IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOSEPH S. AGOSTINELLI,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 98-217-GMS
v.	)	
	)	
CHRISTIANA HEALTH CARE SYSTEMS, INC. t/a MEDICAL CENTER OF DELAWARE,	)	
	)	
Defendant.	)	

M E M O R A N D U M A N D O R D E R

The plaintiff in this case, Joseph S. Agostinelli ("Agostinelli"), filed this complaint on April 30, 1998, alleging that his employer, Christiana Health Care Systems ("CHCS"), retaliated against him when he complained of unlawful age and gender discrimination in CHCS's hiring practices in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623 (d),[1] and Title VII, 42 U.S.C. 2000e-3 (a).[2]

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[1]29 U.S.C. 623 (d) states:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

[2]Section 704 (a) of Title VII states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, asserted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3 (a).

Presently before the court is CHCS's motion for summary judgment. Because Agostinelli has failed to establish a prima facie case of retaliation, it will grant CHCS's motion. The following sections explain the reasons for the court's decision more thoroughly.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P 56(c). 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." *See 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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *see also Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

Specifically, within the context of a Title VII or ADEA case, the employer must show that the plaintiff is "unable to raise a genuine issue of material fact as to either: (1) one or more elements of the plaintiff's prima facie case or, (2) if the employer offers a legitimate non-retaliatory reason for the adverse

employment action, whether the employer's proffered explanation was a pretext for retaliation" in order to obtain summary judgment. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 501 (3d Cir. 1997) (citing *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989)).

II. BACKGROUND

A. Alleged protected activity

Agostinelli began working for CHCS in 1967. He was employed there as a Purchasing Agent until his termination in 1995.[3] When Agostinelli's Purchasing Assistant, Angie Dukes, transferred from the Purchasing Department, three applicants were interviewed for the vacated position. The applicants were interviewed by Director of Purchasing, Hank Ffrench ("Ffrench"), Assistant Director of Purchasing, Susan Gadonas, and Agostinelli himself. After conducting the interviews, Agostinelli favored hiring Jacque Riddle ("Riddle"), a woman over forty, whom he asserted was the most qualified for the job. Specifically, Agostinelli contends that he objected to Brown and preferred Riddle because Brown could not type. According to Agostinelli, both he and Gadonas believed that Riddle was the most qualified applicant. Nonetheless, Rob Brown ("Brown") was hired directly by Ffrench; Agostinelli was informed of the decision on or about February 9, 1994. According to Agostinelli, under CHCS policy, he should have had final decision making authority in the hiring process for his assistant because he was the hiring supervisor.[4]

As a result of Ffrench's decision to hire Brown, Agostinelli promptly complained to CHCS

[3]The plaintiff began working originally at the Medical Center of Delaware, whose successor is the defendant, Christiana Health Care Systems, Inc.

[4]This statement is corroborated by the testimony of Margaret Harrison, trainer for the Department of Purchasing. Harrison stated that in her twelve-year experience with the Purchasing Department, this was the only time that the Purchasing Manager made the hiring decision concerning a Purchasing Assistant as opposed to the Purchasing Agent him or herself.

Manager of Human Resources, Larry Bryson ("Bryson") on or about February 18, 1994.[5] Agostinelli told Bryson that Brown was unqualified for the job, and also that he felt that "if Jacque Riddle was at least twenty years younger, my boss would've hired her over Mr. Brown."[6] Agostinelli also stated that "[his] boss would've hired [Riddle] as a woman and twenty years younger." Agostinelli stated that Riddle is "significantly less youthful in age and appearance than Angie Dukes and Rob Brown," but did not allude to their true ages except to say that Riddle is "over 40 and substantially older" than the others. Agostinelli also expressed his concern to Employee Relations Representative, Mary Kate Harkins ("Harkins"). Harkins confirms that Agostinelli expressed concern over age discrimination in her deposition.

It is not clear whether Riddle every complained to CHCS that its failure to select her for the position of Purchasing Assistant was in any way discriminatory.[7]

B. Reprimands and events during Brown's employment

Brown began working as Agostinelli's Purchasing Assistant on or about March 14, 1994. He

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[5]Agostinelli also contends that he complained to CHCS superiors Chris Lynch, Ray Siegfried, and Mr. Caldas. However, the specific content and date of the complaints is not clear from Agostinelli's allegations.

[6]This statement is not confirmed in Bryson's deposition. Bryson only states that Agostinelli voiced concern that Brown was not qualified and could not type.

