

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

<b>PEGGY DARDARIS,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	
	:	
	:	
<b>DENTAL ORGANIZATION FOR</b>	:	
<b>CONSCIOUS SEDATION,</b>	:	<b>No. 06-947</b>
<b>Defendant.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**May 3, 2007**

Plaintiff Peggy Dardaris brings this action against her former employer, the Dental Organization for Conscious Sedation (“DOCS”), asserting claims under Title VII of the Civil Rights Act (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), the Pennsylvania Human Relations Act (“PHRA”), the Equal Pay Act (“EPA”), and the Pennsylvania Wage Payment and Collection Law (“PWPCCL”). Presently before the Court is Defendant’s motion for summary judgment. For the reasons discussed below, Defendant’s motion is granted in part and denied in part.

**I. BACKGROUND**

This action stems from events occurring throughout Plaintiff’s three-year employment with DOCS. Because the facts are largely contested by the parties, the Court does not enumerate the universe of facts submitted by the parties.

In February 2001, Plaintiff, a fifty-one year old woman, was hired by DOCS, a company that provides educational services to dental professionals in the area of oral conscious sedation. (Def.’s

Mot. for Summ. J. [hereinafter Def.’s Mot.] ¶¶ 1, 3.) She was initially employed in the Membership Services department with a starting salary of \$15.50 per hour. (*Id.* ¶¶ 3-4.) Her responsibilities included handling sales calls, inputting data, and organizing dental seminars. (*Id.* ¶ 7.) Not long after Plaintiff started working, DOCS hired two employees who were significantly younger than Plaintiff – Vanessa Branca and Erin Dimitriou. (*Id.* ¶¶ 8, 10.) Both Branca and Dimitriou assumed tasks for which Plaintiff was responsible, including duties associated with seminar coordination and sales. (*Id.* ¶¶ 8, 10; Pl.’s Resp. to Def.’s Mot. for Summ. J. [hereinafter Pl.’s Resp.] ¶¶ 8, 10.) Plaintiff alleges that DOCS assigned Branca and Dimitriou to Plaintiff’s duties at least in part because “the younger girls [were] better suited to woo the doctors . . . and [were] dressing in a way that would be a little more appealing.” (Def.’s Mot. Ex B (Dardaris Dep., 12/19/06) at 88.)<sup>1</sup>

In mid-2003, Plaintiff requested that Dr. Michael Silverman, President of DOCS, change her position to seminar coordinator. (Def.’s Mot. ¶ 13 & Ex. C (Dardaris Dep., 2/12/07 ) at 45, 85.) Dr. Silverman decided instead to promote Plaintiff to Sales Manager in the Membership Services department, even though Plaintiff had no experience in sales management. (Def.’s Mot. ¶ 13.) As Sales Manager, Plaintiff received commissions from the two other employees in the Sales Department, commissions from her own sales, as well as an hourly rate of \$12.<sup>2</sup> (*Id.* ¶¶ 14, 17.)

In late 2003 and early 2004, Defendant divided the Membership Services department in two, with one branch focused on sales and the other on customer service, and placed a new emphasis on

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<sup>1</sup> In the same vein, Plaintiff avers that Kristi DeSimone, another younger employee hired after Plaintiff, was chosen to make announcements at seminars because she was “spunky” and “vivacious.” (Def.’s Mot. ¶ 55.)

<sup>2</sup> In mid-2003, Defendant changed the pay structure from an hourly rate to a hybrid hourly rate plus commissions. (Def.’s Mot. ¶ 12.) Plaintiff’s salary accordingly went from \$17 per hour to \$12 per hour plus commissions. (*Id.*)

expanding sales. (*Id.* ¶ 22.) Shortly thereafter, Constance Fadigan, Director of DOCS, met with Plaintiff. While the specifics of this meeting are largely disputed, Fadigan told Plaintiff that she was not meeting performance expectations. (*Id.* ¶ 23; Pl.’s Resp. ¶ 23.) Plaintiff, in response, made clear that she was not going to “sell [her] soul” to DOCS. (Def.’s Mot. ¶ 23; Pl.’s Resp. ¶ 23.)

