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

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| TAMARA KLOPFENSTEIN | : | CIVIL ACTION |
| Plaintiff, | : | No. 07-cv-4004 |
| v. | : | |
| | : | Honorable Berle M. Schiller, J. |
| NATIONAL SALES AND SUPPLY, LLC t/d/b/a NATIONAL SALES AND SUPPLY | : | |
| Defendant. | : | |

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

AND NOW comes Plaintiff, Tamara Klopfenstein, by and through her undersigned counsel, and submits the following Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.

## I. Introduction

Plaintiff initiated this action to seek redress for unlawful sexual harassment, gender discrimination and retaliation by Defendant, her former employer, in violation of Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act.

Plaintiff, a twenty six (26) year old female, was employed by Defendant from September 18, 2006 until October 27, 2006 in a Receptionist/Data Entry position. At all times, Plaintiff reported to Jason Shrager and Richard Blum, both Vice Presidents of the company. Plaintiff interviewed with Mr. Blum. Following Plaintiff's interview, Mr. Blum wrote on Plaintiff's job application that Plaintiff "looks nice".

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Approximately two weeks after her employment commenced, Mr. Blum and Mr. Shrager began to demand that Plaintiff serve them coffee every afternoon at 3:00. This task was not included in any job description ever provided to Plaintiff, and Plaintiff found this request to be demeaning and degrading to her as a woman. Plaintiff objected to performing this duty, and informed Mr. Blum and Mr. Shrager that she would not bring them coffee. No male employee was ever requested to serve coffee to Mr. Blum or Mr. Shrager.

On October 26, 2006, Mr. Shrager asked Plaintiff to bring him coffee. Plaintiff refused, and explained to Mr. Shrager that she did not believe that it was part of her job to serve the male managers. That evening, Mr. Shrager e-mailed Plaintiff and advised her that serving him and Mr. Blum coffee was part of her job. Mr. Blum followed up with an e-mail stating, "If you have a problem with this we need to talk." The following morning, Plaintiff responded via e-mail, "I don't have a problem getting coffee and/or water for our guests when they come in. I don't expect to serve and wait on you by making and serving you coffee everyday at 3:00." Nine minutes later, Mr. Blum sent Plaintiff an e-mail terminating her employment.

Plaintiff then went to Mr. Blum's office and asked if she could work for the rest of the day. Mr. Blum agreed. Plaintiff then stated that she was going to file a complaint against Defendant. Mr. Blum understood that Plaintiff was referring to a complaint with the EEOC. In response to Plaintiff's threat to file this complaint, Mr. Blum told Plaintiff to leave, and would not permit her to work the remainder of the day.

## II. <u>Statement of Facts</u>

Plaintiff incorporates the facts set forth in Defendant's Statement of Facts and her responses thereto herein as if the same were set forth at length.

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## III. Legal Argument

Plaintiff has adduced sufficient evidence during discovery to establish a *prima facie* case of sexual harassment, gender discrimination, and retaliation, and Defendant's motion must be denied.

### *a. The standard for summary judgment.*

Federal Rule of Civil Procedure 56 and the authorities interpreting it have set a high standard for the granting of summary judgment – a standard Defendant simply cannot satisfy.

Pursuant to Fed.R.Civ.P. 56(c) summary judgment is appropriate only in cases "... where there is no genuine issue of material fact for the jury to decide." *Coolspring Stone Supply v. American States Life Ins. Co.,* 10 F.3d 144, 148 (3rd Cir. 1993). Summary judgment may be granted only when there is no dispute as to an issue of material fact and the moving party is entitled to judgment as a matter of law. In response to a motion for summary judgment, the nonmoving party must demonstrate the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505 (1986). The burden always remains on the moving party, however, to show that a rational trier of fact could not find for the non-moving party and that there is thus no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348 (1986). Defendant cannot meet that burden.

In ruling on a motion for summary judgment, the Court must accept and believe the evidence of the non-moving party (herein, the Plaintiff) as true, and must not weigh or consider the credibility of witnesses. *Anderson, supra,* 477 U.S. at 248-52. The non-moving party's evidence must be believed as true on summary judgment, and any and all doubts must be resolved in that party's favor. *Eastman Kodak Co. v. Image Technological Services, Inc.,* 504

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U.S. 451, 456, 112 S.Ct. 2072, 2076 (1992). On summary judgment, where the non-moving party's evidence contradicts the movant's evidence, then the non-movant's evidence must be taken as true. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3rd Cir. 1992), *cert. denied,* 507 U.S. 912, 113 S. Ct. 1262 (1993). "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L. Ed. 2d 176 (1962).

As will be demonstrated *infra,* Plaintiff has adduced ample evidence to allow her claims to proceed to trial.

