

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

BARBARA TATE : CIVIL ACTION
 :
 v. :
 :
 MAIN LINE HOSPITALS, INC., :
 et al. : NO. 03-6081

MEMORANDUM

Dalzell, J.

February 8, 2005

After a long tenure as a nurse on Bryn Mawr Hospital's (the "Hospital"'s) pediatric unit, Barbara Tate's working conditions allegedly became so intolerable to her that she took a leave of absence. When she failed to return to work after six months, her employer terminated her. In response, Tate brought this action, claiming that her termination was part of a larger pattern of age-related discrimination that she endured in her final eighteen months at the Hospital. The defendants' motion for summary judgment is now before us.¹

¹ Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

Factual Background

A. Tate's Role at the Hospital

Barbara Tate was born on March 30, 1950 and graduated from the Bryn Mawr Hospital School of Nursing in 1985. Tate Dep. at 8, 69. After graduation, she began work in the Hospital's pediatric unit. Id. at 72-73. Tate worked continuously in the pediatric unit for more than seventeen years, with occasional stints in other units. Id. at 73. Apart from a conflict with a manager and a colleague in 1990, see id. at 131-142, Tate generally worked well with Hospital administrators and other nurses. Tate's fellow nurses respected her skills, and some admired her commitment to advocating for better patient care. See, e.g., Mikus Dep. at 18.

In addition to her regular nursing duties, Tate voluntarily assumed a variety of other responsibilities for which she received no additional pay. For example, she was a CPR instructor for the Pediatric Advanced Life Support ("PALS") program. She created the Halloween Candy Exchange, a program in which diabetic children could trade their candy for prizes. She also ran a summer camp for sick children. Tate Dep. at 76-78, 81, 84-85.

Tate's supervisor, Eileen MacCauly, was responsible for several other Hospital units in addition to the pediatric unit, so she could not always be present on the pediatric unit. When she was not present, she delegated responsibility for ensuring that nurses were covering all scheduled shifts to a "charge

nurse." Tate frequently assumed the role of charge nurse on the pediatric unit. Tate Dep. at 75-77; Decina Dep. at 41.

B. "Do The Right Thing" Incident

In December of 1998, Tate's daughter-in-law gave birth to Tate's grandson at the Hospital. During the labor, the obstetrician discovered that the baby's head was pushing on the umbilical cord, so the doctor decided to perform an amniotic infusion to alleviate the pressure on the cord. The nurse who was assisting during that relatively rare procedure, however, was inexperienced with obstetric emergencies. Fearing that such inexperience prevented the Hospital from delivering quality care to her grandson and other patients, Tate placed a telephone call to "Do The Right Thing," a service that collects anonymous complaints from nurses about their working conditions. Tate Dep. at 117-20.

When "Do The Right Thing" contacted Bryn Mawr Hospital about the incident, MacCauly was able to identify Tate as the complainant and began to berate her in front of doctors and other nurses.² Id. at 120. MacCauly's abuse eventually became so severe that Tate again contacted "Do The Right Thing" to complain that they had disclosed identifying information when they first contacted the Hospital. Id. at 120-21. In 1999, Hospital administrators learned about Tate's second call to "Do The Right

² MacCauly also relieved Tate of responsibility for scheduling nurses' shifts. Tate Dep. at 85-86.

Thing" and dispatched Terry Dougherty, the manager of human resources, to discuss the situation with Tate. Dougherty told Tate that she should have brought MacCauly's behavior to her attention and not contacted "Do The Right Thing." Dougherty then arranged a meeting with Tate, MacCauly, and Karen Bartels, assistant vice-president of patient services. After that meeting, Bartels informed Tate that she (Bartels) would personally assume MacCauly's responsibility for the pediatric unit on an interim basis, and Tate was satisfied with that result. Id. at 121-26.

Although MacCauly no longer managed Tate on a day-to-day basis, she tried to exclude Tate from PALS. Dr. Eric Sundel successfully intervened with Bartels to ensure that Tate could continue to participate, but the situation convinced him that the "administration ha[d] something against" Tate. Tate Dep. at 78-79, 124. Around the same time, in 2000, the Hospital transferred responsibility for the Halloween Candy Exchange and the summer camp from the pediatric nurses to its Community Services department because administrators wanted the nurses to concentrate exclusively on delivering patient care. Id. at 81-85; Sheehan Dep. at 70-71. A few months later, Andrea Gilbert (a senior vice-president at the Hospital), Claire Baldwin (the vice-president of nursing administration), and Dougherty convened a breakfast meeting with senior nurses from all of the Hospital's units to announce that senior nurses would not be receiving the three percent raises that had been promised to all of the

nurses.³ Tate questioned the fairness of the change, and Baldwin asked angrily whether she was "accusing [the Hospital] of age discrimination." Tate Dep. at 60-63.

C. Tate Looks for a New Job

With all of these changes, Tate began to consider switching jobs. In the fall of 2000, the risk manager at Paoli Hospital⁴ made an unsolicited telephone call to Tate to encourage her to apply for a risk management position at that hospital. Tate applied for the job and had two positive interviews, but an admittedly more qualified applicant received the position. Tate Dep. at 90-96. Undeterred, Tate applied to be the risk manager at Bryn Mawr Hospital in February, 2001. See Defs.' Mot. Ex. C. Although Tate's comments during her Bryn Mawr interview were similar to those that she made during the interviews for the Paoli position, the Bryn Mawr interviewers were much less receptive to her answers. Tate Dep. at 98-101. Hospital administrators felt that none of the applicants for the Bryn Mawr job was qualified, so they did not immediately fill the position. Dougherty Dep. at 83-85.⁵

³ Junior nurses, however, were to receive the full three percent raises. Tate Dep. at 62.

⁴ Like Bryn Mawr Hospital, Paoli Hospital is part of the Main Line Hospitals, Inc. system.

⁵ Eventually, Margaret Lange, who is about Tate's age, transferred into the Bryn Mawr position when Main Line Hospitals, Inc. eliminated her former position. Dougherty Dep. at 83-84.

Since she had relieved MacCauly, Bartels had been managing the Hospital's pediatric unit on an interim basis. Eventually, the Hospital contacted Bates and Associates, a recruiting firm, to find a permanent patient care manager ("PCM") for the unit. Dougherty Dep. at 10-11. Although Tate believed that she was fully qualified to become the PCM, she felt that Hospital management "precluded [her] from [applying] because . . . they wanted someone with a master's degree."⁶ Tate Dep. at 332. As a result, Tate never applied for the position, and the Hospital hired Mary Sheehan to be the PCM for the pediatric unit starting in April of 2001. Sheehan Dep. at 16. Sheehan held a master's degree and had about the same amount of nursing experience as Tate, but Sheehan was ten years younger than Tate. Id. at 5-10; see also Pl.'s Br. Ex. K (reporting that Sheehan was born on August 11, 1960).

During her first several weeks on the job, Sheehan was involved in the Hospital's orientation program and only saw the pediatric nurses occasionally. Sheehan Dep. at 17-18. By the end of her orientation, Sheehan understood that her superiors hoped to make the pediatric unit more "cost effective," Sheehan Dep. at 15, and she planned to achieve greater efficiency by adjusting nurses' work schedules and by caring for more adult patients in the pediatric unit. For her part, Tate felt as

⁶ Tate does not have a master's degree. Tate Dep. at 69.

though Hospital management had turned Sheehan against her. Tate Dep. at 358.

D. Adult Patients

Even before Sheehan arrived, Hospital administrators began placing more adult patients in the pediatric unit than had been customary. Dougherty Dep. at 70-73; see also Kelly Dep. at 33; MacGuinness Dep. at 50; Decina Dep. at 37. At first, Sheehan intensified the efforts to increase the number of adult patients by insisting that the pediatric nurses care for any adults who were sent to the unit.⁷ Id. at 36. Many of the pediatric nurses resisted the growing number of adult patients because they were not as experienced in treating adults as they were in caring for children. See, e.g., MacGuinness Dep. at 27; Tate Dep. at 142-43; Sheehan Dep. at 36.

Of all the pediatric nurses, however, Tate appears to have raised her concerns most vociferously. For example, Tate once refused to administer cancer drugs to an adult patient because she did not know how to do so. Tate Dep. at 295. Tate also told Sheehan that a drug-addicted adult who had been injured in a barroom brawl was too dangerous to admit on the pediatric unit, but Sheehan responded furiously, "You older nurses can't do the job, and you complain about everything; and you're too

⁷ It deserves mention that Sheehan ultimately developed a screening process to ensure that the pediatric nurses treated only appropriate adult patients. Sheehan Dep. at 37; Kelly Dep. at 33; Decina Dep. at 35-38; MacGuinness Dep. at 28.

resistant to change. He is coming, and you are taking him." Tate Dep. at 292; see also id. at 287-88, 291.

Occasionally, Tate was unable to reassure the adults' doctors and family members that the pediatric nurses could care for adults. When these situations arose, the doctors and families would demand to speak with Sheehan so that they could voice their complaints. Tate Dep. at 294-95, 297-99. After meeting with the doctors and families, Sheehan would explain the business reasons for accepting adult patients on the pediatric nurses. Tate also claims that Sheehan would sometimes make negative comments, such as "I am sick and tired of you older senior nurses going behind my back and complaining," or "You've been here too long, and you just can't keep up with the way things are in health care." Tate Dep. at 295, 297.

In June, 2001, Sheehan approached Tate to alert her that doctors were complaining about Tate's negative attitude toward caring for adult patients. Sheehan refused to tell Tate which doctors had approached her, so Tate spoke with several of the doctors directly.⁸ The next day, Sheehan confronted Tate about speaking with the doctors behind her back. Tate claims

⁸ All of the doctors, including Dr. Eric Sundel, the doctor whom Sheehan identified as raising the concerns with her, denied making negative comments about Tate. Compare Tate Dep. at 269-70 with Sheehan Dep. at 63-64.

that Sheehan told her "never to talk to the doctors."⁹ Tate Dep. at 268-72; see also Sheehan Dep. Ex. 2, at MLH00164.

E. Bonus Program

Because of a shortage of qualified nurses, the Hospital created a "bonus program" through which participating nurses who remained at the Hospital for three years would receive generous bonuses. On July 25, 2001, Tate signed a "bonus program agreement" recognizing that she would receive a \$23,000.00 bonus if she received "effective" or "exceptional" performance evaluations and remained at the Hospital until July 31, 2004. See Defs.' Mot. Ex. F.

F. 2001 Schedule Changes

Before Sheehan arrived on the pediatric unit, Tate primarily worked day shifts, but she also participated in the "weekend program," which required nurses, once every fourth week, to work two twelve-hour shifts on consecutive weekend days for straight pay. Tate Dep. at 143-44; Sheehan Dep. at 24-26. Though there were more than enough nurses assigned to the day shift (7:00 a.m. to 3:00 p.m.), a shortage of nurses willing to work on the evening shift (3:00 p.m. to 11:00 p.m.) and the night shift (11:00 p.m. to 7:00 a.m.) forced the Hospital to contract

⁹ Sheehan remembers telling Tate that it was unprofessional of her to have spoken with the doctors. Sheehan Dep. at 65.

with a high-priced agency to obtain enough nurses to cover those shifts.¹⁰

In the summer of 2001, Sheehan announced a plan to reduce the Hospital's dependence on the agency by periodically assigning day-shift nurses to evening and night shifts. Though her plan did not include cutting benefits for any of the nurses, many of the nurses, especially the day-shift nurses, were concerned about the changes. Dougherty Dep. at 73; Sheehan Dep. at 20-21; Tate Dep. at 145; MacGuinness Dep. at 24. Nevertheless, Sheehan began to implement her plan in September, 2001, when she collected proposed work schedules from each of the nurses. Sheehan Dep. at 22-23. Tate was the first to submit her proposed schedule to Sheehan, but she was the last to receive her shift assignments.¹¹ When Tate finally received her schedule, she found it totally unacceptable and raised her concerns with Sheehan, who invited Tate to submit a revised proposal. Tate Dep. at 146-47.

Before Sheehan and Tate could agree on a schedule, however, Tate questioned the wisdom of Sheehan's cost-cutting plan at a staff meeting with day-shift nurses. Specifically, Tate suggested that Sheehan's scheduling changes were actually

¹⁰ Although there were day, evening, and night shifts on each weekday, it appears that weekends were divided into the "A" shift (7:00 a.m. to 7:00 p.m.) and the "P" shift (7:00 p.m. to 7:00 a.m.). See Pl.'s Br. Ex. M; Sheehan Dep. at 29.

¹¹ Sheehan did not take nurses' seniority into account when she created their schedules. Sheehan Dep. at 22; Dougherty Dep. at 73-74.

increasing the Hospital's costs because nurses would earn more overtime wages under the new system than they had earned under the old system. After instructing Tate to "speak for [her]self," Sheehan attempted to explain that the additional overtime due some nurses would be more than offset by reductions in the cost of benefits to other nurses. Tate Dep. at 272-74; see also Sheehan Dep. Ex. 2, at MLH00169.

Recognizing the resistance to her plan, Sheehan told the day-shift nurses that they were free to attempt to develop a more acceptable schedule for the unit. Patty Decina decided to respond to the challenge, and she solicited assistance from Tate, who had dealt with scheduling issues as a charge nurse. When Sheehan noticed Decina and Tate working together to create a new schedule, she shredded their proposal and told them that she was "handling it" and was "the boss of [their] lives." Tate Dep. at 319-20. Around the same time, Sheehan suggested that Tate transition from a full-time position to a part-time position so that the Hospital could stop providing her with the vacation time and benefits to which full-time employees were entitled.¹² Tate Dep. at 289-91. Sheehan also complained to Tate that "[y]ou older nurses have too much vacation time, and that's time I pay you to be off." Id. at 286-87.

While resentment over the scheduling changes percolated among the day-shift nurses, Tate continued submitting proposed

¹² Sheehan denies discussing the possibility of a part-time position with Tate. Sheehan Dep. at 18.

shift assignments to Sheehan for her approval. After several revisions, however, Tate was still not satisfied with her assigned shifts, and Sheehan threatened to assign her to full-time night shifts unless Tate accepted the new schedule.¹³ Id. at 147-48. Rather than capitulate, Tate escalated her grievance to Sheehan's supervisor, Claire Baldwin. Id. at 150; Sheehan Dep. at 19.

At an October, 2001, meeting, Baldwin told Sheehan that she should have assigned shifts to full-time nurses, like Tate, before she assigned them to part-time nurses. Baldwin also revised Tate's schedule to excuse her from working on Fridays before her weekend shifts. Tate Dep. at 150-51. On the other hand, Baldwin supported Sheehan's requirements that, one Thursday a month, Tate work from 3:00 a.m. to 7:00 a.m. before her usual day shift and that she work on Fridays before weekends when she was not assigned to work.¹⁴ Tate Dep. at 151-53. The new schedule went into effect before the end of 2001. Sheehan Dep. at 24.

G. Tate's Relationship with Sheehan Deteriorates

Before the new schedules became effective, each day shift nurse cared for an average of four patients at any given

¹³ Sheehan denies threatening to assign Tate to night shifts. Sheehan Dep. at 23.

¹⁴ Tate circumvented this solution by taking vacation days on the Fridays to which she had been scheduled. Tate Dep. at 153.

time. Decina Dep. at 38. An inevitable result of Sheehan's plan to reduce the number of nurses working day shifts, however, was to increase the number of patients for whom each nurse was responsible. Sheehan recognized that the day-shift nurses were not used to the added work and explained that the changes were necessary to make the Hospital more competitive with its peers. Sheehan Dep. at 33-35. Still, Tate believed that the higher patient-nurse ratio was unsafe, and she occasionally complained to Sheehan about it. Id. at 34.

For example, when Tate once informed Sheehan that she was already caring for six patients and could not accept any others, Sheehan said, "I think you can take six patients, or are you too old to keep up? You know, health care is changing, and you just may not be able to keep up anymore." Tate Dep. at 281. On another occasion, Tate asked Sheehan for assistance when she was assigned two children who each needed one-on-one attention, but Sheehan remarked, "Oh, there you go again, Barb. What do I have to do? I think you can handle it. Are you too old to handle it?" Tate Dep. at 274-76. When Sheehan mistakenly believed that Tate had requested additional support, she became angry, but the anger quickly faded into "sweet[ness]" when she realized that a younger nurse had actually made the request. Tate Dep. at 283-85.

In addition to the statements that Sheehan made in response to Tate's perceived complaints about inadequate staffing, Sheehan made several other age-related remarks. When

Sheehan heard Tate and another nurse talking about looking for another job, she told Tate, "Oh, who are you kidding? . . . You're not going anywhere. You'd have too many benefits to lose. It's close to your house; and at your age with your pension coming, you know you're not going anywhere. Who are you kidding?" Tate Dep. at 280; see also id. at 289. Sheehan also told Tate that "[y]ou older nurses are so resistant to change" at least sixty times. Id. at 286.¹⁵ Other nurses heard Sheehan tell Tate that she was too resistant to change, see, e.g., MacGuinness Dep. at 32-33; Decina Dep. at 44-45, and Sheehan admits that she might have made similar comments, Sheehan Dep. at 38.

Tate also noticed that Sheehan assigned tasks for which she had always been responsible to other, often younger, nurses. For instance, Sheehan regularly selected part-time nurses to be the charge nurse, who addressed any staffing problems that arose while Sheehan was temporarily away from the Hospital, even though Tate had extensive experience in that role. Tate Dep. at 75-77. Sheehan personally selected Kathy Irwin, Liz Kelly, and Lizanne Mikus -- all of whom younger than Tate, see Pl.'s Br. Ex. K -- to be part of the Yaya Sisterhood, a group of nurses that Sheehan

¹⁵ Even when Sheehan's conduct lacked age-related overtones, Tate felt as though she was subject to constant verbal harassment. Sheehan was quick to challenge the way in which Tate completed paperwork, even when Tate complied with hospital policy. Tate Dep. at 265-67. She also incorrectly assumed that Tate had falsified her time records. Id. at 353-54. When Tate questioned Sheehan's instructions in front of a doctor's wife, Sheehan screamed at her. Id. at 276-79.

created to discuss issues arising on the pediatric unit. MacGuinness Dep. at 47-49. At the Sisterhood's first meeting, Sheehan demanded that Tate leave the conference room where she was eating lunch, even though there was an empty room nearby where the Sisterhood could have met. Tate Dep. at 260-65. Sheehan also transferred responsibility for developing and maintaining pediatric unit procedures from the Policies and Procedures Committee, of which Tate was a member, to Lisa Waraska. Id. at 86-88. Sheehan once asked Tate to prepare "Clinical Pathways," documents explaining standards for uniform patient care, but she abruptly withdrew the assignment on the next day. Tate Dep. at 74-75.

H. Evaluation and Raise

At the Hospital, nurses' evaluations included ratings in six specific areas and an "overall performance" rating. To explain particular ratings, supervisors could provide comments about each of the areas that they evaluated.

On December 5, 2001, Tate received her first and only evaluation from Sheehan. The evaluation rated Tate as "effective" in most areas, but noted that her "team competencies" needed "improvement." See Pl.'s Br. Ex. I. Sheehan gave Tate an overall performance rating of "effective." Id. The evaluation surprised Tate because her previous evaluation, which Karen Bartels authored, had described her "team competencies" as "exceptional." Pl.'s Br. Ex. H. When she saw that Sheehan

stated that there was "improvement needed," Tate immediately came to believe that Sheehan "really ha[d] it out for" her. Tate Dep. at 308-09. Tate and Sheehan met to discuss the evaluation, but Tate did not protest her ratings because she did not want to antagonize Sheehan. Tate Dep. at 310.

Under the Hospital's performance pay matrix, Tate's evaluation made her eligible for a raise of between two and four percent, with the precise amount fixed by Sheehan. Dougherty Dep. at 76-79; see also Pl.'s Br. Ex. N. Sheehan gave Tate a two-percent raise because she reserved higher raises for those nurses who did not have any areas that needed improvement. Sheehan Dep. at 42-43.

Six months later, Sheehan evaluated Patty Decina, a nurse who was five and a half years younger than Tate. See Pl.'s Br. Ex. P, at MLH00790¹⁶; Pl.'s Br. Ex. K. When Decina met with Sheehan to discuss that evaluation, Decina pointed out that it did not fully reflect all of her contributions to the pediatric unit. Recognizing her omissions, Sheehan increased Decina's raise from three percent to three-and-one-half percent. Decina

¹⁶ Although Tate claims that Sheehan considered the "team competencies" of Decina and Kim MacGuinness (who is also younger than Tate) to be "effective," even though they received comments on their evaluations that were similar to the comments that she received, see Tate Dep. at 311-13, MacGuinness's evaluation is not in the record. Moreover, Sheehan did not comment on why she found Decina's "team competencies" to be "effective," see Pl.'s Br. Ex. P, at MLH00794, but she did explain that Tate's "team competencies" needed "improvement" because Tate "often set[s] herself outside the boundaries of the team when there are changes to meet the unit needs," see Pl.'s Br. Ex. I, at MLH00174.

Dep. at 33-35; Tate Dep. at 350-51; Sheehan Dep. at 44-45. Decina told Tate about how she had convinced Sheehan to give her a larger raise, so Tate approached Sheehan to request a similar adjustment.¹⁷ Sheehan denied the request, and Tate asked how she could appeal the decision. After contacting human resources, Sheehan informed Tate that she could appeal her decision only if she signed a "punitive record." Tate declined to sign the document because Sheehan told her that it might affect her eligibility for the \$23,000.00 bonus. Tate Dep. at 351-52; Sheehan Dep. at 44.

I. Anorexic Patient Incident

During the summer of 2002, Tate's relationship with Sheehan degenerated beyond repair. Near the end of the day shift on July 23, 2002, the pediatric unit admitted an anorexic girl with chest pains. Because her neurologist believed that the patient's heart condition made her inappropriate for placement on the unit, Sue Ford, the pediatric nurse who was responsible for her, informed Sheehan that she should be transferred. Tate expected that the transfer would take place that day. Tate Dep. at 179.

When Tate arrived for her day shift on July 24, the anorexic patient was still in the pediatric unit and her condition was deteriorating. The night shift nurse who had been

¹⁷ There is no evidence that Tate suggested any reason for why Sheehan should give her more than a two percent raise.

caring for the patient informed Tate and Decina that she¹⁸ had paged a doctor because she was afraid that the patient would die. Decina accepted primary responsibility for the patient, and she attempted to discuss the need for transfer with Sheehan. Sheehan did not address Decina's concerns. Tate Dep. at 180.

While Decina cared for the anorexic patient, Tate was responsible for a patient with a seizure disorder. Tate noticed that her patient's Depakote level was too high to permit an accurate blood test, so she paged Dr. Tang to obtain permission to stop providing Depakote for one day. Tate was waiting in the conference room with Decina for Dr. Tang to return the call when Sheehan burst into the room and yelled, "You people don't know about anorexia. You just don't know about anorexia, and it's about time that you got used to anorexia." Although Decina had primary responsibility for the anorexic patient, Tate pointed out the patient's symptoms of cardiac distress. Sheehan responded, "I am not talking about cardiac enzymes. I am not talking about chest pain. I am not talking about blood pressure. I am talking about anorexia." While Sheehan continued to yell, Dr. Tang returned Tate's call. He heard the commotion in the conference room and asked Tate who was yelling. Tate told him that he had heard her supervisor, and Dr. Tang muttered simply, "Oh, my God."

¹⁸ Although there is no evidence of the sex of the night shift nurse, we presume that she was female because all of the other nurses about whom there is evidence were female.

Tate Dep. at 180-83; Decina Dep. at 23-25; Dougherty Dep. at 30-31.

Decina reported Sheehan's behavior to Claire Baldwin, and Tate overheard Sheehan making a snide comment about the decision to involve Baldwin. Because she had a good relationship with Baldwin and because she feared that, with only Decina's word, Baldwin would not respond seriously enough to the incident, Tate called Baldwin on July 26, 2002 to report what she had observed. Baldwin thanked Tate for her call, promised to address the situation with Sheehan, and instructed Tate to call her again if similar behavior continued. Tate Dep. at 183-85, 195-96.

J. Heparin Lock Incident

Near the end of her day shift on July 31, 2002, Tate and Dr. O'Brien were preparing for a baby to be discharged. Just as Tate removed a heparin lock¹⁹ from the baby's arm, Tate heard one of her patients scream. The screaming patient was mentally retarded, was receiving anti-seizure medication, and was alone at the time. Dr. O'Brien told Tate that she would "take care of everything" with the baby, so Tate placed the heparin lock, which was still attached to a padded board, on the bed or a bedside table and rushed to attend to her screaming patient. According to Hospital protocol, Tate should have separated the heparin lock

¹⁹ A heparin lock is a hollow plastic tube that is inserted into a vein in a patient's arm so that fluid can be easily administered to the patient. Ristine Dep. at 20; see also Sheehan Dep. at 49; Dougherty at 18. When inserted into a child, a heparin lock is attached to a padded board so that the child cannot dislodge it by moving his arm. Ristine Dep. at 26.

from the board and discarded the heparin lock in a Sharps container. Tate Dep. at 161-64.

After attending to the screaming patient, Tate went to the conference room for "report," the end-of-shift transitional meeting where departing day-shift nurses would update incoming evening-shift nurses about the patients on the unit. Ristine Dep. at 14. In addition to Tate, Liz Kelly, Trish Ristine, Trish Young, and perhaps others were seated around a table in the conference room. Tate Dep. at 165-66. While the meeting was underway, Sheehan entered the conference room, holding the heparin lock, which was still attached to the padded board, in her ungloved hand. Sheehan confirmed that Tate had left the heparin lock in a patient's room and then immediately began to berate her for not following Hospital procedure. Id. at 166-68. Sheehan acted as though Tate could not have had any valid reason for not placing the heparin lock in a Sharps container. Ristine Dep. at 22.

As she instructed Tate to dispose of the heparin lock properly, Sheehan threw it in Tate's direction and then left the room. Tate Dep. at 166-68. The heparin lock landed on the conference room table and came to rest less than one foot away from Tate.²⁰ Id. at 169-70. Tate believes that the heparin lock

²⁰ The witnesses to this incident have found more ways to describe Sheehan's motion than The Boston Globe's Dan Shaughnessy has used to describe Curt Schilling's pitching delivery. Ristine stated that Sheehan "kind of tossed the heparin lock to" Tate by extending her arm from in front of her chest towards Tate while
(continued...)

contained heparin and blood and that some of the fluid splashed onto the table.²¹ Nevertheless, she removed the heparin lock from the table with her ungloved hand because it was humiliating for it to remain there, and she kept the heparin lock on her lap until the meeting concluded a few minutes later. Id. at 170-73. Tate believes that Sheehan handled the heparin lock incident as she did because she resented that Tate had called Baldwin about Sheehan's recent outburst about the anorexic patient. Id. at 179, 200.

K. Initial Complaint

In the days following the heparin lock incident, Tate's co-workers remarked that Sheehan had been "rude" and "awful," and they encouraged Tate to report her behavior to "the administration." Tate Dep. at 20, 178, 188-90; see also Ristine Dep. at 38. On August 8, 2002, Tate sent Baldwin a letter describing the incident, see Defs.' Mot. Ex. K, and Baldwin forwarded the letter to Dougherty for investigation.

²⁰(...continued)
she released her grip on the heparin lock so that it left her hand in the air, landed on the table, and slid towards Tate. Ristine Dep. at 16-17, 28-29. Kelly remembers Sheehan placing the heparin lock on the table in front of Tate. Kelly Dep. at 15-16, 26-27. Sheehan claims to have dropped the heparin lock on the table and then slid it towards Tate. Sheehan Dep. at 48, 50-51.

²¹ Only Tate believes that fluid splashed out of the heparin lock. See Ristine Dep. at 18; Kelly Dep. at 17; Sheehan Dep. at 49.

Dougherty met with Tate on August 21, 2002²² to hear her version of the heparin lock incident. Dougherty Dep. at 18-19; Tate Dep. at 190-91. Tate remembers that Dougherty used the phrase "workplace violence" to describe the incident and discouraged her from complaining to anyone else. Tate Dep. at 192-93. Tate indicated that she was concerned that she had been exposed to HIV. Dougherty Dep. at 33-34. Dougherty opined that Tate probably was not infected, Tate Dep. at 193-95, 198-99, 204-05, and she promised to investigate the incident, id. at 194, 197. Dougherty also stated that she "d[idn't] want to involve anybody" and "want[ed] to be the one to handle this [incident] because she "kn[ew] the peds group," and Sheehan "was hired for business purposes." Id. at 192-93, 194, 195, 223.

With her curiosity aroused by Dougherty's mention of "workplace violence," Tate read the Hospital's Workplace Violence Policy soon after their meeting. Tate Dep. at 201; see also Pl.'s Br. Ex. R. Reviewing the policy apparently inspired Tate to inform Dougherty that she believed that Sheehan had thrown the heparin lock at her in retaliation for Tate's involvement in the incident with the anorexic patient. See Tate Dep. at 200. To

²² We infer that this meeting took place on August 21, 2002 because it occurred the day before two August 22, 2002 phone conversations between Tate and Dougherty. See Tate Dep. at 206 (fixing second phone conversation on August 22, 2002); id. at 206 (explaining that the second phone conversation occurred on the same day as the first phone conversation); id. at 198 (reporting that the first phone conversation took place the day after the meeting).

remind herself to mention this theory, Tate prepared notes after her initial meeting with Dougherty. Id. at 197, 205.

One day after that meeting, Dougherty called Tate to inform her that the investigation might be delayed because she would be on vacation and to provide Tate with a way to reach her while she was away. Tate Dep. at 197-98, 205. During the telephone call, Tate explained her retaliation theory and inquired whether Dougherty had spoken with Sheehan or the risk management department. Id. at 200-03. Dougherty reiterated that she would be "the only one" to handle Tate's complaint, id. at 198, 201, so Tate asked Dougherty to memorialize the human resources department's official position in a letter, id. at 201. Tate also informed Dougherty that she had decided to be tested for HIV, and Dougherty promised to arrange testing with Patty McBride, an infection control nurse. Tate Dep. at 198-99, 201, 203-04; see also Dougherty Dep. at 33-34.

As soon as Dougherty concluded her call with Tate, she contacted McBride to arrange for Tate to be tested and then called Tate a second time to tell her about the arrangements. Tate Dep. at 205-06. Later that same day, McBride met with Tate on the pediatric unit to discuss the testing procedures. Non-pediatric nurses were to draw Tate's blood outside of the unit so that Sheehan would not be aware of the testing, and McBride would personally bring the blood samples to the employee health unit for testing. Id. at 199, 206-07, 337. In the year following her alleged exposure, Tate was tested six times. Due to some

inconsistency in how the tests were labeled, she never received the results from her November, 2002, test, but all other tests showed that she was not infected. Id. at 338-43; see also Pl.'s Br. Ex. W.

L. 2002 Schedule Changes

In September of 2002, the Hospital realized that labor laws required it to pay overtime to the nurses who had been working twelve-hour weekend shifts. Sheehan Dep. at 30. To correct its mistake, it paid nurses, including Tate, for the overtime that they had earned, but not received, in the previous two years. See Tate Dep. at 315. Going forward, the Hospital planned to reduce the overtime earned by pediatric nurses by ending the "weekend program," in which nurses worked two twelve-hour shifts on consecutive weekend days. Sheehan told Kathy Irwin and Sue Ford,²³ the nurses who had been earning the greatest amount of overtime, about the impending changes, but Dougherty directed Sheehan not to inform any of the other nurses until the Hospital finalized its plans. Sheehan Dep. at 30-31. When Tate learned that Sheehan had told Irwin and Ford that they would only have to work eight-hour weekend shifts, she asked Sheehan if her weekend shifts would also be shortened. Sheehan explained that she had spoken to Irwin and Ford too soon and that

²³ Irwin is about twelve years younger than Tate, but Ford is a little more than three years older than Tate. See Pl.'s Br. Ex. K (reporting that Irwin was born on February 13, 1962 and Ford was born on December 18, 1946).

Tate would have to continue working twelve-hour shifts on the weekend. Id. at 32. Tate remembers Sheehan concluding the discussion by inquiring whether she thought that "everybody [was] out to get" her. Tate Dep. at 314-15.

M. Tate's Final Days

Around the time that Tate learned that only she would have to continue working consecutive twelve-hour weekend shifts, Dougherty returned from vacation and resumed her investigation into the heparin lock incident. Dougherty met individually with Ristine, Kelly, and Young on September 9, 2002 to hear their versions of the incident. Dougherty Dep. at 19-20, 35-39. Dougherty also spoke with Sheehan, who acknowledged that she had spoken firmly with Tate but denied handling the heparin lock improperly. Dougherty Dep. at 22.

After speaking with Sheehan and the other nurses, Dougherty arranged to meet with Tate on Monday, September 16, 2002. Tate Dep. at 211. At that meeting, Dougherty informed Tate that she believed that Sheehan had communicated inappropriately and would receive training to improve her skills.²⁴ Dougherty Dep. at 23, 43. To avoid future communication problems, Dougherty also explained that a third party would be present "if [Sheehan] needed to meet with [Tate]" in the future. Dougherty Dep. at 43; see also Tate Dep. at 216.

²⁴ Sheehan ultimately met with management coach Paula DeLong for three one-hour sessions. Sheehan Dep. at 57-60.

When Tate expressed surprise at the Hospital's leniency, Dougherty asked if she wanted to see Sheehan fired. Tate responded by reminding Dougherty that, at their first meeting, she had characterized Sheehan's behavior as "workplace violence." Dougherty denied making such a statement. Tate Dep. at 211-12.

Dougherty then inquired whether Tate was familiar with the Hospital's "nonpunitive policy" and explained that Hospital administration wanted to prevent a situation like the heparin lock incident from happening again -- without punishing Sheehan. Id. at 214. Tate tried to raise some of the other incidents of harassment, but Dougherty refused to shift focus away from the heparin lock incident. Id. at 220. Tate expressed concern that, unless Sheehan was punished strongly, she would believe that she could continue to harass her. Id. at 214-15. Finally, Dougherty admitted that Sheehan "made a bad management decision" because she "has her favorites, and [Tate was] not one of them." Id. at 215-16. She also suggested that they meet again two days later, after Tate had a chance to formulate other possible solutions. Id. at 218, 221.

On the morning of September 18, 2002, shortly before their appointed meeting time, Tate faxed a letter to Dougherty explaining that her August 8 letter to Baldwin clearly expressed her position, demanding that the Hospital respond to that letter in writing, and requesting that Dougherty forward a copy of the "nonpunitive policy" to her. Tate Dep. at 221-22.

In response to Tate's request for a written response, Dougherty mailed her a letter on September 24, 2002. Dougherty Dep. at 43-44; see also Tate Dep. at 224-26. The letter stated that "in spite of the inappropriateness of th[e] [heparin lock] situation, [Dougherty did not] believe this situation to be workplace violence."²⁵ Defs.' Mot. Ex. L, at MLH00462. It also recognized that Tate could bring a "mutually agreeable person" to any meetings at which Sheehan planned to bring "concerns" to her attention. Id. Finally, Dougherty's letter conceded that she could not provide Tate with a copy of the "nonpunitive policy" because the Hospital had not yet finalized it.²⁶ Id., at MLH00463.

On September 24, 2002, Sheehan approached Tate during lunchtime to discuss an unspecified issue. Apprehensive about how Sheehan would treat her, and relying on Dougherty's promise that she could include a third-party in any meetings with Sheehan,²⁷ Tate asked Patty Decina to be present for the meeting. Sheehan only intended to inform Tate that she had given her a \$0.27 per hour raise, but Tate did not know the purpose of the

²⁵ Dougherty later explained that the heparin lock incident was not workplace violence because there was no physical contact and no threat made. See Dougherty Dep. at 46-47.

²⁶ The Hospital still has not formalized it's a "nonpunitive policy." Dougherty Dep. at 49-50.

²⁷ Although Tate had not yet received Dougherty's September 24, 2002 letter, Dougherty had informed Tate at their September 16, 2002 meeting that she could include a neutral person in any discussions with Sheehan. Dougherty Dep. at 43.

meeting and believed that Sheehan was intentionally attempting to violate the agreement not to meet with her alone. Tate Dep. at 227-30. Tate wrote a letter to Dougherty and Baldwin on September 30, 2002 to inform them that Sheehan did not appear "capable of complying with [their] recommendations of remediation."²⁸ Defs.' Mot. Ex. M.

Frustrated that Dougherty's investigation had not improved her working conditions, Tate sent an impassioned letter to Andrea Gilbert, a senior vice-president and Baldwin's superior, on October 4, 2002. That letter summarized many of the incidents that we described above, expressed dissatisfaction with the human resources department's response, and appealed to Gilbert for "help." See Defs.' Mot. Ex. N.

Attempting to respond to Tate's September 30 letter, Dougherty and Baldwin tried to arrange a meeting with Tate on October 7, 2002, but they refused to allow her to bring a third party to the meeting. When they continued to try to schedule a meeting on October 8, 2002, Tate informed Baldwin's secretary that she had already raised the issue with Gilbert. Immediately after Dougherty and Baldwin learned that Tate had involved Gilbert, they placed seven or eight calls to her at the pediatric unit. Tate Dep. at 234-36. Finally, Tate spoke with Dougherty

²⁸ For her part, Sheehan did not believe that she behaved improperly because she understood that she was to include a neutral third party only when she planned to raise a concern with Tate. Since she planned to announce a raise, she did not believe that she was required to include anyone else in her meeting with Tate. Sheehan Dep. at 60; see also Dougherty Dep. at 62-64.

and explained that she had appealed to Gilbert because she disagreed with Dougherty's findings. Dougherty, however, insisted that Tate "come down [to her office] right away [to] meet with" her, and she refused to allow Tate to bring a third party with her. Id. at 236-38.

That command reduced Tate to tears because she was afraid that Dougherty and Baldwin would fire her, so she told Sheehan that she was sick and left the Hospital immediately. Tate Dep. at 238, 241-42. When she returned to her home on October 8, Tate called Gilbert to discuss her October 4 letter. Because Gilbert had not yet reviewed the letter, she promised to call Tate back. Id. at 233, 239-40.

On October 9, 2002, Gilbert called Tate to discuss the letter. Gilbert explained that, despite having read Tate's letter "quite a lot," she was "not exactly sure what [she was] saying or what it means." Tate Dep. at 243. Tate attempted to explain that the heparin lock incident was just "the last straw of the years of harassment" and that she did not feel safe returning to the pediatric unit. Id. at 243-45. When Gilbert asked her what she wanted, Tate said that she wanted "to go back to work in a safe environment where people understand that people work better when they feel safe and not harassed and not threatened." Id. at 245. After noting the vagueness of that response, Gilbert told Tate that she, too, did not believe that Sheehan's behavior constituted workplace violence as much as "manager and employee dysfunction." Id. at 247. Gilbert

recognized that Dougherty and Baldwin had planned for Tate not to meet with Sheehan alone, but she also stated that their plan was not "feasible." Id. Gilbert went on to say that, although Sheehan had "to learn a lot of skills," id. at 248, the Hospital was "quite happy" with her and believed that she was "doing a very good job,"²⁹ id. at 245, 248. Thus, Tate had to decide either to leave the Hospital or to transfer to another unit. Id. at 245. As Tate began to cry, Gilbert said that she could see how upset Tate had become and encouraged her to think about her decision. Id. at 249. Gilbert memorialized the conversation in a letter dated October 15, 2004. Defs.' Mot. Ex. O.

Rather than attempt to return, Tate notified the Hospital that she would take a leave of absence, beginning on October 14, 2002. Pl.'s Br. Ex. U. During her leave, there were at least ten times when Tate did not receive as much pay as she was entitled to, and Tate believes that Sheehan intentionally caused those pay problems. Tate Dep. at 335-36. The Hospital's Leave of Absence Policy provides that an employee on leave will be terminated if she does not return to work within six months of the beginning of her leave, so the Hospital terminated Tate when she had not returned to work by April of 2003.³⁰ Defs.' Mot. Ex.

²⁹ Tate also remembered Gilbert telling her that Sheehan was "doing a great job because she's doing well business-wise, money-wise, for the hospital." Tate Dep. at 223-24.

³⁰ Since May of 2000, the Hospital has terminated thirteen other nursing department employees when they reached the six-month threshold, and four of those employees were older at their
(continued...)

P; see also Dougherty Dep. at 81. After she had been discharged, the Hospital's staffing department repeatedly contacted Tate to request that she work individual shifts, and Tate believes that the calls were intended to humiliate her. Tate Dep. at 64, 323-24, 328-32; see also Pl.'s Br. Ex. V.

On January 7, 2003, Tate filed charges of discrimination against the Hospital with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"). Compl. ¶ 4. After receiving a right-to-sue letter, Tate filed a complaint and, later, an amended complaint against Main Line Hospitals, Inc., Main Line Health, Inc. d/b/a Bryn Mawr Hospital (together with Main Line Hospitals, Inc., "Main Line"), and Mary Sheehan. The amended complaint includes counts for (I) violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (2004); (II) violation of the Pennsylvania Human Relations Act ("PHRA"), Pa. Stat. Ann. tit. 43, §§ 951-963 (West 2004); (III) intentional infliction of emotional distress; and (IV) breach of contract. Defendants' motion for summary judgment is now before us.

Legal Analysis

A. Age Discrimination

³⁰(...continued)
times of termination than Tate was. See Defs.' Mot. Ex. E.

Counts I and II of the amended complaint allege that Main Line³¹ discriminated against Tate because of her age in violation of the ADEA and the PHRA, respectively. Each count includes four distinct theories of age discrimination: (1) disparate treatment; (2) retaliation for complaining of disparate treatment to the EEOC; (3) hostile work environment; and (4) constructive discharge. Before discussing each of these theories in detail, however, we must consider the effect of the statutes of limitations on Tate's claims.

1. Statutes of Limitations

a. ADEA

Before one alleging age discrimination in employment may sue her employer in court, the ADEA requires that she file a charge against the employer with the EEOC. See 29 U.S.C. § 626(d) (2004). If the alleged discrimination occurs in a state with its own anti-discrimination statute, the employee must file her charge "within 300 days after the alleged unlawful practice occurred." § 626(d)(2). Tate claims that Main Line's discrimination occurred in Pennsylvania, which prohibits age discrimination through the PHRA, so the 300-day statute of limitations applies to her ADEA claims. Since Tate filed her EEOC charge on January 7, 2003, Compl. ¶ 4, she may not recover

³¹ Tate does not assert an age discrimination claim against Sheehan.

under the ADEA for discrimination that occurred before March 13, 2002.

Though this statement may appear unambiguous, the Supreme Court recently grappled with the difficulty inherent in determining when an unlawful employment practice has "occurred." See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002). In Morgan, a black employee filed a discrimination charge against Amtrak alleging that it had "consistently" discriminated against him because of his race for more than four years. Id., 536 U.S. at 105-06 & n.1, 122 S. Ct. at 2068 & n.1. Like Tate, Morgan advanced disparate treatment, hostile environment, and retaliation theories of liability, id., 536 U.S. at 108, 122 S. Ct. at 2069, and the Court distinguished between how Title VII's statute of limitations applies to claims involving "discrete discriminatory acts" and how it applies to "hostile environment" claims. Though the Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," id., 536 U.S. at 113, 122 S. Ct. at 2072, "the entire time period of the hostile environment may be considered by a court for the purposes of determining liability" as long as "an act contributing to the claim occurs within the filing period," id., 536 U.S. at 117, 122 S. Ct. at 2074.

While Morgan required the Court to interpret Title VII's statute of limitations, the ADEA's statute of limitations is sufficiently similar for us to apply Morgan's reasoning in

this case. Compare 42 U.S.C. § 2000e-5(e)(1) (2004) (Title VII) with 29 U.S.C. § 626(d) (2004) (ADEA). Since a reasonable fact-finder could infer that at least some of the events that serve as the basis of Tate's hostile work environment and constructive discharge claims³² under the ADEA (e.g., Sheehan's age-related comments) occurred until she went on leave in October of 2002, see Compl. ¶ 21, we may consider all of the events that were part of the allegedly hostile environment when evaluating those claims, even if some of the events occurred before March 13, 2002. On the other hand, the ADEA's statute of limitations bars recovery for any discrete discriminatory acts that occurred before March 13, 2002. Rather than discuss each of the allegedly discriminatory acts at this moment, we now note only that some of Tate's disparate treatment claims may be time barred and will return to the applicability of the statute of limitations when we analyze Tate's precise claims.

b. PHRA

The PHRA declares that it is an unlawful discriminatory practice for "any employer because of the . . . age . . . of any individual . . . to discharge from employment such individual, or to otherwise discriminate against such individual with respect to

³² We apply Morgan's "hostile environment" rule to Tate's claim for hostile work environment and to her claim for constructive discharge because "constructive discharge . . . can be regarded as an aggravated case of . . . hostile work environment." Pa. State Police v. Suders, 124 S. Ct. 2342, 2354 (2004).

compensation, hire, tenure, terms, conditions or privileges of employment." Pa. Stat. Ann. tit. 43, § 955(a) (West 2004). Even if an employee believes that her employer has violated that statutory right to be free from age discrimination, she may not bring a PHRA claim in any court until she has first given the PHRC an opportunity to investigate her allegations. § 962(c); see also Clay v. Advanced Computer Applications, 559 A.2d 917 (Pa. 1989). Aggrieved employees must file a complaint with the PHRC "within one hundred eighty days after the alleged act of discrimination." § 959(h).

Tate filed her complaint with the PHRC on January 7, 2003, Compl. ¶ 4, so she may not recover under the PHRA for discrimination that occurred before July 11, 2002. In a case involving claims under both Title VII and the PHRA, a Pennsylvania appellate court applied Wagner's reasoning without distinguishing between the federal and state claims, see Barra v. Rose Tree Media School Dist., 858 A.2d 206, 213-14 (Pa. Commw. Ct. 2004), so we predict that the Pennsylvania courts would also apply Wagner's distinction between "discrete discriminatory acts" and "hostile environment" claims to Tate's PHRA claim.

Thus, Tate may recover under the PHRA on hostile work environment and constructive discharge theories for all of the acts that contributed to her allegedly hostile environment because she alleges that she was continuously harassed until she went on leave on October 14, 2002, fewer than 180 days before she filed her PHRC complaint. Compl. ¶ 21. Tate may not, however,

recover under the PHRA for those discrete discriminatory acts that occurred before July 11, 2002 because those events took place outside the limitations period.³³

2. Theories of Liability

Though it includes only two counts of age discrimination, each premised on violations of a different statute, Tate's amended complaint actually states claims under four distinct theories of liability, each of which could permit recovery under either the ADEA or the PHRA. In our discussion of Tate's disparate treatment, retaliation, hostile work environment, and constructive discharge theories, we shall employ the framework that the federal courts have developed to analyze ADEA claims. We shall not consider the PHRA claims separately because we predict that the Pennsylvania courts, which often look to federal decisions when interpreting the PHRA, would adopt the ADEA framework in their construction of Tate's age discrimination claims under state law. See, e.g., Stultz v. Reese Bros., 835 A.2d 754, 759 (Pa. Super. Ct. 2003) (interpreting the PHRA "in accord with its federal counterparts"); see also Connors v. Chrysler Fin. Corp., 160 F.3d 971, 972 (3d Cir. 1998) ("There is

³³ For those discriminatory acts that occurred between March 13, 2002 and July 11, 2002, Tate's disparate treatment claims under the PHRA are time-barred, but the ADEA's statute of limitations does not preclude recovery. This theoretical point has no practical importance for this case because no reasonable fact-finder could conclude, by a preponderance of the evidence, that Main Line committed any particular discriminatory act between March 13, 2002 and July 11, 2002.

no need to differentiate between [the plaintiff's] ADEA and PHRA claims because, for our purposes, the same analysis is used for both.").

a. Disparate Treatment

In age discrimination cases involving disparate treatment, federal courts have used the three-step McDonnell Douglas burden-shifting analysis to determine whether to grant summary judgment.³⁴ See, e.g., Keller v. Orix Credit Alliance, 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). At the first step, the plaintiff "must carry the initial burden . . . of establishing a prima facie case of . . . discrimination." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). To establish a prima facie case of disparate treatment age discrimination, a plaintiff must show that she "(1) was a member of a protected class, i.e., that he was over 40, (2) was qualified for the position at issue, (3) suffered an adverse employment action; and (4) was ultimately replaced, or the position was filled by, a younger person." Connors v. Chrysler Fin. Corp., 160 F.3d 971, 973-74 (3d Cir. 1998). If the

³⁴ While we apply the McDonnell Douglas framework in disparate treatment cases where there is only "indirect evidence" of discrimination, we must apply the principles in "Justice O'Connor's controlling opinion in Price Waterhouse" when a plaintiff comes forward with "direct evidence" of discrimination. Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989). Here, Tate has not attempted to characterize her evidence as "direct" and has not invoked Price Waterhouse, so we shall treat her evidence as "indirect" and apply the McDonnell Douglas framework.

plaintiff fails to introduce evidence from which a reasonable jury could conclude that she has established the elements of the prima facie case, then we must enter summary judgment in favor of the employer.

On the other hand, establishing a prima facie case "creates a presumption that the employer unlawfully discriminated against the employee." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). In the second McDonnell Douglas step, the employer may rebut this presumption by "articulat[ing] some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. Although the defendant employer bears the burden of producing some nondiscriminatory reason for its actions, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S. Ct. at 1093.

When the employer offers a nondiscriminatory explanation for its decisions, we proceed to the third and final step in the McDonnell Douglas framework. There, we consider whether the plaintiff has come forward with "evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id.

To survive summary judgment, the plaintiff must "either (i) discredit[] the proffered reasons, either circumstantially or directly, or (ii) adduc[e] evidence, whether circumstantial or

direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action."

Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). With these principles in mind, we turn to the facts of this case.

There is no dispute that Tate has made out the first two elements of the prima facie case of disparate treatment because she was over forty at the time of the alleged discrimination and was qualified for her position as a pediatric nurse. The only significant issue at the first-step of the McDonnell Douglas analysis involves identifying which of Main Line's actions constituted "adverse employment actions."

While considering that question, however, we must keep in mind that Tate may recover only for disparate treatment that occurred after July 10, 2002. Tate's only allegations that could be read as stating claims for disparate treatment during the relevant period involve (1) Sheehan's handling of the anorexic patient on July 24, 2002; (2) the heparin lock incident of July 31, 2002; (3) the rescheduling of nurses' weekend hours in September of 2002; and (4) the Hospital's termination of Tate in April, 2003.³⁵ With our focus on these incidents, we can identify which of them, if any, constituted "adverse employment actions."

³⁵ The phone calls that Tate allegedly received after her discharge are not actionable under the ADEA or the PHRA because she was not Main Line's employee when she received the calls. The mislabeling of her blood samples and the problems with receiving correct paychecks were not serious enough to constitute adverse employment actions.

For an employer's action to rise to the level of an "adverse employment action," the action must be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). As traumatic as the incidents involving the anorexic patient and the heparin lock may have been to Tate, they do not constitute adverse employment actions because they were transient events that did not alter her compensation, terms, conditions, or privileges of employment. Keeping Tate on weekend shifts and terminating her employment, on the other hand, were both adverse employment actions because they affected her conditions of employment.

The fourth element of a prima facie claim of disparate treatment requires a plaintiff to show that she "was ultimately replaced, or the position was filled by, a younger person." See Connors, 160 F.3d at 974. The Connors test speaks in terms of "replace[ment]" and positions being "filled," so it assumes that the adverse employment action in question must be a discharge. Indeed, one of the adverse employment actions for which Tate seeks recovery is her April, 2003, termination. Discharge, however, is not the only kind of adverse employment action, and we understand the fourth element to require that a plaintiff show only that a younger employee benefitted from the adverse employment action taken against the plaintiff.

In this case, there is no evidence that Main Line hired a younger nurse to assume Tate's responsibilities on the

pediatric unit after she was discharged, so her termination claim cannot survive. As for the changes in the weekend shift that began in September of 2002, Tate has carried her burden of establishing the fourth element of the prima facie case because Sheehan allowed Kathy Irwin, who is twelve years younger than Tate, to reduce her weekend shifts from twelve hours to eight hours each, but she refused to make the same change for Tate.

To sum up, Tate has made out a prima facie case of disparate treatment age discrimination with respect to her allegations about the 2002 changes to the weekend schedule, but she has failed to carry her burden with respect to her other claims of disparate treatment.

Since Tate has established that the weekend scheduling changes may have constituted disparate treatment, we proceed to the second step of the McDonnell Douglas inquiry, where the burden shifts to Main Line to articulate a legitimate, nondiscriminatory reason for the scheduling change. Main Line has carried this burden because the scheduling changes were necessary to bring the Hospital into compliance with labor laws, while minimizing its liability for overtime. Although she adjusted Irwin's schedule first, Sheehan learned, before she could inform Tate of the change, that she should not have reduced Irwin's hours until the Hospital finalized its plans for implementing the new scheduling policy. This account offers a legitimate, nondiscriminatory explanation of the record evidence.

The final McDonnell Douglas step requires us to consider whether there is evidence that discredits Main Line's nondiscriminatory explanation or suggests that discrimination was more likely than not at least a motivating cause of the scheduling change. See Fuentes, 32 F.3d at 764. Sheehan has not submitted any evidence to suggest that Main Line did not allow Irwin to reduce her hours in an attempt to comply with labor law or to call into question that Sheehan changed Irwin's schedule before she should have. Moreover, the record reflects that Sheehan reduced not only Irwin's weekend hours, but also the weekend hours of Sue Ford, a pediatric nurse who is more than three years older than Tate. On the basis of this record, Tate has failed to carry her burden at the third step of the McDonnell Douglas framework, so Main Line is entitled to summary judgment on the disparate treatment aspects of Counts I and II.

b. Retaliation

Apart from her claims of disparate treatment, Tate also asserts that Main Line retaliated against her by firing her for filing a discrimination charge with the EEOC. In retaliation cases brought under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (2004), our Court of Appeals has explained that, "[t]o establish a prima facie case of retaliation . . . , a plaintiff must show: (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a

causal connection between the employee's protected activity and the employer's adverse action." Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). We shall apply the same test to Tate's ADEA and PHRA claims of retaliation because the Court of Appeals has followed that approach. See Fogleman v. Mercy Hosp., 283 F.3d 561, 567 (3d Cir. 2002) ("For purposes of this appeal, therefore, we will interpret the anti-retaliation provisions of the ADA, ADEA, and PHRA cited above as applying identically in this case and governed by the same set of precedents.").

Here, there is no real dispute about the first two elements of the prima facie case of retaliation because filing an EEOC complaint is a protected activity and Tate was terminated about three months after she complained to the EEOC. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995) (recognizing that "a formal letter of complaint to . . . the EEOC [amounts to] the requisite 'protected conduct' under the ADEA"). The parties do contest, however, whether a reasonable fact-finder could infer that a causal connection existed between Tate's EEOC complaint and her termination.

Tate argues that the general "nature and frequency of Defendants['] conduct which caused Plaintiff's constructive discharge," Pl's Br. at 43, the mislabelling of her blood samples, and the repeated phone calls immediately following her discharge all suggest that Main Line terminated her in retaliation for complaining to the EEOC. The defendants' alleged

discrimination against Tate during her final eighteen months at the Hospital does not forge a causal link between her termination and her EEOC complaint. If such general conduct could establish the necessary nexus, then a causal connection would exist whenever a plaintiff filed a charge of discrimination because one cannot complain to the EEOC without alleging pre-complaint discrimination.³⁶

The mislabelling of Tate's blood samples also does not suggest that Main Line terminated her because she filed a discrimination charge with the EEOC. The labelling problem arose well before Tate contacted the EEOC, and it did not worsen after Tate filed her charge. Ultimately, Tate received all of her test results, except for the results from November, 2002 (i.e., from two months before she complained to the EEOC). Tate Dep. at 343. On this record, the Hospital's handling of Tate's blood samples do not suggest that Main Line terminated her because she complained to the EEOC.

As for the post-discharge phone calls, Tate seems to believe that they demonstrate Main Line's fervent dedication to

³⁶ Even if we were to assume, as Tate seems to invite, that defendants' general conduct reveals an age-based animus against her, that assumption would imply that Main Line terminated her because of her age, not because of her complaint to the EEOC. Theoretically, termination based on age is actionable under a disparate treatment theory, but that possibility does not permit Tate to pursue an analytically distinct retaliation theory. In short, the defendants' general conduct does not suggest the kind of causal connection between the EEOC complaint and her termination that is necessary to make out a prima facie case of retaliation.

persecuting her. Even if we accepted that the defendants harbored such intense disdain for Tate that they intentionally harassed her even after they terminated her, we still could not find that the requisite causal connection existed unless Tate could establish that filing the EEOC complaint somehow inspired (or intensified) defendants' hatred of her. She has failed to do this. It seems highly implausible that, if the EEOC complaint irked it so, Main Line would wait until three months after Tate had filed it before unleashing its barrage of telephonic harassment. More fundamentally, it seems unlikely that a business as concerned with the bottom line as Main Line would devote resources to persecuting a former employee.

No reasonable fact-finder could conclude, on the basis of the defendant's general conduct, the mislabelling of the blood samples, the post-termination telephone calls, or any other record evidence, that a causal connection existed between Tate's EEOC complaint and Main Line's decision to terminate her. Having failed to establish that causal connection, Tate has not made out a prima facie case of retaliation, and Main Line is entitled to summary judgment on that theory of age discrimination.

c. Hostile Work Environment

Tate's third theory of age discrimination liability is that she was subjected to a hostile work environment because of her age. While our Court of Appeals has not formally recognized hostile work environment claims of age discrimination, other

judges of this Court have recognized the potential viability of such a theory. See, e.g., Fries v. Metro. Mgmt. Corp., 293 F. Supp. 2d 498, 504 (E.D. Pa. 2003) (Joyner, J.); Tumolo v. Triangle Pac. Corp., 46 F. Supp. 2d 410, 412 (E.D. Pa. 1999) (Ludwig, J.). Moreover, other courts of appeals have permitted recovery under the ADEA for hostile work environment discrimination, following their own Title VII precedents. Bennington v. Caterpillar Inc., 275 F.3d 654, 660 (7th Cir. 2001) (assuming, "without deciding, that plaintiffs may bring hostile environment claims under the ADEA"); Brennan v. Metropolitan Opera Ass'n, 192 F.3d 310, 318 (2d Cir. 1999) ("The analysis of the hostile working environment theory of discrimination is the same under the ADEA as it is under Title VII."); Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996) ("While, as far as we can discern, no circuit has as yet applied the hostile-environment doctrine in an ADEA action, . . . we find it a relatively uncontroversial proposition that such a theory is viable under the ADEA.").

Adding our voice to this growing chorus, we now hold that, to establish a hostile work environment claim under the ADEA and the PHRA, a plaintiff must show that (1) she suffered intentional discrimination because of her 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 vicarious liability. Cf. Cardenas

v. Massey, 269 F.3d 251, 260 (3d Cir. 2001) (stating analogous test in the Title VII context). We shall examine each of these elements separately.

i. First Element

Although Tate's complaint cites several examples of allegedly intentional age-based discrimination, no reasonable fact-finder could conclude from the record evidence that most of these examples demonstrate any impermissible animus. For example, the complaint alleges that hiring Sheehan was part of Main Line's discrimination, Compl. ¶ 17(i), but Tate admitted at her deposition that the discrimination did not begin in earnest until Sheehan arrived on the pediatric unit in April of 2001, see Tate Dep. at 128.³⁷ Similarly, Tate suggests that removing her from PALS, the Halloween Candy Exchange, and her role as a charge nurse constituted discrimination, Compl. ¶ 17(g), but the record evidence demonstrates that these responsibilities were taken away before Sheehan joined Main Line. Since Tate concedes that the discrimination began when Sheehan arrived, no reasonable fact-

³⁷ To be sure, Tate claims that Main Line discriminated against her when it reneged on its promise to give her and other older nurses a three-percent raise in February, 2001, while honoring the same promise to younger nurses. Tate Dep. at 60-63. Tate may not recover for this alleged discrimination on a disparate treatment theory because the statute of limitations had run by the time she filed her complaint with the EEOC. A hostile work environment theory does not permit recovery for Main Line's decision to rescind the raise because no reasonable finder of fact could conclude that it was part of the same allegedly pervasive and regular harassment that Tate endured after Sheehan arrived at the Hospital.

finder could conclude that Hospital administrators relieved her of these duties out of an age-based animus.

Tate also claims that Main Line discriminated against her by not hiring her as the risk manager at Paoli Hospital or Bryn Mawr Hospital. Compl. ¶ 17(h). She admitted, however, that the candidate for the Paoli position was more qualified than she, Tate Dep. at 96, and Main Line did not hire anyone to fill the Bryn Mawr position because it did not consider any of the applicants to be qualified for it, Dougherty Dep. at 83-85. There is no record evidence from which a reasonable fact-finder could conclude that Tate did not receive either risk management position because of her age.

While Tate alleges that younger nurses received larger raises than Tate despite "similar job evaluations," Compl. ¶ 17(e), there is no record evidence to support this allegation. At her deposition, Tate stated that she was referring to MacGuinness and Decina, see Tate Dep. at 311-13, but we cannot comment on how similar MacGuinness's evaluation may have been to Tate's evaluation because MacGuinness's evaluation is not in the record. As for Decina, Sheehan did not comment on her "team competencies," the sole area in which Sheehan believed that Tate needed improvement. Compare Pl.'s Br. Ex. P, at MLH00794 with Pl.'s Br. Ex. I, at MLH00174. Based on this record, no reasonable fact-finder could conclude that age-based animus inspired Tate to give younger nurses better ratings for similar performance.

Still, there is evidence that Sheehan made many ageist remarks to Tate. For example, Sheehan allegedly exclaimed, "I am sick and tired of you older senior nurses going behind my back and complaining." Tate Dep. at 295. Tate also remembers Sheehan telling her, "You've been here too long, and you just can't keep up with the way things are in health care." Id. at 297. Sheehan allegedly even questioned older nurses basic competence, saying, "You older nurses can't do the job, and you complain about everything; and you're too resistant to change." Id. at 292. In all, Tate estimates that Sheehan told her on at least sixty occasions that "older nurses" like her were resistant to change. Id. at 286. A reasonable fact-finder could infer from comments like these that Sheehan treated Tate as she did at least in part because of her age.

In addition to these ageist remarks, Tate claims that Sheehan "repeatedly humiliated, ridiculed and embarrassed [her] in front of other nurses and staff by yelling at and berating [her] for things she did not do while treating younger nurses kindly and with respect, even if they had done something wrong or complained." Compl. ¶ 17(a); see also Tate Dep. at 283-85. To be sure, Sheehan's abrasive management style affected younger nurses, too, see MacGuinness Dep. at 39-40, but a reasonable fact-finder could infer from the record evidence that Tate was more regularly targeted because of her age.

Tate cites Sheehan's scheduling of her shifts as further examples of the age discrimination that she endured. See

Compl. ¶ 17(e)-(f). Specifically, Tate believes that Sheehan discriminated against her when she first began to schedule day-shift nurses to evening and night shifts because she did not receive the shifts that she requested. The alleged discrimination continued when Sheehan removed Irwin and Ford from twelve-hour weekend shifts while she continued to schedule Tate for the long shifts. Sheehan's handling of the weekend scheduling does not suggest a discriminatory motive because one of the two nurses who received better treatment (Ford) is older than Tate. On the other hand, when Sheehan created the new schedules for day-shift nurses, Tate was the oldest full-time, day-shift nurse, and she received the least favorable schedule. Especially when viewed in conjunction with Sheehan's ageist remarks, this treatment could suggest to a reasonable finder of fact that Sheehan discriminated against Tate because of her age.

Finally, the complaint alleges that the heparin lock incident, the Hospital's investigation of that incident, and Tate's ultimate termination were all discriminatorily motivated.³⁸ Compl. ¶¶ 18-20, 23. No reasonable fact-finder could conclude that the heparin lock incident occurred due to age-based animus because Tate herself does not believe it. She thinks that Sheehan was angry about her reporting Sheehan's handling of the anorexic patient to Baldwin. See Tate Dep. at

³⁸ The harassing phone calls that Tate allegedly received are not actionable under a hostile work environment theory because they occurred after Tate was terminated and, thus, could not have been part of any "work environment."

179, 200. As for the ensuing investigation, the record amply demonstrates that Dougherty contacted every identifiable witness and Hospital administrators required Sheehan to attend management training to prevent recurrences. Tate appears to have wanted Main Line to have imposed more stringent sanctions, but there is no evidence that discriminatory animus influenced its choices. Similarly, nothing in the record suggests that Main Line terminated Tate due to her age because Sheehan was not involved in the termination decision and there is no evidence that any of the individuals who were involved ever exhibited any age-based animus. See Dougherty Dep. at 81.

Although the complaint identifies many acts that contributed to Tate's allegedly hostile work environment, most of those acts could not suggest to a reasonable fact-finder that Tate suffered intentional discrimination because of her age. Nevertheless, Sheehan's frequent ageist comments, her enthusiasm for yelling at Tate, and her favoritism towards younger nurses when creating a new schedule in the fall of 2001 would permit a reasonable fact-finder to conclude that Sheehan discriminated against Tate because of her age. Thus, Tate has satisfied the first element of the prima facie case of hostile work environment discrimination.

ii. Second Element

The second element of that claim requires us to consider whether the discrimination was pervasive and regular.

In this regard, we note that Tate claims to have heard the sixty comments about older nurses being resistant to change between April of 2001 (when Sheehan began working at the Hospital) and October of 2002 (when Tate went on leave), a period of fewer than six hundred days. A fact-finder that credited Tate's testimony could calculate that, on average, Sheehan made more than one ageist remark every ten days, and could conclude that remarks made so frequently for such a long period of time were both "pervasive" and "regular."

iii. Third Element

Tate must show that the discrimination detrimentally affected her. Dr. Weston T. Hamilton, a psychiatrist, determined that Tate "demonstrated significant psychiatric symptomatology" and opined that her "psychiatric symptoms are clearly related to and caused by the stress and the alleged harassment that occurred while employed at Bryn Mawr Hospital." See Pl.'s Br. Ex. T. On that basis, a reasonable finder of fact could conclude that Sheehan's behavior towards Tate caused emotional injury.

iv. Fourth Element

Personal injury is not sufficient, however, to make out the prima facie case of hostile work environment discrimination; the fourth element requires that Tate show that the same treatment would have detrimentally affected a reasonable person in her position.

After serving at the Hospital for more than fifteen years, Tate found herself working for a new manager beginning in April of 2001. Before long, Sheehan attempted to implement changes that Tate believed could jeopardize the safety of her patients, and Sheehan repeatedly dismissed Tate's concerns as those of an "older nurse" who was too resistant to change. Tate did not report the remarks immediately, but, when she did attempt to alert Hospital administration to them (during the heparin lock investigation), Dougherty refused to discuss them. Tate Dep. at 220. Given these circumstances, a reasonable fact-finder could conclude that Sheehan's behavior would have detrimentally affected a reasonable person of Tate's age who, like Tate, was under considerable work-related stress to keep more and more patients safe and whose complaints were met with indifference, despite her long and distinguished tenure at the Hospital.

v. Fifth Element

The fifth and final element of the prima facie case requires Tate to show that Main Line is vicariously liable for Sheehan's actions.

The Supreme Court explained the relevant principles for determining whether an employer is liable for a supervisor's harassment of an employee in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998).

The "employer is subject to vicarious liability to a

victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" when the "supervisor's harassment culminates in a tangible employment action." Ellerth, 524 U.S. at 765, 118 S. Ct. 2270; Faragher, 524 U.S. at 807-08, 118 S. Ct. at 2292-93. When no tangible employment action occurs, however, the employer can escape vicarious liability for the supervisor's harassment if it establishes an affirmative defense. The elements of the affirmative defense are "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Ellerth, 524 U.S. at 765, 118 S. Ct. 2270; Faragher, 524 U.S. at 807, 118 S. Ct. at 2293. Though not the only way to do so, an employer can establish its affirmative defense by showing that it "promulgated an antiharassment policy with complaint procedure" and that the plaintiff employee failed to avail herself of the procedure. Ellerth, 524 U.S. at 765, 118 S. Ct. 2270.

In this case, Sheehan was Tate's immediate supervisor, so we must inquire whether Tate was subjected to a tangible employment action. A tangible employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in

benefits."³⁹ Ellerth, 524 U.S. at 761, 118 S. Ct. 2268. Here, it could be argued that a tangible employment action occurred when Tate went on leave or when Main Line terminated her. With respect to the issue of leave, we shall defer consideration of whether there was a tangible employment action until our discussion of Tate's constructive discharge theory. As for the termination, we hold that it was not a tangible employment action within the meaning of Ellerth and Faragher because it occurred six months after Tate withdrew from the allegedly hostile environment. The passage of such a significant amount of time severs any link that might have otherwise existed between Sheehan's harassment and Main Line's vicarious liability for the harassment. In sum, Main Line took no tangible employment action against Tate that would deprive it of the opportunity to assert an affirmative defense.

Still, Main Line has not established either element of the Ellerth-Faragher affirmative defense. First, it submitted no evidence that it had an antiharassment policy with a complaint procedure or that it otherwise exercised reasonable care to prevent and correct promptly any harassing behavior. Even if we were to presume that Main Line, like most sophisticated

³⁹ Our Court of Appeals has explained that the "concept of a tangible employment action is distinct from that of a materially adverse employment action which is a necessary element of a prima facie case [of disparate treatment] under Title VII." Suders v. Easton, 325 F.3d 432, 434 n.1 (3d Cir. 2003), rev'd on other grounds sub nom. Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).

employers, had an antiharassment policy, we could not find that it had established the second element of the Ellerth-Faragher affirmative defense because Dougherty allegedly refused to discuss Tate's harassment claim when Tate brought it to her attention during the investigation of the heparin lock incident. See Tate Dep. at 220. While we can sympathize with Dougherty's attempt to focus on one complaint at a time, she at least should have advised Tate that she could file a separate complaint under Main Line's antiharassment policy (if there was one). Tate's testimony would permit a reasonable finder of fact to infer that Tate attempted to avail herself of Main Line's antiharassment policy, so Main Line has not proven its affirmative defense.

Because Main Line has failed to establish the affirmative defense, a reasonable fact-finder could find it vicariously liable for Sheehan's harassment of Tate. That finding would satisfy the fifth and final element of Tate's prima facie claim of hostile work environment age discrimination. As we have already explained, Tate could also establish the other four elements, so Main Line is not entitled to summary judgment on the hostile work environment portions of Tate's age discrimination claims under the ADEA and the PHRA.

d. Constructive Discharge

The final theory upon which Tate predicates her age discrimination claims is that Main Line constructively discharged her. See Compl. ¶¶ 14, 22. In many ways, a constructive

discharge claim relies on the existence of a particularly hostile work environment. See Pa. State Police v. Suders, 124 S. Ct. 2342, 2354 (2004) ("[C]onstructive discharge . . . can be regarded as an aggravated case of . . . hostile work environment."); see also Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 718-19 (3d Cir. 1997) (holding that constructive discharge claim could not lie when there was no hostile work environment). While a hostile work environment need only involve discrimination that is so pervasive and regular as to detrimentally affect a reasonable person, constructive discharge requires that "a plaintiff . . . show that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1996).

Tate claims that Main Line constructively discharged her in October, 2002, when it informed her that she would have to transfer to another unit or resign and that Sheehan would remain on the pediatric unit. Recognizing that the relationship between Tate and Sheehan was irretrievably broken, Main Line made the business decision to support Sheehan because it considered her management initiatives more valuable than Tate's patient care. Having devoted her entire professional life to Main Line, Tate understandably felt betrayed by Main Line's choice.

Nevertheless, Main Line did not leave Tate without options. Gilbert offered to transfer Tate to another unit where

she would not have any further contact with Sheehan, the only alleged harasser. There is no evidence that the working conditions on the pediatric unit were better than the conditions on other units, that being a pediatric nurse carried greater prestige than being a nurse on another unit, that Tate was not qualified to work elsewhere, or that Tate would have received lower pay had she accepted the transfer. In short, Main Line invited Tate to continue working in a substantially similar capacity.

Moreover, Tate's working conditions probably would have improved if she had agreed to the transfer because she would have been liberated from Sheehan's supervision. No reasonable finder of fact could conclude that a reasonable person in Tate's position would have felt compelled to resign when her employer asked her to stay on in a position where she would have almost no contact with the alleged harasser. Main Line, therefore, is entitled to summary judgment on Tate's constructive discharge claim.

B. Intentional Infliction of Emotional Distress

In addition to her age discrimination claims against Main Line, Tate also asserts a state law claim of intentional infliction of emotional distress against both Main Line and Sheehan. The Pennsylvania Supreme Court⁴⁰ has not been inclined

⁴⁰ We look to Pennsylvania law for the principles governing Tate's state law claims because Pennsylvania has the most
(continued...)

to specify the elements of this tort, see Hoy v. Angelone, 720 A.2d 745, 753 n.10 (Pa. 1998), but it has approved of a lower court's explanation that the conduct at issue "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society," id. at 754 (quoting Buczek v. First Nat'l Bank, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987)). "[I]t is for the court to determine if the defendant's conduct is so extreme as to permit recovery." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (applying Pennsylvania law).

In this case, Tate alleges that Sheehan and Main Line subjected her to a multitude of indignities, from assigning her to undesirable shifts to depriving her of leadership opportunities. However painful they must have been, almost all of these insults are simply not extreme enough to form the basis of a claim for intentional infliction of emotional distress.

⁴⁰(...continued)
significant contacts with the issues involved in this case. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court . . . must conform to those prevailing in . . . courts [of the state where the federal court sits]."); see also In re Estate of Agostini, 457 A.2d 861, 871 (Pa. Super. Ct. 1983) (explaining that Pennsylvania choice-of-law rules "call for the application of the law of the state having the most significant contacts or relationships with the particular issue"). Pennsylvania has the most significant contacts here because Tate is a Pennsylvania citizen, the defendants appear to be Pennsylvania citizens, and the employment relationship was centered in Pennsylvania. Moreover, the parties apparently believe that Pennsylvania law applies because they rely almost exclusively on it in their briefing of the state law issues.

Only the heparin lock incident, which allegedly involved Sheehan publicly berating Tate and throwing a potentially contaminated medical device at her, rises to the level of conduct that is so atrocious as to be utterly intolerable in a civilized society.

Still, Main Line contends that it cannot be liable for intentional infliction of emotional distress because Pennsylvania's Workers' Compensation Act ("WCA") provides that the "liability of an employer under [the WCA] shall be exclusive and in place of any and all other liability to such employes . . . in any action at law or otherwise on account of any injury" arising in the course of her employment and related thereto. Pa. Stat. Ann. tit. 77, § 481(a) (West 2004). On the other hand, Tate points out that the WCA permits an employee to pursue recovery under tort principles for any injury "caused by an act of a third person intended to injure the employe because of reasons personal to [her], and not directed against [her] as an employe or because of [her] employment." § 411(1). Whether this "personal animus exception" applies "is ultimately a question for the trier of fact." McErlean v. Borough of Darby, 157 F. Supp. 2d 441, 448 (E.D. Pa. 2001) (DuBois, J.).

Here, a reasonable fact-finder could conclude that Sheehan threw the heparin lock at Tate because she was angry that Tate had reported her handling of the anorexic patient to Baldwin. Such a finding would bring the heparin lock incident within the personal animus exception, so the WCA would not bar Tate from recovering for intentional infliction of emotional

distress. Though Tate may not pursue her claim for any other events, we cannot enter summary judgment on the portion of the intentional infliction of emotional distress claim that is related to the heparin lock incident.

C. Breach of Contract

Finally, Tate argues that Main Line breached its agreement to pay her a \$23,000.00 bonus. Main Line, on the other hand, points out that the contract required Tate to continue working at the Hospital until July 31, 2003 before she could receive the bonus. Since she was terminated in April and thus did not continue working through the end of July, Main Line argues that the contract does not obligate it to pay the bonus.

Recognizing that her continued employment at the Hospital was a condition precedent to her becoming entitled to the bonus, Tate relies on the "well settled rule of law that a party to a contract cannot escape liability under his obligation on the ground that the other party has failed to perform a condition precedent to the establishment of such liability or to the maintenance of an action upon the contract, where he himself has caused that failure." Arlotte v. National Liberty Ins. Co., 167 A. 295, 296 (Pa. 1933); see also Miles v. Metzger, 173 A. 285, 287 (Pa. 1934) ("It is well settled, as a principle of fundamental justice, that where one party to a contract is himself the cause of a failure of performance by the other party,

he cannot take advantage of his own breach of the contract in so doing, to prevent a recovery by the other party.").

According to Tate, Main Line prevented the condition precedent from happening by constructively discharging her, so it cannot rely on the non-occurrence of the condition to excuse its liability for the bonus. Of course, we have already held that no reasonable fact-finder could conclude that Main Line constructively discharged Tate, so the alleged constructive discharge does not excuse Tate's premature departure. Since she offers no other reason to excuse the non-occurrence of the condition precedent and it is undisputed that the condition did not occur, the agreement does not obligate Main Line to pay the bonus, and we shall enter summary judgment in favor of Main Line on the breach of contract claim.

Conclusion

Tate asserts four theories upon which she predicates Main Line's alleged liability for age discrimination under the ADEA and the PHRA. For the reasons explained above, Main Line is entitled to summary judgment on the disparate treatment, retaliation, and constructive discharge portions of those claims, but Tate may proceed to trial on her hostile work environment theory of age discrimination. Similarly, Tate is entitled to present to a jury the part of her intentional infliction of emotional distress claim against Main Line and Sheehan based on the heparin lock incident. We shall, however, enter summary

judgment in favor of Main Line on all other parts of the intentional infliction of emotional distress claim and on the breach of contract claim.

An appropriate Order follows.

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

BARBARA TATE	:	CIVIL ACTION
	:	
v.	:	
	:	
MAIN LINE HOSPITALS, INC.,	:	
et al.	:	NO. 03-6081

ORDER

AND NOW, this 8th day of February, 2005, upon consideration of defendants' motion for summary judgment (docket entry # 15), plaintiff's response thereto, and defendants' reply, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Defendants' motion for summary judgment is GRANTED IN PART;
2. Plaintiff and counsel for the parties shall APPEAR in our Chambers (Room 10613) at 9:30 a.m. on February 15, 2005 for a settlement and final pretrial conference; and
3. Defendants or their representatives with plenary settlement authority shall BE AVAILABLE TELEPHONICALLY during the conference.

BY THE COURT:

Stewart Dalzell, J.