[7]CHCS says Riddle never complained of possible discrimination. Agostinelli contradicts this claim. In his briefing on the motion, Agostinelli claims that "Jacque Riddle complained to [him] and then to Larry Bryson about the inequity of Brown being selected for the position rather than Ms. Riddle." D.I. 54 at 3. The record does not exactly support this contention. Rather, according to Agostinelli in his deposition, Bryson called him on behalf of Jacque Riddle, who allegedly wanted to know why she did not get the job. D.I. 55 at B21. Agostinelli also claims that Riddle "decided to drop her complaint." *Id.* at B25. However, it is not clear if Riddle's complaint was related to discrimination, and even if it was if that discrimination was related to age, gender, or race (Brown is African-American).

proved to be extremely difficult to train. Department trainer, Margaret Harrison, stated that after just two days, she informed Ffrench that she felt that Brown "couldn't read or write." Harrison was subsequently removed from Brown's training, and Ffrench assigned several other trainers. Eventually, Agostinelli was also assigned to train Brown. Brown's probationary period was extended and lasted for one year – longer than CHCS's normal ninety-day probationary period or six-month evaluation period. Despite the apparent difficulty in training Brown, his performance was subsequently assessed as "satisfactory" on June 13, 1994.

According to Agostinelli's termination report from CHCS, the day after Brown's hire, he complained about Brown's performance at a meeting, and subsequently asked Procurement Agent, Joanne Baker, when someone was going to admit that a hiring mistake was made. The report indicated that CHCS believed that this statement indicated that Agostinelli "[had] pre-judged [Brown's] ability prior to giving him a chance." Agostinelli reported to Ffrench that Brown was "illiterate and could not type" shortly after Brown was hired, and apparently met again with Bryson "to reaffirm that [Brown] was not qualified for the position." Agostinelli admits to making a "comparison chart" between Brown and Riddle and presenting it to Harkins in an inquiry about Brown's selection.[8]

Ffrench sent Brown to a typing class in late March of 1994. Agostinelli then told Riddle that Brown was participating in the class in April of 1994. When she received this information, Riddle then telephoned Bryson to voice her dissatisfaction. Following Riddle's complaint, Bryson contacted Agostinelli; according to Agostinelli, Bryson was "upset" that Brown had violated CHCS's policies regarding confidentiality by

[8]It is unclear when this occurred, though it seems to have occurred early on in Brown's employment.It does not appear in the CHCS report, nor does Agostinelli's reference to a subsequent complaint to Harkins following this event.

telling Riddle that Brown was assigned to a typing class.

As a result of his statement concerning the typing class, Agostinelli received his first formal disciplinary memo, which CHCS labeled a "Coaching," from the hospital on June 20, 1994.[9] This report, entitled "Breach of Confidentiality," stated that Agostinelli had discussed a confidential Personnel matter, despite being given clear instructions that the matters at issue were confidential. The report also stated that Agostinelli denied the discussion until he was confronted about the issue. The report also found through later investigation that Agostinelli had indeed breached confidentiality, and that Agostinelli engaged in this behavior despite three warnings. The document also advised that the consequences for a further problem in this area would result in "further disciplinary action up to and including termination."

In a two-page, typed response, Agostinelli challenged this disciplinary action as unwarranted. Agostinelli denied the matters in response, and claims that the list of typing class participants was a matter of public hospital record. Agostinelli did admit, however, to making a more general comment that "the problem we are having is because we did not hire the proper individual." In addition, Agostinelli's written challenge is devoid of any suggestion that unlawful retaliation motivated the coaching.

During this time period, tensions mounted between Agostinelli, Brown and Ffrench, and this produced heightened strain in the work environment. Agostinelli claims that Brown made threatening gestures towards him and threatened to shave his head, dye his hair orange, and come to work with a gun.[10]

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[9]CHCS uses a multi-step disciplinary system in which the increasingly severe actions of "coaching," "warning," "reprimand," suspension and termination are employed.

[10]This allegation is confirmed by the CHCS report, which also states that Agostinelli complained of Brown's threatening comments during a meeting. CHCS states that its investigation found Agostinelli to have been acting inappropriately during the meeting.

In a July 7, 1994 email, Agostinelli complained to Chris Lynch, Director of Human Resources, that he was tired of being harassed by Ffrench. Ffrench was reprimanded at one time for telling Agostinelli that "nobody likes you Joe."

