

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

SHELLY THOMPSON, Plaintiff, v. MERCK & CO., INC., Defendant.	CIVIL ACTION NO. 05-4275
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MEMORANDUM & ORDER

Marvin Katz, S.J.

July 27, 2006

I. BACKGROUND

The series of events that lead to Plaintiff's termination began on August 18, 2003 when Plaintiff approached her supervisor in Department 115, Brian Kunz, to request time off for death in family leave. Deposition of Shelley Thompson ("Pl. Dep."), at 18,56,68. Plaintiff told Mr. Kunz that her grandfather had died, and that she needed leave from work to attend his funeral scheduled on Thursday, August 21, 2003. Pl. Dep. at 79-80; Am. Compl. at ¶ 16. Under the terms of the Defendant's Collective Bargaining Agreement ("CBA"), a union employee is entitled to four days of paid leave for the death of someone in the individual's immediate family. Pl. Dep. at 65-66. Plaintiff was given paid leave for the dates of August 20, 21, 22, and 25. Pl. Dep. at 69.

In fact, the individual who died, John Robinson, was not Plaintiff's grandfather, nor was he even related to her. Pl. Dep. at 56, 71 and 84-85. Plaintiff did not attend the funeral that was scheduled for August 21, 2003, but instead traveled to Jamaica for a vacation from August 21, 2003 until August 25, 2003 with her boyfriend, Fred Edwards. Pl. Dep. at 44, 45, 97, and 106; Am. Compl. at ¶ 20. Plaintiff asserts that she attended a private viewing for decedent John Robinson on August 20, 2003, and she was not aware that her boyfriend was planning to take her on a surprise vacation to Jamaica at the time she requested the death in family leave. Pl. Dep. at 96-98.

After Plaintiff returned to work, her supervisor, Brian Kunz, approached her and asked her to provide documentation for her funeral leave. Pl. Dep. at 113. Mr. Kunz requested documentation because there were indications that she had taken a vacation – she had a tan and there were rumors that other employees had seen pictures of her Jamaican vacation. Kunz Dep. at 24-27. Plaintiff did not provide the documentation but instead filed a grievance alleging that the request for documentation was harassment. The grievance was denied.

Eventually, Plaintiff did submit a certificate of attendance to document her death in family leave. Pl. Dep. at 126-128. The certificate of attendance that Plaintiff submitted to Merck stated that Plaintiff had attended funeral services for

John Robinson on August 20, 2003 and that she was his granddaughter. Pl. Dep. at 126-129.

Defendant obtained an obituary for Mr. Robinson. See Pl. Dep. at 181-182. The obituary stated that Mr. Robinson's funeral was held on August 21, 2003, and it did not list Plaintiff or anyone with the surname "Thompson" as a survivor of the decedent. Id. A fact finding meeting was held on December 17, 2003 to discuss Plaintiff's leave. Pl. Dep. at 146-47. At the fact finding meeting, Plaintiff was asked about her whereabouts from August 20 to August 25, 2003. She stated that she was off work for the death of her grandfather, Mr. Robinson, and that the funeral took place on August 20, 2003. Pl. Dep. at 148. Upon further questioning, she admitted that she left for a trip to Jamaica on August 21, 2003 and returned on August 25, 2003. Pl. Dep. at 148. Plaintiff insisted that she attended the funeral on August 20, 2003, even after she was shown a copy of the obituary listing the services as being held on August 21, 2003. Pl. Dep. at 148-49. Additionally, Plaintiff was asked three times whether Mr. Robinson was her grandfather. The first two times she stated that he was her grandfather. Pl. Dep. at 149-150. It was not until the third time she was questioned—and only after she was shown the obituary which did not list Plaintiff's mother as a survivor—that she finally admitted that he was not her grandfather, but rather an individual whom she

considered to be a father figure. Pl. Dep. at 149-50.

