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

DONNA PERRY, Plaintiff and Counter-defendant v. H&R BLOCK EASTERN ENTERPRISES, INC., Defendant and Counter-claimant	:	CIVIL ACTION NO. 04-6108

MEMORANDUM AND ORDER

McLaughlin, J. March 27, 2007

Donna Perry ("Perry") has sued her former employer, H&R Block Eastern Enterprises, Inc. ("Block"), for sex and age discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. The plaintiff alleges that a Block supervisor improperly enforced the company dress code against her and made inappropriate comments about her physical appearance. She further alleges that the supervisor terminated her in retaliation for lodging a complaint against him with Block's corporate headquarters, and that the defendant otherwise retaliated against her for filing a Charge of discrimination with the EEOC. The plaintiff has also asserted claims for slander and tortious interference with a contractual relationship based on a telephone call allegedly placed by a Block employee to the plaintiff's new employer.

The defendant has asserted counterclaims against the plaintiff for breach of contract, misappropriation of trade secrets, tortious interference with prospective business advantage, and breach of duty of loyalty. The defendant alleges that the plaintiff wrongfully solicited and performed work for former Block clients at her new place of employment.

The defendant has moved for summary judgment on all counts of the complaint. The defendant has also moved for summary judgment on its counterclaim for breach of contract. The Court will grant the defendant's motions for summary judgment on all claims except the plaintiff's claim of slander.

I. FACTS

Viewing the evidence in the light most favorable to the plaintiff, the Court finds the following facts.[1]

A. Block's Employment Contracts and Non-Compete Covenant

The plaintiff began working for the defendant in 1988 pursuant to a series of seasonal employment contracts. The

[1] On a motion for summary judgment, a court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment is proper if the pleadings and other evidence on the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2006).

plaintiff signed a new contract in November or December of each year. She did not read any of the contracts before signing them, and she did not receive copies of the signed contracts until the following February or March. On one occasion, the plaintiff asked a district manager whether she could take the contract home to read. He refused her request. 1/5/06 Pl. Dep. at 20, 165;[2] Answer to Countercl. ¶ 7; 2/16/05 Pl. Dep. at 34-35.[3]

The plaintiff last worked as a tax preparer for the defendant at its Upper Darby, Pennsylvania, office during the 2002-2003 tax season. Her last contract with the defendant was dated November 11, 2002. It provided that the plaintiff would work as a Senior Tax Advisor in the defendant's Philadelphia District 5 until April 16, 2003. 1/5/06 Pl. Dep. at 21; Answer to Countercl. ¶¶ 7, 14; Emp. Agmt. ¶ 1.[4]

The contract contained the following "Noncompetition Covenant":

> Associate covenants that for two (2) years following the voluntary or involuntary termination of Associate's employment (such period to be extended by any period(s) of violation), Associate will not, directly or

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[2] Excerpts of the plaintiff's deposition taken on January 5, 2006, are attached to the defendant's motion for summary judgment on plaintiff's claims as Exhibit 1 and cited herein as "1/5/06 Pl. Dep. at __."

[3] Excerpts of the plaintiff's deposition taken on February 16, 2005, are attached to the defendant's motion for summary judgment on its counterclaim for breach of contract as Exhibit 3 and cited herein as "2/16/05 Pl. Dep. at __."

[4] A copy of the plaintiff's employment agreement with the defendant is attached to the defendant's motion for summary judgment on plaintiff's claims as Exhibit 2 and cited herein as "Emp. Agmt. ¶ __."

> indirectly, provide any of the following services to any of the Company's Clients: (1) prepare tax returns, (2) file tax returns electronically, or (3) provide bookkeeping or any other alternative or additional service that the Company provides within the Associate's district of employment. Company Clients are defined as (i) every person or entity whose federal or state tax return was prepared or electronically transmitted by the Company in the Associate's district of employment during the 2002 or 2003 calendar year . . . .

Emp. Agmt. ¶ 11.

The contract provided that Block would be entitled to seek injunctive relief and liquidated damages, plus costs and attorney's fees, for any breach of the Noncompetition Covenant. Emp. Agmt. ¶ 14.

B. Enforcement of Block's Employee Dress Code

Block has an employee dress code, which calls for female employees to wear business suits, dresses, skirts, dress-type slacks with blouses, or "H&R Block 'approved' apparel." Assoc. Appearance Policy.[5]

In January of 2002, Jeff Salyards ("Salyards"), the plaintiff's district manager and supervisor, verbally reprimanded her for wearing what he believed to be a T-shirt. Salyards verbally reprimanded her again when she wore the same shirt on April 2, 2002. When the plaintiff wore the same shirt in a different color on April 5, 2002, Salyards told her to go home.

[5] A copy of the defendant's associate appearance policy is attached to the defendant's motion for summary judgment on plaintiff's claims as Exhibit 4 and cited herein as "Assoc. Appearance Policy."

The following day, he issued the plaintiff a Corrective Action Form for violating Block's dress code. 4/6/02 Corr. Action.[6]

During the April 2, 2002, reprimand, Salyards told the plaintiff that she could not wear T-shirts because they made her breasts look too big. The plaintiff complained about Salyards' comment to Patricia Armstrong ("Armstrong"), Block's Regional Human Resources Manager. EEOC Charge.[7]

In January of 2003, the plaintiff asked Salyards whether she could wear a "company approved" T-shirt with the H&R Block logo it. Salyards responded that she could not wear the T-shirt, even though it was company approved, because her breasts were too big. The plaintiff called Block's corporate headquarters to complain about the refusal. Armstrong responded by letter on January 7, 2003. In the letter, Armstrong reiterated the company's dress code, but she did not mention the plaintiff's complaints about Salyards. She merely stated that supervisors have "authority to determine whether the appearance of each associate meets Company standards" and that the plaintiff

[6] A copy of the Corrective Action Form that was issued to the plaintiff on April 6, 2002, is attached to the defendant's motion for summary judgment on plaintiff's claims as Exhibit 6 and cited herein as "4/6/02 Corr. Action."

[7] A copy of the plaintiff's EEOC charge of discrimination form is attached to the defendant's motion for summary judgment on plaintiff's claims as Exhibit 8 and cited herein as "EEOC Charge."

should contact Salyards with any further questions about the dress code. EEOC Charge; 1/7/03 Letter from Armstrong to Perry.[8]

C. The Plaintiff's Termination

The defendant also has a confidentiality policy, which prohibits employees from taking home client files "without the Company's prior written authorization." Confident. Policy.[9]

On or around April 15, 2003, the plaintiff took home a client file to give to another Block tax preparer who had more expertise on the client's issue. The plaintiff was aware of the defendant's confidentiality policy, but asked and received verbal permission from her office manager, Michelle Mazza ("Mazza"), to take the file home. The plaintiff kept the file in her car for approximately one week because she could not reach the other tax preparer. 1/5/06 Pl. Dep. at 77-83.

Salyards terminated the plaintiff on April 22, 2003. The Corrective Action Form for the termination states that the plaintiff was being fired for taking home client information. 4/22/03 Corr. Action.[10]

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[8] A copy of Armstrong's January 7, 2003, letter to Perry is attached to the plaintiff's complaint as Exhibit B and cited herein as "1/7/03 Letter from Armstrong to Perry."

[9] A copy of the defendant's confidentiality and privacy policies is attached to the defendant's motion for summary judgment on plaintiff's claims as Exhibit 10 and cited herein as "Confident. Policy."

[10] A copy of the Corrective Action Form that was issued to the plaintiff on April 22, 2003, is attached to the plaintiff's complaint as Exhibit C and cited herein as "4/22/03 Corr. Action."

D. The Plaintiff's New Employment

Sometime after August of 2003, the plaintiff went to work for the defendant's competitor, Jackson Hewitt, at an office located two stores down from her former Block office. From January 1, 2004, to December 31, 2005, while employed at Jackson Hewitt, the plaintiff performed 195 tax returns for 150 individuals who had been her clients at Block during the 2002 and 2003 tax years. The plaintiff admits that "some of the clients she serviced at Jackson Hewitt were also persons she had serviced while employed by Block." 1/5/06 Pl. Dep. at 9; 2/16/05 Pl. Dep. at 41-42; Cheng Decl. ¶¶ 2-5;[11] Opp. to Mot. for Summ. J. on Countercl. at 4.

E. The EEOC Charge and Subsequent Events

The plaintiff filed a Charge of Discrimination based on sex and age with the EEOC on January 22, 2004. EEOC Charge.

On February 5, 2004, the defendant's counsel, Denise Howard ("Howard"), wrote a letter to Loretta DeCample ("DeCample") at Jackson Hewitt, informing DeCample that the plaintiff was contractually prohibited from competing with Block for two years after her termination. Howard also sent a cease-

[11] A copy of Thomas C. Cheng's declaration is attached to the defendant's motion for summary judgment on its claim for breach of contract as Exhibit 13 and cited herein as "Cheng Decl. ¶ __."

and-desist letter to the plaintiff on February 11, 2004. 2/5/04 Letter from Howard to DeCample;[12] 2/11/04 Letter from Howard to Perry.[13]

The plaintiff alleged in her deposition that in March of 2004, "Angela Costa, who worked at H&R Block at the time, called Cookie Devlin at Jackson Hewitt and told her not to trust [the plaintiff; the plaintiff] stole all the computers out of [her previous H&R Block office.]" The plaintiff alleged that she was made aware of this accusation when Devlin "called [her] up and asked [her] who this Angela Costa is that she's talking about [the plaintiff] that said these things [sic]." The plaintiff further alleged in her deposition that two other Block employees, Virginia Depaulis and Dave MacIntyre, subsequently informed the plaintiff that Costa had said that the plaintiff stole all the computers from Block's office. 1/5/06 Pl. Dep. at 65-66

On November 5, 2004, the defendant sued the plaintiff in state court for breach of the Noncompetition Covenant in her last employment contract with Block. Def. St. Ct. Compl.[14]

The plaintiff filed this lawsuit on December 30, 2004.

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[12] A copy of Howard's February 5, 2004, letter to DeCample is attached to the plaintiff's complaint as Exhibit F and cited herein as "2/5/04 Letter from Howard to DeCample."

[13] A copy of Howard's February 11, 2004, letter to Perry is attached to the plaintiff's complaint as Exhibit E and cited herein as "2/11/04 Letter from Howard to Perry."

[14] A copy of the defendant's state court complaint against the plaintiff is attached to the plaintiff's complaint as Exhibit H and cited herein as "Def. St. Ct. Compl."

II. ANALYSIS OF THE COMPLAINT

The defendant has moved for summary judgment on the plaintiff's sex and age discrimination and retaliation claims on the grounds that they are time-barred, unexhausted, and/or unsupported by the record. The defendant has also moved for summary judgment on the plaintiff's slander and tortious interference claims on the ground that the plaintiff has not submitted any evidence to support these allegations. The Court finds that the defendant is entitled to summary judgment on the plaintiff's discrimination, retaliation, and tortious interference claims, but not on her claim of slander.

A. Count One – Age and Sex Discrimination

In count one of the complaint, the plaintiff alleges that the defendant discriminated against her on the basis of age and sex when (i) Salyards made comments about the plaintiff's breasts, (ii) Salyards enforced the dress code unequally against her, and (iii) the defendant failed to address the plaintiff's complaints about Salyards' conduct. Compl. ¶¶ 24-26. The defendant is entitled to summary judgment on count one because the plaintiff did not file a timely charge of discrimination with the EEOC relating to these allegations.

To pursue a claim under Title VII or the ADEA, a plaintiff must file an EEOC Charge alleging such discrimination within 300 days of the discriminatory act. See 42 U.S.C. § 2000e-5(e) (2006) (Title VII); see 29 U.S.C. § 626(d) (2006)

(ADEA); Watson v. Eastman Kodak Co., 235 F.3d 851, 854 (3d Cir. 2000).

Here, the plaintiff filed her EEOC Charge on January 22, 2004. The plaintiff is therefore barred from pursuing a claim under Title VII or the ADEA based on any discriminatory acts that occurred before March 28, 2003. The last act of age and sex discrimination alleged in count one -- the defendant's failure to respond to the plaintiff's complaints about Salyards' comments -- occurred in January of 2003,[15] more than 300 days before the plaintiff filed her EEOC Charge.[16]

The plaintiff argues that her EEOC Charge was timely because the earlier acts of discrimination were part of a continuing violation, culminating in her termination. Under the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), however, the plaintiff's discrimination claims are based on discrete acts that cannot be aggregated with later acts to survive a time-bar.

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[15] On January 7, 2003, Armstrong sent a letter to the plaintiff stating that supervisors have "authority to determine whether the appearance of each associate meets Company standards" and that the plaintiff should contact Salyards with any further questions about the dress code. 1/7/03 Letter from Armstrong to Salyards. These statements were sufficient to put the plaintiff on notice that the defendant had no intention of addressing her complaints any further.

[16] The defendant did file the EEOC charge within 300 days of her termination, but she has not alleged that the termination was an act of age or sex discrimination. Count one of the complaint alleges discrimination only with regard to Salyards' comments, his unequal enforcement of the dress code, and Block's failure to respond. Compl. ¶¶ 24-26.

In Morgan, the plaintiff brought suit under Title VII for race discrimination based on several alleged acts, some of which occurred more than 300 days before the plaintiff filed his EEOC Charge. The district court granted summary judgment to the defendant on all incidents that occurred more than 300 days before the EEOC Charge was filed, but the United States Court of Appeals for the Ninth Circuit reversed. Id. at 104-108. The Court of Appeals reasoned that the district court should have considered all discriminatory or retaliatory acts that were plausibly or sufficiently related to an act that fell within the 300-day period because such acts were part of a continuing violation. Id. at 114.

The Supreme Court rejected the Court of Appeals' reasoning. The Supreme Court held that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act" and is "not actionable if time barred, even when [it is] related to acts alleged in timely filed charges." Id. at 113; accord O'Connor v. City of Newark, 440 F.3d 125, 127 (3d Cir. 2006). The Court then went on to provide guidance as to what constitutes a "discrete" act. See Morgan, 536 U.S. at 114; O'Connor, 440 F.3d at 127. The Court explained that a "discrete" act is easy to identify because each "discrete" act constitutes a separate, actionable "unlawful employment practice." See Morgan, 536 U.S. at 114. The Court then provided a non-exhaustive list of "discrete" acts, which included termination, failure to promote, denial of transfer, and refusal to hire. See id. The

United States Court of Appeals for the Third Circuit has observed that wrongful suspension, wrongful discipline, denial of training, and wrongful accusation also fall into this category. See O'Connor, 440 F.3d at 127.

Applying Morgan to the present case, the Court concludes that the discriminatory acts alleged in count one are all "discrete" acts and therefore cannot be aggregated with any timely acts under a continuing violation theory. Like the "discrete" acts enumerated in Morgan and O'Connor, each act of alleged discrimination in count one constitutes a separate, actionable unlawful employment practice. Furthermore, all the acts alleged in count one are either among the non-exhaustive list of "discrete" acts enumerated in Morgan and O'Connor or are very similar to such actions. Indeed, a review of the facts in the Court of Appeals' decision in Morgan shows that one of the "discrete" acts found to be time-barred was the defendant's alleged failure to respond to the plaintiff's complaints of discrimination. See Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1011 (9th Cir. 2000), rev'd 536 U.S. 101 (2002).

B. Count 2 – Retaliation

In count two of the complaint, the plaintiff alleges that the defendant violated Title VII by unlawfully retaliating against her for engaging in various protected activities. First, the plaintiff alleges that the defendant terminated her in retaliation for her lodging complaints of sex and age

discrimination with Block's corporate headquarters. Compl. ¶ 28. Second, the plaintiff alleges that the defendant sought to enforce a provision of its employment contract that it does not typically enforce in retaliation for the plaintiff's filing an EEOC Charge. Compl. ¶ 29. And third, the plaintiff alleges that the defendant, through Costa, made baseless accusations about the plaintiff in retaliation for the plaintiff's filing an EEOC Charge. Compl. ¶ 30. The defendant argues that it is entitled to summary judgment on the retaliation claims because the plaintiff has failed to exhaust and because the defendant is entitled to judgment on the merits. The Court will grant the defendant's motion with regard to these claims of retaliation.

1. Termination as Retaliation

a. Failure to Exhaust

The defendant argues that the plaintiff did not exhaust administrative remedies with regard to her retaliatory discharge claim because the plaintiff failed to include this allegation in her EEOC Charge. Although this is a very close question, the Court rejects this argument.

To determine whether a plaintiff has exhausted administrative remedies, a court must examine whether the "acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint [] or the investigation arising therefrom." See Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir.

1984)). Because EEOC charges are most often drafted by individuals who are not well-versed in the art of legal description, the scope of the charge should be construed liberally. See Hicks v. ABT Assoc., Inc., 572 F.2d 960, 965 (3d Cir. 1978).

In the narrative section of her EEOC Charge, the plaintiff spends the first two paragraphs describing the allegedly discriminatory acts relating to Block's dress code, including Salyards' unequal enforcement of the dress code, Salyards' comments about the plaintiff's breasts, and the plaintiff's complaints about Salyards to Block's corporate headquarters. The next paragraph then states "[y]ounger females are allowed to wear revealing clothing and tattoos, tongues and belly button rings and other things, which were are [sic] all in violation of the dress code and these incidents all contributed to my discharge." EEOC Charge.

Although the plaintiff did not specifically refer to retaliation, and the wording of her EEOC Charge is somewhat awkward, her retaliation claim nevertheless falls reasonably within the scope of her Charge. The plaintiff's statement "these incidents all contributed to my discharge" appears to refer to the list of acts enumerated in the first two paragraphs, and not to the alleged non-enforcement of the dress code against younger females. Among the acts alleged in these paragraphs were the plaintiff's complaints about Salyards to Block's corporate headquarters. The plaintiff has therefore alleged that Salyards

terminated her, at least in part, because she complained to Block's corporate headquarters about his allegedly discriminatory conduct. Such an allegation is sufficient to put the EEOC and the defendant on notice of a potential retaliation claim.

This decision is consistent with the decisions of other district courts in this circuit. See, e.g., Fugarino v. Univ. Serv., 123 F. Supp. 2d 838, 841-42 (E.D. Pa. 2000) (finding that a retaliation claim could "reasonably be expected to grow out of" the plaintiff's EEOC Charge, which alleged that the defendant discriminated against her in violation of Title VII, failed to address her complaints about being sexually harassed, and later fired her without explanation); see also, Hartwell v. Lifetime Doors, Inc., No. Civ.A. 05-2115, 2006 WL 381685, at *18 (E.D. Pa. Feb. 16, 2006) (finding that the plaintiff's retaliation claim was fairly within the scope of the plaintiff's prior EEOC Charge, which stated, "I was fired on March 26, 2004, after filing a discrimination charge with the EEOC dated March 26, 2004").

b. Merits

The defendant argues that it is entitled to summary judgment on the plaintiff's claim for retaliatory discharge because (i) the plaintiff has not alleged a causal connection between her complaints to Block's corporate headquarters and her termination, and (ii) the plaintiff has failed to raise a genuine issue of material fact as to whether Block's articulated reason for terminating her was pretextual.

A "pretext" claim of unlawful retaliation under Title VII follows the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). Under this framework, a plaintiff must first establish a prima facie case of retaliation. Id. If the plaintiff succeeds, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its actions. Id. at 920 n.2. The defendant's burden at this stage is relatively light: the defendant must simply articulate a nondiscriminatory reason for the discharge; it need not prove that the articulated reason actually motivated the discharge. Id. Should the defendant carry this burden, the plaintiff must then convince the fact-finder both that the reason was false and that the discrimination was the real reason. Id.

(1) Prima Facie Case of Retaliation

To establish a prima facie case of retaliation under Title VII, the plaintiff must tender evidence that (i) she engaged in a protected activity, (ii) she subsequently suffered an adverse employment action, and (iii) there was a causal connection between her engaging in the protected activity and the

adverse employment action.[17] Moore v. City of Philadelphia, 461 F.3d 331, 341-42 (3d Cir. 2006).

The United States Court of Appeals for the Third Circuit has noted that when examining the issue of causation, courts have tended to focus on two factors: (i) the temporal proximity between the protected activity and the alleged discrimination, and (ii) the existence of a pattern of antagonism in the intervening period. See Jensen v. Potter, 435 F.3d 444, 450 (3d Cir. 2006).

Timing alone raises the requisite inference of causation when it is "unusually suggestive" of retaliatory motive. Id. For example, in Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989), the court found that the defendant had demonstrated the requisite causal link when the discharge occurred just two days after the plaintiff had engaged in the protected activity. Id. at 708. To be "unusually suggestive" of retaliatory motive, however, the temporal proximity must be immediate. See, e.g., Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 760-61 (3d Cir. 2004). In Williams, the court found that a two-month lapse between the plaintiff's engaging in a protected activity and his termination was

[17] It is undisputed that the plaintiff's complaints to Block's headquarters about Salyards' alleged discriminatory comments constituted a protected activity. See Barber v. CSX Distrib. Serv., 68 F.3d 694, 702 (3d Cir. 1995). It is also undisputed that Block's termination of the plaintiff constituted an adverse employment action. Caver v. City of Trenton, 420 F.3d 243, 256 n.10 (3d Cir. 2005).

insufficient, by itself, to raise the requisite inference of causation. Id.

When temporal proximity is lacking, courts often look to the intervening period for a pattern of antagonism or other evidence of retaliatory animus. Jensen, 435 F.3d at 450. For example, in Robinson v. Southeastern Pennsylvania Transportation Authority, 982 F.2d 892 (3d Cir. 1993), the court found the requisite pattern of antagonism to demonstrate causation where the plaintiff was subjected to a "constant barrage of written and verbal warnings, inaccurate point totalings, and disciplinary action, all of which occurred soon after plaintiff's initial complaints and continued until his discharge." Id. at 895.

Even if both temporal proximity and a pattern of antagonism are lacking, a plaintiff may nevertheless be able to demonstrate causation if the proffered evidence, looked at as a whole, raises an inference of causation. Jensen, 435 F.3d at 450. In Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173 (3d Cir. 1997), the court explained that the element of causation necessarily involves an inquiry into the motives of the employer and is therefore highly fact-specific. Id. at 178. When there may be valid reasons why the adverse employment action was not taken immediately after the protected activity, the absence of immediacy between the cause and effect does not disprove causation. Id.

In the present case, the plaintiff has failed to demonstrate a causal connection between her complaints to Block's

corporate headquarters and her subsequent termination. The plaintiff's causation argument relies solely on the fact that her termination occurred "a mere fifteen weeks" after she received Armstrong's January 7, 2003, letter, which indicated that Block would not pursue her claims of discrimination against Salyards any further. Opp. to Mot. for Summ. J. on Pl. Claims at 9-10. This time interval, standing alone, is not "unusually suggestive" of retaliatory motive. See Williams, 380 F.3d at 760-61 (finding that an eight-week interval between the plaintiff's engaging in a protected activity and his termination was insufficient, by itself, to raise the requisite inference of causation). Furthermore, the plaintiff submits no evidence of a pattern of antagonism that ensued after she complained about Salyards' comments to Block's corporate headquarters. Indeed, the plaintiff submits no evidence whatsoever of retaliatory motive other than the temporal proximity of her complaints to her termination. The evidence, looked at as a whole, does not raise the requisite inference of causation.

(2) Pretext

Because the Court finds that the plaintiff has failed to make out a prima facie case for retaliatory termination, it will not reach the merits of the plaintiff's argument that she has raised a genuine issue of material fact with regard to pretext.

2. The Cease-and-Desist Letters, Costa's Call, and the State Court Litigation as Retaliation

The defendant argues that it is entitled to summary judgment on these claims because the plaintiff failed to exhaust administrative remedies. The plaintiff responds by arguing that she should be excused from exhausting these claims because they fall within the scope of her EEOC Charge, which was pending when these acts occurred.

To determine whether a plaintiff will be excused from exhausting claims arising from discriminatory actions taken after the filing of an EEOC charge, a court must examine whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC charge or the investigation arising therefrom. Waiters, 729 F.2d at 237. In Robinson v. Dalton, 107 F.3d 1018 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit clarified that in announcing this test, it had not adopted a per se rule that all allegations of retaliation that occur during the pendency of an EEOC complaint fall within the scope of that complaint. Id. at 1024. Indeed, the court specifically rejected the rule adopted in other circuits under which "all claims of 'retaliation' against a discrimination victim based on the filing of an EEOC complaint are 'ancillary' to the original complaint, and [] therefore no further EEOC complaint need be filed." Id. (rejecting Gupta v. East Tex. State Univ., 654 F.3d 411, 413-14 (5th Cir. 1981)).

Courts should instead "examine carefully the prior pending EEOC complaint and the unexhausted claim[s] on a case-by-case basis before determining that a second complaint need not have been filed." Id. Factors that the district court may consider in making this determination include (i) whether the prior EEOC complaint alleged the same retaliatory intent inherent in the unexhausted claims, (ii) whether the subject matter of the prior EEOC complaint was used as a basis for the retaliatory action in the unexhausted claims, and (iii) whether the EEOC should have been put on notice of the plaintiff's unexhausted claims and therefore should have investigated them. See id. at 1026.

In the present case, the plaintiff claims that after she filed her EEOC Charge, the defendant unlawfully retaliated against her (i) when Block's counsel sent letters to the plaintiff and to Jackson Hewitt stating that Block intended to enforce restrictive provisions of its employment contract that it does not typically enforce, (ii) when Costa called Jackson Hewitt and accused the plaintiff of theft, and (iii) when Block initiated state court proceedings against Perry.

None of these claims falls fairly within the scope of the EEOC Charge. The Charge referred almost exclusively to the allegedly discriminatory conduct relating to Block's enforcement of its dress code, including Salyards' comments about the plaintiff's breasts, his unequal enforcement of the dress code, and the plaintiff's unredressed complaints to Block's corporate

headquarters. As explained above, the Charge made only an indirect reference to retaliation when it stated "these incidents all contributed to my discharge." EEOC Charge. Although this fleeting reference to retaliation may be sufficient to exhaust the plaintiff's retaliation claim relating to an incident recited in the Charge itself, it is insufficient to put the EEOC on notice that it should investigate any further claims of retaliation. Furthermore, the plaintiff has presented no evidence that she amended, or even attempted to amend, her Charge to include these post-Charge acts of retaliation.

The plaintiff's claims also did not fall within the investigation arising from her EEOC Charge. As explained at oral argument, the EEOC dismissed the plaintiff's claims based solely on her questionnaire answers and the EEOC Charge itself. Tr. at 31.[18] Indeed, the defendant initiated state court proceedings against the plaintiff one month after the EEOC closed its investigation. The plaintiff has therefore failed to exhaust administrative remedies on her post-Charge claims of retaliation, and the Court will accordingly enter summary judgment in favor of the defendant on these allegations.

C. Count 3 - Slander

In count three of the complaint, the plaintiff alleges that the defendant slandered her when Costa contacted Devlin at

[18] Oral arguments regarding all pending motions in this case were held on June 2, 2006. The transcript from this hearing is cited herein as "Tr. at __."

Jackson Hewitt and accused the plaintiff of stealing computer equipment from Block. Compl. ¶ 32. The defendant argues that it is entitled to summary judgment because the plaintiff has failed to provide any admissible evidence of the alleged slander.

The United States Court of Appeals for the Third Circuit has repeatedly stated that hearsay statements can be considered on a motion for summary judgment if the statements are capable of being admissible at trial. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993) (citing J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1542 (3d Cir. 1990)); see also Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 63 F.3d 1267, 1275 n.17 (3d Cir. 1995). Only when the out-of-court declarant is either unknown or unavailable will the court refuse to consider the hearsay statements. See Philbin v. Trans Union Corp., 101 F.3d 957, 961 n.1 (3d Cir. 1996) (stating that the hearsay statement of an unknown individual is not capable of being admissible at trial and therefore cannot be considered on a motion for summary judgment).

During her deposition, the plaintiff stated that in March of 2004, "Angela Costa, who worked at H&R Block at the time, called Cookie Devlin at Jackson Hewitt and told her not to trust [the plaintiff; the plaintiff] stole all the computers out of [her previous H&R Block office.]" The plaintiff alleged that she was made aware of this accusation when Devlin "called [her] up and asked [her] who this Angela Costa is that she's talking

about [the plaintiff] that said these things [sic]." The plaintiff further alleged that two other Block employees, Depaulis and MacIntyre, subsequently informed the plaintiff that Costa had said that the plaintiff stole all the computers from Block's office. 1/5/06 Pl. Dep. at 65-66.

Although the allegedly slanderous statements are hearsay in their present form, they are capable of being made admissible at trial through the testimony of either Devlin, Depaulis, MacIntyre, or Costa herself. Nothing on the record suggests that these witnesses will be unavailable at trial. The Court will therefore deny the defendant's motion for summary judgment on the slander claim.

D. Count Four - Tortious Interference with a Contractual Relationship

In count four of the complaint, the plaintiff alleges that the defendant tortiously interfered with her contractual relationship with Jackson Hewitt (i) when it sought to enforce the Noncompetition Covenant of her last employment contract, and (ii) when Costa called Devlin and accused the plaintiff of theft. Compl. ¶ 34. The defendant argues that it is entitled to summary judgment on this claim because the defendant has failed to produce any evidence that she suffered pecuniary harm. The Court will grant the defendant's motion with regard to this claim.

The elements of tortious interference under Pennsylvania law are: "(i) the existence of a contractual . . . relation between the complainant and a third party; (ii)

purposeful action on the part of the defendant, specifically intended to harm the existing relation . . .; (iii) the absence of privilege or justification on the part of the defendant; and (iv) the occasioning of actual legal damages as a result of the defendant's conduct." Crivelli v. Gen. Motors Corp., 215 F.3d 386, 394 (3d Cir. 2000). The damages element of a tortious interference claim requires a plaintiff to prove "actual pecuniary loss flowing from an alleged interference with contract." Shiner v. Moriarty, 706 A.2d 1228, 1239 (Pa. Super. Ct. 1998) (stating that although "non-pecuniary harms are recoverable in an intentional interference action, such an action cannot be maintained in the absence of pecuniary loss flowing from the interference").

To the extent that the plaintiff's tortious interference claim is based on the defendant's enforcement of the Noncompetition Covenant of Block's employment agreement, the claim fails because the provisions themselves are evidence that the defendant's "interference" was privileged and justified. As explained in Part III below, the plaintiff's argument that the Noncompetition Covenant is unenforceable is not persuasive.

To the extent that the tortious interference claim is based on Costa's call, the claim fails because the plaintiff has failed to submit any evidence that she has suffered any pecuniary losses as a result of such action. The plaintiff testified at her deposition that, to the best of her knowledge, the call did not cause her to lose any clients, any money, or any benefits of

employment at Jackson Hewitt. 1/5/06 Pl. Dep. at 67-68. The plaintiff did testify that she was "upset and embarrassed" by the call, id. at 67, but, as noted above, Pennsylvania law does not recognize tortious interference claims based solely on emotional distress. Shiner, 706 A.2d at 1239.

III. ANALYSIS OF THE COUNTERCLAIM

The defendant has moved for summary judgment on its counterclaim for breach of contract based on the defendant's violation of the Noncompetition Covenant. In response, the plaintiff does not argue that the Noncompetition Covenant is unenforceable because it places unreasonable restraints on the employee. Nor does the plaintiff argue that she did not violate the Noncompetition Covenant. The plaintiff instead contends that the entire employment agreement is unenforceable because (i) the plaintiff did not read the contract before signing it, and (ii) the plaintiff did not receive consideration in exchange for entering into the Noncompetition Covenant. The Court will grant the defendant's motion for summary judgment.

Under both Missouri law and Pennsylvania law,[19] a plaintiff who alleges breach of contract must prove: (i) the existence of a contract; (ii) the rights and obligations of the respective parties, (iii) a breach of a duty imposed by the contract; and (iv) resultant damages. Howard Constr. Co. v. Bentley Trucking, Inc., 186 S.W.3d 837, 844 (Mo. Ct. App. 2006); see Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003) ("Pennsylvania law requires that a plaintiff seeking to proceed with a breach of contract action must establish '(i) the existence of a contract, including its essential terms, (ii) a breach of a duty imposed by the contract[,] and (iii) resultant damages.'").

The defendant has submitted sufficient undisputed evidence to support its claim for breach of contract. First, the defendant has submitted a signed copy of the employment agreement that governed the plaintiff's employment with Block for the 2002-2003 tax season. The contract contains the following Noncompetition Covenant:

> Associate covenants that for two (2) years following the voluntary or involuntary termination of Associate's employment (such period to be extended by any period(s) of violation), Associate will not, directly or

[19] The contract contains a choice-of-law provision calling for the application of Missouri law. The plaintiff contests the validity of the contract, and therefore argues that Pennsylvania law should apply to the present dispute. The Court need not, and should not, determine which state's law to apply because both call for the same result. Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 462 (3d Cir. 2006) ("[W]here the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a 'false conflict,' and the Court should avoid the choice-of-law question.").

> indirectly, provide any of the following services to any of the Company's Clients: (1) prepare tax returns, (2) file tax returns electronically, or (3) provide bookkeeping or any other alternative or additional service that the Company provides within the Associate's district of employment. Company Clients are defined as (i) every person or entity whose federal or state tax return was prepared or electronically transmitted by the Company in the Associate's district of employment during the 2002 or 2003 calendar year . . . .

Emp. Agmt. ¶ 11.

The defendant has also supplied portions of the plaintiff's deposition where she admits to preparing the tax returns for some of her former Block clients while she worked at Jackson Hewitt in 2004. 1/5/06 Pl. Dep. at 144-45. This action constitutes a breach of the Noncompetition Covenant. And finally, the defendant has submitted the declaration of Thomas Cheng ("Cheng"), who compared the listing of paid returns prepared by the plaintiff at Jackson Hewitt in 2004 and 2005 with the listing of paid returns prepared by the plaintiff at Block during the 2002 and 2003 tax seasons. According to Cheng, from January 1, 2004, to December 31, 2005, while employed at Jackson Hewitt, the plaintiff performed 195 tax returns for 150 individuals who had been her clients at Block during the 2002 and 2003 tax years. This loss of business is sufficient to demonstrate damages resulting from the plaintiff's breach of contract.

Neither Missouri law nor Pennsylvania law supports the defendant's contention that she cannot be bound by a contract she did not read. Absent proof of fraud, a party is bound by a

contract that he or she has signed but did not read. See Sanger v. Yellow Cab Co., 486 S.W.2d 477, 481 (Mo. 1972) (citing Higgins v. Am. Car Co., 22 S.W.2d 1043, 11044 (Mo. 1929) ("[I]t is the duty of every contracting party to learn and know its contents before he signs and delivers it. If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party.")); see Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983) ("In the absence of proof of fraud, failure to read the contract is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.").

The plaintiff has not put forth any evidence that the defendant induced her through any fraud or misrepresentation to sign the 2002 contract, or any previous contract, without reading it first. In her deposition, the plaintiff alleged that the defendant did not gave her copies of the signed contracts until three or four months after she signed them, and that on one occasion several years ago, a supervisor refused to give her permission to take a contract home to review. The plaintiff has not, however, alleged that she asked for a copy of any contract she signed, nor did she ask to take the 2002 contract home to review. Furthermore, the plaintiff has not claimed that the defendant prevented her from reading any of the contracts in the office before signing them, misrepresented the contents of any of

the contracts, or somehow tricked her into thinking that she did not need to read the them. Indeed, the plaintiff has admitted that she never asked Block what would happen if she wanted to read the contracts before signing them, or say that she did not want to sign the contracts. 2/16/05 Pl. Dep. at 34-36.

The plaintiff's argument that the Noncompetition Covenant is unenforceable for lack of consideration is equally unavailing. Under both Missouri law and Pennsylvania law, courts have enforced non-compete covenants that are ancillary to an employment relationship. Reed, Roberts Associates, Inc. v. Bailenson, 537 S.W.2d 238, 241 (Mo. App. 1976) (stating that the employer's agreement to hire the employee and pay him a salary was adequate consideration for employee's agreement to perform services and refrain from competing with employer for three years after termination); John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc., 369 A.2d 1164, 1168 (Pa. 1977) ("[A] restrictive covenant is enforceable if supported by new consideration, either in the form of an initial employment contract or a change in conditions of employment.").

In the present case, the plaintiff received consideration in the form of employment and salary in exchange for her agreement to the terms of the employment contract, which contained the Noncompetition Covenant. The plaintiff has not disputed the fact that the defendant hired her under a new employment contract with a specified term each year. The plaintiff has also failed to dispute the fact that Block was not

obligated to rehire her in any given year. The plaintiff argues only that she did not receive adequate consideration because Salyards unilaterally reduced her compensation by taking clients away from her in 2002-2003. The plaintiff does not, however, point to any provision in the contract guaranteeing that she will have or be able to keep a certain number of clients.

The Court will accordingly enter summary judgment in favor of the defendant on its counterclaim for breach of contract.

An appropriate Order follows.

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

DONNA PERRY, Plaintiff and Counter-defendant v. H&R BLOCK EASTERN ENTERPRISES, INC., Defendant and Counter-claimant	: : : : : : : : : :	CIVIL ACTION NO. 04-6108

ORDER

AND NOW, this 27th day of March, 2007, upon consideration of the defendant and counter-claimant's Motion for Summary Judgment on Plaintiff's Claims (Doc. No. 49) and Motion for Summary Judgment on its Counterclaim for Breach of Contract (Doc. No. 48), the plaintiff and counter-defendant's oppositions thereto (Doc. Nos. 56 & 57), and after an oral argument on the record on June 2, 2006, IT IS HEREBY ORDERED that:

1. The Motion for Summary Judgment on Plaintiff's Claims is GRANTED in part and DENIED in part for the reasons stated in the memorandum of today's date. The Court will enter summary judgment in favor of the defendant on counts one, two, and four. The Court will not enter summary judgment in favor of the defendant on count three.

2. The Motion for Summary Judgment on the Defendant's Counterclaim for Breach of Contract is GRANTED for the reasons stated in the memorandum of today's date.

BY THE COURT:

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