IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALBERTA BURTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03-915 (GMS)
	)	
MBNA AMERICA BANK, N.A.	)	
	)	
Defendant.	)	

MEMORANDUM

I. INTRODUCTION

Presently before the court is a motion for summary judgment (D.I. 27) filed by Defendant MBNA America Bank, N.A. ("MBNA") in the above-captioned action, in which Plaintiff Alberta Burton alleges that she was the victim of unlawful *quid pro quo* sexual harassment, hostile work environment, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* After reviewing the record in its entirety, the court has determined that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). Therefore, the court will grant summary judgment in favor of MBNA and dismiss all counts of the complaint.

II. JURISDICTION

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

III. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact. *See* Fed. R. Civ. P 56(c). A fact is material if it might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmovant. *See In re Headquarters Dodge, Inc.*, 13 F.3d 674, 679 (3d Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When deciding a motion for summary judgment,

the court must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). The nonmoving party, however, must demonstrate the existence of a material fact supplying sufficient evidence – not mere allegations – for a reasonable jury to find for the nonmovant. *See Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996) (citation omitted). To raise a genuine issue of material fact, the nonmovant "need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the 'mere scintilla' [of evidence] standard." *Petruzzi's IGA Supermarkets, Inc. v Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993) (citations omitted). The nonmovant's evidence, however, must be sufficient for a reasonable jury to find in favor of the party, given the applicable burden of proof. *See Anderson*, 477 U.S. at 249-50.

IV. BACKGROUND

Alberta Burton was originally hired by MBNA on October 28, 1996, as a Credit Analyst in the Unsecured Lending Department of MBNA's Customer Finance Division. (D.I. 29 at A10; Burton Dep. at 20:18-24.) On March 1, 1998, Burton was promoted to Loan Specialist (D.I. 29 at A10), and toward the end of 2000, she successfully applied for the position of Community Relations Specialist in the Community Relations Department of the MBNA Foundation. (Id. at A11.) At her new position in the Foundation, Burton worked under the supervision of Craig Marvel, Director of Community Relations. (Id.) From March 2001 through January 2002, Marvel engaged in a pattern of inappropriate conduct toward Burton (e.g., striking her in the buttocks with his knee, writing on her hand with an ink pen, touching the neckline of her blouse in such a way that she felt the need to cover her breasts with her arms, tripping her, etc.). (Id. at A11-A12.) On one occasion in

November 2001, Marvel asked Burton which of a few African-American, female, upper-management MBNA employees she wanted to be like. (D.I. 41 at B5.) He further suggested that in order for Burton to achieve similar success, she would need to "learn to do things the MBNA way." (Id.) Burton believes this was a proposition for sexual favors in exchange for favorable job opportunities. (D.I. 31 at 12-13.) Marvel's inappropriate behavior was not limited to Burton, either. In February 2002, he struck another female employee, which resulted in a Corrective Action Report and a "final warning." (D.I. 29 at A1.) As a further consequence of his actions, Marvel was reassigned to another department on March 6, 2002. (D.I. 41 at B9.) Within two weeks he was replaced by Karen Yanick, who then became Burton's direct supervisor. (Id.)

As of that time, Burton had not yet reported the harassment she suffered at the hands of Marvel. However, during a March 19 discussion between Burton and Teresa Mason, MBNA's Affirmative Action Officer, Burton mentioned that she "was so glad that Craig [Marvel] was in a new department because [she] was tired of him hitting [her] and talking so abusively to [her]." (Id. at B10.) Although Burton initially discouraged Mason from taking any action, she was eventually persuaded that filing a complaint against Marvel was the right thing to do. (Id. at B10-B11.) Yanick learned about Marvel's harassment of Burton on March 20. (Id. at B10.) Burton's complaint resulted in an addendum to Marvel's Corrective Action Report on May 13, 2002. (Id. at B35.)

In May and June 2002, Burton was promoted to a higher job grade level and she received a 13.5% raise. (Burton Dep. at 65:3-13.) However, by August 2002, Burton felt "isolated" and she believed her work was being "streamlined" because Yanick was spending more time developing the career of one of Burton's co-workers, Maureen Flynn-Wildt. (Id. at 118:23-119:19.) Since Burton felt "out of the loop," she "decided to go back to school and obtain [her] M.B.A." (D.I. 41 at B13.)