Plaintiff was subsequently terminated from Merck on January 5, 2004. Pl. Dep. at 8. She received a Notice of Discipline which stated that “[t]he facts establish that Ms. Thompson is guilty of no less than three dischargeable offenses as outlined in the employee Code of Conduct: (1) “abuse of Company benefits and/or policy, e.g., ... death in family...;” (2) “deliberate falsification of Company records and documents, including time cards;” and (3) “falsifying relevant information or testimony when the Company is investigating possible rules violations.” Pl. Dep. At 155-157; see also Employee Conduct Manual.

On August 11, 2005, Plaintiff brought suit against Defendant alleging violations of Title VII and the Pennsylvania Human Resources Act (“PHRA”) for intentional discrimination based on race and sex. After her first lawyer withdrew from the case because he felt he could not prosecute the case with the bounds of Federal Rule of Civil Procedure 11, Plaintiff filed an amended complaint that states three claims under Title VII, Section 1981, and the PHRA: 1) intentional discrimination based on race and sex; 2) retaliation for filing grievances against Defendant; and 3) hostile work environment. Now before this court is Defendant’s Motion for Summary Judgment.

II. DISCUSSION

A court may grant summary judgment when “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED.R.CIV.P. 56(c). “When the nonmoving party bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial.” See Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 329 (3d Cir.1995). If the moving party meets that burden, the nonmoving party can create a genuine issue of material fact by providing evidence “such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “In reviewing the record, the court must give the nonmoving party the benefit of all reasonable inferences.” Brewer, 72 F.3d at 330.

A. Intentional Discrimination

Under the shifting burdens analysis of *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case. Waldron v. SL Industries, Inc. 56 F.3d 491, 494 (3d Cir.1995) The burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its employment decision. Id. "If one or more such reasons are proffered, the presumption of discrimination created by establishment of the *prima facie* case is dispelled, and Plaintiff must prove that the employer's

proffered reason or reasons were pretextual." Id.

1. *Prima Facie* Case

Plaintiff fails to establish a *prima facie* case for intentional discrimination because she cannot show that her discharge occurred under circumstances that give rise to an inference of discrimination. To establish a *prima facie* case of intentional discrimination, Plaintiff must demonstrate that: 1) she is a member of a protected class; 2) she was qualified for an employment position; 3) she was discharged from that position; and 4) the discharge occurred "under circumstances that give rise to an inference of unlawful discrimination." See Waldron v. SL Industries, Inc., 56 F.3d 491, 494 (3d Cir. 1995)(citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

Here, Plaintiff unsuccessfully attempts to create an inference of unlawful discrimination by asserting that Defendant treated other similarly situated employees not of her protected classes more favorably. Specifically, Plaintiff asserts that Defendant fired eight other members of Department 115 for time card falsification, but eventually rehired those individuals or allowed them to retire. Demonstrating that a defendant treated similarly situated employees outside the relevant class more favorably is a common method of establishing an inference of discrimination. See Bullock v. Children's Hosp. of Philadelphia 71 F.Supp.2d

482, 487 (E.D.Pa. 1999).

In this case, however, Defendant's decision to rehire other employees, including white males, who had been terminated for time card falsification raises no inference of unlawful discrimination, because these employees are not similarly situated to Plaintiff. Other employees are similarly situated only if they "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."

Anderson v. Haverford College, 868 F. Supp. 741, 745 (E.D.Pa. 1994) (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir.1992)).

Here, such differentiating and mitigating circumstances exist. See Edwards v. Merck & Co., Inc., No. 05-373, 2006 WL 1030281, *4 (E.D.Pa. Apr. 18, 2006) (holding that Fred Edwards, the individual who went to Jamaica with Plaintiff Thompson, was not "similarly situated" to employees fired for time card falsification in part because they were discharged for one offense, while he was discharged for three). Unlike the other employees fired from Department 115, Plaintiff did not just lie initially; she compounded her offense by continuing to lie to employer in an attempt to cover up her actions. Additionally, the other employees were brought back pursuant to a negotiated agreement with the union, in part, because a supervisor was involved in the other employees' time card

falsification. Thus, Plaintiff has presented no similarly situated individuals whose treatment could raise an inference of discrimination.