***b. Plaintiff Has Established a Claim for Sexual Harassment.***

As Plaintiff was terminated for her refusal to conform to an outdated and offensive gender stereotype (that of the subservient female employee), she has established a *prime* facie case of sexual harassment. The Supreme Court has held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 66, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1985). According to EEOC regulations, sexual harassment can take the form of:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a). "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such

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as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis." 29 C.F.R. § 1604.11(b).

Courts in this District have already held that the type of conduct to which Plaintiff was subjected is prohibited by Title VII. As one Court has stated:

> A third category of actionable conduct is behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex. This third category describes *behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. That Title VII outlaws such conduct is beyond peradventure.*

*Stair v. Lehigh Valley Carpenters Local Union No. 600*, 1993 U.S. Dist. LEXIS 8668, (E.D. Pa. June 24, 1998) (emphasis added) (Huyett, J.), *citing Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991). Applying this standard, the Northern District of Florida denied a defendant's motion for summary judgment on a claim for sexual harassment based, in part, on forcing female employees to perform personal, non-work-related tasks for male employees.

> Plaintiffs also depict behavior which can be properly classified as the third type of conduct, that which creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. In the case at bar, Plaintiffs were repeatedly subject to treatment which relegated them to the stereotypical role of subservient female. Plaintiffs were repeatedly asked to run errands for the CSPs including picking up lunch, beer, and cigarettes, dropping-off laundry, and paying their personal bills.

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*King v. Auto, Truck, Industrial Parts and Supply, Inc.* 21 F. Supp. 2d 1370, 1379 (N.D. Fl. 1998) (internal citations omitted). Such is the case in this matter. Plaintiff was compelled to perform servile tasks for her male supervisors (tasks that other female employees but not male employees) were also required to perform. Such demands on Plaintiff amounted to an attempt to reinforce outdated gender stereotypes (*i.e.*, that females should serve their male bosses), created a hostile work environment for Plaintiff, and constituted unlawful sexual harassment against Plaintiff. That these demands were based on Plaintiff's gender is supported by the comment made by Mr. Blum on Plaintiff's job application – "Looks nice". Plaintiff's appearance should have nothing to do with her ability to perform her job duties. Accordingly, Plaintiff is entitled to an inference that Mr. Blum was inspired to hire Plaintiff, in part, on her physical appearance. When this is combined with the requirement that Plaintiff serve coffee to management, a job that was not included in a description of her job duties, the totality of the circumstances supports a finding that Plaintiff's gender was at the heart of the conduct of Defendant.

***i. Quid Pro Quo Theory***

This matter is also appropriate for analysis under the framework of *quid pro quo* sexual harassment. "[T]o prove a claim of *quid pro quo* sexual harassment, a plaintiff must demonstrate either that she submitted to the sexual advances of her alleged harasser *or suffered a tangible employment action as a result of her refusal to submit to those sexual advances*." *Hurley v. Atlantic City Police Department*, 174 F.3d 95, 102 (3rd Cir. 1999) (emphasis added). In this matter, there can be no doubt that Plaintiff suffered an adverse job action as a result of her refusal to act as Defendant's maid. Termination is undoubtedly an adverse job action. *See Griesbaum v. Aventis Pharamceuticals*, 2007 U.S. App. LEXIS 29697, *34 (3rd Cir. December 24, 2007) ("[I]t is hard to understand how any employment action could be more adverse than a

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termination of the employment."). As such, the only issue that remains is whether the requirement that an employee conform to an outdated and subservient gender stereotype triggers a *quid pro quo* analysis.

Traditionally, *quid pro quo* sexual harassment has involved implicit or explicit demands for sexual relations. However, the matter currently before the Court is theoretically identical. Just as in *King*, Plaintiff was expected to serve in and outdated role for females in a male-dominated workplace. In fact, as the evidence demonstrates, her willingness to conform to this role was an absolute prerequisite for her employment. Such demands were unnecessary to the performance of Plaintiff's actual job responsibilities, and were intended solely to put Plaintiff in the position of a subservient employee. These demands created an unnecessary barrier to Plaintiff's progress in the workplace and relegated Plaintiff to the role of the subservient female, much as would demands for sexual relations.

Plaintiff's claims under a quasi-*quid pro quo* theory are subject to the burden-shifting paradigm of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Akonji v. Unity Heealthcare, Inc.*, 517 F. Supp. 2d 83, 93 (D.D.C. 2007). As the Third Circuit Court of Appeals has noted:

> Briefly summarized, the *McDonnell Douglas* analysis proceeds in three stages. First, the plaintiff must establish a *prima facie* case of discrimination. If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's [termination].[1] Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

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[1] The *McDonnell-Douglas* analysis is couched in terms of denial of promotions, but is applied in the same manner to cases where, as here, the Plaintiff claims she was terminated for a discriminatory reason. *See, e.g., Jones v. City of Wilmington,* 299 F. Supp.2d 380, 394 n. 15 (D. Del. 2004) (applying *McDonnell*-Douglas in a firing case).

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*Jones v. School Dist. of Philadelphia,* 198 F.3d 403, 410 (citing *McDonnell-Douglas,* 411 U.S. at 802). However, in this matter, Defendant has claimed that Plaintiff was not terminated, but rather resigned. Accordingly, the analysis under *McDonnell Douglas* is not whether Defendant would have had a legitimate reason to terminate Plaintiff's employment, but rather whether there is a genuine issue of material fact as to whether Plaintiff actually resigned or whether she was terminated. *See Chapman v. UPMC Health Systems*, 516 F. Supp. 2d 506 (W.D. Pa. 2007). There, the court held:

> In this case, defendant asserts that plaintiff was not terminated, but instead resigned from her employment. That assertion is supported by evidence in the record that satisfies defendant's burden of production under *McDonnell Douglas*. With respect to the final part of the test, once the employer answers its relatively light burden by articulating a legitimate reason for the unfavorable employment decision, here plaintiff's resignation, the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence that the employer's explanation is pretextual (thus meeting the plaintiff's burden of persuasion).

*Id.*, at 526-527 (internal quotes omitted). Accordingly, Plaintiff need not show that the alleged performance issues were pretextual, but only that there is a genuine issue of fact as to whether she resigned her employment. In this matter, there is more than sufficient evidence that the proffered explanation for Plaintiff's departure from Defendant's employment, *i.e.*, that she resigned voluntarily, was pretextual.

> [A] plaintiff who has made out a *prima facie* case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Thus, if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.

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*Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994). In order to discredit the employer's proffered reasons for taking an adverse job action, "the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence". *Id.*, at 765.

In this matter, Defendant has claimed, on various occasions, that Plaintiff resigned her employment because she did not want to bring the vice presidents coffee and that Plaintiff was terminated for performance reasons. These varying accounts cast doubt on Defendant's proffered explanations for the circumstances surrounding the end of Plaintiff's employment, sufficient to create an issue of fact as to whether Defendant's current proffered excuse is mere pretext.

### *ii. Hostile Work Environment Theory*

Even if, *arguendo*, the Court does wish to examine the alleged performance basis for Plaintiff's termination, such proffered excuse also bears the stigma of pretext. Plaintiff has testified that no one ever complained to her about her performance and Defendant has produced no e-mails or documents attesting to any performance deficiencies. Most telling, however, is the fact that the e-mail terminating Plaintiff's employment was sent within ten minutes of Plaintiff's e-mail stating that serving management coffee was not one of her job duties. The mere temporal proximity of these events establishes a serious weakness in Defendant's claim that Plaintiff was terminated for performance reasons. Accordingly, Defendant's motion must be denied.

Even if the Court does not apply the analytical framework of a *quid pro* quo case, Plaintiff has adduced more than sufficient evidence to support a claim for a hostile work environment under a traditional analysis under Title VII of the Civil Rights Act of 1964.

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> [F]ive constituents must converge to bring a successful claim for a sexually hostile work environment under Title VII: (1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.

*Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482, fn. 13 (3rd Cir. 1990).

Initially, there is respondeat superior in this matter.

> Applying traditional agency principles, respondeat superior liability exists when the defendant knew or should have known of the harassment and failed to take prompt remedial action. Therefore, if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile work environment and failed to take prompt and adequate remedial action, the employer will be liable.

*Id.*, at 514 (internal citations omitted). In this case, the harassment was carried out by two vice presidents of the company – the individuals responsible for the day-to-day operations of the company. As these management-level employees must have had knowledge of their own actions, Defendant is liable for their conduct.

As noted above, the demands on Plaintiff to act as a servant for male superiors constitutes intentional discrimination because of Plaintiff's gender, as it creates an unnecessary barrier to Plaintiff's progress in the workplace and relegates her to the stereotypical role of subservient female. Plaintiff testified that she never saw either Mr. Blum or Mr. Shrager ask a male employee to bring him coffee, and Mike Sanchez testified that he was never ask to bring anyone coffee.

Furthermore, because the requests were more offensive and demeaning to women than men, Plaintiff can establish that the harassment was because of her gender. *King*, *supra.* at 1379, *citing Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-1523 (M.D. Fla. 1991).