In September 2002, with Yanick's approval, Burton became one of seven people chosen to participate in MBNA's pilot education program. MBNA agreed to pay $15,000 of Burton's tuition, and she was responsible for the remaining balance of $3,000. (Id.) Around the same time, an MBNA employee named Chris Dollard was transferred from another department into the Foundation. (Id. at B13.) MBNA says he was brought in to automate the Foundation's processes. (D.I. 37 at C6-C7.) However, Burton suspects he was brought in to replace her because she had to train him on her projects.[1] (D.I. 41 at B13.)

Then, in January 2003, Yanick informed Burton of an opportunity for her to transfer to the Foundation's Special Services division and assume a supervisory role managing MBNA's disabled employees. (Id. at B14-B15.) But because Burton had previous personal experiences that she felt would make it difficult for her to work with the mentally and physically challenged, she turned down the opportunity. (Id. at B15.) In further explaining her decision to Yanick, she said, "you are not treating me fairly because you are not allowing me to move on my right career path and you are setting me up to fail." (Burton Dep. at 75:4-6.) Although MBNA employees generally "do not have a choice about accepting [a] position or not," an exception was made in Burton's case because of a concern "that an unwilling manager would not do well in Support Services." (D.I. 29 at A45.)

Shortly thereafter, MBNA began to "refocus attention on its operations areas," which caused "a need for additional people to be transferred to the customer contact areas." (Id.) Along these lines, Burton recalls that on January 28, 2003, Craig Schroeder, one of the Foundation's supervisors, called a meeting and "explained how the bank's delinquencies were high and outstandings were

[1]Regarding counsel's uncited assertion that Dollard was not "technologically savvy" (D.I. 31 at 19), *see infra*, note 2.

low." (D.I. 41 at B16.) She also recalls Schroeder saying that "various people will be moved around the bank to assist with MBNA's new goal. He said if you are asked to transfer you must; there are no options." (Id.) In February 2003, a position opened up in Business Development for Colleges & Universities. (Id.) Although Burton was qualified, she was not given an opportunity to express interest in the position. (D.I. 41 at B16-B17.) Instead, the less-qualified Flynn-Wildt was given the position, and Burton was involuntarily reassigned as a Credit Analyst in the Credit Department. (Id. at B16-B18.) Although the job of Credit Analyst involved entry-level work and a less-desirable schedule (id. at B18), Burton's pay was not decreased (Burton Dep. at 81:16-82:19).[2]

On March 13, 2003, Burton filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), more or less alleging the facts stated thus far. (D.I. 29 at A22.) Burton commenced the present action in this court on September 29, 2003. (D.I. 1.) Subsequently, in November 2003, Burton was once again involuntarily reassigned to the Portfolio Risk Management/Credit Bureau Disputes Department as a Credit Dispute Representative. (D.I. 41 at B19.)[3] Leading up to this reassignment, Burton had been suffering from mild depression. (Burton

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[2]In her Answering Brief, Burton asserts that she "lost her exempt status and was required to sign in and out" as a result of this reassignment. She further asserts that if she "missed work or was late, she was docked," and that she "lost her bonuses and was required to meet incentive based quotas." (D.I. 31 at 20.) This is but one example in her brief where she makes a factual representation, but fails to cite to the record. In its effort to insure a fair result, the court searched the record for evidence to support these assertions and found only vague references to the job status known as "exempt," and to Burton becoming "an hourly employee." As far as the court can tell, no record evidence specifically explains what it means to be "exempt." Even if such an explanation exists and the court simply missed it, it is unreasonable for a party represented by counsel to expect the court to expend its scarce resources scouring the record in an effort to determine the existence of facts to support that party's contentions. Therefore, the court will disregard these assertions.

[3]It is unclear from the record whether this transfer was in June or November of 2003. (See D.I. 41 at B19.) In her Answering Brief, Burton asserts that the transfer was in November

Dep. at 95:4-5.) By November 26, her depression was so severe that her physician told her he was "taking [her] out on disability." (Id. at 95:14-20.) Upon receiving her doctor's orders not to return to work, Burton took time off under the Family Medical Leave Act ("FMLA"). (Id. at 96:9-12.) She informed MBNA that her estimated return-to-work date would be sometime in December. (Id.) However, pursuant to her doctor's orders, Burton pushed back her return-to-work date on more than one occasion. (Id. at 96:12-16.) On February 20, 2004, Burton was informed that her leave time, both FMLA time and Personal Time Off, would expire on March 22. (D.I. 41 at B27.) Thus, MBNA scheduled Burton to return to work by March 23.[4] (Id.) As of April 8,[5] Burton had not returned to work and she was terminated. (Id.)