On December 29, 1994, Agostinelli received another formal disciplinary action, a "Reprimand," from CHCS for poor work performance. The Reprimand stated that Agostinelli inhibited the training and evaluation process of Brown, did not actively participate in the training, and displayed inappropriate behavior towards Brown. Again, Agostinelli challenged this disciplinary action using CHCS's formal Employee Problem Solving Procedure.[11] In the course of the Problem Solving Procedure, Agostinelli issued a rebuttal statement. In his rebuttal statement, Agostinelli rejected his evaluations, but did not mention that his dissatisfaction with Brown was related to his age or past discrimination in hiring against Riddle due to her age. Ffrench and Ffrench's supervisor, Ray Seigfried, upheld the Reprimand. On February 23, 1995, Agostinelli challenged the action against him before the Peer Review Panel. The Peer Review Panel determined that the discipline against Agostinelli was warranted because he had displayed an "unwillingness to follow the guidance" of management and human resources, and that his actions had "inhibited [the Purchasing] Department's ability to objectively evaluate the performance of [his] Assistant." Although upholding the disciplinary action against Agostinelli, the Peer Review Panel reduced the "Reprimand" to a "Warning."

[11]CHCS employs an Employee Problem Solving Procedure which provides eligible employees with a formal means of addressing individual disputes regarding the application of policies, procedures, and organizational practices. The formal process permits an employee to seek redress with successively higher levels of management within his or her management chain, as well as the opportunity to present his or her case before a Peer Review Panel.

C. Reprimands and events following Brown's transfer

In April of 1995, Brown began working as assistant to another Purchasing Agent, and Riddle was hired as Agostinelli's assistant in August of 1995. During this time period, tensions also developed between Agostinelli and Riddle. Specifically, Riddle complained that Agostinelli treated her poorly, that Agostinelli called Brown incompetent and compared her performance with Brown's, and that Agostinelli undermined Ffrench.

In September of 1995, Agostinelli received yet another formal "Reprimand" entitled, "Lack of Courtesy," regarding a verbal altercation with Riddle which occurred on August 11, 1995.[12] The Reprimand stated to Agostinelli: "As a supervisor your actions were contrary to the guidance provided to you previously on the tone and manner in [sic] which you use when dealing with your assistant. Also, you have again behaved in a manner inconsistent with [the company's] Core Values." The Reprimand also advised Agostinelli that "further occurrences of this nature will be reviewed and may result in further disciplinary action up to and including termination."[13]

Again, Agostinelli initiated the Problem Solving Process at the executive management level to challenge the September 1995 disciplinary action. He presented his case to James F. Caldas ("Caldas"), Christiana Care's Chief Operating Officer, in a lengthy meeting. Caldas upheld the disciplinary action against Agostinelli. The investigation related to the September 1995 reprimand also found that Agostinelli had improperly attempted to influence his assistant, Riddle, prior to her meeting with Caldas. Agostinelli

[12]The reprimand is not officially dated, but was signed September 1, 1995.

[13]Regarding this issue, Agostinelli's termination memo stated that "the fact finding revealed that he was treating [Riddle] in an unacceptable manner, and that he was creating a hostile environment with his demeaning comments about staff, to include Mr. Ffrench."

claims that the altercation was a "minor incident" and did not "disturb the whole department" as was alleged.

On October 17,1995, Agostinelli was issued a fourth disciplinary action, another "Reprimand" for "Work Performance [and] Improper Use of Time" for leaving his work area for forty minutes on October 3, 1995. The Reprimand explained that Agostinelli was "unable to write an account of your whereabouts for that period, yet it was unnecessary for [him] to be out of [his] work area." Agostinelli refused to sign this document. However, in a memo to Ffrench dated October 6, 1995, Agostinelli stated that the time was spent completing a shuttle pick-up for the mail, using the restroom, and stopping at a pharmacy.

D. Agostinelli's Termination

1. Termination and Agostinelli's Challenge

On November 15, 1995, CHCS terminated Agostinelli's employment.[14] The next day, Agostinelli received a three-page document outlining the reasons for his discharge. This document recounted specific instances in which Agostinelli had been disciplined, his challenge of those disciplinary actions under the formal Problem Solving Procedure, and the failure of Agostinelli to change his behavior to comply with CHCS's formal standards, despite efforts by management and Human Resources to assist Agostinelli in doings so. Specifically, the termination memo cited Agostinelli's:

- sub-optimal working relationship with and inappropriate behavior toward Brown;
- sub-optimal working relationship with and inappropriate behavior toward Riddle;

[14]Although CHCS marks November 15th as the date termination, Agostinelli does not. According to his complaint, he was "suspended" on November 16th and ultimately terminated on December 20th. The December 20th date coincides with the date of the actual Peer Review Decision. Upon consideration of the record, it appears that the November 15th date is correct. D.I. 50 at A-141.

- continued obsessive behavior toward Brown even after Riddle became his assistant; and
- creation of a hostile environment with his demeaning comments about staff, including Ffrench.

D.I. 50 at A138.

On December 18, 1995, Agostinelli challenged his termination before a Peer Review Panel in accordance with CHCS Problem Solving Procedures. The Peer Review Panel upheld Agostinelli's discharge. It explained that:

> Our investigation revealed that the inappropriateness of your behavior as a supervisor has been brought to your attention on numerous occasions. Despite the guidance that was provided, you have not been successful in modifying your behavior. As a result, your actions continue to create an intimidating and hostile work environment. This is inconsistent with the Medical Center's Core Values and the Employee Relations Philosophy which all members of management are charged with upholding. Based on the facts of the case, we find it necessary to uphold the decision to terminate your employment.

D.I. 50 at A-141.

2. Attempt to Manipulate the Composition of the Peer Review Panel

According to the CHCS protocol, a Peer Review Panel may be assembled to hear a party's grievance. The protocol allows for the random selection of appropriate panel members, but appears to allow the employee to select which pooled members will sit on the panel. Prior to the meeting of the December 1995 Peer Review Panel, Agostinelli again attempted improperly to influence the Problem Solving Procedure. In his deposition, Agostinelli admits to attempting to mark one of the cards in order to get a specific individual on the panel. This card was not used and thus, the process was not adversely affected by this incident. Agostinelli contends that none of the panelists that he selected appeared on the list for his panel. Agostinelli stated that he then attempted to secure a place on the panel for "the chaplain" by trying to mark his card.

Agostinelli's attempt to mark the card constituted a separate offense for which he could have been discharged. However, the Peer Review Panel was not advised of Agostinelli's inappropriate action when it met on December 18, 1995. The court also notes that Agostinelli admits that the panel did not act or question him in an inappropriate manner. Despite this admission, Agostinelli subsequently complained about how his Peer Review was handled to CHCS managers, Lynch, Caldas, Harkins, and Bryson.

E. Events following Agostinelli's termination

After his termination, Agostinelli applied to many companies seeking employment including Union Hospital.[15] In February, 1996, Agostinelli sent a letter and resume to Union Hospital Vice President James Crouse ("Crouse"), after which Agostinelli claims he received a phone interview from Crouse. Agostinelli states that at that time, Crouse told him that he was going to call Ray Siegfried ("Siegfried"), who is Ffrench's manager at CHCS. This was the last reported contact regarding this prospective job.

Crouse stated that he never spoke with Agostinelli, and that the application process was instead likely handled primarily by Union's human resources department. Seigfried also contends that he never spoke to Crouse about Agostinelli. Pamela Gouge, Crouse's coworker, contends only that it is customary to speak with prospective applicants, that she believes that Agostinelli was interviewed, and that she believes that negative talk was exchanged between Crouse and Seigfried with regards to Agostinelli's application. D.I. 55at B-74, 88.

About a year later, Agostinelli applied again to Union Hospital. This time he requested that Crouse's co-worker, Pamela Gouge ("Gouge"), speak directly to Tim Constantine ("Constantine"), who

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[15]Agostinelli wrote to more than ninety companies and employment agencies seeking a job or assistance in finding a job. It appears that he did not meet with success until late 1998.

had replaced Crouse as the supervisor over purchasing agent hires. According to Gouge, Constantine was "impressed" with Agostinelli's credentials when Gouge approached him with Agostinelli's resume. Agostinelli states that he then called Constantine, and claims that Constantine was not interested in an interview as a result of the previous conversation between Seigfried and Crouse.

Constantine stated that he does not remember speaking to Agostinelli. He further states that he does not remember ever telling anyone, including Gouge, that he was impressed with Agostinelli's resume. Constantine contends that he did speak to Crouse in order to get feedback about some of the candidates, including Agostinelli, and that he "[doesn't] recall specifics, but I [don't] recall it being very favorable."

Agostinelli did not secure a position with Union Hospital. He did get a job with Graver Technologies in 1998.

There is also evidence in the record that Agostinelli applied to Pennsylvania Hospital's Purchasing Department in January or February of 1997, and interviewed with Tony Pasquarella, the Director of Pharmacy and Purchasing. Agostinelli was not hired for this position. Tom Karrenbauer, one of Pasquarella's subordinates called Ffrench at CHCS twice, seeking information about Agostinelli. Both Ffrench and Karrenbauer testified that Ffrench said nothing to Karrenbauer about Agostinelli. Indeed, both men testified that Ffrench referred Karrenbauer to CHCS's Human Resources Department. Thus, it seems that Pasquarella, who apparently made the hiring decision, received no information about Agostinelli from CHCS.

IV. DISCUSSION

The framework for evaluating a plaintiff's discrimination claim under Title VII has traditionally been

employed in the evaluation of ADEA retaliation claims. *See, e.g., Barber v. CSX Distribution Services,* 68 F.3d 694 (3d. Cir. 1995); *Maxfield v. Sinclair Int'l,* 766 F.2d 788 (3d Cir. 1985, *cert. denied,* 474 U.S. 1057 (1986)). To satisfy his prima facie burden with regards to both claims, the plaintiff must show "(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." *See Krouse,* 126 F.3d at 500 (citing *Woodson v. Scott Paper Co.,* 109 F.3d 913, 920 (3d Cir. 1997)); *see also Jalil,* 873 F.2d at 708. If the employee establishes a prima facie case, the burden shifts to the employer "to advance a legitimate, non-discriminatory reason for its adverse employment action."[16] *See Krouse* at 500. If a reason is articulated, the burden then shifts back to the plaintiff to prove that the employer's proffered explanation was false and that retaliation was the true motivation behind the adverse action. *See id.* at 501 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 519 (1993)). Though the burden of persuasion may shift, the burden of proof remains with the plaintiff at all times. *See Woodson,* at 920 n.2.

A. Title VII retaliation claim

In order to meet his prima facie burden on his Title VII retaliation claim, Agostinelli must first show that he complained about an unlawful employment practice under Title VII. Title VII prohibits the consideration of race, color, religion, sex, or national origin in employment practices, and also prohibits discrimination based upon any of these characteristics. *See* 42 U.S.C. § 2000e-2 (a) (stating that "it shall

[16] The employer's burden is "relatively light: it is satisfied if the defendant articulates any legitimate reason for the [adverse employment action]; the defendant need not prove that the articulated reason actually motivated the decision." *Id.* at 500-1 (citing *Woodson,* 109 F.3d at 920 n.2).

be unlawful for an employer to limit, segregate, or classify his employees . . . because of such individual's race, color, religion, sex, or national origin"); *see also* 42 U.S.C. § 2000e-2 (m) (stating that "an unlawful employment practice is established when . . . [any of these factors] [is] a motivating factor for any employment practice, even though other factors also motivated the practice"). In his deposition, Agostinelli has stated that he believed that "[his] boss would've hired [Riddle] as a woman and twenty years younger." When asked if he explained to Harkins "what discrimination was involved, sex, [or] disability," Agostinelli replied "age" and then stated, "yea, it was age, we talked bout age." In addition, he concedes that he told "Larry Bryson and other management people that Riddle was not hired . . . because of her age."

In light of Agostinelli's own admissions, the court concludes that Agostinelli did not engage in protected activity, and thus, he cannot establish a prima facie case of retaliation under Title VII. Agostinelli by his own words has negated his contention that his discrimination complaints were in any way related to Riddle's gender. By stating that he believed that Riddle would have been hired had she been a younger woman, Agostinelli, in fact, concedes that he believed that Riddle's gender had nothing to do with Ffrench's selection. When questioned whether he believed that sex discrimination was involved, Agostinelli confirmed that it was not by stating that he believed that "it was age." Because Agostinelli has not demonstrated that he complained about discrimination due to Riddle's gender, Agostinelli has failed to establish that he engaged in protected activity. Thus, he fails to state an actionable Title VII retaliation claim under 42 U.S.C. § 2000e-3 (a). *See e.g., Malarkey v. Texaco, Inc.*, 704 F.2d 674, 674-75 (2d Cir. 1983) (upholding dismissal of gender discrimination claim where female plaintiff contended promotions were given only to attractive women).

B. ADEA retaliation claim

1. Prima Facie case

Again, to state a prima facie case of retaliation, a plaintiff must show that he engaged in protected employee activity, suffered an adverse action by the employer either after or contemporaneous with the employee's protected activity; and that there is a causal connection between the employee's protected activity and the employer's adverse action. *See Krouse*, 126 F.3d at 500.

a. Protected activity

In order to state a valid retaliation claim under the ADEA, Agostinelli need not prove the merits of his complaints, but simply that "he was acting under good faith [and a] reasonable belief that a violation existed." *See Griffiths v. Cigna Corp.*, 988 F.2d 457, 468 (3d Cir. 1993). Assuming Agostinelli's beliefs were reasonable, his complaints must have, however, either explicitly or implicitly alleged that Riddle's age was the cause of the alleged unfairness. *See Barber*, 68 F.3d at 702 (stating that "informal protests of discriminatory employment practices, including making complaints to management" may constitute protected activity as the filing of a formal E.E.O.C. charge is not required, however, that "general" complaints do not give rise to protected activity). According to the record, Agostinelli specified that he believed that discrimination had taken place as the result of Riddle's age when he complained in 1994 to Bryson and Harkins, and when he filed a charge of discrimination with the EEOC on December 5, 1997.

Although Agostinelli complained about alleged age discrimination against Riddle, and not himself, Agostinelli was engaged in protected activity. Under 29 U.S.C. § 623(d), where an employee is retaliated against because he advised his employer that he opposes a discriminatory practice against himself or other

employees, he has engaged in protected conduct. Thus, Agostinelli has established the first element of a prima facie case of retaliation.

b. Adverse employment action

The second element of a prima facie case of retaliation requires that Agostinelli's protected activity was followed by an actionable adverse action by CHCS *See Krouse*, 126 F.3d at 500. An action, other than the obvious discharge or refusal to rehire, is "adverse" "only if it alters the employee's compensation, terms, conditions, or privileges of employment, or deprives him or her of employment opportunities." *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir.1997). This alleged retaliatory conduct must be serious and tangible enough to adversely affect a plaintiff's status as an employee. *See id.*; *see also Schmidt v. Montgomery Kone Inc.*, 69 F. Supp. 2d. 706, 713 (E.D. Pa. 1999) (stating that the plaintiff must show the employment action was "material").

The Third Circuit recently addressed this issue in *Weston v. Pennsylvania*, 251 F.3d 420 (3d Cir. 2001).[17] In *Weston*, the court held that the plaintiff's prima facie case of retaliation failed because being given two written reprimands did not constitute an adverse employment action. *See id.* at 430. Emphasizing that "Title VII specifically prohibits action which would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." *Id.* at 430-31 (citing 42 U.S.C. S 2000e-2(a), the court found that it would consider the written reprimands at issue to be an adverse employment action only if the plaintiff could show that, "that these written reprimands

[17]In *Robinson v. City of Pittsburgh*, 120 F.3d 1300 (3d Cir.1997), the Third Circuit held that unsubstantiated oral reprimands and unnecessary derogatory comments were not adverse employment actions in a retaliatory conduct case. *Id.* at 1301.

affected the terms or conditions of his employment." Id. In particular, the court noted that even though these reprimands were placed in the plaintiff's personnel file for six months,

> he was not demoted in title, did not have his work schedule changed, was not reassigned to a different position or location in the prison, did not have his hours or work changed or altered in any way, and that he was not denied any pay raise or promotion as a result of these reprimands.

Id. Therefore, the court concluded that they did not change or alter his employment status. Id.

Here, Agostinelli contends that he suffered adverse employment actions as a direct result of his support of Riddle when he was subjected to a series of disciplinary actions and subsequently discharged. According to the record, Agostinelli received the following reprimands from CHCS:

1. Breach of Confidentiality (June 1994)
2. Work Performance (December 1994)
3. Lack of Courtesy (September 1995)
4. Improper use of Time (October 1995)
5. Termination (November 1995)

There is no evidence in the record that the first four reprimands resulted in any deterioration of Agostinelli's status, job responsibilities, salary, benefits, or any other material terms, privileges, or conditions of his employment. As in *Weston*, Agostinelli has failed to offer any evidence which would show that these disciplinary actions affected the terms or conditions of his employment. Therefore, only Agostinelli's discharge may count as an adverse employment action for purposes of the test.

