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

JACQUELINE PHILIPS-CLARK,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	**NO. 04-2474**
	:	
PHILADELPHIA HOUSING	:	
AUTHORITY,	:	
Defendant.	:	

M E M O R A N D U M

STENGEL, J. **February 22, 2007**

Jacqueline Philips-Clark brought a race discrimination and retaliation claim against her employer for failing to permanently promote her. Defendant moves for summary judgment. I will grant defendant's motion because plaintiff fails to show pretext on her race discrimination claims and cannot establish a *prima facie* case of retaliation.

I. BACKGROUND[1]

Jacqueline Philips-Clark is an African-American woman. Compl. ¶ 5. Defendant Philadelphia Housing Authority ("PHA") is a public agency charged with acquiring, leasing, and operating affordable housing for city residents with limited incomes. Id. ¶ 6.

Philips-Clark began working for PHA in January 1999 as a contract specialist. Id. ¶ 9. Her position was titled "Construction Contract Coordinator" and Philips-Clark had

[1] For the purposes of this motion, all inferences must be made in favor of the non-movant.

supervisory authority over several employees. Id. ¶¶ 10-11. Philips-Clark worked in PHA's Contracts Administration Department (the "Department"). PHA Statement Undisputed Facts ¶ 1. From 2002-2003, Jim Conlin, who is white, was Philips-Clark's direct supervisor. Id. ¶ 3. Vernon Cooney, who is also white, worked in the Department with Philips-Clark and also had supervisory authority over employees. Id. ¶ 4.

A. Request to "Downgrade" Performance Evaluations

In September 2002, Philips-Clark "opposed the practice of downgrading the performance evaluations for several African-American workers that she supervised." Compl. ¶ 12. At the time, Philips-Clark was responsible for evaluating the following employees: Diana Benson, Joyce Freeman, Alberta Rouse, Stephanie Rose, Annette Strokes, and Michael Young. PHA Statement Undisputed Facts ¶ 5. Conlin disagreed with the evaluations that Philips-Clark submitted for Joyce Freeman and Michael Young and asked her to substantiate her evaluations of these employees. Id. ¶¶ 7, 9. Young testified that he told other coworkers that he believed Conlin's demand that Philips-Clark "downgrade" his evaluation was racially motivated. Young Dep. pp. 20-23. Conlin refused to sign her evaluations and drafted his own based on his observations of Freeman and Young; while he noted that both employees needed improvement, he rated them as overall satisfactory. PHA Statement Undisputed Facts ¶¶ 10, 11. Conlin gave Philips-Clark a written reprimand for this incident. Id. ¶ 13; see also Def's Mot. Summ. J. Ex. I

"Written Reprimand."[2] PHA did not suspend Philips-Clark as a result of this reprimand nor was her pay reduced. PHA Statement Undisputed Facts ¶ 56. Philips-Clark did not file a complaint with PHA alleging that Conlin's request to downgrade these evaluations was discriminatory. Id. ¶ 57. Philips-Clark did speak with John Cho, an attorney in PHA's Office of Human Resources, concerning her role in these performance evaluations but did not report any discrimination to him. Id. ¶ 58.

B. Failure to Promote

In November 2002, two months after PHA reprimanded Philips-Clark, PHA promoted her to the position of Supervisory Contract Specialist on a probationary basis. Compl. ¶ 13. Conlin recommended Philips-Clark for the promotion. PHA Statement Undisputed Facts ¶ 15. PHA also promoted Vernon Cooney, a white employee, and Anthony Ross, an African-American employee, to Supervisory Contract Specialist at the same time. Id. ¶¶ 14-15. Philips-Clark and Cooney were promoted to two separate positions in the Department; Cooney was responsible for construction-related contracts and Philips-Clark was responsible for professional services contracts. Id. ¶17. Ross worked in the contracts procurement section of the Department. Id. ¶ 19. The promotion of all three employees was subject to a six-month probationary period and the promotions

[2] The parties dispute why Philips-Clark received this reprimand. The reprimand states that Philips-Clark refused to substantiate her ratings and rate her employees below satisfactory. Def's Mot. Summ. J. Ex. I "Written Reprimand." Philips-Clark asserts that "the reprimand was for failing to downgrade the performance evaluations based on unsupported, subjective conclusions by Conlin..." Pl's Resp. Def's Statement of Undisputed Facts & Pl's Counterstatement of Material Facts ("PRSUPC") ¶ 13. The court does not have to resolve this dispute for the purposes of this motion because Philips-Clark's claims fail as a matter of law.

would only become permanent at the conclusion or the probationary period. Id. ¶ 16. The purpose of the probationary period is to allow PHA to evaluate employees' performance in their new roles to determine if they are capable of successfully performing in that position. Id. ¶ 21.

Philips-Clark and Cooney reported to Conlin, who had the authority to recommend whether their promotions should be approved. Id. ¶ 22. In April 2003, Conlin accepted another job before the probationary periods were finished. Id. ¶ 23. Before leaving PHA, Conlin concluded that Cooney had satisfactorily completed his probationary period. Id. Conlin recommended that Clark's probationary period be extended until June 15, 2003 because she needed to improve her supervisory skills. Id. ¶ 24; see also Def's Mot. Summ. J. Ex. O "Request for Extension of Probationary Period."

After Conlin left PHA, Thomas Papa, who was Conlin's supervisor, assumed Conlin's responsibilities. PHA Statement Undisputed Facts ¶ 26. Papa met with Philips-Clark to review Conlin's April 2003 assessment of her performance. Id ¶¶ 26-27. Rather than relying on Conlin's conclusions, Papa decided to extend Philips-Clark's probationary period for an additional 90 days so he could evaluate her performance first-hand. Id. ¶¶ 26, 28.

At the end of the ninety days, Papa decided that Clark had not satisfactorily completed her probationary period and decided not to permanently promote her. Id. ¶¶ 29-30. Papa drafted a memorandum dated July 23, 2003, which provides a detailed

account of how he reached this decision. Id. ¶ 30; Def's Mot. Summ. J. Ex. R "Evaluation of Jackie PhilipsClark." Papa listed the following concerns: her relationship with her staff is that of a "protector" and "[w]hen presented with an issue handled by one of her employees she in most cases tells me it's somebody else's fault without having researched the issue first;" repeatedly asking Philips-Clark to perform tasks; Philips-Clark's argumentative nature; Papa's impression that she was not truthful with him; and Philips-Clarks's lack of attention to details. Id. Papa stressed that he was confident that Philips-Clark could return to her previous position and that his decision was "purely based on her abilities as a supervisor." Id.[3]

At the conclusion of the probationary period, Cooney, who is white, and Ross, who is African-American, received permanent promotions to Supervisory Contract Specialist. PHA Statement Undisputed Facts ¶ 36. After she failed to successfully complete her probationary period, Philips-Clark returned to the Construction Contract Coordinator position. Id. ¶ 34.[4] However, before she returned to this position, Philips-Clark requested and received twelve weeks of Family and Medical Leave Act leave. Id. ¶ 37. Philips-

[3] Philips-Clark takes issue with two of Papa's reasons in this memorandum. First, she argues that Papa had personal knowledge that there were problems in the contracts department, so therefore his criticism of her is unjustified. PRSUPC ¶¶ 14-15. This does not seem to be responsive to Papa's specific reasons for finding her supervisory skills unsatisfactory. Second, she asserts that Papa retracted his remark that Philips-Clark incorrectly blamed others for problems in his deposition testimony. Id. ¶ 13. A review of Papa's deposition testimony does not show this "stunning reversal."

[4] PHA asserts that Philips-Clark earned a higher salary upon her return to coordinator position than she initially earned and that she also earned more than Cooney. Philips-Clark denies these assertions without contradicting the numbers PHA presents. PRSUPC ¶ 34. Instead, Philips-Clark argues that her salary decreased after the demotion. Id. Again, this dispute does not create a genuine issue of material fact concerning whether PHA discriminated against her and the court does not need to resolve the issue.

Clark returned to PHA in October 2003 as a Construction Contract Coordinator. Id. ¶ 38. Rylanda Wilson, who is African-American, was her supervisor. Id. at ¶ 39.

C. Allegations of Discrimination

In addition to the failure to permanently promote, Philips-Clark points to other evidence of discrimination.[5] Philips-Clark alleges that she was asked to perform more work than Cooney; had to respond to a large number of e-mails on a daily basis from her supervisor Conlin; was responsible for keeping Peoplesoft, a software system, running; and did not receive the same signing authority as Cooney. PHA Statement Undisputed Facts ¶ 44. At her deposition, Philips-Clark admitted that she did not know how many emails Cooney received each day and that Ross, an African-American, received the same signing authority as Cooney. Id. ¶ 44. Cooney and Ross' signing authority increased as a result of finishing their probationary periods.

Philips-Clark also alleges that Papa continued her previous supervisor Conlin's "culture of antagonism" by labeling her a "protector" of her employees and describing her as argumentative and untruthful. PRSUPC ¶ 46. Michael Young testified that he told other coworkers that he believed Conlin's demand that Philips-Clark "downgrade" his performance were racially motivated and that he believed Conlin micro managed Philips-Clark while he was "hand-off" with Cooley. Young Dep. pp. 20-23. Another employee,

[5] Philips-Clark also incorporates memorandum that she authored expressing her feelings that she had been discriminated against. See Mem. Pl's Opp'n Def's Mot. Summ. J. Ex. A. "Plaintiff's Affidavit;" Ex. H. Pl's "Notes to Staff Meeting dated July 23, 2003;" Ex. K. Pl's Mem. Aug. 7, 2003 to Thomas Papa.

Diana Benson, testified that Cooney treated African-American employees less favorably than white employees. Mem. Pl's Opp'n Def's Mot. Summ. J. Ex. J. Benson. Dep. pp. 72-73. Benson also testified that Papa protected Cooney's handling of a questionable contract modification for a vendor. Id. pp. 80-89.

Philips-Clark claims that Wilson, her supervisor, retaliated against her by charging her with being absent without leave and by setting unrealistic deadlines for her to complete projects. PHA Statement Undisputed Facts ¶ 59. Philips-Clark now concedes that she did not follow Wilson's explicit instructions and she failed to call Wilson to let her know that she was absent. Id. ¶¶ 61, 63. Philips-Clark also testified that Wilson only knew that she had filed an EEOC charge because she brought it to Wilson's attention. Id. ¶ 65.

D. Allegations of Retaliation

Philips-Clark testified that she was subjected to the following adverse actions as a result of her refusal to "downgrade" the performance evaluations of her subordinates: received a written reprimand in September 2002; forced to complete payroll and pick up the mail for the entire department; instructed to make sure her employees were appropriately dressed; required to respond to an excessive amount of emails sent by Conlin. PHA Statement Undisputed Facts ¶ 50. PHA required other supervisors to respond to emails from their supervisors, enforce workplace dress code, complete payroll, and retrieve mail. Id. ¶ 52. Philips-Clark also alleges that PHA's failure to be promote

her was retaliatory. Id. ¶ 50.

Philips-Clark filed a timely charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on March 12, 2003. Compl. ¶¶ 7-8. On June 7, 2004, Philips-Clark filed this complaint alleging: (1) race discrimination in violation of 42 U.S.C. § 1981 ("Section 1981"); (2) race discrimination in violation of Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e-2 et seq ("Title VII"), (3) retaliation in violation of Title VII; (4) race discrimination in violation of the Pennsylvania Human Relations Act 43 PA. CONS. STAT. § 951 et seq ("PHRA"); (5) retaliation in violation of the PHRA. Due to multiple requests from the parties to extend discovery and to place the case briefly in civil suspense, PHA did not file its motion for summary judgment until November 27, 2006. Plaintiff responded in opposition on January 15, 2007 and PHA filed a reply brief on January 26, 2007.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at

325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see also Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court

determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Race Discrimination Claims

Plaintiff brings Title VII,[6] Section 1981,[7] and state law[8] claims of race discrimination. Plaintiff cannot produce any direct evidence of discrimination and therefore must proceed under the burden-shifting framework first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973). See also Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999).

In the McDonnell Douglas analysis, the plaintiff bears the initial burden of establishing a *prima facie* case of employment discrimination by a preponderance of the evidence. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760 (3d Cir. 2004)(citing Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). A *prima facie* case requires a

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[6] Title VII provides that "[i]t shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...". 42 U.S.C. § 2000e-2.

[7] Section 1981 states, in relevant part, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." A Section 1981 analysis is identical to a Title VII analysis. Schurr v. Resorts International Hotel Inc., 196 F.3d 486, 499 (3d Cir. 1999) (holding that the elements of employment discrimination under Title VII are identical to the elements of discrimination under § 1981).

[8] The PHRA provides "[t]he opportunity for an individual to obtain employment for which he is qualified... without discrimination because of race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin...". Courts interpret the PHRA consistently with Title VII. Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001)("The proper analysis under Title VII and the Pennsylvania Human Relations Act is identical, as Pennsylvania courts have construed the protections of the two acts interchangeably.").

showing that: "(1) she is a member of a protected class; (2) she satisfactorily performed the duties required by her position; (3) she suffered an adverse employment action; and (4) either similarly-situated non-members of the protected class were treated more favorably or the adverse job action occurred under circumstances that give rise to an inference of discrimination." Langley v. Merck & Co., No. 05-3205, 2006 U.S. App. LEXIS 14958, at * 4 (3d Cir. June 15, 2006) (citing Sarullo v. U.S. Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003)).

A plaintiff's properly pleaded *prima facie* case "eliminates the most common nondiscriminatory reasons" for an employer's actions. Burdine, 450 U.S. at 253. While the *prima facie* case only "raises an inference of discrimination," the Supreme Court has stated that, once the *prima facie* case is established, it will presume that the employer's action is "more likely than not based on the consideration of impermissible factors." Id. at 254. Should the plaintiff establish her *prima facie* case, the burden of production (but not the burden of persuasion) shifts to the defendant to articulate some legitimate and nondiscriminatory reason for the employer's action. Sarullo, 352 F.3d at 797. If the defendant meets this burden, the presumption of a discriminatory action raised by the *prima facie* case is rebutted. Id. The plaintiff must then demonstrate by a preponderance of the evidence that the employer's articulated reason was merely a pretext for discrimination, and not the actual motivation behind its decision. Id.

(1) Philips-Clark can establish a *prima facie* case of discrimination.

PHA argues that Philips-Clark fails to establish the fourth prong of the *prima facie*[9] case—that the circumstances surrounding her failure to be permanently promoted give rise to an inference of discrimination—because she points to nothing more than her own speculation that PHA discriminated against her. To establish a *prima facie* case of employment discrimination requires more than mere speculation. Bullock v. Children's Hosp., 71 F. Supp. 2d 482, 490 (E.D. Pa. 1999).

PHA argues that Philips-Clark cannot identify any other employees who had poor supervisory skills yet were permanently promoted to Supervisory Contract Specialist. Two other employees, Vernon Cooney, a white male, and Anthony Ross,[10] an African-American male, followed the same probationary track as Philips-Clark and were both permanently promoted. Unlike Cooney or Ross, Philips-Clark received a written reprimand prior to her temporary promotion that indicated she needed to improve her supervisory skills. PHA extended her probationary period and two supervisors–Conlin and Papa–evaluated her performance as a manager and found it insufficient. When Papa demoted Philips-Clark from the Supervisory Contract Specialist position, he noted that

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[9] Phillips-Clark satisfies the first and third elements of the *prima facie* case because she is African-American and suffered an adverse employment action by not being promoted. While PHA also seems to contest the second element–that Philips-Clark was qualified for the supervisory position–they do not argue this point in their brief. Therefore, the court will assume she meets this element.

[10] Philips-Clark identifies Conlin, and not Ross, as her comparator in order to allege racial discrimination. Yet, she has admitted that Ross, an African-American, followed the same probationary and promotion track that she did even though he worked in a different section of the Department. PHA Statement Undisputed Facts ¶¶ 15, 16, 19; PRSUPC admitting ¶¶ 15, 16, 19. The court must consider all relevant comparators–not just the one Philips-Clark has hand picked. See e.g. Simpson v. Kay Jewelers, 142 F.3d 639, 646 (3d Cir. 1998)("...the plaintiff can not pick out one comparator who was not demoted amid a sea of persons treated the same as her to establish a jury question.")

although Philips-Clark was not an adequate supervisor, he was confident she would be able to work successfully in her prior position.

Philips-Clark's *prima facie* case is weak and primarily relies on the promotion of Conlin, a white employee, while ignoring that PHA also promoted Ross, an African-American employee at the same time. However, the burden of establishing a *prima facie* case is not heavy. Edwards v. Pa. Tpk. Comm'n, 80 Fed. Appx. 261, 263 (3d Cir. 2003). Even assuming that Philips-Clark has established a *prima facie* case of discrimination, she cannot meet her burden of showing pretext.

(2) PHA has a legitimate non-discriminatory reason for its decision and Philips-Clark can not establish pretext.

Philips-Clark's lack of supervisory skills, identified by two of her supervisors, is PHA's legitimate non-discriminatory reason for failing to permanently promote her. While Philips-Clark disagrees with this reason, she must show that this reason is pretextal to survive summary judgment.

To show pretext, Philips-Clark must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998) (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). This requires pointing to "weaknesses,

implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons...." Id. (citations omitted). The Third Circuit has cautioned that it is not the court's role to scrutinize how employers form business decisions absent evidence of discrimination. Id. at 647 ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination."); see also Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 527 (3d Cir. 1992) ("...barring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions.").

Philips-Clark fails to meet her burden of establishing that PHA's reason for failing to promote her is pretextual and that discrimination was the real reason. In opposing summary judgment, Philips-Clark presents a disjointed laundry list of evidence that does not establish differential treatment. See Mem. Pl's Opp'n Def's Mot. Summ. J. pp 5-9.

Philips-Clark argues that Conlin unfairly reprimanded her prior to her promotion for refusing to "downgrade" the evaluations of two employees because Conlin was aware of the historical and broader problems with processing invoices in the Department. Philips-Clark argues that she fairly evaluated Young and Freeman in light of "real-world working conditions" in the Department and that Conlin never gave her documentation concerning why he had rejected her evaluation of these two employees. Philips-Clark ignores the fact that Conlin ultimately re-evaluated the performance of these two

employees as satisfactory, although he noted that they needed to improve in certain areas. Conlin's ultimate approval of these employees contradicts Philips-Clark's allegation that Conlin's "downgrading" was racially motivated, despite the contrary beliefs of Philips-Clark and Michael Young. Conlin also accepted Philips-Clark's evaluation of other African-American employees.

Michael Young testified that Conlin micromanaged Philips-Clark while subjecting Cooney to little supervision. Conlin's micromanaging of Philips-Clark supports PHA's legitimate non-discriminatory reason. PHA was concerned about her supervisory skills, not Cooney's. This concern explains any micromanagement. Another employee, Diana Benson, also testified that Papa treated Cooney favorably while investigating Cooney's "questionable" handling of a contract modification. The court will not infer discrimination from one incident of leniency.

Philips-Clark speculates that "in a continuing antagonistic reprisal" Conlin extended her probationary period even though he knew that he was resigning. Mem. Pl's Opp'n Def's Mot. Summ. J. p. 6. Philips-Clark alleges that her new supervisor, Papa, was influenced by Conlin's previous written reprimand of her. Extending Philips-Clark's probationary period is an example of PHA's leniency. Instead of terminating her promotion at the initial state, PHA gave her another chance. When Papa replaced Conlin, he knew about Conlin's unfavorable ratings of Philips-Clark and still granted another extension of her probationary period so he could see for himself. Overall, Philips-Clark's

employment record shows no evidence of discrimination. Instead, Conlin recommended Philips-Clark for a promotion even after giving her a written reprimand, and extended the probationary period. Papa also extended the probationary period to judge Philips-Clark's abilities for himself. After finding Philips-Clark argumentative when he criticized her employees and too quick to defend them without researching problems he brought to her attention, Papa concluded that she was unfit to be a supervisor.

Philips-Clark presents no evidence from which this court could infer discrimination. It is illogical that PHA would decide to promote her provisionally, even though it had concerns with her ability as a supervisor, and then demote her based on racial discrimination eight month later after two supervisors found her performance insufficient. Any inference of discrimination is further rebutted by PHA's promotion of Ross, an African-American, during the same time period. Nor can Philips-Clark point to any evidence that Ross and Conlin, who were both ultimately promoted, had previously been reprimanded for poor supervisory skills. PHA gave Philips-Clark every chance to succeed as a supervisor before demoting her.

B. Retaliation Claim

Title VII prohibits employers from retaliating against employees who oppose discriminatory employment practices or file their own charge of discrimination. See 42 U.S.C. § 2000e-3(a). To establish a *prima facie* claim of retaliation under Title VII or the

PHRA,[11] a plaintiff must establish three elements: (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected conduct; (3) a causal connection between the employee's protected activity and the employer's adverse action. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). The McDonnel Douglas burden shifting formula also applies to retaliation claims; once a plaintiff establishes a *prima facie* case of discrimination, the defendant must produce a legitimate non-discriminatory reason for the adverse action and then the plaintiff must establish pretext. Id. Philips-Clark fails to establish a *prima facie* case of retaliation.

(1) Filing an EEOC complaint is the only protected activity Philips-Clark engaged in.

A formal complaint to an employer or the EEOC are not the only recognized forms of protected activity. Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995). Courts have also recognized informal protests against discriminatory practices including complaining to managers or supporting co-workers who have filed formal charges. Id.; see also Moore v. City of Philadelphia, 461 F.3d 331, 343 (3d Cir. 2006) ("Opposition to discrimination can take the form of informal protests of discriminatory employment practices, including making complaints to management. To determine if retaliation plaintiffs sufficiently opposed discrimination, we look to the message being conveyed

[11] See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997) (noting that elements of a PHRA retaliation claim and Title VII retaliation claim are the same).

rather than the means of conveyance.") (citations omitted). If a plaintiff wishes to forgo filing a formal EEOC charge and lodge her complaint in an informal manner, a court must evaluate the message closely to determine whether it is protected conduct. The Third Circuit has explained that "[a] general complaint of unfair treatment does not translate into a charge of illegal...discrimination." 68 F.3d at 702 (finding that plaintiff's letter to human resources was not a protected activity because while it expressed dissatisfaction with a promotion, it did not specifically complain about age discrimination).

Philips-Clark argues that she engaged in two forms of protected conduct (1) refusing to "downgrade" the evaluations of Young and Freeman, who were both African-Americans, at Conlin's direction and (2) filing an EEOC Charge in September 2003 alleging race discrimination. PHA does not dispute that filing an EEOC charge is protected activity.

Philips-Clark's refusal to "downgrade" evaluations does not qualify as a protected activity. PHA argues that being asked to substantiate an employee evaluation is not the same as being asked to downgrade. Even assuming PHA required Philips-Clark to "downgrade," Philips-Clark did not make it clear that she opposed this request because she believed it to be racially discriminatory. Philips-Clark did not file a formal complaint with PHA's internal office charged with investigating potential discrimination. She admits that she did not document her refusal to "downgrade" to anyone at PHA, although she spoke with John Cho, an attorney in PHA's Office of Human Resources, concerning

the procedures for performing evaluations. Philips-Clark Dep. pp. 85-86. She did not tell Cho she believed the request was discriminatory and he advised her to review her supervisor's manual.

The record does not support Philips-Clark's contention that her refusal to "downgrade" is an activity protected under federal or state law. Her refusal to change or substantiate her evaluations was a disagreement with her supervisor; at no time did she complain to anyone at PHA or anyone outside the organization that she believed Conlin's request to be discriminatory and that she opposed it. Therefore, for the purposes of this motion, the only activity that qualifies as protected is her September 2003 complaint to the EEOC and the court will disregard all of Philips-Clark's evidence of retaliation in response to her refusal to downgrade.

(2) Philips-Clark did not experience any materially adverse actions after filing an EEOC complaint in September 2003.

To prove the second element of a *prima facie* case of retaliation, a plaintiff must show that the action was materially adverse, which means the action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2415 (U.S. 2006). The Supreme Court has instructed that this requirement is meant to separate trivial from serious harms because Title VII is not "a general civility code for the American workplace" and "[a]n employee's decision to report discriminatory behavior cannot

immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Id.

Philips-Clark alleges that Rylanda Wilson, her current supervisor, subjected her to the following retaliation after filing her EEOC complaint: (1) charging her with being absent without leave and (2) setting unrealistic deadlines to complete projects. These two acts simply do not meet the standard for a materially adverse action. Philips-Clark has conceded that she had an unexcused absence when Wilson was out of town and that she failed to follow Wilson's instructions to call. Even assuming Wilson did set unmanageable deadlines, this does not meet the materially adverse standard outlined by the Court in Burlington Northern.

(3) Philips-Clark cannot establish a causal connection because her supervisor did not know she had filed an EEOC charge.

Since Philips-Clark cannot show that she suffered a materially adverse employment action, her retaliation claim fails. Even if she could allege an adverse action, she has not established a causal connection between her protected conduct, filing an EEOC charge, and Wilson's actions because Wilson did not know that she had filed an EEOC charge. Since relevant decision-makers must know about the protected activity to act with a retaliatory motive, Philips-Clark's claim fails. Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 415 (3d Cir. 1999); Krouse v. American Sterilizer Co., 126 F.3d 494, 505 (3d Cir. 1997).

IV. CONCLUSION

For the reasons stated above, I will grant defendant's motion for summary judgment. An appropriate order follows.

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

JACQUELINE PHILIPS-CLARK,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	**NO. 04-2474**
	:	
PHILADELPHIA HOUSING	**:**	
AUTHORITY,	**:**	
Defendant.	**:**	

O R D E R

AND NOW, this 22nd day of February, 2007, upon consideration of Defendant's Motion for Summary Judgment (Document No. 30) and Plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED**.

The Clerk of the Court is directed to mark this case closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.