V. DISCUSSION

A. *Quid Pro Quo* Sexual Harassment and Hostile Work Environment

Pursuant to statute, a victim of sexual harassment has at most three hundred days "after the alleged unlawful employment practice occurred" to file a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(e)(1). In this case, Burton's *quid pro quo* sexual harassment is based on the

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2003. (D.I. 31 at 20.) Thus, the court will assume that is the correct date.

[4]In support of her opposition to MBNA's motion for summary judgment, Burton submitted the letter she received informing her that she had been terminated for failing to return to work by March 23, 2004. (D.I. 41 at B27.) The court notes that this document is fraught with hearsay, particularly with regard to dates and leave time. However, the letter is one of Burton's proposed trial exhibits, and MBNA has no objection to its use at trial. (Schedule (c) of the Pretrial Order, Plaintiff's Exhibit 6.) Therefore, the court assumes the matters asserted therein are uncontested.

[5]Burton's Answering Brief asserts on page 9 that she was terminated on April 8, 2004. (D.I. 31 at 9.) However, the very same brief asserts on page 18 that she was terminated on February 23, 2004. (Id. at 18.) The court assumes the latter date is merely an oversight by counsel since the termination letter submitted by Burton is dated April 8, 2004. (D.I. 41 at B27.)

actions of Marvel alone (Tr. at 5:1-5),[6] and both parties "are in agreement that the last issue of harassment with respect to Craig Marvel was in January of 2002." (Tr. at 4:13-15.) It is similarly undisputed that Burton did not file a charge of discrimination until March 13, 2003. Thus, since more than three-hundred days elapsed between January 2002 and March 2003, Burton's *quid pro quo* claim must be dismissed.

The same time limitation applies to Burton's hostile work environment claim. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002). However, at the pre-trial conference held before the court on June 2, 2005, counsel for Burton advanced the following theory in an attempt to save her hostile work environment claim from the same fate as her *quid pro quo* claim:

> Our belief is that although we are in agreement that the last issue of harassment with respect to Craig Marvel was in January of 2002, that the hostile work environment continued on based on how she was treated by the other supervisors, in particular Karen Yanick, within the department. And based upon that, that although Craig Marvel had been removed from the department – again, we don't dispute that – but as a result of her reporting these things to MBNA, that then there was a course of action that continued on, which still is the hostile work environment.
>
> Merely because it is not sexual in nature by Craig Marvel, it's still a hostile work environment in and of itself by how she is being treated within the department.

(Tr. 4:13-25.)

The court declines to address the merits of Burton's new theory because it is an unbriefed departure from her previously-articulated theory of hostile work environment. The section of Burton's brief which discusses this claim addresses only Marvel's behavior. (D.I. 31 at 13-16.) Nary a word can be found regarding the actions of Yanick in the context of hostile work

[6]"Tr." refers to the transcript of a pre-trial conference held before the court on June 2, 2005.

environment. (See id.) It was not until the pre-trial conference – a mere three-and-a-half weeks before trial – that counsel announced Burton's new theory. With trial looming, it is simply too late in the process to set forth a new theory of liability. Thus, the court holds that Burton cannot save her contentions of exposure to a hostile workplace on this basis. Therefore, Burton's hostile work environment claim, which is based only upon Marvel's actions, is also time barred and must be dismissed.

B. Retaliation

The statutory prohibition against retaliation reads as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The proper mode of analysis for a claim of retaliation under this provision is the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, in which the plaintiff bears the initial burden of establishing a prima facie case of retaliation, the defendant bears the subsequent burden of proffering a non-discriminatory reason for its actions, and the plaintiff bears the final burden of undermining the defendant's proffered reason. 411 U.S. 792, 802-04 (1973). At stage one, the plaintiff's prima facie case of retaliation consists of three elements: "(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997).[7] If the plaintiff is unable to raise a genuine issue of material fact as to each

[7]Although *Krouse* involved the retaliation provision of the American's with Disabilities Act (ADA), the court explicitly noted that the analysis is identical under the retaliation provision

element of the prima facie case, summary judgment must be granted in favor of the defendant. *Krouse*, 126 F.2d at 501.

In adducing evidence of causation, the plaintiff may not rely "merely on a post hoc, ergo propter hoc inference from the fact that the restriction was imposed after [she] filed her complaint." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997). "[I]f timing alone could ever be sufficient to establish a causal link, . . . the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred. *Robinson*, 120 F.3d at 1302; *see, e.g., Jalil* [*v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989)] (causal link established where 'discharge followed rapidly, only two days later, upon Avdel's receipt of notice of Jalil's EEOC claim')." *Krouse*, 126 F.3d at 503. On the other hand, "[w]hen temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus." *Id.* at 503-04. Evidence of retaliatory animus may be either direct, *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 178-79 (3d Cir. 1997), or indirect, *Robinson v. S.E. Pa. Transp. Auth.*, 982 F.2d 892 (3d Cir. 1993) ("*SEPTA*"); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271 (3d Cir. 2000).

Direct evidence of retaliatory animus, though perhaps rare, permits a direct inference that the defendant "placed 'substantial negative reliance on an illegitimate criterion in reaching [his] decision.'" *Kachmar*, 109 F.3d at 179 (quoting *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995)). For example, in *Kachmar*, the plaintiff's supervisor told her that "she was not on the management track because of her complaints concerning her salary, her 'campaigning on women's issues,' and her handling of [a] female employee matter, which [the manager] cited as an

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of Title VII. 126 F.3d at 500.

additional example of feminist campaigning." 109 F.3d at 178. Since these statements "would permit a factfinder to infer that [the plaintiff] was being taken off the management track because of her opposition to the manner in which [the defendant] was treating her and other women in the organization, and that her final dismissal was just a matter of time," the Third Circuit held that the plaintiff had "alleged enough direct evidence of a retaliatory animus" to survive summary judgment on the issue of causation. *Id.*

In the absence of direct evidence, the plaintiff may nevertheless prove retaliatory animus with indirect evidence. Two evidentiary scenarios are common: (1) evidence of an intervening pattern of antagonism by the defendant, *SEPTA*, 982 F.2d at 895, or (2) evidence of the defendant's inconsistent explanation of its actions, i.e., that its explanation is pretextual, *Ferrell*, 206 F.3d at 286. In *SEPTA*, although two years had elapsed between the protected conduct and the adverse action, the plaintiff successfully demonstrated an intervening pattern of antagonism by adducing evidence that his supervisors "repeatedly disciplin[ed] him for minor matters, miscalculat[ed] his points for absences from work, and generally tr[ied] to provoke [him] to insubordination." 892 F.2d at 895. Likewise, in *Woodson v. Scott Paper Co.*, where there was a similar two-year gap, the Third Circuit upheld the district court's finding of a causal link where the defendant (1) set the plaintiff up to fail "by hiring him as a product system leader in [a] poorly performing . . . division and then refusing to provide him with adequate resources," (2) failed "to respond appropriately to racist graffiti in its plant" that was directed at the plaintiff, and (3) terminated the plaintiff "pursuant to a 'sham' ranking process performed by individuals who were not familiar with his employment record, but only with his charges of discrimination." 109 F.3d 913, 921 (3d Cir. 1997). Characterizing it as a "very close" question, *id.* at 924, the *Woodson* court reasoned that "[w]hile each piece of evidence alone is not

sufficient to support an inference of a pattern of antagonistic behavior, taken together the evidence is sufficient," *id.* at 921.

In contrast, in *Weston v. Commonwealth of Pa.*, 251 F.3d 420 (3d Cir. 2001), the Third Circuit upheld the district court's dismissal of a plaintiff's retaliation claim, in part due to the absence of an intervening pattern of antagonism. In *Weston*, the plaintiff, a prison employee, was subjected to inappropriate physical touching, leading to "comments, jokes and jibes made by employees [including managers] and inmates who had learned of the incidents." 251 F.3d at 423. The plaintiff alleged that these comments, jokes, and jibes were made partially in retaliation for his filing of a grievance against his supervisor. *Id.* at 428. The plaintiff also suffered two written reprimands, and he was eventually suspended on two occasions for attendance problems. *Id.* at 430. The court held that there was no clear evidence of a pattern of antagonism because the alleged pattern "did not portend any future retaliation [i.e., suspension]." *Id.* at 432. "Instead," the court wrote, "the adverse employment actions were discrete responses to particular occurrences." *Id.*

Other cases look to inconsistencies in the defendant's explanation of its actions in deciding the sufficiency of the plaintiff's causation evidence. In *Farrell*, for example, the plaintiff challenged the defendant's assertion that she had been terminated due to a position elimination resulting from economic concerns. 206 F.3d at 285. She adduced evidence that only a few weeks prior to her termination the defendant had purchased her house in Maryland, and moved all of her possessions to her new home in North Carolina. *Id.* The plaintiff also pointed to a memo written by the very supervisor who had harassed her, in which he purported to have terminated her solely for her lack of interpersonal skills, rather than for economic reasons. *Id.* Moreover, the memo was written just a few weeks after its author had praised the plaintiff and asked her if she would be interested in a

promotion. *Id.* The plaintiff adduced further evidence that at least one of her managers commented that she was helpful, not that she lacked interpersonal skills. *Id*. at 286. The Third Circuit held that these inconsistencies, together with evidence that her supervisor changed his demeanor (as well as his flight plans) after she rebuffed his sexual advances, were sufficient for the plaintiff to demonstrate causation.[8]

In the present case, MBNA must prevail on its motion for summary judgment because Burton is unable to raise a genuine issue of material fact as to causation. The relevant time frame over which Burton must show causation is the period beginning with her March 2002 internal complaint about Marvel, and ending with her April 2004 termination. Since Burton presents no direct evidence of retaliatory animus, she must prove it with indirect evidence. As previously mentioned, however, she may not rely "merely on a post hoc, ergo propter hoc inference." *Robinson*, 120 F.3d at 1302. Rather, in the absence of unusually suggestive timing,[9] Burton must adduce other evidence from which to infer causation. Indeed, it is Burton's contention that the evidence in the record supports both a finding of an intervening pattern of antagonism, and a finding that MBNA's explanation of its actions is pretextual.[10]

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[8]In *Farrell*, the Third Circuit explicitly recognized that by permitting evidence of inconsistencies to prove retaliatory animus, it was running the risk of "conflat[ing] the test for causation under the prima facie case with that for pretext." *Farrell*, 206 F.3d at 286. Nevertheless, because such a danger is inherent to the similarity of the inquiries at those distinct stages of the *McDonnell Douglas* analysis, the court essentially concluded that the potential for overlap is unavoidable and must be tolerated. *Id.*

[9]Burton concedes that there was a "lack of temporal proximity" between her protected activity and her termination. (D.I. 31 at 21.)

[10]In her Answering Brief, Burton only explicitly argues pretext in the context of the final stage of the *McDonnell Douglas* analysis. However, the "Causal Link" section of her brief includes reference to Dollard's transfer to the Foundation, which – as the court's discussion of Dollard, *infra*, should make clear – only makes sense if Burton is implicitly arguing that pretext

Burton's argument is summarized as follows: In August 2002, five months after she complained about Marvel, Burton began to feel that she was isolated and that her work was being streamlined because Yanick was spending more time developing Flynn-Wildt's career. Then, in September 2002, Dollard was transferred to the Foundation, ostensibly to automate certain projects. However, because Burton had to train him on her projects, she argues it would be reasonable to infer that the real reason for his transfer was to replace her. Yanick's first attempt to reassign Burton was in January 2003, when she pressured Burton to assume a supervisory role as an assistant manager in Support Services within the Foundation. Burton declined the reassignment, but in February 2003, after failing to offer Burton the desirable position given to the less-qualified Flynn-Wildt, Yanick informed Burton that she was being involuntarily reassigned as a Credit Analyst in the Credit Department. Burton's pay remained unchanged after the reassignment, but her new position was a functional demotion because it involved entry-level duties.

