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

MARION P. RUSSELL, Plaintiff v. THE VANGUARD GROUP, Defendant	Civil Action No. 04-3269

OPINION

Pollak, J. July 24, 2006

Defendant The Vanguard Group ("Vanguard") moves for summary judgment in this employment discrimination and retaliation case brought by plaintiff Marion P. Russell ("Russell"). For the reasons that follow, the motion will be granted in part and denied in part.

Facts and Procedural History

Russell began working at Vanguard as a Project Manager in June 1996. In January 2000, Russell filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against her supervisor, and in June 2000, Russell filed a Charge of Discrimination with the EEOC against another supervisor. Russell was promoted in July 2001, and she dropped her discrimination claims as a result of the promotion. In October 2002, Russell expressed interest in an additional promotion to the position of

Systems Manager. However, on the recommendation of the Senior Manager of Russell's department, Richard Farrelly, Vanguard chose to promote Don Williams to the position of Systems Manager rather than Russell.

Russell did not enjoy a blissful working relationship with Williams and Farrelly. On numerous occasions, Williams and Farrelly criticized Russell for, *inter alia*, arriving late at or failing to attend meetings, refusing to invite Williams to certain meetings, sleeping during meetings, refusing to provide Williams with the password to a project plan, communicating in a demeaning fashion to others, and failing to meet client expectations. Conversely, Russell complained that, *inter alia*, Williams harassed her, Farrelly and Williams inappropriately sought to discuss issues she had with previous managers against whom she had filed charges of discrimination, Farrelly retaliated against her by attempting to take away her flex schedule, Farrelly made inappropriate veiled comments about her, and Farrelly inappropriately berated her in front of her peers about arriving late to a meeting.

On May 14, 2003, Farrelly gave Russell an oral warning for repeated lateness to meetings. On June 18, 2003, Russell complained to the head of the crew relations department that Farrelly had harassed and discriminated against her. On June 30, 2003, Farrelly and Williams issued a written alert to Russell. The written alert cited a recent complaint from a client in which the client indicated that Russell had not provided a timely project plan, that he detected friction between Russell and her team, and that

Russell did not communicate effectively. The written alert also claimed that Russell had failed to use the proper methodology on a project, that she had failed to complete a required training class, that she was resistant to feedback from others, that she was confrontational with her managers, and that she had been late to or had skipped several meetings. On July 28, 2003, Russell submitted a lengthy written response to the written alert. In her response, Russell claimed that she used the methodology she was instructed to use, that she actually had completed the required training class, that the lateness of her project was a result of her managers' refusal to allocate adequate resources to the project, that she only missed meetings when she had a legitimate conflict, that her tardiness to some meetings was trivial and/or excusable, and that most of the written alert was based on misrepresentations by her managers. The crew relations department agreed to investigate Russell's allegations. On July 31, 2003, Russell received a formal warning in which she was accused of, *inter alia*, failing to competently manage her projects, confronting a client in public about feedback the client had provided, continuing to exhibit a confrontational attitude toward management, arriving late to and skipping meetings, and sleeping during meetings.

On August 15, 2003, Russell filed a Charge of Discrimination against Vanguard with the Equal Employment Opportunity Commission. On August 17, 2003, Russell met with Farrelly, Farrelly's manager, and the head of the crew relations department, and Russell was informed that the investigation of her response to the written alert failed to

uncover any evidence undermining the written alert. Russell accused those consulted in the investigation of lying, and Russell expressed unwillingness to comply with her managers' requests for improvement. Russell's employment was terminated shortly after the meeting.

On July 12, 2004, Russell initiated the instant litigation, and on May 25, 2005, she filed an amended complaint asserting seven counts of age and gender discrimination and retaliation. Counts I, II, and III of the amended complaint assert claims of gender and/or age discrimination in violation of Title VII[1], the PHRA[2], and the ADEA[3], respectively. Counts IV, V, VI, and VII of the amended complaint assert claims of retaliation in violation of Title VII, the PHRA, the ADEA, and 42 U.S.C. § 1981, respectively. With discovery complete, Vanguard moves for summary judgment on each of Russell's claims.

Discussion

Summary judgment is proper if the evidence creates no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

[2] Pennsylvania Human Relations Act, 43 P.S. 951 *et seq*.

[3] Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

Each of Russell's claims is evaluated using the familiar burden-shifting framework announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Pamintuan v. Nanticoke Memorial Hosp.*, 192 F.3d 378, 385 (3d Cir. 1999); *Gomez v. Allegheny Health Services, Inc*., 71 F.3d 1079, 1083-84 (3d Cir. 1995); *Keller v. Orix Credit Alliance, Inc*., 130 F.3d 1101, 1108 (3d Cir. 1997); *Quiroga v. Hasbro, Inc.* 934 F.2d 497, 501 (3d Cir. 1991). Under this framework, Russell is first required to establish a *prima facie* case, after which the burden shifts to Vanguard to articulate a legitimate, non-discriminatory (or non-retaliatory) reason for its actions. If Vanguard produces such an explanation, then, in order to survive summary judgment, Russell must either discredit that explanation or show that unlawful discrimination was more likely than not a motivating factor in the adverse employment action. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). To discredit Vanguard's explanation, Russell "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [its] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." *Id.* at 765.

Discrimination

Russell's age and gender discrimination claims – Counts I, II, and III of the amended complaint – arise from Vanguard's decision to promote Don Williams, a 34-year-old black male, to the position of Systems Manager in 2002 rather than Russell.

Vanguard maintains that both Russell and Williams were considered for the position and that Williams was ultimately chosen because he had experience working with: 1) outside vendors, 2) the Technology Operations Department, and 3) web-based technology. Vanguard contends that these three areas of experience were important assets for the particular Systems Manager position in which Russell was interested. Russell responds that Williams was actually less qualified for the position than she, that Vanguard's failure to post the position opening was a violation of its own policy and demonstrates pretext, that Vanguard's failure to notify Russell that she was being considered for the position is evidence of pretext, and that the fact that Farrelly exercised discretion in making his recommendation is evidence of pretext.

In contending that she was more qualified than Williams, Russell does not deny that she lacked experience working with outside vendors, the Technology Operations Department, or web-based technology, and she also does not contend that such experience is unnecessary or unhelpful for the position she sought. Rather, Russell cites to Vanguard's published generic qualifications for a Systems Manager and contends that she must have been more qualified for the disputed position than Williams because she met the experience requirement, and Williams did not[4]. This argument misses the mark.

[4] The generic qualifications include "Eight years of software development experience including five years as a Project Manager/Manager." Russell claims that Williams had only four years of experience as a manager and 6 ½ years of experience in software development, while Russell had six years of experience as a manager and fifteen years of experience in software development.

There is nothing suspicious about an employer, faced with the task of filling a particular job opening, discounting one or more general requirements and weighing more heavily factors that are pertinent to the specific job opening being filled. Russell has not pointed to a major disparity between Vanguard's generic experience requirements and Williams's level of experience. In the absence of such a major disparity or some evidence that the three factors Vanguard found to weigh in favor of Williams are unrelated to the demands of the Systems Manager position, the difference between Russell's total experience and Williams's total experience does not constitute evidence of pretext. *See Kautz v. Met-Pro Corp.*, 412 F.3d 463, 468 (3d Cir. 2005).

Russell's allegations of deficiencies in the hiring process also do not amount to evidence of pretext. Russell points out that Vanguard policy requires it to post a position opening when there is no one within the department qualified for the position. Again citing to the generic Systems Manager qualifications, Russell contends that Williams was not qualified for the position, and therefore Vanguard's failure to post the position was a violation of its own policy. Russell cites *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977), for the proposition that an employer's violation of its own policy is evidence of pretext. Russell misreads the law insofar as she contends that violation of internal policy is always evidence of pretext. An employer's violation of its own policy "*might* afford evidence that improper purposes are playing a role," but such a violation does not necessarily constitute evidence of pretext. *Id.* (emphasis added). The

circumstances of the alleged policy violation in this case do not warrant an inference of pretext. Russell offers no cogent argument as to how Vanguard's failure to post the position undermines Vanguard's assertion that it chose Williams because of his experience in three particular areas, and I discern nothing about Vanguard's failure to post the position that casts doubt on its proffered reasons for promoting Williams. Similarly, Farrelly's failure to notify Russell that she was being considered for the Systems Manager position does not cast doubt on Vanguard's explanation that it chose Williams because of superior qualifications in certain important areas. Finally, the mere fact that Farrelly exercised discretion in determining whom to recommend for the Systems Manager position does not, by itself, constitute evidence of pretext. Vanguard has articulated objective reasons for its preference of Williams over Russell, and nothing in the relevant case law suggests that the exercise of discretion amounts to evidence of pretext under such circumstances. *Cf. Iadimarco v. Runyon*, 190 F.3d 151, 165 (3d Cir. 1999) (holding that "an employer cannot successfully defend a hiring decision against a Title VII challenge merely by asserting that the responsible hiring official selected the man or woman who was 'the right person for the job.'")

Vanguard has articulated three reasons for its preference of Williams over Russell. Instead of confronting those reasons, Russell has pointed to unrelated supposed deficiencies in the hiring decision. This court's role is not to grade Vanguard's hiring process and results, but rather to determine whether its proffered reasons for reaching its

result can rationally be thought to be pretextual. Russell having provided no evidence that Vanguard's proffered reasons for promoting Williams rather than her are pretextual or that Vanguard was motivated by discriminatory animus, Vanguard is entitled to summary judgment on Russell's discrimination claims under Title VII (Count I), the PHRA (Count II), and the ADEA (Count III).

Retaliation

Russell's retaliation claims – Counts IV, V, VI, and VII of the amended complaint – arise from Vanguard's ultimate decision to terminate her employment. Vanguard concedes for purposes of its motion for summary judgment that Russell has made out a *prima facie* case of retaliation. However, Vanguard contends that Russell cannot show that Vanguard's proffered reasons for terminating her – that Russell was insubordinate on numerous occasions – are pretext for unlawful retaliation. Russell responds that several of the incidents Vanguard cites as evidence of her insubordination do not support that characterization and are therefore pretextual. I agree that Russell's countering evidence, while modest, casts just enough doubt on some of Vanguard's proffered reasons that her retaliation claims should survive summary judgment. *Cf. Fuentes*, 32 F.3d at 764 n.7 ("If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder.").

Vanguard claims that, following Williams's promotion, Russell engaged in repeated unprofessional conduct, including: 1) refusing to attend meetings, 2) being late for meetings, 3) refusing to invite Williams to meetings with her team, 4) defying Williams's instructions that she refrain from sending out certain reports, 5) failing to give Williams access to the project plan, 6) sleeping in meetings, and 7) speaking to Williams and others in an unprofessional manner. Russell responds with evidence that she only missed meetings when she was not required to attend or when the meetings conflicted with other mandatory meetings, that she notified Williams of such meeting conflicts, that she arrived at one meeting fifteen minutes late because she was not notified of a change in the meeting's location and that Farrelly inappropriately berated her in front of her colleagues on that occasion, that she arrived two to three minutes late at the other meetings for which Vanguard claims she was tardy, that she eventually did invite Williams to her team meetings and that he attended one and then never attended another, and that it was unusual at Vanguard for a project manager to give the password to a project plan to someone else. This evidence, while not massive, could be viewed by a jury as responsive to, and casting doubt on, a "fair number" of Vanguard's proffered reasons for terminating Russell's employment.

Russell also points to a report made by Williams in which he stated that there was no excuse for the way in which Russell had chosen to treat him and her previous managers. In his deposition, Williams was unable to explain the basis for his belief that

Russell had mistreated previous managers, except to say that Russell had told him that she once had a manager removed for incompetence. Russell's declaration denies that she ever made such a statement to Russell. Accepting Russell's version of events as true, as I must at this stage of the litigation, I conclude that it is possible that a jury could understand Williams's statement about Russell's treatment of previous managers to refer to Russell's claims of discrimination against two of her previous managers. Such an understanding of Williams's statement could ground an inference that Williams harbored retaliatory animus against Russell.

Also of some concern is the fact that one of the employees involved in conducting the investigation of Russell's rebuttal to her written alert was a person against whom Russell had previously filed a charge of discrimination. Russell had specifically requested that this individual not participate in the investigation. A jury could infer from this circumstance that Vanguard was not serious about ensuring the accuracy of Williams's and Farrelly's complaints against Russell and that these complaints therefore served as pretextual reasons for her termination.

Finally, Russell points out that she filed an internal complaint of unlawful discrimination against Farrelly on June 18, 2003, and that she was placed on written alert just days later, on June 30, 2003. This temporal connection between Russell's complaint and Farrelly's action against her may be viewed as constituting some evidence of retaliation. *See Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73 (3d Cir. 1986); *see*

also Bassett v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000).

Based on the foregoing, I find that Russell has produced adequate evidence to raise a genuine issue of material fact as to whether Vanguard's proffered reasons for terminating her are pretextual. *Cf. Fuentes*, 32 F.3d at 765. Russell's evidence may be tenuous, but it is adequate to defeat summary judgment on her retaliation claims (Counts IV, V, VI, and VII).

An order effectuating the foregoing accompanies this opinion.

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ORDER

July 24, 2006

For the reasons provided in the accompanying opinion, it is hereby ORDERED that the "Motion of Defendant the Vanguard Group, Inc. for Summary Judgment" (Docket # 33) is GRANTED in part and DENIED in part. Summary judgment is GRANTED in favor of defendant Vanguard and against plaintiff Marion P. Russell on Counts I, II, and III of the amended complaint; those counts are dismissed. Summary judgment is DENIED as to Counts IV, V, VI, and VII of the amended complaint; those counts remain.

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.