Moreover, even if these eight employees were similarly situated, their rehiring would not provide an inference of discrimination based on race or gender because the group of rehired employees included other African-Americans and women. Thus, the rehiring of these individuals does not give rise to an inference of unlawful discrimination on the basis of race or sex.

Similarly, Plaintiff's assertion that other employees in Department 115 were not required to provide documentation of their death in family leave creates no inference of discrimination based on race or gender. Plaintiff testified that Bud Hoffman, a white male employee, was required to provide documentation for death in family leave and that an African-American female employee was not. Pl. Dep at 19. Moreover, Plaintiff admits that Defendant's request for documentation would be reasonable if the company believed that she had lied about taking the leave. Pl. Dep. at 121-122. In this case, there were strong indications that Plaintiff had lied about her death in family leave. Kunz. Dep. at 24-27. Therefore, Plaintiff cannot demonstrate that the request for documentation was applied in a discriminatory fashion.

2. Pretext

Even assuming Plaintiff could establish a *prima facie* case for discriminatory discharge, Plaintiff fails to put forth any evidence to rebut Defendant's legitimate, non-discriminatory reasons – the three dischargeable offenses she committed. To defeat summary judgment when the defendant provides a legitimate, non-discriminatory reason, Plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either: (1) disbelieve the employer's articulated legitimate reasons by demonstrating “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence;” or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action by showing that the employer in the past had subjected him to unlawful discriminatory treatment, that the employer treated other, similarly situated persons not of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). This standard “places a difficult burden on the plaintiff” in order to balance the inherent tension between preventing discrimination and

allowing free decision-making by the private sector in economic affairs. Id. at 765.

Here, with regards to the first prong, Plaintiff has provided no reason to disbelieve the employer's articulated legitimate reasons. Defendant fired Plaintiff for committing three dischargeable offenses under Defendant's Employee Code of Conduct. Firing an employee who not only knowingly lied to her supervisor to obtain four days of paid death in family leave only to go on vacation to Jamaica but who also lied and submitted false documentation in attempt to cover up her misuse of leave time appears reasonable on its face. The reasonableness of this termination is further buttressed by the determination of a fair and impartial arbiter that Plaintiff's actions rose to the level of "extremely serious offenses" and that "the penalty of discharge was indeed warranted." Even Plaintiff agrees that she deserves some punishment for her actions; she merely disagrees with the severity of her punishment. Her disagreement with the severity of the punishment, however, "does not create a material issue of fact." See Williams v. Phoebe-Devitt Home, No. 93-3386, 1994 WL 541493, *5 (E.D.Pa. Sept. 27, 1994)("Evidence which simply disagrees with the decision is 'little more than the schoolground retort, 'Not so,' which does not create a material issue of fact'") aff'd 60 F.3d 819 (3rd Cir. 1995).

Additionally, Plaintiff in this case has also failed to provide any evidence

that invidious discrimination was more likely than not a motivating cause of her discharge. As discussed previously, Plaintiff presents no evidence that Defendant has previously subjected her or any other members of any protected class to discriminatory treatment. Further, she has not pointed to the existence of any similarly situated members not of her protected class that were treated more favorably.

The sole basis for Plaintiff's intentional discrimination claims appear to be her personal belief that she faced discrimination. An employee's subjective view of why they faced an adverse employment action is insufficient to establish pretext, though. Sarullo v. U.S. Postal Service, 352 F.3d 789, 800 (3d Cir. 2003).

Thus, Plaintiff cannot establish that the proffered legitimate, non-discriminatory reason was a pretext for race or sex discrimination.