Although Burton was told in the meeting with Schroeder in January 2003 that the upcoming transfers were part of an attempt by MBNA to solve its financial problems, she argues that MBNA's "economic downturn" explanation is pretextual. In particular, she questions whether a company experiencing an economic downturn would promote Marvel to a $205,000 salary (D.I. 29 at A50); she questions why she would be transferred out of the Foundation in the name of an economic downturn, only to be replaced by Dollard; and she questions whether a company experiencing an economic downturn would promote the under-qualified Flynn-Wildt. Presumably, Burton's argument is that, assuming these rhetorically-phrased questions sufficiently undermine MBNA's "economic downturn" explanation, it would be reasonable to infer that retaliation was the true

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proves causation. Therefore, the court will address pretext as it relates to causation.

motivation for her being involuntarily reassigned and passed over for the position given to Flynn-Wildt.

Subsequently, eight months after Burton filed her EEOC complaint and two months after she instituted the present action, she was once again involuntarily reassigned to the Portfolio Risk Management/Credit Bureau Disputes Department as a Credit Dispute Representative. MBNA's final act of retaliation was terminating Burton in April 2004, in spite of her doctor's order that she remain out of work.[11] Taken together, Burton asserts that this evidence is sufficient to infer that her termination was causally related to her complaints in March 2002, March 2003, and September 2003. (D.I. 31 at 19-22.)

The court disagrees. One major problem with Burton's argument is that she implicitly asks the court to ignore crucial undisputed evidence. Although the court is obliged to view the evidence in the light most favorable to Burton, and to draw all reasonable inferences in her favor, the court also has a duty to prevent Burton from "cherry picking" the best evidence in an effort to distort the record. Indeed, that is what Burton has attempted to do in opposing MBNA's motion. For example, her argument omits the fact that shortly after her initial internal complaint against Marvel, she was promoted and her pay was increased by 13.5%. She also fails to mention that beginning in September 2002, contemporaneous with Dollard's transfer to the Foundation, she began the M.B.A. program at Wilmington College. Of the total tuition, Burton was responsible for $3,000, whereas MBNA agreed to pay the remaining $15,000. Moreover, Burton's participation in this pilot program required the approval of Yanick – the very person at the center of Burton's retaliation claim. And perhaps most important, Burton leaves out the undisputed fact that she was terminated after she ran

[11]Plaintiff's tenth Contested Issue of Fact in the Pretrial Order.

out of leave time.

Thus, the full record reflects that although Burton was passed up for one job opportunity and forced into a demotion (in function only), she was also promoted, offered a supervisory position, and sent to business school during the alleged retaliation period. Furthermore, all of these positive employment actions[12] occurred in the eleven months *before* the first arguable acts of antagonism.[13] Furthermore, even after Burton filed an EEOC charge in March 2003 and the present lawsuit in September 2003, her second involuntary transfer was not until November 2003. In the interim, Burton does not allege that any antagonism occurred. In the end, Burton was terminated after an absence of over four months. While Burton does not appear to dispute that she was out of leave time at the time of her termination, she contends that MBNA's decision to override her doctor's orders not to return to work was retaliatory. Yet, the court is aware of no rule of law that requires an employer to indefinitely retain an ill employee as long as she is following her doctor's orders. More to the point, aside from her involuntary transfer in November 2003, Burton has not adduced any evidence of retaliatory animus in the time between her September 2003 complaint in this court, and her April 2004 termination. Given this progression, it would be unreasonable to conclude that any of those events "portend any future retaliation." *Weston*, 251 F.3d at 432.

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[12]Burton may not agree with the court's characterization of the offer of a supervisory position in Support Services as a positive employment action because it was not on her "right career path." But at her deposition, Burton denied that the new position was not a good one. Instead, she simply said it "was not the opportunity for" *her*. (Id. at 73:5-6.) At worst, then, it is a neutral employment action.

[13]The court notes that these acts – the February 2003 involuntary reassignment and the promotion of Flynn-Wildt – might also be fairly characterized as adverse employment actions. However, they were not briefed as such. Thus, the court has only considered them as evidence of retaliatory animus.

Even if the court were to view the record through the prism urged by Burton, the evidence she sets forth to prove retaliatory animus is insufficient. Her feeling that she was isolated and that her work was being streamlined is only half supported by the record. Burton explained in her deposition that she began feeling isolated in August 2002 because Yanick was spending more time developing the career of Burton's co-worker, Flynn-Wildt. That testimony certainly supports her feeling of isolation, but as far as the court can discern, the record contains no specific evidence of any changes in Burton's workload to support her claim that her work was being streamlined. Even if the record did contain such evidence, neither a feeling of isolation, nor a streamlining of work rise to the level of antagonism. *See, e.g.*, *Weston*, 251 F.3d at 432 ("comments, jokes, and jibes" made partially in retaliation for the plaintiff's filing of a grievance against his supervisor was insufficient to establish causation); *Woodson*, 109 F.3d at 921 (standing alone, setting the plaintiff up to fail by putting him in a poorly performing division and then withholding adequate resources was "not sufficient to support an inference of a pattern of antagonistic behavior").

As to Dollard's transfer into the Foundation, the record does not support Burton's assertion that MBNA's proffered reason for his transfer is pretextual. The fact that Burton had to train him on her projects is perfectly consistent with MBNA's explanation that Dollard was brought in to automate the Foundation's projects. It is axiomatic that he would need to gain a familiarity with the projects before he could set about automating them. Therefore, there is no evidentiary reason to doubt MBNA's explanation.

Likewise, there is no evidentiary reason to believe that Yanick's pressuring of Burton to take the position in Support Services was antagonistic. Burton characterizes this as Yanick "setting [her] up to fail" (Burton Dep. at 75:4-6), which is similar to the language used in *Woodson*. However,

in *Woodson*, the plaintiff was "set up to fail" because he was hired into a poorly-performing division and subsequently denied the resources necessary to succeed. 109 F.3d at 921. Burton, on the other hand, was "set up to fail" because she was not allowed to pursue her "right career path." The following excerpt from Burton's deposition is particularly enlightening in this regard:

> Q. Would it be fair to say that this, the job that was offered to you was regarded as a good job by at least some people at MBNA?
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> A. I never said it wasn't a good job, Mr. Sandler. I said it was not the opportunity for Alberta [Burton].

(Id. at 73:5-6.) Thus, any similarity to *Woodson* is only skin deep. Importantly, even if Burton had been set up to fail in a similar fashion, the *Woodson* court held that such evidence is insufficient standing alone to support an inference of antagonism. 109 F.3d at 921. Consequently, it was not antagonistic for Yanick to pressure Burton to accept a supervisory position that did not suit her preferences.

Finally, the court disagrees with Burton's argument that an inference of retaliatory animus can reasonably be drawn from the allegedly pretextual nature of MBNA's "economic downturn" explanation. Marvel's promotion does not undermine MBNA's explanation because his promotion was approximately one year before the January 2003 meeting in which Schroeder announced MBNA's need to make changes due to economic concerns.[14] Business fortunes can change radically in that amount of time, so Marvel's early 2002 promotion is not probative as to MBNA's financial condition in early 2003. Dollard's transfer to the Foundation in September 2002 suffers a similar temporal flaw. Additionally, Burton has adduced no evidence that Dollard was not in fact brought

[14]The record is unclear as to precisely when Marvel was promoted. According to MBNA's responses to Burton's written interrogatories, however, it appears that Marvel had a $205,000 salary at least as early as March 2002. (D.I. 29 at A49-A50.)

in to automate the Foundation's projects. Certainly, automation is consistent with reducing costs. As to Flynn-Wildt's promotion, no evidence adduced thus far indicates that the position was newly created for her. Such evidence, if it existed, might belie MBNA's explanation because it would demonstrate expansion in a time of alleged financial straits. However, the only record evidence apparent to the court indicates that Flynn-Wildt was promoted to fill a newly-vacant position, not a newly-created position. (D.I. 29 at A45.) Therefore, Burton has failed to demonstrate that MBNA's explanation is pretextual.

Thus, after careful consideration of the entire summary judgment record, the court holds that it would be unreasonable to infer that Burton's termination was anything but a discrete response to the fact that she did not return to work after running out of leave time. Consequently, Burton cannot bear her burden of establishing a prima facie case of retaliation, and summary judgment in favor of MBNA is appropriate.

IV. CONCLUSION

For the foregoing reasons, the court will grant summary judgment in favor of MBNA and dismiss Burton's complaint in its entirety.

Dated: June 22, 2005

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALBERTA BURTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03-915 (GMS)
	)	
MBNA AMERICA BANK, N.A.	)	
	)	
Defendant.	)	

ORDER

IT IS HEREBY ORDERED THAT:

1. The defendant's motion for summary judgment (D.I. 27) be GRANTED; and

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

Dated: June 22, 2005

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE