IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RHONDA I. EDWARDS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-599 GMS
	)	
CONCORD EFS, INC.,	)	
JOANNE FREIDEL, and	)	
MARY BERGES,	)	
	)	
Defendants.	)	

MEMORANDUM

I. INTRODUCTION

On June 24, 2003, the plaintiff, Rhonda I. Edwards ("Edwards"), filed the above-captioned action against her employer, Concord EFS, Inc. ("Concord") and supervisors, Joanne Freidel ("Friedel") and Mary Berges ("Berges"), alleging race and gender discrimination under to 42 U.S.C. § 2000(e)-(2), retaliation pursuant to 42 U.S.C. § 2000(e)-(3), violation of equal rights pursuant to 42 U.S.C. § 1981, federal civil conspiracy claims under 42 U.S.C. § 1985 and § 1986, a state law employment discrimination claim pursuant to 10 Del. C. § 701, *et seq.*, and a common law breach of the covenant of good faith and fair dealing contract claim.

On April 8, 2004, the defendants filed a motion for summary judgment. Edwards subsequently conceded that her sex discrimination claim could not survive the motion, dropped her state law claim pursuant to 10 De. C. § 701, *et seq.* for lack of a private right of action for damages under that statute, and also dropped her federal civil conspiracy claims pursuant to sections 1985 and 1986 because those claims are based on the same set of facts as her action under Title VII and 42 U.S.C. § 1981. In place of her federal civil conspiracy claim, Edwards asserts a Delaware

common law conspiracy claim in her answering brief in opposition to the defendant's motion for summary judgment.

On June 24, 2004, the court held oral argument on the defendants' motion for summary judgment with regard to Edwards' race discrimination claim, retaliation claim, section 1981 claim, Delaware common law civil conspiracy claim, and breach of covenant of good faith and fair dealing claim. Having considered the parties' arguments and submissions, the court will grant summary judgment in favor of the defendants on the Title VII race discrimination claim, but it will deny summary judgment on the remaining claims. The reasons for the court's ruling are set forth below.

II. STANDARD OF REVIEW

The court may grant summary judgment "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 judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, the court may grant summary judgment only if the moving party shows that there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *See Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id.*; *see also Assaf v. Fields*, 178 F.3d 170, 173-174 (3d Cir. 1999). With these standards in mind, the court will describe the facts that led to the present motion.

III. BACKGROUND

A. Edwards' Job Responsibilities

Concord is a financial services company. Edwards, who is African-American, began employment at Concord in 1997 as an Administrative Assistant in the Customer Service Department. In 1999, she became an HR Assistant in the Human Resources Department. As an HR Assistant, Edwards was responsible for assisting Recruiters with all aspects of hiring, such as processing new hire paperwork, including pre-employment drug testing. During her tenure as an HR Assistant, Edwards processed paperwork for at least 50 new hires.

In March 2001, Edwards was promoted to Recruiter in the HR Department. As a Recruiter, Edwards' responsibility was to fill open positions in the various departments at Concord. The process worked as follows. A Recruiter would receive a requisition that a manager in a particular department needed to fill certain positions. The Recruiter then would place newspaper ads or other advertisements, attend job fairs or do whatever was necessary to find suitable employees. After identifying candidates, the Recruiter would review their resumes, and if a candidate was qualified, submit his or her resume to the hiring manger. If the hiring manager was interested, he or she would instruct the Recruiter to schedule an interview. If the hiring was for the Customer Service Department, the candidate was required to appear and pass a written test before going through the interview process.

If the hiring manager wanted to bring the employee on board, he would send the Recruiter a Concord Offer Request Form ("Offer Request Form") asking that an offer be made to the potential candidate. The Offer Request Form would show when the candidate would start employment and name any current employee entitled to a hiring bonus for referring the candidate. The Offer Request Form also has three signature lines, one for "Approval of Hiring Manager," one for "Approval of

Second Level Manager," and one for "Approval of Human Resources." At the bottom of the Offer Request Form there is a note that states, "Offer of employment outside of standard hiring guidelines will require a third level of signature."

After receiving an Offer Request Form for a candidate, the Recruiter would then make a verbal offer and tell the candidate that she would have to pass a background screen and drug test. The same day the verbal offer was made, the Recruiter would send an offer packet to the prospective employee by overnight mail (or the candidate would come in to pick up the packet). Once the candidate signed the offer, the Recruiter then gave the paperwork to an HR Assistant and informed the employee that she had forty-eight hours to appear at one of the listed laboratories to submit a sample for drug screening. The letter given to prospective employees would state that the background check could take five to seven days to complete and that the offer was conditional upon a successful background check and negative drug test results. Under normal circumstances, the drug test results would be received two business days after the sample was given by the candidate. At all relevant times, it was the policy of Concord that an applicant may not start employment without successfully completing a drug screen and background check.

B. Edwards Complains to Her Supervisors About Discriminatory Practices

At the time Edwards was promoted to Recruiter, Therese Williams was the Director of Staffing and Training and Edwards' supervisor. Later, in May 2001, Berges replaced Williams and became Edwards' supervisor. Friedel is Berges' supervisor in the Human Resources Department. Friedel was one of the people who recommended Edwards for promotion to her position as a Recruiter.

After her promotion to Recruiter, Edwards began to bring to the attention of Berges and

Friedel instances where she perceived that employees and prospective employees were being treated differently because of race. For example, she notified Berges and Friedel that a current white employee, Mr. Lichman, had received a referral bonus for referring a white prospective employee but that a current black employee, Ms. Kinslow had not received a referral bonus for referring a prospective black employee under similar circumstances. She also told Berges and Friedel that an exception to the hiring policy concerning relatives had been made for a white employee, Ms. Besak, but not for a black employee, Mr. Ross. After Edwards raised these concerns, her relationship with Berges and Friedel became strained. The last time Edwards complained to her supervisors about racial inequities in hiring was in mid September of 2001.

C. The Hiring and Termination of Krista Mann

From February of 2001 through the end of the year, the need for employees was very great, and Recruiters at Concord were extremely busy. By July of 2001, the Customer Service Department had developed an urgent need to hire permanent employees. Accordingly, Edwards scheduled ten interviews (including that of a prospective employee Krista Mann) for the week of July 9 in order to fill the training class which was to begin on Monday July 16, 2001. Mann took the written test and interviewed on July 9, 2001. On July 10, 2001, the hiring manager for Customer Service Department, Greg Kaznowsky, completed an Offer Request Form authorizing Edwards to make an offer of employment to Mann. Mann's Offer Request Form indicated a start date of July 16, 2001, i.e., the date of the training class for the Customer Service Department. The Offer Request Form was signed by Kaznowsky, Chuck Cluff, a higher level manager in the Customer Service Department, and also by Berges.

Because of the time constraints, Edwards asked Mann to come pick up her paperwork instead

of using overnight mail. Mann came in to pick up the paperwork on July 11, 2001. While at the office, she signed the offer letter and informed Edwards that she would not be able to provide a sample for the drug test until Thursday, July 12, 2001, still within the criteria of the offer which requires a drug test within forty-eight hours.

When the results of Mann's drug test had not been reported by Friday, July 13, 2001, Edwards called the upper level manager of the Customer Service Department, Joseph Biener, and told him that Mann's background check would not be complete in time to start her in the July 16th training class. Edwards did not tell Mr. Biener, however, that it was the drug test results that had not been received. (Edwards Dep. at 95:8-19). Biener instructed Edwards to start Mann in the training program on Monday, July 16, 2001, and said that if there were any problems, he would cover her. Biener denies having had any such conversation with Edwards. Biener is not Edwards' supervisor.

Edwards contacted Mann and asked her if there was any reason why she would not have passed the drug test. When Mann responded, "no," Edwards told her that she could start on July 16, 2001. Edwards did not tell Berges, or any other supervisor in the HR Department, that she allowed Mann to begin work without having received her drug screen results.

Mann started employment on July 16, 2001. On July 17, 2001, her drug screen came back positive. Edwards confronted Mann and told her that she could no longer work at Concord and had security escort Mann from the premises. Edwards then went to HR Assistant Jamie Fairchild and requested that she send a letter to Mann rescinding the offer of employment. Edwards also instructed HR Assistant Lisbeth Fiesler to process the paperwork which would ensure the individual who referred Mann, Yvette Walker, would not receive a referral bonus.

Edwards then called Biener and told him that Mann did not pass the background check. Edwards told Biener that he should process the paperwork to make sure that Mann was officially terminated from employment. A Recruiter does not have the authority to terminate an employee in the Customer Service Department, and Edwards was aware of this policy. It is the responsibility of a manager in the Customer Service Department to process termination paperwork for employees and trainees of that department. At no point did Edwards tell Berges, or any other supervisor in the HR Department, about Mann's drug screen results and termination.

D. Edwards' Termination

Biener did not process the termination, and Mann ended up getting paid for three weeks of work even though she was only at Concord for a day and a half. On or about Spetember 20, 2001, Concord's payroll department notified the Human Resources Department that Mann had remained on the payroll for several weeks after her termination. Initially, Ms. Hamilton, the Employee Relations Representative, spoke with Edwards about the situation, and later Berges did the same. Edwards explained to both of them what happened, claiming that Biener told her it was alright to start Mann's training without the results of the drug screen. After consulting with Biener and then again amongst each other, Hamilton, Berges, and Friedel decided to terminate Edwards and did so on September 20, 2001. They told Edwards that she was being fired because she had violated Concord's hiring and termination policies with respect to the recruitment and termination of Mann.

E. Concord's Disciplinary Procedures

Concord's disciplinary procedures are outlined in the Associates' Reference Guide to Human Resources Policies and Procedures, which provides a four-step process for corrective action. The document goes on to provide for "accelerated corrective action, up to and including termination,"

which may be "used when one or more corrective action steps are bypassed," and then explicitly states that "Concord retains the **unconditional** right to determine the circumstances in which accelerated corrective action will be used." Edwards never had any corrective employment action taken against her during her tenure at Concord.

F. Treatment of Similarly Situated Employees

Edwards admits that she did make a mistake with regard to the Krista Mann incident, (Edwards Dep. at 173:17-18), and concedes that disciplinary action may have been warranted (Edwards Dep. at 171:7-8). She contends, however, that she was disciplined too harshly for her mishap, particularly when compared to other similarly situated white Recruiters. In support of this assertion, Edwards reports instances where two white Recruiters, Tina Akin and Derek Studer, made exceptions to the hiring policy by starting employees in training before receiving drug screen results. While working in her previous position as an HR Assistant, Edwards recalls being asked by the former Director of Staffing and Training in the HR Department, Williams, to input data for two different recruits of Akin to start before the drug tests results were returned. When Edwards inquired, Williams informed her that they were making an exception. Later, Edwards remembers a similar incident where one of Studer's recruits was allowed to start before the drug test. Studer, however, had received Friedel's permission to start the employee without having received the drug screening results.

G. Greg Kaznowsky

Greg Kaznowsky was a Manager in the Customer Service Department during the time Edwards worked for Concord. Kaznowsky reports that, about a month before Edwards was fired, Biener asked him to compile a list of complaints regarding Edwards' failure to return phone calls,

even though it appeared this was not, in fact, a problem..

After Edwards' termination, the Delaware Department of Labor Unemployment Board (the "Board") held a hearing on her claim. Kaznowsky was scheduled to testify at that hearing, and Hamilton and Berges approached him to ascertain what he would say. He recounted being in Biener's office on July 13, 2001, and hearing Biener tell Edwards on speaker phone to do whatever she had to do to fill the training class on July 16, 2001, and that he would "cover her back." Berges and Hamilton then told Kaznowsky that his recollection was not consistent with the position the company was taking and asked him to testify as if he did not remember what Biener said. Kaznowsky never testified before the Board.

IV. DISCUSSION

A. Racial Discrimination Claim

In the absence of any direct evidence of racial discrimination, Edwards attempts to prove through indirect evidence, that the defendants' actions were racially motivated pursuant to the *McDonnell Douglas* burden shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case by demonstrating that she is a member of a protected class. She must then establish that she was qualified for an employment position, but was not hired or was fired from the position "under circumstances that give rise to an inference of unlawful discrimination." *See Waldron v. SL Industries, Inc.*, 56 F.3d 491, 494 (3d Cir. 1995). When the plaintiff establishes this prima facie showing, the burden shifts to the defendant to articulate one or more legitimate, non-discriminatory reasons for its employment decision. *Id*. If the defendant produces one or more legitimate reasons, the presumption of discrimination is rebutted. The plaintiff must then prove that the employer's

reasons were pretextual–that is, that they are false and that the real reason for the employment decision was discriminatory. *Id.*

Edwards' claim fails under the burden-shifting regimen of *McDonnell Douglas*, as she cannot establish a prima facie case of race discrimination. Although Edwards is a member of a protected class and was qualified for the Recruiter position she held, the circumstances surrounding her dismissal do not give rise to an inference of unlawful discrimination. As an initial matter, Edwards' admits that she made a mistake warranting discipline with regard to the Krista Mann situation. Indeed, it was Concord's policy that no candidate may begin employment until the HR Department has been notified that she passed the drug screen. The note on the standard Offer Request Form explicitly requires the approval of a third level supervisor before any exception to this policy may be made. Berges, not Beiner, was Edwards' supervisor. Edwards allowed Mann to begin employment at Concord before having received Mann's drug screen results and without notifying Berges of this fact. Not only did Edwards fail to obtain approval from her supervisor, Berges, before deviating from the hiring policy, but she never told Berges of the Krista Mann hiring and termination situation until they confronted her about it two months after the incident.

In view of her violation of the hiring policy and in combination with Concord's unconditional discretion to bypass progressive discipline, the crux of Edwards' position is that she was disciplined more harshly than other similarly situated, white Recruiters. Circumstantial evidence of discrimination may include evidence "that the employer treated other, similarly situated persons out of his protected class more favorably." *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). "In determining whether similarly situated nonmembers of a protected class were treated more favorably than a member of the protected class, the focus is on the particular criteria or

qualifications identified by the employer as the reason for the adverse action." *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 647 (3d Cir. 1998) (citing *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 528 (3d Cir. 1993)). To survive summary judgment, "the plaintiff must point to evidence from which a factfinder could reasonably infer that the plaintiff satisfied the criterion identified by the employer or that the employer did not actually rely upon the stated criterion." *Simpson* 142 F.3d at 639 (citing *Fuentes,* 32 F.3d at 767)).

Edwards fails to point to any concrete examples or instances in which any other Recruiters committed a violation of the hiring policy without prior approval from one of their supervisors. Edwards admits that Williams asked her to input the data for Akin's excepted recruits and thereby confirms that Williams, the then relevant supervisor, knew of and approved the exception to the hiring policy. In Studer's case, he also had advance permission from an HR Department supervisor, Friedel. The fact that Akin and Studer received permission from their supervisors to make exceptions to the hiring policy stands in sharp contrast to the conduct of Edwards, who never asked or informed her supervisors before deviating from the policy. In this regard, Edwards is not similarly situated to Akin or Studer. In the absence of further evidence, Edwards cannot establish a prima facie case that her termination occurred under circumstances giving rise to an inference of racial discrimination. The court will grant summary judgment to the defendants on Edwards' Title VII race discrimination claim and in part on her section 1981 claim as it relates to racial discrimination.

B. Retaliation Claim

In contrast, the court finds disputed issues of material fact so as to preclude summary judgment on Edwards's retaliation claim. To establish a prima facie case of retaliation, a plaintiff

must show that: (1) she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action. *Weston v. Commonwealth of Pa.*, 251 F.3d 420, 430 (3d Cir. 2001); *Childress v. Dover Downs, Inc.*, No. 98-206-SLR, 2000 WL 376419, at *11 (D. Del. Mar. 31, 2000), *aff'd without op.*, 263 F.3d 157 (3d Cir. 2001). Once a plaintiff establishes a prima facie case, the employer must proffer a legitimate, non-discriminatory reason for the adverse action. *Weston*, 251 F.3d at 430. The burden then shifts back to the plaintiff to show that the proffered reason is pretext. *Id.*

Edwards has adduced sufficient evidence to support a prima facie case of retaliation. She clearly suffered an adverse employment action in that she was fired from her job. Moreover, informal protests against discrimination, including verbal complaints to management, may be considered protected activities. *See Abramson v. William Patterson College of N.J.*, 260 F.3d 265, 287-88 (3d Cir. 2001) (citing *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701-02 (3d Cir. 1995) (citing *Summer v. U.S. Postal Servs.*, 899 F.2d 203, 209 (2d Cir. 1990))). Edwards claims she complained to Berges and Friedel about racial discrimination in hiring on at least two occasions. Such incidents, if believed, could sustain a jury finding that Edwards engaged in protected activity. Edwards also sets forth sufficient evidence to create an issue of material fact on the causation element of her prima facie case, in that she was terminated just days after her last complaint to her supervisors but over two months after the incident for which she was allegedly fired. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000) (finding that the ultimate determination of causation depends on "how proximate the events actually were, and the context in which the issue [arose]").

Although the defendants can certainly set forth a legitimate reason for Edwards' termination–that she violated Concord's hiring policy–the court nonetheless finds disputed issues of fact with regard to whether or not this reason is pretextual. Specifically, Kaznowsky testified that Biener, a member of Concord's management, asked him to fabricate complaints about Edwards. According to Kaznowsky, Berges, another management employee at Concord, also pressured him to lie in the hearing before the Board. If believed, Kaznowsky's testimony, in conjunction with Edwards' claim that her relationship with Friedel and Berges became strained after her complaints, would create a genuine issue of material fact as to the defendants' true motive in terminating Edwards. Kaznowsky's credibility is an issue for the jury to decide, and not appropriate for determination on summary judgment. Given that Title VII and section 1981 retaliation claims are analyzed under the same substantive standard, the court will also deny summary judgment on both of these counts.

C. Civil Conspiracy Claim

The defendants argue that Edwards is barred from now bringing a civil conspiracy claim in lieu of her original section 1985 and 1986 claims. In view of the Federal Rules of Civil Procedure Rule 8(a)'s liberal notice pleading requirements, the court does not agree and with defendants and will consider Edwards' civil conspiracy claim. The court determines that there are genuine issue of material fact with regard to the civil conspiracy claim.

Edwards claims that Berges and Friedel had an agreement to unlawfully fire her due to her complaints about racial discrimination. Under Delaware law, a civil conspiracy requires three elements: (1) an agreement between two or more individuals; (2) an unlawful act done to further the conspiracy; and (3) damages to the plaintiff. *See Capano Mgmt. Co. V. Transcontinental Ins. Co.*,

78 F. Supp. 2d 320, 331 (D. Del. 1999); *S&R Assocs., LP v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. 1998). Sufficient facts exist to support a claim that Berges and Friedel had an agreement, in that, at the very least, they met on September 20, 2001 and discussed Edwards' termination. As already noted, there exist genuine issues of material fact as to whether the defendants' proffered reason for terminating Edwards is really a pretext for retaliation. In this regard, the court also finds a disputed issue of material fact as to whether Berges and Friedel unlawfully acted in furtherance of a conspiracy. Finally, given that Edwards was terminated from her job, she could certainly establish damages. The court therefore will deny summary judgment on Edwards' civil conspiracy claim.

D. Breach of the Covenant of Good Faith and Fair Dealing

Edwards argues that because her termination was due to the defendants' retaliation, it was in violation of public policy and therefore breaches the covenant of good faith and fair dealing. Under Delaware law, an employer breaches the covenant of good faith and fair dealing when he fires and employees in violation of some public policy. *Schatzman v. Martin Newark Dealership, Inc.*, 158 F. Supp. 2d 392, 398 (D. Del. 2001); *Schuster v. Derocili*, 775 A.2d 1029, 1039 (Del. 2001). Furthermore, it is clear under Delaware law that a plaintiff can maintain a common law claim for breach of the covenant due to discriminatory conduct or retaliation for reporting discriminatory conduct. *See Schatzman, 158 F. Supp. 2d at 399.* Again, because the court has found genuine issues of material fact on Edwards' retaliation claim, it finds the same with regard to whether or not the defendants violated public policy in terminating Edwards. The court therefore will deny summary judgment on the breach of the covenant of good faith and fair dealing claim.

V. CONCLUSION

Because the facts show that Edwards violated Concord's hiring policy and in the absence of

any evidence that she was disciplined more harshly than similarly situated employees, Edwards cannot demonstrate that she was terminated under circumstances that give rise to an inference of unlawful discrimination. In this regard, Edwards cannot establish a prima facie case of race discrimination, and the court therefore will grant summary judgment on this claim. Nevertheless, as set forth above, the court finds genuine issues of material fact with regard to Edwards' remaining claims and will deny summary judgment on them accordingly.

Date: July 20 , 2004

Gregory M. Sleet
United States District Court Judge

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Defendants.	)	

ORDER

For the reasons set forth in the court's memorandum issued contemporaneously herewith, IT IS HEREBY ORDERED that:

1. The Defendants' Motion for Summary Judgment (D.I. 30) is GRANTED IN PART and DENIED IN PART.

2. Counts One, Four, Five and Six of the plaintiff's complaint (D.I. 1) are DISMISSED.

3. Count Three of the complaint is dismissed IN PART, as it relates to racial discrimination.

4. The plaintiff is granted leave to refile her complaint to properly allege a common law civil conspiracy count.

Dated: July 20, 2004

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE