

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

JANICE ALDERFER : CIVIL ACTION  
 :  
 v. :  
 :  
 NIBCO INC. : NO. 98-6654

MEMORANDUM

Dalzell, J.

October 19, 1999

This is an action for unlawful retaliation under Title VII and the Pennsylvania Human Relations Act, as well as for wrongful discharge for filing a workers' compensation claim under the Pennsylvania Supreme Court's recent decision in Shick v. Shirey. Defendant has moved for summary judgment on all of plaintiff's claims. For the reasons that follow, we will grant defendant's motion and dismiss this action.

Facts

Plaintiff Janice Alderfer began working for defendant Nibco Inc., an Indiana-based manufacturer of plumbing products, in July of 1996. She worked as a UPS shipper in its Kulpsville, Pennsylvania warehouse, and her duties included packing materials for shipping.

As a new Nibco employee, Alderfer was subject to an initial three-month probationary period. During her probationary period, in mid-October of 1996, Brian Annillo, Alderfer's former

supervisor, terminated her.<sup>1</sup> A few days later, Alderfer called Nibco's corporate headquarters in Indiana and reported to Ron Kurz, Nibco's Human Resources Manager, that Annillo had made humiliating sexual comments to or about her. She never submitted a written complaint, but Nibco investigated her charges and, in November of 1996, reinstated her at her former rate of pay with an award of backpay. Within two weeks of her reinstatement, Nibco gave her a raise. Alderfer no longer needed to worry about working with Annillo, because he left Nibco before she returned.

Upon her return to Nibco, Alderfer never discussed the subject of Annillo with Larry Price, the former manager of the Kulpsville warehouse.<sup>2</sup> See Pl.'s Dep. at 203. In fact, Alderfer states that upon her return to the company, no Nibco manager or supervisor, nor anyone else in the company, ever mentioned her complaint against Annillo. See id. at 204-05 ("I didn't talk to anybody else. It was done and over with. It was a closed chapter in my life. It was done and closed.").

Shortly after her return to Nibco, on January 14, 1997, Alderfer fell off a ladder while she was dusting the warehouse doors. She admits that she may have been standing on the fourth rung of the ladder, despite being aware of a warning not to do

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<sup>1</sup> According to Alderfer, Annillo fired her because she was working too slowly. See Pl.'s Dep. at 36-38. She also signed a Termination Memorandum that stated that she had been absent four times in the first ten weeks of her probationary period. See id. ex. 6.

<sup>2</sup> Nibco closed its Kulpsville warehouse in October of 1997.

so. See id. at 86. She fell onto the cement floor, landing on her left side. She went back to work, but when her left wrist and hip began to hurt a half hour after the accident, Price sent her home to rest. The next morning, Alderfer was in much pain, so Price made a doctor's appointment for her. The doctor told her to take the rest of the week off, which she did, and he placed her on light duty, restricting her from all lifting. Nibco provided her with light-duty work (at her normal rate of pay),<sup>3</sup> gave her time off for regular follow-up visits with her doctor, and paid all of her medical bills. Alderfer admits that during her entire time at Nibco, she did not discuss the subject of workers' compensation with anyone and did not seek worker's compensation benefits. See, e.g., id. at 117.

Alderfer was in trouble several times after her return to Nibco. On December 27, 1996, she engaged in "horseplay," a violation of Nibco's company rules as stated in the employee handbook and the Rules of Conduct.<sup>4</sup> She admitted to the horseplay and signed a written warning. See id. at 134-35 and ex. 15. On January 2, 1997, during a meeting with Price and Alderfer's supervisor, Matt Bridi (which was called to discuss Alderfer's performance), she accused a co-worker of speeding on a forklift and almost hitting her. Because no one in the warehouse

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<sup>3</sup> Alderfer's light-duty work consisted of paperwork, inventory, and cleaning.

<sup>4</sup> Specifically, Alderfer removed the operating key from a co-worker's equipment so that he could not return to work after a break. See Pl.'s Dep. at 134-35.

corroborated her story, and because Alderfer changed her story upon further questioning, Bridi found that the account was without merit and prepared an incident report. See, e.g., id. at 137, 139, 143 and ex. 16.

Seven days later, Alderfer made an allegedly serious mistake while filling customer orders--she packed orders for three different customers in one box and then processed it for shipping to a fourth customer. Someone else in the warehouse caught the error, and Alderfer then re-packed it properly. See id. at 148-49. On January 16, Price gave her a verbal warning that he memorialized in a memorandum dated the same day. Part of the memorandum states:

[You] . . . continue to make too many mistakes. Previous errors have been discussed with you and you were counseled to be more careful. You must improve the quality of your work or further corrective action will be taken.

Id. ex. 17.

On January 22, Price placed Alderfer on performance-based probation because of, inter alia, her low efficiency record, packing errors, and inaccurate daily work tallies. See id. at 152. He told her that once her medical restrictions were lifted, her work would have to improve significantly, or she would be terminated. At a meeting that day, Price gave her a memorandum which warned her that: "No further violation of company rules will be tolerated . . . . [F]ailure to meet the aforementioned performance expectations or violation of company

rules may lead to immediate termination of your employment.” Id. ex. 12.

On January 30, eight days after receiving this warning, Alderfer was absent from work. She was aware that the failure to call in an absence violated company rules. See id. at 158. She claims that she called in and told a supervisor, Bob Glose, that she wouldn't be in, but, according to Alderfer, Price questioned everyone on her shift and no one remembered receiving her call. See id. at 162-63. Because he could not substantiate her claim that she had called in her absence, Price suspended Alderfer for three days in early February for violation of the company attendance policy. Price recorded the suspension in a memorandum on February 4 and wrote that “any further violation of your probation may be grounds for the immediate termination of your employment.” Id. ex. 18.

When Alderfer returned to work after her suspension, Price assigned her some cleaning duties. Because part of the area Alderfer was to clean was not ready to be cleaned, she went to a different part of the warehouse to do other work. When Bridi, Alderfer's supervisor, came to where she was working and ordered her to do the cleaning work, she refused. Bridi again ordered her to do the cleaning, and Alderfer became angry, yelled at him, and used the word fuck. When he learned about the incident, Price met with Alderfer, who admitted using the word fuck. See id. at 171-72, 193-94. Because Alderfer's behavior

violated the employee handbook<sup>5</sup> and the posted General Rules of Conduct,<sup>6</sup> Nibco terminated her on February 12, 1997. Ron Kurz, the Human Resources Manager who had reinstated Alderfer in November of 1996, and Kevin King, the National Distribution Manager, made the ultimate decision to terminate her, and Price actually fired her. Her Termination Memorandum identifies violation of the conditions of her probation and insubordination as the reasons for her discharge. See id. ex. 21.

Three weeks after her termination, Alderfer filed a petition for workers' compensation. In December of 1997, she resolved the claim for \$4000.

In December of 1998, Alderfer filed this action, alleging retaliatory discharge in violation of Title VII, 42 U.S.C. § 2000e et seq., and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 et seq. She also alleges wrongful discharge for filing a workers' compensation claim, a new cause of action that the Pennsylvania Supreme Court recently recognized in Shick v. Shirey, 716 A.2d 1231 (Pa. 1998).

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<sup>5</sup> The handbook identifies "cursing a supervisor" as activity that may result in immediate discharge. See id. ex. 1.

<sup>6</sup> The Rules prohibit "insubordination," which is defined as "[f]ailure to follow legit[imate] instructions, orders, and operating procedures[.] Careless workmanship. Refusal to accept reasonable temporary assignment to other duties. Abusive comments to supervisors or others who are delegated authority." Id. ex. 6. According to Nibco's rules, insubordination "could be cause for progressive disciplinary action upto [sic] and including discharge or criminal charges." Id.

## Alderfer's Title VII and PHRA Retaliation Claims<sup>7</sup>

In order to make out a prima facie case for retaliatory discharge,<sup>8</sup> Alderfer must prove that:

1. She engaged in a protected activity;
2. She was discharged after or contemporaneous with the activity; and
3. There is a causal link between the protected activity and the discharge.

Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir. 1991); see also, e.g., Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989).

If Alderfer makes out a prima facie showing of these three factors, the burden shifts to Nibco to "to articulate some legitimate, nondiscriminatory reason for [its conduct]." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)

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<sup>7</sup> Under Fed. R. Civ. P. 56(c), a motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." The moving party bears the burden of proving that there is no genuine issue of material fact in dispute, see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986), and we view all evidence in the light most favorable to the nonmoving party, see id. at 587. When responding to a motion for summary judgment, the nonmoving party "must come forward with specific facts showing there is a genuine issue for trial." Id.; see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

<sup>8</sup> The analysis is the same for claims under Title VII and the PHRA. See, e.g., Harley v. McCoach, 928 F. Supp. 533, 538 (E.D. Pa. 1996); Brennan v. National Tel. Directory Corp., 881 F. Supp. 986, 994 n.5 (E.D. Pa. 1995).

(citation omitted). If Nibco meets this burden of production, the burden shifts back to Alderfer to establish that Nibco's "proffered explanation was false and that retaliation was the real reason for the adverse employment action." Krouse v. American Sterilizer Co., 126 F.3d 494, 501 (3d Cir. 1997) (citations omitted).

#### Alderfer's Prima Facie Case

We find that Alderfer's prima facie case fails because she cannot make out the third Quiroga element, a causal connection between her protected activity and her discharge.

The "protected activity" that Alderfer engaged in was her internal complaint to Kurz, Nibco's human resources manager, about Annillo's harassment. She therefore has satisfied the first element of the prima facie case. She also has made out the second element, because her second discharge occurred after her internal complaint. Because Nibco reinstated Alderfer with back pay after her complaint, and because she gave Nibco more than enough reason to fire her, we find that Alderfer has failed to demonstrate a causal connection between her protected activity and her discharge (or, for that matter, any adverse employment activity that happened to her upon her return to Nibco).

Our Court of Appeals has noted in dicta that a plaintiff may be able to make out an inference of a causal link by demonstrating the temporal proximity between the protected activity and the adverse employment action. See, e.g., Woodson

v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997) (stating that "temporal proximity between the protected activity and the termination is sufficient to establish a causal link"); but see Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 199 n.10 (3d Cir. 1996) ("[T]iming alone will not suffice to prove retaliatory motive.").<sup>9</sup> However, timing must be "unusually suggestive of retaliatory motive before a causal link will be inferred." Krouse, 126 F.3d at 503 (quotation omitted);<sup>10</sup> see also Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997) ("[T]he mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events.").

Here, four months elapsed between Alderfer's protected activity and her discharge. Other circuits have held that a time span of four months is insufficient to create an inference of a causal link between the activity and the discharge. See, e.g., Hughes v. Derwinski, 967 F.2d 1168, 1174 (7th Cir. 1992) (holding that a disciplinary letter issued four months after plaintiff's charge of discrimination was not causally linked to the protected activity); Cooper v. City of North Olmsted, 795 F.2d 1265, 1272

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<sup>9</sup> Our Court of Appeals noted this split in authority in Krouse, see 126 F.3d at 503, but declined to resolve it based on the facts of that case. Krouse involved a time lapse of nineteen months between the protected activity and the alleged retaliation.

<sup>10</sup> To illustrate the concept of "unusually suggestive" timing, our Court of Appeals cited Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), where the plaintiff was fired two days after defendant received notice of his EEOC complaint.

(6th Cir. 1986) (holding that plaintiff's discharge four months after filing a discrimination charge did not create an inference of a causal link). We find these cases persuasive and find that there is nothing "unusually suggestive of a retaliatory motive" in the four-month time span here.

Even if we were to find that this four-month interval created an inference of a causal link, however, the fact that Nibco actually rehired Alderfer immediately after her complaint breaks the chain of causation, as do Alderfer's admissions about her poor job performance.<sup>11</sup> We therefore hold that Alderfer cannot rely on temporal proximity to establish a causal link in this matter.

If there is a lack of temporal proximity, a plaintiff may make out the causal link by producing circumstantial evidence of a pattern of antagonism following the protected activity. See Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997); Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 895 (3d Cir. 1993). Because Nibco rehired Alderfer, awarded her backpay, and gave her a raise two weeks after her return, and because Alderfer admits that Nibco had a reason on each occasion for its discipline of her, we find that she has produced no

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<sup>11</sup> We do not hold that an employer can avoid a retaliation lawsuit simply by rehiring an employee who has engaged in protected activity, only to fire them shortly thereafter, after the causal chain has been successfully broken. Rather, our holding relies on the fact that this plaintiff admitted in her deposition that she violated various Nibco rules and policies, thereby giving Nibco ample reason to terminate her.

evidence of a pattern of antagonism in this matter, and therefore that she cannot establish a causal link.<sup>12</sup>

We therefore hold that Alderfer cannot make out the third element of her prima facie case, and Nibco is thus entitled to summary judgment on Alderfer's Title VII and PHRA claims. Accord Krouse, 126 F.3d at 504 (holding that because defendant rehired plaintiff after his complaint, plaintiff had failed to establish a causal link where nineteen months elapsed between the complaint and the adverse action and no pattern of antagonism was present).

#### Nibco's Proffered Reason is not Pretextual

Even if we were to conclude that Alderfer could make out her prima facie case, we still would grant summary judgment to Nibco because Alderfer has produced nothing that would suggest that Nibco's proffered reason for her termination is pretextual.

In Krouse, our Court of Appeals stated that

[T]o survive a motion for summary judgment in a pretext case, the plaintiff must produce sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action. . . . This is ordinarily done by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or

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<sup>12</sup> Also, Alderfer has presented no evidence that anyone at the Kulpville plant was even aware of her internal complaint. She admitted in her deposition that she never discussed Annillo's treatment of her with Price or with any warehouse manager or supervisor after her reinstatement. This lack of knowledge further suggests the absence of a causal link.

contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.

Krouse, 126 F.3d at 504 (internal quotations omitted).

Nibco cited Alderfer's "insubordination" while on performance-based probation as the reason for her discharge. Alderfer has produced nothing that would suggest that this reason is pretextual. Quite to the contrary, she admits to "cursing out" a supervisor, an act of disobedience that, according to Nibco's written rules and policies, may subject an employee to discharge. She also admits to many other instances of misconduct, ranging from a refusal to comply with orders to horseplay.

Based on her admissions and her lack of evidence of pretext, no reasonable factfinder would deem Nibco's proffered reasons unworthy of credence. We therefore will grant summary judgment to Nibco on this alternative ground.

#### Alderfer's Workers' Compensation Retaliation Claim

In 1998, the Pennsylvania Supreme Court recognized a cause of action for wrongful discharge in retaliation for pursuing a claim for workers' compensation benefits. See Shick v. Shirey, 716 A.2d 1231 (Pa. 1998). Nibco argues that because Alderfer admits that she did not exercise any of her rights under

the Workers' Compensation Act while employed by Nibco,<sup>13</sup> she may not recover under this cause of action. We agree.

There is a dearth of caselaw interpreting Shick, and the Pennsylvania courts have not set forth a model of proof to use in evaluating claims under it.<sup>14</sup> We nevertheless believe that, regardless of the method of proof employed, Alderfer must at a minimum demonstrate that she engaged in protected activity under the Workers' Compensation Act. It is undisputed that Alderfer never even mentioned the possibility of a workers' compensation claim to anyone at Nibco. See, e.g., Pl.'s Dep. at 117. Therefore, she has no remedy under Shick.

Alderfer argues that we should construe Price's act of filing a notice of claim with the Bureau of Workers' Compensation in January of 1997 as "protected activity" attributable to her. Under the facts of Alderfer's case, this would lead to an absurd result that we cannot conceive the Pennsylvania Supreme Court would allow. We would, in effect, be holding that because Nibco fired Alderfer after following its procedures for reporting

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<sup>13</sup> Alderfer did file a workers' compensation claim on March 7, 1997, three weeks after her discharge.

<sup>14</sup> In Shick, the plaintiff's complaint alleged that defendant had informed him that he was being terminated for pursuing a workers' compensation claim. See 716 A.2d at 1232. Because of the procedural posture of the case--a decision on defendant's request for a demurrer--this allegation is akin to direct evidence of a retaliatory motive, since all of the allegations in plaintiff's complaint had to be taken as true. See also Carlson v. SEI Corp., 1999 WL 54526, at \*3 (E.D. Pa. Jan. 28, 1999) (holding that plaintiff who had produced no direct evidence of a retaliatory motive could not recover under Shick).

workplace injuries to the Bureau, it is subject to a claim under Shick. Under this logic, Nibco would be better off had Price not followed the correct procedures and not ensured that Alderfer received medical treatment.

Finally, because we held above that Nibco had more than sufficient reason for firing Alderfer, and because Alderfer has produced no evidence from which a reasonable juror could infer a retaliatory motive on Nibco's part, we would nonetheless grant summary judgement in Nibco's favor even if we were somehow to conclude that she did in fact pursue workers' compensation benefits while still employed at Nibco.

An Order follows.