After the meeting, DOCS posted an ad for the Sales Manager position and hired Anthony Corona, a forty-eight year old with managerial experience in both telesales and telemarketing.<sup>3</sup> (Def.’s Mot. ¶ 24.) Corona was apparently operating under the misapprehension that he was hired to manage a fully operational sales force. (*Id.* ¶ 27.) Corona tendered his resignation on his second day of employment, upon realizing that he would have to build his own sales force from the ground up. (*Id.*) DOCS then hired Christopher Weniger, a twenty year old with prior experience in sales. (*Id.* ¶ 28.) Both Corona and Weniger were offered a salary of \$50,000 plus commissions. (*Id.*)

Plaintiff was terminated shortly after Weniger was hired. (*Id.* ¶¶ 33, 35.) According to Dr. Silverman and Fadigan, Plaintiff’s work had been deteriorating and she regularly committed data entry errors; Plaintiff contends that her “deteriorating performance” was never discussed with her and notes that her allegedly subpar performance was never documented in her personnel file. (*Id.* ¶¶ 31-32; Pl.’s Mot. ¶¶ 31-32.)

According to Defendant, despite these problems, Dr. Silverman offered Plaintiff a position in the Customer Services department at a reduced salary, but Plaintiff refused to accept the position

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<sup>3</sup> The parties dispute whether Plaintiff requested an opportunity to speak with Dr. Silverman before the Sales Manager position was posted. (Def.’s Mot. ¶ 24, Ex. I (Fadigan Dep.) at 102 & Ex. C at 92.) Plaintiff suggests that she independently approached Dr. Silverman around this time to discuss a number of other matters including salary, unpaid wages, and her status with DOCS, but never had the opportunity to discuss whether DOCS should advertise the Sales Manager position. (Pl.’s Resp. ¶¶ 22, 66.)

and was terminated.<sup>4</sup> (Def.’s Mot. ¶¶ 33-35.) Plaintiff asserts that she was never offered an alternate position, and that Dr. Silverman approached her multiple times seeking her resignation but eventually just terminated her employment. (*Id.* Ex. C at 98.) Finally, according to Plaintiff, even after her termination and despite her efforts with the Company, certain commissions owed to her by DOCS remain unpaid. (Def.’s Mot. ¶ 37.)

Throughout the course of Plaintiff’s employment at DOCS, she asserts that she was the subject of, and witness to, countless inappropriate sexual comments and behavior. Prior to 2002, Plaintiff endured many uncomfortable encounters with Stewart Briefer, a bookkeeper with DOCS, who regularly put his arms around her and placed his head on her shoulder.<sup>5</sup> (*Id.* ¶¶ 2, 40.) In January 2002, Briefer dropped a jelly donut on his pants and allegedly told the other employees that he wanted Plaintiff to “lick it off.” (*Id.* ¶ 42.) Plaintiff confronted Briefer and told him that his inappropriate behavior, including the unwanted touching, needed to stop. According to Plaintiff, this confrontation began a campaign by Briefer, Fadigan, and Dr. Silverman to force Plaintiff to leave her job. (*Id.* ¶ 57; Pl.’s Resp. ¶ 57.) Plaintiff cites a host of additional events which allegedly evidence this campaign, and which form the basis of Plaintiff’s retaliation claims, which the Court will not recount. (Def.’s Mot. ¶ 58, Pl.’s Resp. ¶ 58.)

Briefer’s behavior was equally inappropriate with other female employees. For example, Briefer allegedly asked one female employee to “be his dummy” during a CPR training; he asked another if she needed lubricant when she was having trouble inserting a disk into her computer.

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<sup>4</sup> Defendant submits that the position offered to Plaintiff was filled by thirty-four year old Nolan Smith at a salary of \$30,000. (Pl.’s Resp. Ex. L (Interrogatory) at 4.)

<sup>5</sup> The parties dispute whether Briefer was employed in a managerial role at DOCS.

(*Id.*) Apart from Briefer’s conduct, Plaintiff alleges that Jason Joyce, an employee in the Sales department, made inappropriate sexual gestures and comments, and exposed himself to Plaintiff and another employee in the workplace. (*Id.* ¶¶ 46-47; Pl.’s Resp ¶¶ 46-47.) The lunchroom conversations at DOCS were regularly inappropriate and saturated with sexual innuendo. (Def.’s Mot. ¶ 49.) Furthermore, Dr. Silverman himself was a source of gender-inappropriate comments. For example, Dr. Silverman purportedly said that Fadigan would never become CEO because she was a woman and could not command respect like a man. (*Id.* ¶ 54.)

Plaintiff alleges age discrimination, gender discrimination, hostile work environment, and retaliation based on Title VII, the ADEA and the PHRA. Plaintiff also asserts claims under the EPA and PWPCCL based on her unpaid commissions.

## **II. STANDARD OF REVIEW**

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party’s evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 258-59. In reviewing the record, “a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party’s favor.” *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

### **III. DISCUSSION**

#### **A. Plaintiff's Equal Pay Act Claim**

The Equal Pay Act prohibits wage differentials in employment based on sex. 29 U.S.C. § 206(d)(1) (2007). More specifically, an employer cannot compensate employees of one sex at a lower rate than it compensates employees of the opposite sex for “equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” *Id.*

Courts consider claims asserted under the EPA under a two-step burden shifting paradigm. First, the plaintiff must demonstrate that employees of the opposite sex were compensated at a different rate for the performance of equal work. *Stanziale v. Jargowski*, 200 F.3d 101, 107 (3d Cir. 2000). Once the plaintiff has made out a prima facie case, the burden shifts to the defendant to demonstrate the applicability of one of the four affirmative defenses listed in the statute. The defendant must show that the unequal wages are the product of: (1) a seniority system; (2) a merit-based system; (3) a system that measures earnings by quantity or quality of production; or (4) any factor other than sex. *Stanziale*, 200 F.3d at 107.

The plaintiff may not rely on job titles or descriptions in establishing an EPA claim; the inquiry is focused on whether actual job performance or job requirements are sufficiently distinct. *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 155 (3d Cir. 1985) (internal citations omitted); *see*

also *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1171 (3d Cir. 1970). “The crucial question on the equal works issue is whether the jobs to be compared have a ‘common core’ of tasks, i.e. whether a significant portion of the two jobs is identical.” *Brobst*, 761 F.2d at 156. Thus, whether two jobs qualify as equal work depends on whether those differing tasks actually make the character or the content of the work substantially different. *Id.*

Plaintiff contends Defendant violated the EPA by hiring Corona and Weniger at \$50,000 plus commission, a salary significantly higher than Plaintiff’s \$12 per hour plus commissions. While there was clearly a salary differential between Plaintiff’s salary and those offered to Corona and Weniger, Plaintiff has not met her burden of demonstrating that her position was substantially similar to the position briefly held by Corona and ultimately filled by Weniger. In fact, the undisputed facts establish that the positions were *not* substantially similar, but rather, that DOCS was looking for a new manager who could both manage and carry out DOCS’s plan for growth, i.e. building a larger Sales department with a new focus on telemarketing.

As an initial matter, Defendant hired an outside consultant to help increase the size of its sales department. (Def.’s Mot. Ex. F at 40.) On the advice of that consultant, DOCS posted an advertisement for a Sales Manager who was interested in building a telephone sales force by hiring, training, and effectively assembling a whole new department.<sup>6</sup> (Def.’s Mot. Ex. U.) After he was hired, Weninger was in fact tasked with hiring new competent staffers; on the other hand, Plaintiff, as Sales Manager, was not authorized to hire or fire employees. (Def.’s Mot. Ex. E (Silverman

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<sup>6</sup> The ad stated: “You will hire and motivate inside sales reps. You will bring them on board, work with us to train them, and get them onto shifts, diligently and productively making outbound calls and taking inbound calls.” (Def.’s Mot. Ex. U (Job Advertisement) at 1.) Although job substance rather than job description is at the heart of the EPA inquiry, the advertisement is indicative of the substance of the position.

Dep., 12/20/06) at 182; Pl.'s Mot. Ex. F (Fadigan Dep, 3/8/07) at 106.) Additionally, while Plaintiff supervised two employees, Weniger, in the newly-founded Sales department, oversaw eleven. (*See* Def.'s Mot. Ex. C at 56; Pl.'s Mot. Ex N (Interrogatory) at 2.)

Finally, the fact that Corona resigned upon discovering that his job would involve building as well as maintaining a sales force further supports the conclusion that the responsibilities associated with growing a sales department are fundamentally different than those associated with simply maintaining a preexisting sales force. (*See* Def.'s Mot. Ex. F at 39 & Ex. I at 103.)

The Court finds it both reasonable and consistent with the EPA that a manager tasked with increasing the size of a department, making substantive changes in how a department accomplishes its goals, and concomitantly managing such modifications would be compensated more than another employee whose responsibilities were fewer. Accordingly, the Court grants Defendant summary judgment on Plaintiff's EPA claim.<sup>7</sup>

#### **B. Plaintiff's Pennsylvania Wage Payment and Collection Law Claim**

The Pennsylvania Wage Payment and Collection Law provides employees with a private remedy to recover past due wages and benefits. *See* 43 PA. CONS. STAT. ANN. § 260.1 *et seq.* (2007); *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997). The PWPCCL "provides a statutory remedy when an employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned." *DeAsensio*

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<sup>7</sup> Plaintiff also includes a separate claim under the Fair Labor Standards Act ("FLSA"). (Compl. ¶¶ 74-79.) In her response to Defendant's motion for summary judgment, she acknowledges that her claim under the EPA and the FLSA are one and the same. (Pl.'s Resp. at 39.) Indeed, the EPA is a subsection of the FLSA. *See, e.g., E.E.O.C. v. Allstate Co.*, 467 U.S. 1232, 1233 (1984). Accordingly, the Court grants Defendant summary judgment on Plaintiff's FLSA claim.

*v. Tyson Foods, Inc.*, 342 F.3d 301, 309 (3d Cir. 2003).

Plaintiff alleges that she stopped receiving sales reports in October 2003 and received inadequate commissions, with numerous unspecified payments missing. (Def.'s Mot. Ex. B at 85.) For example, according to Plaintiff "a day, a whole week, a whole month" of commission sales would be missing from her paychecks. (*Id.*) Further, she claims that she is owed override commissions for the sales of Kristi DeSimone and \$300 for a seminar that she worked. (Pl.s' Resp. at 41.) Defendant has submitted Plaintiff's pay stubs and payroll records showing that Plaintiff regularly received commissions. Defendant also provided a sales report with a handwritten notation "+300 EST; estimate in Memphis." (Def.'s Mot. Ex. O (Pay Stubs), Ex. T (Payroll Ledgers) & Ex. DD (3/17/04 Sales Report).)

Plaintiff's unsupported and general assertions that she is owed certain unidentified commissions are insufficient state a PWPC claim. Plaintiff has failed to highlight for the Court *which* commissions remain unpaid. Defendant submitted all of Plaintiff's pay stubs evidencing the commissions paid out during the relevant period, and Plaintiff has not produced any evidence – employment contract, receipt, or invoice – showing that she was entitled to any specific payments that she did not receive. Her imprecise allegations fail as a matter of law to demonstrate that she was contractually owed commissions for services rendered, that those commissions went unpaid, and the amount, if any, of the unpaid commissions.

Plaintiff similarly fails to provide evidence sufficient to support her claim that she was never paid override commissions based on Kristi DeSimone's sales and that she is owed \$300 for a seminar in Memphis. At most, Plaintiff has shown that DeSimone was an employee in the Sales

department at the time of Plaintiff's termination and that she did not know the amount of DeSimone's sales. (Pl.'s Resp. at 41 & Ex. L Attachment.) Plaintiff has not demonstrated that she was owed money for DeSimeone's sales and the Memphis seminar, or that the money went unpaid. The Court notes that the nucleus of a PWPCl claim is a contractual obligation – either oral, written, or implied – for services rendered. *DeAsensio*, 342 F.3d at 309. Plaintiff has not produced evidence of the basis for a contractual obligation or of the services provided. *See Harding v. Duquesne Light Co.*, 882 F. Supp. 422, 428 (W.D. Pa. 1995). Accordingly, Plaintiff's PWPCl claim fails as a matter of law and the Court grants Defendant summary judgment on this claim.

### **C. Plaintiff's Discrimination & Retaliation Claims**

Genuine issues of material fact preclude disposition of Plaintiff's discrimination and retaliation claims under Title VII, the ADEA, and the PHRA at the summary judgment stage. *See Alvarado v. Montgomery County*, Civ. A. No. 05-5379, 2007 WL 916855, at \*4 (E.D. Pa. Mar. 22, 2007).

Plaintiff has provided sufficient evidence to establish a *prima facie* case of age discrimination, gender discrimination, hostile work environment due to sexual harassment, and retaliation under Title VII, the ADEA, and the PHRA. *See, e.g., Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Ed.*, 470 F.3d 535, 539 (3d Cir. 2006) (“[T]here is a low bar for establishing a *prima facie* case of employment discrimination.”). Under the *McDonnell Douglas* burden shifting framework, which applies to all of Plaintiff's remaining claims, once the plaintiff has established a *prima facie* case of discrimination, the burden shifts to the defendant, to show that he had legitimate non-discriminatory reasons for taking the adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973). Defendants offer multiple

reasons for Plaintiff's discharge, including her deteriorating work performance, her inability and unwillingness to meet new performances goals as Sales Manager, and her refusal to accept an alternate position in lieu of termination. (Def.'s Mot. at 26-28.)

Yet Plaintiff, by her own testimony and by highlighting the lack of documentation supporting Defendant's assertion that her work deteriorated in quality, has offered evidence from which a reasonable jury could find that Defendant's proffered non-discriminatory reasons for terminating her were pretextual. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) (“[T]he non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.”) (internal citations omitted); *see also Ramos-Rosa v. Principi*, Civ. A. No. 03-4955, 2004 WL 1631412, at \*4 (E.D. Pa. July 20, 2004) (“It is within the sole province of the fact finder to weigh the facts and conduct of the parties and to determine whether Defendant's true motivation was in fact discriminatory.”)

As a final matter, the Court rejects Defendant's argument that Plaintiff's hostile work environment claims are time-barred. *See* 42 U.S.C. § 2000e-5(e) (2007) (300 day statute of limitations under Title VII); 43 PA. CONS. STAT. ANN. §§ 959(a), 962 (2007) (180 day statute of limitations under PHRA). Viewing the facts in the light most favorable to Plaintiff as the non-moving party, the Court concludes that a jury could find some events that contributed to the hostile environment occurred within the statutory time period, and therefore “the entire time period of the hostile environment may be considered by [this Court] for the purpose of establishing liability.” *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002).

#### **IV. CONCLUSION**

For the foregoing reasons, the Court grants Defendant summary judgment on Plaintiff's claims brought under the Equal Pay Act and the Pennsylvania Wage Payment and Collection Law. Defendant's motion for summary judgment is denied in all other respects. An appropriate Order follows.

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

**PEGGY DARDARIS,**  
**Plaintiff,**

v.

**DENTAL ORGANIZATION FOR  
CONSCIOUS SEDATION,**  
**Defendant.**

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**CIVIL ACTION**

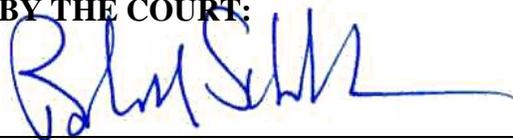
**No. 06-947**

**ORDER**

**AND NOW**, this 3<sup>rd</sup> day of **May, 2007**, upon consideration of Defendant's motion for summary judgment, the response thereto, and for the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion for Summary Judgment (Document No. 13) is **GRANTED in part** and **DENIED in part** as follows:

1. Defendant's motion is **GRANTED** as to Plaintiff's claims under the Fair Labor Standards Act, the Equal Pay Act, and the Pennsylvania Wage Payment and Collection Law. Thus Counts Six, Seven, and Eight are **DISMISSED**.
2. In all other respects, Defendant's motion is **DENIED**.

**BY THE COURT:**



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**Berle M. Schiller, J.**