necessary “causal link.”

The “temporal proximity” between Dean’s complaints to Wojokowski about the Davis’s firing and her own termination also provide little evidence of causality. In April 2002, Dean protested Wojokowski’s decision to discharge Davis and alleged that the decision was racially motivated. Four months later, Dean was suspended, and less than a month later, she was terminated. The timing of Dean’s discharge arguably suggests that her complaints about race discrimination may have motivated Kraft’s employment decision. However, the timing is not unusually suggestive and absent extraordinary circumstances, “temporal proximity alone” is ordinarily not sufficient to establish the necessary causal connection. *Farrell*, 206 F.3d at 280; *see also Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (affirming the district court’s conclusion that “the three-month period between the [plaintiff’s protected] activity and termination, standing alone, does not establish a causal connection.”); *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) (determining that a nineteen month lapse between the

plaintiff's protected activity and his placement on leave "cannot, standing alone, support a finding of causal link."); *Hughes v. Derwinski*, 967 F.2d 1168, 1174 (7th Cir. 1992) (concluding that the four month span between the plaintiff's discrimination claim and the employer's disciplinary letter, "standing by itself, does not sufficiently raise the inference that [the plaintiff's] filing was the reason for the adverse action.")

Nonetheless, even though Dean's evidence in support of her retaliation claim is weak, because "the prima facie case under the *McDonnell Douglas-Burdine* pretext framework is not intended to be onerous," *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995), I will assume that Dean's has come forward with sufficient evidence to set forth a prima facie case and move forward to the pretext analysis.

2. *Pretext analysis*

As I described above, Dean's evidence is insufficient to permit a reasonable jury to conclude that Kraft's explanation for Dean's termination is "unworthy of credence." *See* Part III.A.2. Dean only succeeded in showing pretext for her race discrimination claims under *Fuentes's* second prong by presenting evidence that racial discrimination was "more likely than not" a motivating factor in Kraft's employment decision due to evidence of past discrimination. Here, Dean has not set forth sufficient evidence of retaliation for a reasonable jury to determine that retaliation was "more likely than not" a motivating cause behind Kraft's action. There is no evidence of past retaliatory conduct by Kraft against Dean or other similarly situated employees who complained about race discrimination. Hence, Dean has failed to come forward with sufficient evidence to suggest that Kraft's proffered explanation is a pretext for unlawful retaliation and I will enter judgment in favor of Kraft with respect to Dean's retaliatory discharge

claim.

IV. CONCLUSION

For the reasons explained above, I will enter judgment in favor of Nabisco and Kraft with respect to Dean's discrimination claim for denial of performance reviews and pay increases in 1997 and 1998 and Dean's retaliatory discharge claim, and I will deny the balance of Kraft's motion for summary judgment. An appropriate order follows.

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

SONDRA L. DEAN,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
KRAFT FOODS NORTH AMERICA, INC., doing	:	NO. 02-8609
business as KRAFT-NABISCO,	:	
and NABISCO, INC.,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of July, 2005, upon consideration of defendant Kraft Foods North America's motion for summary judgment and memorandum of law in support thereof (Doc. No. 43), defendant Sondra L. Dean's memorandum of law in opposition thereto (Doc. No. 47), and defendant's reply brief in further support of its motion (Doc. No. 48), it is hereby ORDERED that defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Judgment is ENTERED in favor of defendants Kraft Foods North America, Inc. and Nabisco, Inc. and against plaintiff Sondra L. Dean with respect to Dean's discrimination claim for denial of performance reviews and salary increases in 1997 and 1998 and Dean's retaliatory discharge claim.
2. The balance of defendant's motion is DENIED.

William H. Yohn, Jr., J.