Agostinelli also contends that Seigfried, on behalf of CHCS, retaliated against him in February, 1996 by giving him a negative recommendation for a job at Union Hospital. Agostinelli further contends that this recommendation foreclosed a second job opportunity with Union Hospital in February, 1997.[18]

[18]Agostinelli does not contend that he received a second negative recommendation from Seigfried in 1997. Rather he states that the 1996 recommendation had negative repercussions on his

Even viewing the facts in the light most favorable to the plaintiff, the court cannot consider this alleged negative recommendation as an adverse employment action. First, the court notes that Agostinelli was no longer an employee of CHCS when Siegfried allegedly gave the negative recommendation. Agostinelli offers nothing in support of his claim that these post-termination actions somehow could affect the terms and conditions of his employment. *See Robinson*, 120 F.3d at 1300. Moreover, Agostinelli admits that he offers no evidence as to the content or validity of this recommendation, nor any evidence that a negative recommendation could have even been motivated by his complaints about age discrimination. In light of Agostinelli's workplace conduct and extensive list of reprimands, there is a great possibility that a negative recommendation was based upon non-discriminatory reasons. The court thus holds that Agostinelli's negative post-termination recommendation would not constitute an adverse employment action. Therefore, the court will only consider Agostinelli's discharge as a adverse employment action.

c. Causal link

The court must next examine whether a causal link exists between Agostinelli's protected complaints and his termination. Agostinelli claims that the "causal link between [his] protected activity of complaining about Rob Brown and supporting Jacque Riddle's application for the position was immediate and obvious to all members of the Purchasing Department." D.I. 54. However, the court finds that after reviewing the record, this link in neither immediate or obvious. Again, viewing the record in the light most favorable to Agostinelli, the court finds that he has failed to show that there was a causal link between his

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1997 opportunity for a position, and that "[he] figured, again, [Siegfried], whatever he said, was the reason they weren't going to call me."

complaints about age discrimination against Riddle and his termination. Examining the temporal proximity between the employee's protected activity and the adverse employment action is an obvious method by which a plaintiff can proffer circumstantial evidence "sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." *See Kachmar v. Sungard Data Systems, Inc.,* 109 F.3d 173, 177 (3d Cir. 1997) (citing *Zanders v. National R.R. Passenger Corp.,* 898 F.2d 1127, 1135 (6th Cir. 1990) and *Jalil,* 873 F.2d at 708). The events at issue must not only be proximate, but their timing must be "'unusually suggestive of a retaliatory motive before a causal link will be inferred." *See Krouse v. American Sterilizer Co.,* 126 F.3d 494, 503 (3d Cir. 1997); *see also Lewis v. State of Delaware Dept. of Public Instruction,* 948 F. Supp. 352, 364 (D. Del 1996) (citing *Robinson v. Southeastern Pa. Transportation Authority,* 982 F.2d 892, 894-95 (3d Cir. 1993) (holding that two years is too long an intermittent period for causation to be inferred).

The causal link is very context-specific. *See Kachmar,* 109 F.3d at 178. When there is a lack of temporal proximity and immediacy between cause and effect, circumstantial evidence of a "pattern of antagonism" by the employer following protected activity may give rise to an inference of causation. *See Id.* at 177. Conversely, intervening unprotected conduct by the employee may sever the causal connection between protected activity and an adverse action. *See Mesnick v. General Elec. Co.,* 950 F.2d 816, 828 (1st Cir. 1991) (holding no causal link where a "particularly provocative act in outright defiance" occurred prior to termination and nine months following a protected complaint); *see also Kiel v. Select Artificials, Inc.,* 169 F.3d 1131, 1136 (8th Cir. 1999) (holding that an argument immediately prior to termination severed any suggested causal link); *see also Seaman v. CSPH, Inc.,* 179 F.3d 297, 301 (5th Cir. 1999) (holding that termination was the immediate result of insubordination despite employee's mention of

protected complaint in the argument).

First, the court concludes that there is a lack of proximity between the protected complaint and the adverse action in this case. Agostinelli's first age-related complaints occurred in February of 1994. These complaints occurred about eighteen months prior to his November, 1995 notice of termination. Intermittently, six months passed between Agostinelli's first and second reprimands, during which time Agostinelli's employment and status remained intact. Following his Work Performance action in December 1994, Agostinelli's status again remained constant for nine months until September of 1995. In a cluster of occurrences thereafter, Agostinelli was disciplined in September, 1995 and again in October, 1995 before he was finally terminated in November of 1995. The court finds that this chronology adds to its finding that temporal proximity between the 1994 complaints and Agostinelli's 1995 termination is lacking in this case. *See Krouse,* 126 F.3d at 503 (holding that nineteen months between E.E.O.C. complaint and alleged adverse action precluded a causal link); *see also Verone v. Catskill Regional Off-Track Betting Corp.*, 10 F. Supp. 372, 376-77 (S.D.N.Y. 1998) (holding no causal connection between protected complaints fifteen and six months prior to termination where employee had an altercation with supervisor which occurred immediately prior to termination).

Second, the court finds that Agostinelli's intervening unprotected conduct has severed any putative causal link between his 1994 protected complaints and his 1995 termination. *See Alston v. Rice,* 825 F. Supp. 650, 655 (D. Del. 1993) (holding that plaintiff was terminated not for discriminatory reasons, but for "insubordination," "causing discontent amongst [his] staff," and "poor work performance" when considering 'whether the plaintiff was performing his job at the level that met his employer's legitimate expectations') (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013-14 (1st Cir. 1979)). Agostinelli

confirms that he breached confidentiality by telling Riddle that Brown was sent to a typing class, the act he was reprimanded for in June 1994. Agostinelli also admits to keeping a "comparison chart" between Brown and Riddle and presenting the chart to Harkins. Agostinelli's behavior following Brown's transfer seems no less antagonistic, as his relationships with management and with Riddle were both poor and confrontational. Agostinelli concedes to having an altercation with Riddle in September, 1995, albeit small, and admits to being away from his desk for forty minutes in October of 1995. In addition, although he was not disciplined for his final act of insubordination, Agostinelli also does not dispute that he tried to mark a card for his Peer Review hearing immediately prior to his final termination. Finally, and most significant, throughout his campaign to discredit Brown, Agostinelli did not make a single formal complaint about the alleged discrimination towards Riddle. Moreover, outside of his alleged initial complaints to Bryson and Harkins, there is no evidence that Agostinelli ever raised the issue of retaliation or age discrimination during any the responses and challenges to the disciplinary actions taken against him.[19]

In light of this undisputed evidence in the record, Agostinelli's termination was justified. There is no evidence that the so-called pattern of antagonism by CHCS was in any way motivated by Agostinelli's 1994 age discrimination complaints. The lack of temporal proximity between the protected activity and adverse employment action and Agostinelli's intervening acts suggest the absence of a causal connection between his statutorily protected complaints and his termination from employment. In sum, Agostinelli has

[19]Agostinelli claims that he did not know that he could make a formal complaint about discrimination or retaliation through the Problem Solving Procedure. However, the CHCS Employee Handbook clearly states that: "Employees are permitted to use this procedure to resolve any work-related problem, including complaints related to discriminatory treatment . . . . without fear of reprisal." D.I. 50 at A94.

failed to establish a prima facie case of retaliation.

2. Legitimate Reason and Pretext

Even assuming satisfaction of the elements of his prima facie case of retaliation, Agostinelli has not offered sufficient evidence to rebut CHCS's proffered legitimate, nondiscriminatory reasons for his termination. As the court has just explained, Agostinelli's termination was justified in light of his conduct following Brown's hire and leading up to his termination. This decision was upheld by an independent Peer Review Panel, which Agostinelli does not contend was in any way even aware of his retaliation claim. *See Pamintuan v. Nanticoke Mem. Hosp.*, 192 F.3d 378, 387-88 (3d Cir. 1999) (affirming summary judgment where internal review process upheld plaintiff's suspension, despite plaintiff's argument that peers' decision was incorrect). Although Agostinelli characterizes the conduct of CHCS and Ffrench in particular, as openly retaliatory, Agostinelli has failed to set forth any evidence from which a reasonable fact finder could conclude that retaliatory animus played a role in CHCS's decision-making process and that it had a determinative effect on that process. *See Krouse*, 126 F.3d at 501. In order to raise a genuine issue of material fact concerning whether CHCS's legitimate reasons were pretextual, Agostinelli cannot merely argue that CHCS's decisions were wrong or erroneous, but rather, that it's decisions were motivated by retaliatory animus. *Keller v. Orix Credit Alliance, Inc*., 130 F.3d 101, 1108-09 (3d Cir. 1997).

IV. CONCLUSION

For the foregoing reasons, the court finds that Agostinelli has failed to show that there is a causal link between his alleged complaints of age discrimination and his termination. Therefore, he cannot establish a prima facie case of retaliation. Even assuming that Agostinelli satisfied the elements of a prima facie case of retaliation, he has failed to create a genuine issue of material fact from which a reasonable jury could

conclude that CHCS's legitimate, nondiscriminatory reasons for his termination were pretextual.

For these reasons, IT IS HEREBY ORDERED that:

1. The defendant's motion for judgment for summary judgment (D.I. 48) shall be GRANTED.

2. Summary judgment be and is hereby ENTERED in favor of defendant.

August 29, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE