IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| Dannette G. McLaughlin | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 03-617 (GMS) |
| | ) | |
| Diamond State Port Corp. | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM**

## I. INTRODUCTION

Presently before the court is defendant Diamond State Port Corp.'s ("Diamond State") motion for summary judgment. (D.I. 36.) This is an action brought by plaintiff Dannette McLaughlin on July 1, 2003, in which she alleges one count of unlawful gender discrimination in violation of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and one count of unequal pay in violation of the Equal Pay Act, 29 U.S.C. § 206 (1998). (D.I. 1.) On October 14, 2004 McLaughlin sought to amend her complaint for the first time by adding a retaliation claim under Title VII, and an equal protection claim under 42 U.S.C. § 1983 (2003). (D.I. 34.) The court denied her motion (D.I. 56), so only the counts of the original complaint are the proper subject of Diamond State's motion. For the following reasons, the court will grant summary judgment in favor of Diamond State.

## II. JURISDICTION

The court has jurisdiction pursuant to 28 U.S.C. § 1331 (1993).

## III. STANDARD OF REVIEW

Summary judgment is appropriate "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©; *see also Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, summary judgment is appropriate 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. *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, 173-74 (3d Cir. 1999).

## IV. BACKGROUND

Defendant Diamond State is a corporation-like arm of the State of Delaware created to operate the Port of Wilmington. Del. Code Ann., tit. 29, § 8735(a) (2003). It assumed control of the Port of Wilmington in 1995. (Markow Dep. at 7:10, D.I. 42 Ex. B at 4.) Diamond State has three classes of employees: A, B, and C. A and B class employees are the subject of a collective bargaining agreement between Diamond State and the International Longshoreman's Assoc. AFL-CIO, Local 1694-1. (See generally D.I. 42 Ex. C.) Employees begin as C class and graduate to B class once they have worked 800 hours. (Immediato Dep. at 48:12-15, D.I. 42 Ex. A at 14.) A and B class employees perform the same work, however, A class employees are guaranteed 40 hours per week. (Markow Dep. at 18:11-14, D.I. 42 Ex. B at 7.) B class employees work as needed to fill in

the gaps left by the A class employees. (Id.) Although various positions are available at Diamond State, only the positions of lift-truck operator and laborer/checker are relevant in this case.

Whenever there is an A class opening, it is posted and B class employees may apply. The list of interested employees is then sent to individual supervisors, who rate the employees based on certain criteria. (Markow Dep. at 56:19-577:, D.I. 42 Ex. B at 16-17.) These criteria include good work ethic, punctuality, strong port knowledge, and ability to perform the particular position. (See, e.g., D.I. 42 Ex. G at DSPA4187.) Each supervisor ranks his or her top five choices and assigns each top-five candidate anywhere from one to five points, with the top candidate receiving five points and the fifth candidate receiving one point. (Stansbury Dep. at 40:8-20, D.I. 42 Ex. D at 12.) Each supervisor then returns his or her score sheet to labor relations hiring manager Andrew Markow and terminal manager William Stansbury, who tally the candidates' points. (Markow Dep. at 57:6-13, D.I. 42 Ex. B at 17.) This tallying usually reveals a grouping of just a few candidates with a high number of points. (Id.) The employees in that group are granted interviews with Markow and Stansbury (and sometimes HR manager Philip Immediato). (Markow Dep. at 57:15-58:10, D.I. 42 Ex. B at 17.) These interviews result in a final recommendation and offer of employment. (Id.)

Plaintiff McLaughlin, a woman, was hired in 1998 as a C class employee and graduated to B class in 1999. (D.I. 40 at 7.) During her time as a B class employee, she applied for six A class openings as either a lift truck operator or as a laborer. (D.I. 38 Ex. F at DSPA2502, DSPA4208, DSPA2514, DSPA2908, DSPA4135, DSPA4168.) In all but one case, a man was chosen for promotion over McLaughlin.

McLaughlin believes that she was passed over because of her gender. Therefore, on May

28, 2002, she filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). (D.I. 42 Ex. J.) However, she continued to work for Diamond State even after filing the EEOC charge. Of the six promotions, three were offered before the EEOC complaint and three were offered after. The EEOC issued a right-to-sue letter on April 3, 2003. (D.I. 1 ¶ 8.) McLaughlin filed the present action on July 1, 2003. (Id.)

## V. DISCUSSION

### A. Count I – Title VII Gender Discrimination

Title VII prohibits an employer from discriminating against any individual on the basis of race, color, religion, sex or national origin:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Discrimination claims under Title VII are analyzed under the three-step burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case by demonstrating that she is a member of a protected class. The plaintiff must then establish that she was qualified for an employment position, but was not hired for the position "under circumstances that give rise to an inference of unlawful discrimination." *See Waldron v. SL Indus., 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 for its employment decision were pretextual – that is, that they are false and that the real reason for the employment decision was discriminatory. *Id.* If the plaintiff cannot carry the burden of proof under the shifting-framework established in *McDonnell-Douglas*, the defendant is entitled to summary judgment. *Stafford v. Noramco of Delaware, Inc.*, 2000 WL 1868179, at *1 (D. Del. Dec. 15, 2000).

In its opening brief, Diamond State concedes for the purposes of this motion that McLaughlin is a member of a protected class, that she applied for and was qualified for a number of promotions, and that she did not receive any of the promotions. (D.I. 37 at 13.) However, Diamond State vigorously disputes that the circumstances give rise to an inference of unlawful discrimination. (Id.) Obviously, McLaughlin disagrees with Diamond State's characterization of the evidence. She contends that the circumstances give rise to an inference of discrimination for four reasons: (1) Diamond State's pattern and practice of discriminating against women, (2) its supervisors' comments and conduct toward McLaughlin based specifically on her gender, (3) its disparate treatment of McLaughlin with regard to training and opportunities, and (4) its subjective promotion process. (D.I. 40 at 17.)

**1. Pattern and Practice of Discriminating Against Women**

McLaughlin first argues that the circumstances give rise to an inference of discrimination because Diamond State has a pattern and practice of discriminating against women. She points to Diamond State's response to Interrogatory No. 11, in which it admits that prior to March 31, 2004, the last time a woman was hired to an A class A full-time position was on June 7, 1982. (Def.'s Resp. to Interrogs., No. 11, D.I. 42 Ex. F at 5.) And, although Diamond State hired Tina Woolford to a Chapter A full-time position in May 2004 (D.I. 38 Ex. F at DSPA4134), McLaughlin speculates

that Woolford's promotion was either the result of some sort of nepotism, because her "father and two uncles are currently A class employees" (D.I. 40 at 6 n.3), or a deliberate attempt by Diamond State to defend itself in this lawsuit (Id. at 23 n.12). McLaughlin also points to an apparent conflict between Immediato's testimony, in which he says he tried to implement a solution to the gender gap (Immediato Dep. at 57:13-59:16, D.I. 42 Ex. A at 17), and Markow's testimony, in which he says he made promotion decisions based only on the ranking numbers he was given by the supervisors (Markow Dep. at 61:13-21, D.I. 42 Ex. B at 18). She argues this conflict is a basis from which a reasonable factfinder could infer that the dearth of female promotions remains unaddressed. Finally, McLaughlin argues that the Port of Wilmington was not amenable to women based on Immediato deposition testimony, in which he described the intensely physical nature of the job, the vulgarity and lack of professionalism among the employees, and the lack of a women's restroom at the work site as of 1997.[1] (Immediato Dep. at 52:15-54:10, D.I. 42 Ex. A at 15-16.)

The court does not believe that this is sufficient evidence from which a reasonable factfinder could infer a pattern and practice of gender discrimination. Although a twenty-two year drought between female A class employees is disconcerting, McLaughlin skims over the fact that Diamond State did not purchase the Port of Wilmington until September 1995. (Castagna Dep. at 10:18-21, D.I. 38 Ex. B at APP24.) Thus, any gender discrimination prior to that date is not attributable to Diamond State. And even if it were so attributable, McLaughlin presents no evidence as to the number of female employees who applied for promotion to A class full-time positions from 1982 until 2000, or as to the number of female employees overall during this period. Without such

[1]It is unclear from the record whether there was a women's restroom. To be precise, Immediato testified that the "rest room facilities needed upgrading." (Immediato Dep. at 53:17-18, D.I. 42 Ex. A at 16.)

evidence, any statistically-based inference of discrimination would be unreasonable. Furthermore, McLaughlin's attempt to discount Woolford's promotion as an act of nepotism is pure conjecture because she offers no evidence of a connection between Woolford's father and two uncles to the promotion process. Further, to the extent McLaughlin argues that Woolford's promotion was a deliberate attempt to defend itself in this lawsuit, the court considers such an inference impermissible. Just as subsequent remedial measures are generally inadmissible under Fed. R. Evid. 407, a defendant's attempt to reverse allegedly discriminatory practices should also be inadmissible. It would be perverse indeed if attempts to reverse discrimination could be used to condemn a defendant. Such use of evidence would only serve to discourage reform, and the court will not permit it.[2]

McLaughlin's argument that a conflict between the testimony of Immediato and Markow permits an inference that the twenty-two year drought remains unaddressed is similarly unsupported by the evidence. Immediato testified at length about his efforts beginning around 1997 to increase the number of women in the A class:

> BY MS. CALO:
>
> Q: Did you ever take any initiative to determine why there were no women in A class other than Ms. Wilhelmania Archie?
>
> A: The initiative I took was since the route to A was through B, the initiative that I took was to make sure that the feeder source, namely B, had representation of females, which, frankly, overall at the port when I first got there, there was very few females even attempting to be hired at the hiring

[2]McLaughlin's brief refers to an incident in which she was abruptly assigned to work on a larger machine "as soon as Plaintiff filed her EEOC charge." (D.I. 40 at 9.) Her point in raising this seems to be along the same lines as her point about Diamond State promoting Woolford as an attempt to defend itself. If so, the court is of the same opinion about the appropriateness of such an inference.

hall. Frankly, it – I believe the number was like 27 percent when I left that there were some – across including the office and whatever. There were a, certainly a representative. It had come a long way in terms of women.

Q: In the B class or throughout the facility?

A: Well, both. In the B class there were – because in order to get to B you had to have 800 hours of work. So there has to be an initiative to, first of all, get hired in order to get your 800 in order to get in B. And then it was – it's an evolutionary process just by virtue of the union structure, because then, even though you were in B – and I don't recall specifically as a matter when Dannette came on board, but it was probably 2001, somewhere around there, that you came at the bottom of B by virtue of their structure.

So now as work slowed down, you were, for lack of a better term, you were subject to the seniority hiring process, because the Bs actually, they had a seniority right after the As were hired. A's were guaranteed 40 hours if there was any work. So the top part of B was largely male. Shirley Taylor might be the highest one and she was like whatever number.

But as the Bs – the good news is as we started establishing and the Bs grew in number, there were more females there. Certainly there were a fair amount of female, "fair amount" being I'd say 18 percent, 15 percent, 15 to 18 percent, where before there was one in the A. So it's an evolutionary process. . . .

(Immediato Dep. at 47:22-49-10, D.I. 42 Ex. A at 14-15.)

McLaughlin contrasts this with Markow's testimony:

BY MS. CALO:

Q: . . . . Over the course of time that you've been involved in the process of hiring B members into the A classification, has there been any initiative on your part to try to interview more women?

A: Any initiative? On my part, on my personal part?

Q: Correct.

A: No. The numbers are what they are.

Q: Numbers being the ranks?

A: Yes.

(Markow Dep. at 61:13-21, D.I. 42 Ex. B at 18.)

In spite of McLaughlin's assertion to the contrary, these two pieces of testimony are not in conflict. Immediato testified that he took a bottom-up approach, by bringing women in first as C class, then promoting them to B class once they worked 800 hours. From there, promotion to A class was done by the ranking system. Markow merely testified that he adhered strictly to the "numbers" (or ranks) when considering promotions from B class to A class. His testimony sheds no light on the efforts of Immediato to bring women up through the system.

McLaughlin's final assertion that the unrefined nature of the Port of Wilmington shows that Diamond State engaged in discrimination is also unfounded. Immediato testified to the following:

BY MS. CALO:

Q: . . . . Did you take any actions to try to entice women to join the port, for example?

A: In my own way, by providing structure and providing discipline in the ranks, I tried to make the port more of a place where women would want to work. Quite frankly, prior to my arrival I'm not sure that was the case. I tried to be on top of enough things and develop enough structure and performance standards, including attendance and treatment of each other, employee interaction, to the point that we would not tolerate a number of things that were in place prior to Diamond State Port Corporation.

Q: What things did you witness when you first joined Diamond State that would be either a barrier or inhospitable, if you will, to women?

. . .

A: Well, it was like the wild west down there, so to speak, when I joined. I mean, I was scared, I mean, I was offended just in terms of, you know, what I witnessed. There were no – in my view there were very few standards that were in place, that people knew they needed to be on time even, things of that nature. There was no standards of performance that were acceptable. There was no drug or alcohol program as an example. There was a number of

things. It's too much for me to get into, but it was basically free wheeling from all respects.

. . .

There were times when I first got there that people would ride down to the street and ride down to the corner and try to put people in to get work down there. You didn't know whether you were getting drug free people or not. It was pretty tough, rough. Not that it's a piece of cake now. It was a lot rougher when I got there than when I left.

Q: What you are describing it seems to me is an environment that was probably hard or difficult for everyone?

A: Yes.

. . .

Q: Were there things in particular that you saw that would be harder for women to deal with or manage than men?

. . .

A: Well, it's an immensely physically environment. It's a labor intensive environment. I don't think I'm speaking out of turn by saying that that certainly would, in my view, influence certain things around, you know, the female end of it because it was very labor intensive. Certain women would respond to it and do well and other women perhaps would choose another course because it was clearly extremely labor intensive. . . .

. . .

Q: We talked about this at the very beginning. When you first got there, through your employment with Diamond State, was there rough kind of cursing language used in the facility that you observed?

A: The language was different. As I described earlier, it was more street. I didn't sense that it was offensive to the population, largely. It may not have been appropriate for this office, but in that environment I would say it was rough language, but it wasn't necessarily totally offensive language. . . .

(Immediato Dep. at 50:2-54:7, D.I. 42 Ex. A at 15-16.)

This testimony does not implicate Diamond State in a pattern and practice of gender discrimination. Attorney Calo, on behalf of McLaughlin, specifically elicited testimony that the

environment was difficult for everyone, *regardless of gender*. Furthermore, Immediato was describing the Port of Wilmington as it existed just after Diamond State assumed control. So even if the environment was once gender biased, such bias is not attributable to Diamond State. As to the physical environment, it is certainly not evidence of discrimination to elicit testimony that the nature of the work tends to attract more men than women. Thus, McLaughlin's evidence is inadequate to permit a reasonable factfinder to conclude that Diamond State had a pattern and practice of discriminating against women.

**2. Supervisors' Comments and Conduct Toward McLaughlin Based Specifically on Her Gender**

McLaughlin's second argument is that she was subjected to hostility based on her gender. In particular, she was (a) told she could not work on larger machines because she was a woman, (b) told by supervisor Johnson that women should be at home having men pay their bills rather than working at the port, © romantically propositioned by Johnson, and (d) written up by supervisor Betts after she rejected his sexual suggestions. (D.I. 40 at 19.) However, as explained below, none of her evidence is sufficient to support an inference that discrimination was a factor in the promotion process.

The record evidence that she was told she could not work on larger machines because she was a woman comes entirely from McLaughlin's own deposition testimony, from which very little can be reasonably inferred:

> BY MR. CINCILLA:
>
> Q: . . . . Now, I understand that you believe you have been denied machinery training, experience and promotion. But what specifically is your basis for that that is because of your gender?
>
> A: . . . . When I first arrived there, like I stated, they told me that, you know,

> you are not going to be able to do this. You are not going to be able to do that. They don't say that to a man. Like I stated, don't tell me I can't do anything. . . .

(McLaughlin Dep. at 137:8-138:1, D.I. 42 Ex. H at 37.) First, McLaughlin does not specify who "they" are. Second, even though they said she could not "do this" or "do that," their motivation for coming to that conclusion is unclear; there is no evidentiary basis for assuming the motivation was gender-based animus. Finally, her assertion that "they don't say that to a man" is pure speculation given that Diamond State has hundreds of employees. Thus, the court does not find sufficient evidence to support McLaughlin's contention that she was told she could not work on large machines on account of her gender.

McLaughlin also contends that "Johnson has made the statement to me and other female workers, 'I don't think that women should be employed at Diamond State Port because women should be sitting at home having men pay their bills.'" (D.I. 42 Ex. J.) Although this sort of comment might serve as a reasonable basis from which to infer discrimination, McLaughlin has not offered any corroborating evidence, e.g., the testimony of other female workers. The absence of corroboration is noteworthy for at least two reasons; (1) McLaughlin's testimony is self-serving, and (2) as already noted, and discussed further below, the other evidence offered by McLaughlin to support her claim that Diamond State engaged in a pattern and practice of gender discrimination has difficulty passing close scrutiny. In other words, even assuming, as the court must, that Johnson made the statement to McLaughlin and other female workers, the statement alone, particularly when viewed in light of the totality of this summary judgment record, is not enough to raise a genuine issue for a jury's resolution.

McLaughlin's further assertion that Johnson romantically propositioned her also proves very

little. At her deposition, she said Johnson asked her to dinner once in 1999, while she was still a C class employee. She turned him down, and that seems to be the end of the story. (McLaughlin Dep. at 132:7-133:8, D.I. 42 Ex. H at 35-36.) Without more, a man asking a woman out to dinner is simply insufficient to support an inference of discrimination.

Finally, McLaughlin presents evidence that she was written up by Betts after she rejected his sexual suggestions. In her brief, McLaughlin points to two pieces of deposition testimony to support this assertion. In the first, she describes an incident in which she was doing some work for Betts and told him she needed to use the bathroom. He followed her and began yelling at her when she stepped out of the bathroom, apparently for taking too long (although it is not entirely clear). (McLaughlin Dep. at 122:11-15, D.I. 42 Ex. H at 33.) The court fails to understand how this first piece of evidence supports her assertion that Betts made sexual suggestions.

The other piece of evidence is more clear. On an unspecified number of occasions, Betts asked McLaughlin out to dinner. She consistently turned him down. Then sometime in March 2004, McLaughlin says she was listening to gospel music at lunch when Betts said, "gospel songs, it's nothing like doing it off gospel songs." In response, McLaughlin says, "I looked at him and I cussed him out because I thought that was disrespectful to God and me." (McLaughlin Dep. at 133:19-134:14, D.I. 42 Ex. H at 36.) This exchange was followed by an email from Betts to Markow on March 16, 2004:

> Apparently Net feels as if she's only suppose to operate the 21's only. I was informed that she going to try to get me fired because I'm mistreating her. This is the way I run my ship. If the ship starts at 8am everyone who is there at 8 starts on the truck they are on. Someone shows up at 8:15 they gets what left. This is another one of her ways of using her femalism to get a job. Andy, you can send her to Russle from now on. I've worked to hard to get the people I want on the ship. It is hard enough tring to get the stuff to the right place without a disgrundle employee to disrupt my operation.

(D.I. 42 Ex. O.)

The court agrees with McLaughlin insofar as she argues that Betts' comment about "doing it off gospel songs" could reasonably be construed as offensive. However, the court does not agree that this is sufficient evidence from which to infer discrimination. Of the six promotions for which McLaughlin applied, Betts rated applicants in three – one in 2003 and two in 2004. (D.I. 38 Ex. F at DSPA2908, DSPA4135, DSPA4168.)[3] And, of those three, only two of the 2004 ratings processes took place after the gospel-music incident and subsequent email. Moreover, in the second of those, not only did a woman (Woolford) win the promotion (D.I. 39 Ex. F at DSPA4134), but Betts ranked her as his third choice out of twenty-nine applicants. (Id. at DSPA4135). Therefore, while Betts' comment may have been inappropriate and offensive, the evidence does not establish that he harbored any gender-based animus.[4]

**3. Disparate Treatment With Regard to Training and Opportunities**

McLaughlin's third argument that the circumstances give rise to an inference of discrimination is that she was not "allowed to train on the heavy machines like other less qualified male employees." (D.I. 40 at 20.) McLaughlin claims that when she signed up for formal training, the classes were cancelled. (Id.) At her deposition, she implied that when her supervisors saw her name on the training sign-up sheet, they would make an excuse to cancel the class. (McLaughlin

[3]The ratings sheets for the 2003 promotion are missing from Diamond State's records. (D.I. 37 at 9 n.10.) However, Diamond State admits that Betts was one of the rating supervisors involved in that promotion. (D.I. 43 at 10.)

[4]The email could be evidence of retaliation, however, the court recently denied McLaughlin's request to add a retaliation claim (among other things). (D.I. 56.) Therefore, the evidence is only being analyzed by the court insofar as it is relevant to the two counts in the original complaint.

Dep. at 81:13-15, D.I. 42 at 23.) Aside from the fact that her assertion is purely speculative, she presents no evidence showing that training tended to be canceled when women signed up. At best, her speculation about the motives of her supervisors would only support an inference that they did not like her in particular, as opposed to women generally. But even that inference is dubious because it is undisputed that McLaughlin received training on several other processes and pieces of machinery. (D.I. 38 Ex. F at DSPA2395, DSPA2434, DSPA2437; McLaughlin Dep. at 79:19-80:10, D.I. 42 Ex. H at 22.)

McLaughlin says that unlike her male co-workers, she was even prevented from training on the heavy machinery on her own:

> BY MR. CINCILLA:
>
> Q: . . . . Now, I understand that you believe you have been denied machinery training, experience and promotion. But what specifically is your basis that that is because of your gender?
>
> A: . . . . One day I'm there on a 21,000-pound machine practicing on empty pallets. Security pulls up. They made this big stink. Hey made me get off the lift truck and I was escorted up to the office by security.
>
> I go to Dave Castagna and Dave Castagna told me I have to have someone with experience sitting there watching me. I said, well, in training they never told me that. They just said the way they learned was through them, they themselves practicing by themselves. So he told me, well, you have to have someone with experience or whatever to stand there with you. I said like someone is going to take off on a weekend and watch me play with a truck or take their lunch break and watch me operate a truck.
>
> Now, when I was here, they told me to do this. They did it. And then when I told some people what happened, it never happened to them. I went to Freeman, Russell Corbin, Timothy Miller, Darry Dillard. I told them all, why did they do that? They said they don't know because they never experienced that when they practiced on the larger machines. They never had a problem.

(McLaughlin Dep. at 137:8-139:13, D.I. 42 Ex. H at 37.) Even if requiring a person to be supervised

while practicing on heavy machinery was unreasonable, McLaughlin fails to present the affidavits or testimony of the men (i.e., Freeman, Corbin, Miller and Dillard) who were allowed to train in this manner. Furthermore, McLaughlin's testimony as to the statements of those men is inadmissible hearsay. Fed. R. Evid. 802. Thus, the court once again finds her unsupported assertions incapable of raising a genuine issue of material fact.

McLaughlin also says that on the one occasion she was able to work on a heavy machine, supervisor Gamble told her to get down and she was replaced her with a male C class employee. (McLaughlin Dep. at 137:13-19, D.I. 42 Ex. H at 37.) Gamble could have had any number of motivations for replacing her on a piece of heavy equipment, including McLaughlin's admitted inexperience with such machines. Thus, the court will not permit McLaughlin to characterize Gamble's motives without some evidence – either direct, circumstantial or a combination of the two – as to his actual motivation.

**4. Subjective Promotion Process**

McLaughlin's final argument is that the supervisors are given no training on the ratings criteria, that no checks are in place to ensure that the suggested criteria are actually used by the supervisors, and that there is no discussion with the supervisors as to the reasons for their ratings. (D.I. 40. at 5-6, 20.) Because of this subjectivity, McLaughlin claims she was passed over for promotion in favor of less-qualified men. In particular, she says she is more qualified than (1) Harold Goodridge "because he only knows how to be a laborer and she is more experienced," (2, 3) Alfie Zimmerman and Lyndon Henry "because they only know how to operate a lift truck," (4) Tina Woolford "because [she] was not dependable or reliable during the two years prior to her promotion and no supervisors wanted her to work for them," and (5) Steve Hinkle "because he only

knows how to check." (D.I. 40 at 10.) McLaughlin further points out that supervisor Corbin rated her as his first choice for promotion among all the candidates for the class A lift-truck operator position in early 2004 (D.I. 38 Ex. F at DSPA4188), but the position was ultimately awarded to Lyndon Henry. (D.I. 42 Ex. G at DSPA4192.)

The evidence shows that McLaughlin applied for six promotions (D.I. 38 Ex. F at DSPA2502, DSPA4208, DSPA2514, DSPA2908, DSPA4135, DSPA4168). She argues that she was more qualified than five of the six successful candidates. However, McLaughlin's qualifications relative to those of Woolford are not probative on the issue of gender discrimination because both McLaughlin and Woolford are women. Therefore, only the relative qualifications of Goodridge, Zimmerman, Henry and Hinkle are relevant. But McLaughlin's criticisms of the qualifications of these four men do not show they were less qualified than her. She criticizes Goodridge because he only knows how to be a laborer, but he was promoted to class A *laborer*. (D.I. 38 Ex. F at DSPA4197.) Similarly, she criticizes Henry because he only knows how to operate a lift truck, but he was promoted to class A *lift-truck operator*. (D.I. 42 Ex. G at DSPA4192.) The fact that one supervisor rated her highly is not evidence that she was more qualified than Henry because he had several supervisors rate him higher than her. (See D.I. 42 Ex. G at DSPA4172-DSPA4191.) She criticizes Hinkle because he only knows how to check, but by her own admission McLaughlin "very seldom" works as a laborer or checker (McLaughlin Dep. at 52:7, D.I. 42 Ex. H at 15) thereby undercutting her claim to be more qualified than Hinkle. Finally, she criticizes Zimmerman because, like Henry, he only knows how to operate a lift truck. Although Diamond State asserts that Zimmerman was hired as a lift-truck operator (D.I. 43 at 5), the portion of the record to which it cites for this proposition gives the impression that he was actually hired as a laborer (D.I. 38 Ex. F

at DSPA4197). If he was hired as a lift-truck operator, then McLaughlin's criticism is without merit because he would have been hired for precisely the skill set McLaughlin says he has. If he was hired as a laborer, McLaughlin's criticism would be meritorious if not for her admission that she "very seldom" works as a laborer. Thus, either way her claim that Zimmerman only knows how to operate a lift truck does not prove she was more qualified than he. Since McLaughlin has not presented evidence that she was more qualified than the people who ultimately prevailed, her argument that the subjective promotion process gives rise to an inference of discrimination must fail.

In sum, the court is presented with a record consisting both of evidence that does not support the inferences for which McLaughlin argues, and of the McLaughlin's uncorroborated statements. Of course, the court is cognizant of *Weldon v. Kraft, Inc.*, 896 F.2d 793, 800 (3d Cir. 1990), and *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 236 (3d Cir. 1987), where the Third Circuit held that no rule of law prevents a plaintiff from surviving a motion for summary judgment in a discrimination case based solely on his or her own self-serving testimony. However, those cases must be read in light of their facts, lest they be allowed to "undermine the entire *McDonnell-Douglas* framework by drastically limiting the possibility that summary judgment could be granted because virtually any contrary testimony by a plaintiff would preclude a grant of summary judgment to the defendants." *Pamintuan v. Nanticoke Mem'l Hosp.*, 192 F.3d 378, 387 (3d Cir. 1999).

In *Weldon*, the plaintiff contended that (1) he and other black trainees endured unfair treatment from a particular white supervisor, (2) he was required – unlike his white co-workers – to adhere strictly to medical documentation and advance-money policies, and (3) statistical evidence showed a disproportionate number of involuntary terminations among minority employees during a four-year span. 896 F.2d at 799. Although the Third Circuit believed the plaintiff's case

presented "a close case," it held:

> If a factfinder were to credit [the plaintiff's] testimony regarding the harshness of the treatment he and other blacks received as well as his view of the statistical evidence, it could conclude that the performance evaluations were unfair and that [the defendant's] explanations were pretextual.

*Id.*

In *Jackson*, the plaintiff presented "nearly 700 transcript pages" in which he made specific allegations regarding the issue of pretext. 826 F.2d at 234. In particular, he rebutted the defendant's contention that he was terminated for performance deficiencies by pointing to (1) the fact that he never received a single complaint about his performance, (2) the compliments he received regarding his work, (3) information that was withheld from him, (4) his supervisor's solicitation of complaints about the plaintiff's work *after* he was terminated, and (5) threats communicated to the plaintiff's lawyer and others that the plaintiff's supervisor intended to ruin the plaintiff's reputation and "destroy" him. *Id.* The plaintiff also testified that he was not even assigned to some of the allegedly mishandled matters, that he was not permitted the benefit of outside consultants on specialty matters, and that, unlike his white colleagues, he was given neither a secretary nor less-experienced staff for support. *Id.* at 234-35. The Third Circuit reversed the district court's granting of summary judgment for the defendant because the plaintiff's extensive and detailed testimony contained both circumstantial and direct evidence from which a jury could infer pretext. *Id.* at 236.

The court is mindful of its role in this case, as it tries to be in every case brought before it for summary resolution. In other words, the court understands that, when determining the propriety of summary judgment, its job is not to weigh the evidence or to make credibility determinations. On the other hand, the Third Circuit in *Pamintuan* clearly established that there is a threshold of sufficiency which the plaintiff must surpass before she can survive summary judgment. In contrast

to both *Weldon* and *Jackson*, McLaughlin's single piece of admissible evidence that might support an inference of discrimination is Johnson's uncorroborated statement that women should not be "employed at Diamond State Port because women should be sitting at home having men pay their bills." Simply put, the court does not believe this one statement crosses the sufficiency threshold. In other words, the court does not believe it would be reasonable, in light of the entire record, for a factfinder to infer that McLaughlin was the victim of gender-based discrimination based on Johnson's statement alone.

Therefore, McLaughlin has failed to establish a prima facie case as required by *McDonnell-Douglas*, and consequently, summary judgment on Count I of the complaint in favor of Diamond State is appropriate.

**B. Count II - Equal Pay Act**

The Federal Equal Pay Act provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1998).

Aside from the fact that the class system at Diamond State probably fits into one of the enumerated exceptions of § 206(d)(1), it is an explicit statutory requirement that liability under this statute depends on finding a pay differential "on the basis of sex." In this case, McLaughlin has failed to present evidence from which a reasonable factfinder could infer gender-based

discrimination. Therefore, it is axiomatic that she has also failed to present evidence sufficient to support finding a pay differential "on the basis of sex." Thus, summary judgment is appropriate on Count II of the complaint as well.

## VI. CONCLUSION

Because McLaughlin was unable to establish a prima facie case of gender discrimination through the introduction of admissible evidence, the court will grant summary judgment in favor of Diamond State on all counts in the complaint.

Dated: December 30, 2004

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| Dannette G. McLaughlin | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 03-617 (GMS) |
| | ) | |
| Diamond State Port Corp. | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

IT IS HEREBY ORDERED that:

1. The defendant's Motion For Summary Judgment (D.I. 36) be GRANTED; and

2. The plaintiff's complaint be DISMISSED on all counts.

Dated: December 30, 2004

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE