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

SELMA L. BELL,	:	CIVIL ACTION
	:	
v.	:	
	:	
QUEST DIAGNOSTICS and	:	
KELLY SERVICES INC.	:	NO. 04-5005

MEMORANDUM AND ORDER

McLaughlin, J. February 7, 2006

The Court decides here the motion for summary judgment of Quest Diagnostics ("Quest") on Selma Bell's sex and religion-based harassment and retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000(e) et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C.S.A. § 951 et seq. These claims relate to Quest's termination of Bell's temporary employment. The Court will grant summary judgment in favor of Quest.[1]

I. Facts

A. Parties

Bell worked for Quest through Kelly Services, Inc. ("Kelly"), a temporary employment agency. Bell has settled with

[1] Under Fed. R. Civ. P. 56, summary judgment is appropriate when, viewing the facts and inferences in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Kelly, and Quest is the only remaining defendant. (Quest Undisp. Facts ("QUF") & Bell Resp. to Undisp. Facts ("BRUF") ¶ 1).

B. Bell's Employment

Bell became employed by Kelly beginning in late April or early May of 2002. She was never terminated from Kelly. As a Kelly employee, Bell was assigned to two Quest facilities. First, she worked in Quest's Norristown location from May through October of 2002. In October, she was offered a permanent position in Norristown, but she turned it down. While in Norristown, she reported to Kelly employee Chris Rieben. (QUF & BRUF ¶¶ 1, 3-6, 10).

Around October 28, 2002, Bell began a second assignment at Quest's Collegeville location, in the purchasing department. All of her claims arise from this second stint of Quest employment. In Collegeville, Bell continued to report to Rieben. Within Quest, the parties agree that Bell originally reported to Aaron Pikovsky. Bell claims that this reporting relationship continued, but Quest claims that after a few weeks, Bell began to report to Pete Crosdale. In her deposition, Bell admitted that she changed from reporting to Pikovsky to reporting to Crosdale. (QUF & BRUF ¶¶ 12-13; Bell Dep. at 87).

When Bell received her Collegeville assignment, Rieben told her that it would last no more than five or six months,

possibly until March of 2003. While at Collegeville, Bell essentially performed the duties of a "coordinator," which included data entry, fielding phone calls, and generally assisting buyers. (QUF & BRUF ¶¶ 14-15).

At Collegeville, Bell and the coordinators sat near each other in open cubicles. Bell sat next to James Springman, and backed Keri Bosar. The directors and managers, including Aaron Pikovsky, Gladys Daniel and Pete Crosdale, sat down the hall. Bell never received any formal evaluations or performance reviews while at Collegeville. Bell's Collegeville assignment ended on December 13, 2002. (QUF & BRUF ¶¶ 16-18).

C. Bell's Background

Bell is a female. Although baptized and raised Baptist, she was a nonpracticing Christian until 2000, when she became a Born Again Christian. (QUF & BRUF ¶ 24).

D. General Atmosphere

Bell claims that individuals at Collegeville cursed, saying "shit" and "God Damn" in her presence. She believes that they did so purposely, to see what her response would be, after they learned that she was Born Again. She admits that her male and female co-workers used this language among themselves from the day she arrived at Quest. She claims that she objects to

such language because of her Christian morals, although it's "not against [her] religion." (QUF & BRUF ¶¶ 28-30; Bell Dep. at 175).

E. Specific Incidents

Bell details several specific incidents that she claims entitle her to relief. She admits that even if she were a man, these incidents would have occurred. (Bell Dep. at 64).

The first incident that Bell describes occurred on November 20, 2002. Bell claims that James Springman, a co-worker, was talking to his fiancée on the phone at his desk, and slammed down the phone and yelled "Damn, she must be on the rag." In addition to Bell, three other co-workers were present. Bell said "Excuse me? Why would you say that out loud like that?" to Springman. Springman apologized, and Bell did not complain to anyone else at Quest about this comment. (QUF & BRUF ¶¶ 35-38).

The next incident occurred in a staff meeting on November 22, 2002. Director Gladys Daniel invited the employees to have a "bitch session" and asked the buyers what their "bitch of the day" was. In addition to Bell and Daniel, seven co-workers were present at this meeting. Bell did not complain to anyone about this comment. (QUF & BRUF ¶¶ 32-34).

Around November 29, 2002, Springman learned that his fiancée was pregnant. Between December 2 and 4, 2002, Crosdale

walked over to Bell's desk to talk to Springman about a college girlfriend who he had thought was pregnant because her period was late. She had taken a pregnancy test. Bell asked if they would mind, because she did not care to listen to the conversation. Crosdale moved away, but Bell claims that she could still hear him. Bell did not otherwise complain to anyone at Quest about this conversation. (QUF & BRUF ¶¶ 39-41).

On December 5, 2002, two co-workers of Bell's, Brian Holman and Jon Canella, were talking, and Canella said "shit" several times. Bell asked him if he had to use that word. Canella replied "what, the word 'shit?'" Bell said "excuse me," and Canella continued to use the word. Three co-workers were present. Bell never complained to anyone at Quest about the incident. (QUF & BRUF ¶¶ 42-44).

On December 6, 2002, Crosdale began speaking in the workplace about a college girlfriend who had been slim, and laughed about how she was now fat and unattractive. Bell asked Crosdale to repeat his statement, which he did. Three co-workers were present. Bell did not complain to anyone at Quest about the comment. (QUF & BRUF ¶¶ 45-48).

Bell also claims that Crosdale stared at her and watched her in a sensual way when she walked past his office, or during meetings. She never complained to anyone about this conduct. (QUF & BRUF ¶¶ 49-50).

On December 9, 2002, Bell said to Holman, a black male, that there was a new black male working at the Xerox machine area, and that it would be nice if Holman would say hello and welcome that individual. Holman responded, "You had better stop speaking to men first, they might think you are trying to push up on them." Holman got Canella involved in the conversation, and Bell told them to stop thinking with their hormones. Holman and Canella were co-workers, and Bell does not recall if anyone else was present. She did not complain to anyone about these comments. (QUF & BRUF ¶¶ 51-54).

On December 11, 2002, co-worker Geoff Ellis was looking out the window at the inclement weather, and said "Look at this shit." Bell's young daughter was present. Bell said "Excuse me?" She never complained to anyone else. (QUF & BRUF ¶¶ 55-56).

On December 12, 2002, manager Pikovsky and co-worker Canella were discussing the TV show The Sopranos. They were loudly discussing the murders and plots of the show. Canella yelled out the name of the character "Pussy." Three other co-workers were present. Although Bell states in her response that she "complained to manager Pikovsky at the time of the occurrence," she does not cite to the record for this fact, and in her deposition she admitted that she did not complain, but only looked at Pikovsky, and that Springman noticed that the

comment upset her. She never complained to anyone else about the comment. (QUF & BRUF ¶¶ 57-59).

Also on December 12, 2002, Holman came back from the restroom and announced that the stalls were taken up with “dudes” reading the paper. He described foul odors and mentioned that “their pants were down to their ankles.” Bell said “my word, you and Jon are being just a little bit too colorful today.” Three other co-workers were present for this conversation. Bell did not complain about it to anyone. (QUF & BRUF ¶¶ 60-62).

That same day, Bell got off the phone with a supplier and mentioned to co-workers that the supplier thought that they were having a party because it was so loud. Springman replied by stating “well, it’s better than the music you listened to.” Bell claims that Springman was referring to Christian music that she played. Bell never complained to anyone about this comment. (QUF & BRUF ¶¶ 63-64).

On December 13, 2003, Springman asked Bosar a question while she was on the phone, and she said “James, I am going to kick your ass.” That same day, co-worker Wayne Johnstone said “fuck” in the aisle. Bell did not complain about these comments. (QUF & BRUF ¶¶ 65-67).

Johnstone and co-worker Jay Rubin would often come into Bell’s work area to retrieve faxes, and if expected faxes were not there, they would yell “shit” or “Goddamn it.” Bell would

ask them to stop using that language. (QUF & BRUF ¶ 68).

Bell claims that she saw co-workers Springman and Canella hit co-worker Jennifer McHugh on the arm as they walked by. McHugh never complained to Bell, and Bell never complained to anyone about this conduct. These employees also hit Bell on the arm and said "What's going on" seven to ten times in a day or two. Bell asked them to stop, and they did. Bell never complained to anyone about this. She forwarded a chain email to a friend, Springman and Holman on December 11, 2002. (QUF & BRUF ¶¶ 69-70).

F. Bell's Performance Problems and Comments

At Collegeville, Bell assisted buyer Geoff Ellis. Ellis explained the job to Bell. A week into Bell's training, Ellis explained how capital expenditure was done. Quest alleges that he did this because of inconsistencies in Bell's work. Bell alleges that Ellis only provided positive feedback to her after this, although Quest claims that he spoke to her about inconsistencies in her work at least twice. Quest states that Bell's performance did not improve, and so Ellis spoke to Crosdale about the problems. Bell was not aware of such a communication. (QUF & BRUF ¶¶ 73-76).

Crosdale spoke to Bell's other supervisor, Gladys Daniel. Daniel agreed that they should sit down with Bell and

Ellis to discuss the performance issues. Quest claims that they did so that day, but Bell denies such a meeting. (QUF & BRUF ¶¶ 77-78).

Quest claims that after the meeting Bell's performance improved and then worsened again. Bell claims that she was not made aware of any deficiencies. (QUF & BRUF ¶ 79).

In early December of 2002, Ellis again contacted Crosdale to discuss Bell's work issues. Crosdale suggested another meeting. Crosdale spoke to Daniel about the problem, and Daniel agreed on another meeting. Quest claims that such a meeting took place that same day, but Bell denies any such meeting. (QUF & BRUF ¶¶ 80-82).

Bell denies that she was ever spoken to by Ellis or Crosdale about her performance, except that Ellis once told her that she was not entering the capital expense information on the requisition properly. (QUF & BRUF ¶ 83).

Bell had received an email from Crosdale on November 20, 2002, which stated that Bell and another temporary employee were not doing their part answering incoming calls. Bell admits that she was not answering the phones, but claims that she had never been trained on them and had been told not to answer them. Quest claims that its records show that Bell had previously used the phones, so she had to know how to do so. (QUF & BRUF ¶¶ 84-87).

Crosdale did not immediately report any performance problems regarding Bell to Kelly because he did not think that they were serious enough to warrant doing so. (QUF & BRUF ¶ 88).

On December 13, 2002, Crosdale was out of the office. He received numerous phone calls indicating that Bell had told Keri Bosar that she was living in sin. Quest also claims that Bell said that Bosar was going to hell, but Bell denies this. Crosdale called Gladys Daniel to inquire about the situation, and Bosar's boyfriend, Dan Quayle, was in Daniel's office at that time. Bosar and Quayle were extremely upset about what Bell had said about their living arrangements. (QUF & BRUF ¶¶ 89-90).

Bell admits that she said that Bosar was living in sin. She states that she was friendly with Bosar, and that Bosar was also a Born Again Christian. She says that Bosar was discussing spending nights with her boyfriend, and mentioned that his snoring and bathroom habits kept her awake, and Bell responded that Bosar was living in sin because "that's what her parents or older people would say to people living together who weren't married." Bell admits that Bosar was offended and got up and left when Bell made this comment. Bell admits that Bosar was not talking about having sex. (QUF & BRUF ¶¶ 91-93; Bell Dep. at 109-11).

Through more phone calls that day, Crosdale learned that Bell had also told James Springman that he was living in sin

and going to hell. Springman confirmed this statement, and Bell does not dispute it. Bell also admits that Springman was not talking about having sex. (QUF & BRUF ¶ 94, Bell Dep. at 111).

Crosdale spoke to Daniel about these comments, and Daniel advised Crosdale that the comments, coupled with Bell's recent performance issues, weighed in favor of ending her employment with Quest. (QUF & BRUF ¶ 95).

Crosdale called Rieben at Kelly to request that Bell's employment be ended that day. Quest claims that Crosdale told Rieben about Bell's performance issues, and that he requested that no negative notation be put in her record, and that she be given another assignment because of the impending holidays. Bell argues that Rieben's testimony indicates that Crosdale did not make these two requests. Rieben stated that Crosdale told him that Bell's remarks were making others uncomfortable, but that she was a good worker. Rieben indicates that Crosdale had said that Bell had told other employees that they were going to hell. (QUF & BRUF ¶¶ 96-97; Rieben Dep. at 39; Resp. Ex. K).

At the time of Bell's termination, Crosdale knew that she was religious. He claims, however, that he did not know that she was a Born Again Christian. Although she disputes it in her response, in her deposition, Bell admitted that she never complained to Crosdale about religion or sex-based harassment. (QUF & BRUF ¶ 98; Bell Dep. at p. 210).

Around 4:00 P.M. on December 13, 2002, Bell called home from work to check her messages, and got a message from Rieben informing her that it was her last day of work at Quest, and that he would talk to her Monday about a new position. Bell called Rieben on Monday, December 16, 2002, and he informed her that her employment had ended because she did not work out and she did not blend. (QUF & BRUF ¶¶ 99-100).

G. Anti-Harassment Policies

Quest had an anti-harassment policy that specifically prohibited harassment and retaliation based upon sex and religion in place during Bell's assignment. There was an "Open Door" policy that allowed individuals to report problems to immediate managers or supervisors, and up the chain of command to Human Resources. The policy also allowed employees to go directly to Human Resources "if any steps are inappropriate (e.g., sexual harassment by an immediate manager)." This policy was available to all employees, including temporary ones such as Bell, through Quest's intranet site, and was posted on bulletin boards near the elevators. Kelly also had a sexual harassment policy. (QUF & BRUF ¶¶ 19-23).

Bell was aware of Kelly's and Quest's policies. At Quest, during her initial two weeks of training, she was trained on Quest's harassment policy. (QUF & BRUF ¶¶ 23, 25).

II. Claims

Based upon the above facts, Bell makes claims under Title VII and the PHRA. She claims that she was subjected to retaliation and unlawful treatment based upon her sex and religion. Her complaint contains five counts: Count One against Quest for sexual harassment, Count Two against Quest for retaliatory discharge, Count Three against Quest for religious harassment, Count Four against Kelly for religious discrimination, and Count Five against Kelly for retaliatory discharge. Because Bell has agreed to settle with Kelly, the Court will only address Counts One through Three.

Count Two of the complaint alleges retaliatory discharge and requests "equitable/injunctive relief directing Quest to cease any and all unlawful religious discrimination." (Compl ¶ 37). Sex is not mentioned. At oral argument, Bell conceded that she has not made a claim of retaliatory discharge relating to religion-based complaints against Quest. In fact, it appears that she has made such a claim, but has not claimed that Quest engaged in retaliation relating to sex-based complaints.

Quest's motion addresses religious and sexual harassment. Quest also argues that Bell failed to exhaust her administrative remedies by failing to mention anything about her religion-based claims in her EEOC charge of discrimination.

Finally, Quest's motion addresses the retaliation claim.

Although she did not officially withdraw the harassment claims, Bell did not brief them. At oral argument, Bell asserted that she does not oppose the Court's granting of summary judgment on the harassment claims. Bell denies that she failed to exhaust her administrative remedies, but makes no argument on this point. Bell's response focuses only on the retaliation claim.

III. Procedural History

On December 23, 2002, Bell met with an EEOC investigator named Diane Decorsey. At this meeting, she filled out a charge questionnaire, was given papers to fill out, and was told to return in January. (QUF & BRUF ¶ 101).

In the questionnaire, she wrote that she was terminated because of her Christian values and morals, and that she was denied the opportunity to defend or discuss why she did not "blend." (QUF & BRUF ¶ 102).

Around January 16, 2003, Bell filed her official charge of discrimination against Quest with the EEOC. She checked off the "sex" and "retaliation" boxes as causes of discrimination. She described claims of sexual harassment and retaliation based upon sex-based complaints. At the end of the charge, Bell stated, "I believe I was subjected to a sexually hostile work environment and my dismissal was in retaliation of my disapproval

and objection to this work environment." Religion was not checked off or mentioned anywhere in the charge. Bell read this charge before signing it, and did not inquire about its failure to mention religion. (QUF & BRUF ¶¶ 103-105).

Around August 1, 2003, Quest responded to the charge's sexual harassment and sex-based retaliation allegations. Quest did not address religion. Quest claims that it had no notice of any religion allegations. Bell claims that it did, and that this notice "is explained below in Plaintiff's brief," but the brief never mentions such notice again. (QUF & BRUF ¶ 106).

The EEOC never had a fact-finding conference. On September 30, 2003, the EEOC made its determination. It found that the allegations did not rise to the level of a sexually hostile working environment. It found, however, that the comments were offensive to Bell because of her religious convictions, that Quest was aware of those convictions because Bell repeatedly voiced her disapproval of the profanity and offensive comments, and that Quest retaliated against Bell by terminating her employment. Thus, it concluded that a Title VII violation had occurred. (QUF & BRUF ¶¶ 107-109).

At oral argument, Quest informed the Court that after this determination was issued, Quest had addressed the religion-based retaliation issue and asked the EEOC to reconsider its determination. The EEOC denied Quest's request for

reconsideration.

Bell filed her complaint in this Court against Kelly and Quest on October 25, 2004. After discovery was conducted, Quest filed its motion for summary judgment on October 14, 2005. In a letter dated November 15, 2005, Bell informed the Court that she had settled with Kelly.

IV. Analysis

A. Threshold Issues

The Court must consider two threshold issues: whether Bell failed to exhaust her administrative remedies by failing to mention her religion-based claims in her EEOC charge of discrimination; and whether Bell failed to assert certain claims against Quest in Count Two of her complaint, which alleges retaliatory discharge and mentions "unlawful religious discrimination" but makes no mention of sex.

1. Failure to Exhaust Administrative Remedies for Religion Claims

Quest argues that Bell failed to exhaust her administrative remedies by failing to mention any religion claim in her EEOC charge of discrimination, and then bringing religion claims in this Court. In her response, Bell denies Quest's statement that it did not receive notice of the religion charges. She does not, however, rebut Quest's exhaustion arguments or

explain why her charge made no mention of religion.

The United States Court of Appeals for the Third Circuit has held that where a substantive basis for discrimination, such as gender or race, was not checked off or mentioned in an EEOC charge, it could not be raised in the District Court. Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996)(holding that where a charge only mentioned disability discrimination, a later gender discrimination claim was barred). In contrast, where a basis for discrimination is mentioned in the body of a charge but is not checked off, a defendant is sufficiently on notice and a later claim on that basis is not barred. Id.; Mullen v. Topper's Salon & Health Spa, Inc., 99 F. Supp. 2d 553, 556 (E.D. Pa. 2000).

Other judges of this Court have held that where an EEOC charge contains no reference to a basis for discrimination later asserted in federal court, the fact that there was a mention of that basis in an earlier charge questionnaire at the EEOC will not save a plaintiff from defeat based upon a failure to exhaust administrative remedies. Yang v. Astrazeneca, 2005 U.S. Dist. LEXIS 1825 at *8 (E.D. Pa. Feb. 10, 2005); Johnson v. Chase Home Fin., 309 F. Supp. 2d 667, 672 (E.D. Pa. 2004). Another judge of this Court also recognized "Title VII's preference for investigation and conciliation by the EEOC over formal adjudication," and noted that allowing unexhausted claims to be

pursued in the District Court would "deprive the charged party of notice of the allegations raised against it." Vlachos v. Vanguard Invs., Inc., 2002 U.S. Dist. LEXIS 16260 at *5 (E.D. Pa. Aug. 19, 2002).

Bell's charge of discrimination made no mention of religious discrimination, and Quest responded only to the claims that it did contain. Quest had had no opportunity to respond to the religion claims upon which the EEOC based its determination. Although it was able to respond to these claims when it requested reconsideration, the EEOC upheld its prior determination.

Because the Court finds that Bell's substantive claims cannot survive summary judgment, it need not decide whether she failed to exhaust her administrative remedies relating to her religion claims. Rather, the Court will proceed as though there was proper exhaustion and address the merits of the claims.

2. Claims in Count Two

At oral argument, Quest argued, and Bell conceded, that Bell's retaliation claim against Quest in Count Two of her complaint addressed only sex-based retaliation, and that no religion-based retaliation claim was asserted against Quest. In fact, Count Two mentions "unlawful religious discrimination," but not sex. Nevertheless, because the Court concludes that Bell's retaliation claim is not meritorious whether based upon sex or

religion, it need not determine whether Count Two encompasses both of these claims. It will proceed as if both claims were made and address their merits.

B. Sexual and Religious Harassment/Hostile Work Environment Claims Under Title VII and the PHRA

Because Bell did not respond to Quest's motion on the harassment claims, and conceded at oral argument that she did not oppose the Court's granting of summary judgment in favor of Quest on those claims, the Court will grant summary judgment in favor of Quest on Counts One and Three.

C. Retaliation

Count Two of Bell's complaint contains a claim for retaliatory discharge. As noted above, this Count only explicitly references religion-based retaliation, but the Court will address the parties' arguments relating to both sex and religion-based retaliation.

1. Prima Facie Case

To make out a prima facie case of retaliation, Bell must establish that (1) she engaged in protected activity, (2) she was discharged subsequent to or contemporaneously with such activity, and (3) there is a causal link between the protected activity and the discharge. Woodson v. Scott Paper Co., 109 F.3d

913, 920 (3d Cir. 1997). The allocation of the burden of proof for the federal and state retaliation claims follows the familiar McDonnell Douglas pattern. Id. at 919 (describing the holding of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). If the plaintiff makes out the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action. Id. Should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id.; Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999).

(a) Protected Activity

Quest argues that Bell did not engage in any protected activity. In the retaliation context, protected activity is an employee's opposition to employment practices that are unlawful under the anti-discrimination statutes. Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995). This opposition can be formal or informal, and internal, as in a complaint to management, or external, as in a complaint to the EEOC. Id.

The Barber court held that a letter that "complain[ed] about unfair treatment in general and expresse[d] [the plaintiff's] dissatisfaction with the fact that someone else was

awarded the position, but . . . d[id] not specifically complain about age discrimination" did not constitute a protected activity. Id. The court explained:

> It is clear from Barber's letter that he felt that he had been treated unfairly as he stated that "the position was awarded to a less qualified individual." However, that letter does not explicitly or implicitly allege that age was the reason for the alleged unfairness. A general complaint of unfair treatment does not translate into a charge of illegal age discrimination. The jury was not presented with any evidence to supports its conclusion that Barber's position was eliminated because he engaged in protected activity.

Id.

Bell never put any opposition in written form. More importantly, it is not clear that any of the conduct that Bell describes constitutes opposition. Bell's "opposition" consisted of saying "excuse me, there is a lady present" or "could you please not talk about that here," making facial expressions, and asking someone to repeat a statement. Facial expressions, saying "excuse me," and a request for repetition would not clearly put anyone on notice that a person opposed his statements.

Even when Bell directly asked someone to stop talking as they were or stop touching her arm, she never once mentioned that sex or religion were the bases for her objections. In this respect, the Barber rule governs and is dispositive. A complaint that does not reference a protected trait cannot constitute

protected activity.[2]

In her response, Bell does not address Barber. Rather, she argues that because people at Quest knew that she was a Born Again Christian, they must have understood her opposition to be related to her religion. She argues that the "context [in] which she voiced her opposition" somehow rendered it protected activity. The law does not support these arguments. The Court finds that Bell never engaged in protected activity.

(b) Timing of Discharge and Causal Link

Bell must show that she was discharged "subsequent to or contemporaneously with" a protected activity. Woodson, 109 F.3d at 920. In addition, she must establish that there was a causal link between her alleged protected activity and the discharge. Id. Timing and ongoing antagonism are the two main factors to be considered in the causal link analysis. Abramson v. William Paterson Coll., 260 F.3d 265, 288 (3d Cir. 2001).

Bell was discharged after the actions which she argues

[2] At oral argument, Bell urged the Court to adopt the arguably more lenient standard employed by the Supreme Court of California in Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1047 (Cal. 2005). The Court is not persuaded that Yanowitz should change its analysis. Even under Yanowitz, the Court must look to "whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." Id. (internal citation omitted). Bell did not sufficiently convey any concerns relating to discrimination.

were protected activities took place. Because these actions were not protected activities, the point is moot.

Even if they had been protected activities, however, and viewing the facts and inferences in the light most favorable to Bell, no reasonable factfinder could find that these actions were causally connected to Bell's termination. Bell was a temporary employee who was at Quest for less than two months. Although she disputes some of the performance problems that Quest describes, it is undisputed that on at least two occasions, Bell was spoken to about performance issues, namely the capital expense information and the telephones.

Often, Bell did not complain at all about comments and actions she now claims were unlawful. When she did, the vast majority of her comments were made to co-workers, and not superiors. Because the people who made the decision to terminate Bell did not know about most of her alleged protected activity, they could not have based the decision upon the activity.

Although Bell describes many incidents at Quest, she only voiced opposition to a supervisor on one occasion. This occurred when she asked Pete Crosdale to move away when he was talking to James Springman about Springman's fiancée's pregnancy. Crosdale immediately complied with her request, although she argues that he did not move far enough away. It is unlikely that Crosdale's recommendation that she be terminated on December 13,

2002 was in retaliation for this minor incident.

Most importantly, Bell admits that immediately prior to her termination, she told two employees that they were living in sin and at least one employee that he was going to hell. These comments were directed specifically at the lifestyles of other employees, unlike many of the comments Bell cites, which were not even directed at her. These comments were objectively offensive. Quest terminated Bell immediately upon learning of her comments. Bell had been engaging in what she argued was protected activity throughout the entire course of her employment, yet it was not until she made these comments that she was terminated. It is clear that these comments, coupled with Bell's performance issues, and not unlawful discrimination, were the impetus for her termination.

2. Legitimate Nondiscriminatory Reason

To satisfy its burden of asserting a legitimate, non-discriminatory reason for Bell's termination, Quest argues that it terminated Bell's employment because of her performance problems, coupled with the comments that she made indicating that other employees were "living in sin" and "going to hell." Quest notes that Bell admits that the employees to whom she made these comments were offended. These comments, coupled with Bell's performance, constituted legitimate nondiscriminatory reasons for

her termination.

3. Pretext

To satisfy her burden of showing that Quest's asserted legitimate, non-discriminatory reason was in fact a pretext for discrimination, Bell must proffer evidence from which a reasonable jury could either (1) disbelieve Quest's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of Quest's action. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). Bell must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered legitimate reasons for Quest's actions that a reasonable fact finder rationally could find them unworthy of credence. Id. at 1108-09.

"[A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

As discussed above, when Quest terminated Bell's employment, it had legitimate reasons for doing so. Bell had made offensive comments to other employees, and had some performance problems. Bell attempts to create issues of fact by arguing that Crosdale stated that Bosar called him at home, when in fact he stated that he received several calls at home about Bosar, and not that she called him. She argues that because Rieben's version of his conversation with Crosdale differs from Crosdale's, summary judgment is inappropriate. Although it seems that Crosdale focused on Bell's comments as the reason for her termination when he spoke to Rieben, and not on performance problems, these comments alone were legitimate reasons for her termination. These factual disputes are not material.

Given the fact that Bell was a temporary employee who was discharged immediately after making offensive comments to co-workers, and after at least some admitted performance problems, she cannot show that a reasonable jury could find that Quest's asserted legitimate nondiscriminatory reasons for her termination were pretextual. Accordingly, Quest is entitled to summary judgment.

An appropriate order follows.

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

SELMA L. BELL,	:	CIVIL ACTION
	:	
v.	:	
	:	
QUEST DIAGNOSTICS and	:	
KELLY SERVICES INC.	:	NO. 04-5005

ORDER

AND NOW, this 7th day of February, 2006, upon consideration of the motion for summary judgment of Quest Diagnostics (Docket No. 30), and the response and reply thereto, and after oral argument on December 16, 2005, IT IS HEREBY ORDERED that for the reasons set forth in a memorandum of today's date, the defendant's motion for summary judgment is GRANTED. Judgment is entered in favor of the defendant and against the plaintiff. This case is closed.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. MCLAUGHLIN, J.