B. Retaliation

Plaintiff's claim for retaliation follows the same shifting burdens analysis as her claim for intentional discrimination. Delli Santi v. CNA Ins. Companies, 88 F.3d 192, 199 (3d Cir. 1996). A plaintiff must first establish a *prima facie* case of retaliation by showing that: (1) the employee engaged in a protected employee

activity;¹ (2) the employer took an adverse 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. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000). “If plaintiff successfully establishes a *prima facie* case, the burden shifts to defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action taken. Finally, if the defendant offers a non-retaliatory reason, plaintiff must

¹Here, Plaintiff alleges in her Complaint that she engaged in the following protected activities for which she is facing retaliation: 1) In 2000, in her capacity as Union Steward, Plaintiff filed and prosecuted race and sex discrimination grievances against Jim Bukowski on behalf of Pam Batterson and Pam Bishop; 2) In 2002, in her capacity as Steward, Plaintiff filed and prosecuted race and sex discrimination grievances against Christopher Vanelli, Raymond Fitch, and Rich Derickson on behalf of Adriana Lowery and Fred Edwards; 3) On August 29, 2002, Plaintiff filed a grievance against her supervisor in Department 176, Jim Bukowski, on her own behalf because he allegedly made disparaging racial comments about her; and 4) On September 22, 2003, and November 5, 2003, Plaintiff filed grievances because she believed Defendant’s request to submit documentation for her death in family leave was harassment.

Notably, Plaintiff provides no evidence that the grievance filed on August 28, 2002, complained of violations of conduct which would violate an anti-discrimination statute. Although, Plaintiff asserts in her complaint that she filed the August 28, 2002 grievance because she was informed by others that Mr. Bukowski “had made racially disparaging remarks” about her, the record does not support that assertion. Am. Compl. ¶12. At no point in this grievance did Plaintiff assert race or gender discrimination, nor did she allege any racially disparaging remarks. Plaintiff’s Response to Defendant’s Motion for Summary Judgment, Exh. F. Plaintiff stated in her deposition that she filed the August 28, 2006 grievance because Mr. Bukowski publically attributed a change in company policy to her leaving work early. Specifically, Plaintiff alleged that Burkowski violated Defendant’s *company* policy, “MU12”, that states that any supervisor or manager that threatens or intimidates the personnel will be dealt with accordingly.” Id. The court notes that Plaintiff had no difficulty asserting race and gender as the source of her harassment in her later filed grievances. Plaintiff’s Response to Defendant’s Motion for Summary Judgment, Exh. T.

demonstrate sufficient evidence from which a factfinder might find the reason offered is pretextual.” Mroczek v. Bethlehem Steel Corp., 126 F.Supp.2d 379, 387 (E.D.Pa. 2001); see also Farrell v. Planters Lifesavers Co., 206 F.3d 271, 278-79 (3d Cir. 2000).

As with her intentional discrimination claim, Plaintiff fails to cite sufficient evidence to establish that the employer’s legitimate, non-retaliatory reasons were a pretext. The analysis regarding Plaintiff’s intentional discrimination, thus, applies with equal force here. She has provided no evidence to suggest that the employer's proffered reasons for terminating her were pretext for retaliation.

C. Hostile Work Environment²

Plaintiff has not produced sufficient evidence to establish that she suffered a hostile work environment. To bring an actionable claim for sexual or racial harassment because of an intimidating and offensive work environment, a plaintiff must establish “by the totality of the circumstances, the existence of a hostile or abusive working environment which is severe enough to affect the psychological stability of a minority employee.” Andrews v. City of Philadelphia, 895 F.2d 1469,

¹ The Defendant concedes that she may not bring a hostile work environment claim under Title VII or the PHRA because she failed to procedurally exhaust her administrative remedies and because such claims are now untimely. Plaintiff further agrees that any claims that Mr. Bukowski created a hostile work environment in Department 176 are barred by the statute of limitations applicable to Section 1981 claims. Thus only Plaintiffs Section 1981 claims regarding the work environment in Department 115 remain.

1482 (3d Cir. 1990) (quoting Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1510 (11th Cir.1989)). Specifically, under Title VII, the PHRA, or Section 1981, (1) the plaintiff must have suffered intentional discrimination because of his or her membership in the protected class; (2) the discrimination must have been pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of respondeat superior liability. West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995).

Here, Plaintiff's hostile work environment claim fails because she cannot establish the first element of her *prima facie* case, that she suffered intentional discrimination because of her race or gender. There is no evidence in the record to suggest that Plaintiff suffered a racially or sexually hostile work environment. See Tucker v. Merck & Co., Inc., No. 03-5015, 2004 WL 1368823, *15 (E.D.Pa. June 17, 2004)(granting summary judgment in hostile environment claim in part because the “plaintiff cannot cite a single incident involving the utterance of a racial epithet, the use of a racist symbol, or *any* direct comment concerning race”); McBride v. Hosp. of the Univ. of Pa., No. 99-6501, 2001 WL 1132404, *6 (E.D.Pa. Sept. 21, 2001)(granting summary judgment on hostile work environment claim because Plaintiff did not present competent evidence to show that alleged

discriminatory employment decisions were racially motivated).

Here, Plaintiff first alleges she faced a racially hostile work environment because the supervisors in Department 115 meted out discipline based on race. Am. Compl., ¶ 11 Yet, Plaintiff points to only a few incidents of discipline she faced, and in both cases there is no basis for an inference of discrimination. Her first incident of discipline in Department 115 occurred when she, along with the rest of her department including white and African-American employees, received a one-day suspension for leaving early. Pl. Dep at 190-192. Plaintiff does not contend that this suspension was unwarranted or that Defendant gave preferential treatment to non-minority employees. Her second incident of discipline in Department 115 took place when she received a written reprimand for manipulating the speed of a filler machine. Again, she provides no evidence that this reprimand was not warranted, nor that other similarly situated non-minority employees were treated preferentially.

Next, Plaintiff asserts she suffered a hostile work environment because Defendant requested that she provide documentation for death in family leave. She fails, however, to provide any evidence that Defendant's request for documentation regarding her death in family leave was discriminatory. In short, Plaintiff's belief that her supervisors singled her out based on her race and gender

“amount to nothing more than speculation based upon subjective feelings.”

Cooper v. Binney & Smith, Inc., No. 96-623, 1998 WL 103302, *1 (E.D.Pa. Feb. 26, 1998) (granting summary judgment on hostile work environment claim where the plaintiff provided no evidence to support his subjective belief that black employees were disciplined more severely than white employees).

Additionally, even if Plaintiff had suffered intentional discrimination, that discrimination was not sufficiently pervasive and regular to satisfy the second element of the *prima facie* case. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment is not actionable. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir.1995) (“[I]solated or single incidents of harassment are insufficient to constitute a hostile environment).

Here, Plaintiff’s hostile work environment allegations amount to her allegations she was disciplined and singled out to document her death in family leave. These allegations are insufficient to satisfy the requirement of “severe and pervasive” harassment. See Weston v. Pa., No. 98-3899, 2001 WL 1491132, at *12 (E.D. Pa. Nov. 20, 2001) (granting summary judgment to employer and

holding that four incidents over a three-and-a-half-year period were “at best . . . sporadic and isolated incidents of harassment, not pervasive conduct”) (citations omitted); Nwanji v. City of New York, No. 98-4263 , 2000 WL 1341448, at *5 (N.D.N.Y. Sept. 15, 2000)(holding, in case where plaintiff’s supervisors were “constantly reprimanding” him and “documenting his poor performance,” that it was reasonable for jury to find that conduct was not severe or pervasive enough to constitute a hostile work environment). Therefore, the conduct of which Plaintiff complains simply was not sufficiently severe or pervasive to rise to the level of an objectively hostile work environment, given the isolated and limited nature of the incidents alleged. Plaintiff thus cannot establish a *prima facie* case for hostile work environment.

Therefore, for reasons stated, the court will grant Defendant’s Motion for Summary Judgment. An appropriate Order follows.

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

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ORDER

AND NOW, this 27th day of July, 2006, upon consideration of Defendant's Motion for Summary Judgment, and Plaintiff's Response thereto, Defendant's Motion for Summary Judgment is **GRANTED**. Judgment is entered in favor of Defendant and against Plaintiff, and Plaintiff's claims in the Amended Complaint are **DISMISSED** with prejudice.

BY THE COURT:

MARVIN KATZ, S.J.