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("[B]ehavior that is not directed at one particular group individual or group but is nonetheless disproportionately more offensive or demeaning to one sex will qualify as actionable conduct."). As noted above, *Robinson* has been cited with approval by courts in this District. In *King*, the court found that the demands to conform to the role of the subservient female were more offensive to females than to males, and held that the plaintiffs had established that the harassment was because of their sex. Similarly, in this matter, the demand that a subordinate employee act as a waitress for the male management is definitely more offensive to a female than to a male. Accordingly, Plaintiff can establish that the demands made upon her were because of her gender.

Plaintiff testified that, after the first two weeks of her employment, the demands to bring coffee to the managers occurred on a daily basis. This establishes the "pervasive" requirement. In addition, Plaintiff testified that she found the requests to be demeaning and degrading to her as a woman. As such, Plaintiff has established that the conduct detrimentally affected her. Finally, Plaintiff can establish an issue of fact as to whether the conduct to which she was subjected would detrimentally affect a reasonable person of the same sex in her position. As at least one federal court has already held that the requirement to act in a subservient role to male employees can be sexual harassment, only a finder of fact can decide if such requests in this matter reach that standard. Plaintiff has produced sufficient evidence to create a genuine issue of material fact to each and every element of a claim for sexual harassment, and Defendant's motion must be denied.

### c. *Plaintiff has Established a Claim for Gender Discrimination*

As Plaintiff has adduced sufficient facts to establish a genuine issue of material fact as to her claim for gender discrimination, Defendant's motion must be denied. Title VII of the Civil

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Rights Act of 1964 prohibits workplace discrimination based on gender. "It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to [her] … sex…" 42 U.S.C. § 2000e-2(a)(1). It is also unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's … sex …" 42 U.S.C. § 2000e-2(a)(2). In this matter, Plaintiff can establish that Defendant has violated each of these provisions.

To establish a *prima facie* case of gender discrimination under § 2000e-1(a)(1), Plaintiff must demonstrate that: "(i) she belongs in the protected class; (ii) she was qualified for the position; (iii) she suffered an adverse employment action; and (iv) circumstances existed that support an inference of discrimination." *Washington v. Volunteers of America*, 2007 U.S. Dist. LEXIS 56583, *10 (E.D. Pa. August 3, 2007) (Tucker, J.). In this matter, Plaintiff is undoubtedly a female, and therefore within a protected class. Plaintiff's qualifications for the position can be inferred from the facts that Defendant hired her for the job and never complained to her that she had any performance issues. Plaintiff's termination was certainly an adverse job action. *See Griesbaum, supra.* Finally, there is sufficient evidence to create a genuine issue of material fact as to whether Plaintiff's termination was under circumstances to give rise to an inference of gender discrimination.

As noted *supra.*, Plaintiff was being required to conform to the stereotype of a subservient female. This is a role that is patently more offensive to females than to males. When Plaintiff objected to her treatment, and requested to speak to Defendant, her employment was abruptly terminated. As her termination was a direct result of her refusal to conform to the

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discriminatory role in which Defendant had placed her, sufficient evidence exists from which a reasonable factfinder could determine that her gender played a role in Plaintiff's termination. Specifically, the court in *Stair* (citing *Robinson*), has held that Title VII prohibits conduct reinforcing the belief that women "are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment." *Stair*, *supra.* In terminating Plaintiff's employment for her unwillingness to subvert her identity to this stereotype, Defendant's decision was undoubtedly tinged with latent gender discrimination. As such, Plaintiff has established her *prima facie* case of gender discrimination.

Plaintiff can also set forth a claim under § 2000e-2(a)(2). By forcing Plaintiff into the subservient role of waitress to the male managers, Defendant has deprived Plaintiff of employment opportunities and adversely affected her status as an employee. As noted above, the type of conduct that Plaintiff opposed has the tendency "to create[] a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment." *Stair*, *supra.* Creating this barrier to Plaintiff's progress and conveying the message that Plaintiff is not welcome in the workplace unless she subverts her identity to the sexual stereotype obviously deprives Plaintiff of employment opportunities (*i.e.*, to advance within the company) and affects her status as an employee, in that it renders her little more than a personal servant of the male managers. Accordingly, Plaintiff has also established a claim under § 2000e-2(a)(2) of Title VII, and Defendant's motion must be dismissed.

Plaintiff's claim for gender discrimination is subject to the same analysis under *McDonnell-Douglas* as is set forth *supra*. In light of such analysis, Defendant's motion must be denied.

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### *d. Plaintiff has Established a Claim for Retaliation*

Plaintiff has also adduced sufficient facts to establish a *prima facie* claim for retaliation. Title VII makes it unlawful to retaliate against an employee who registers opposition to unlawful sexual harassment or gender discrimination. "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this title." 42 U.S.C. § 2000e-3.[2]

> To state a *prima facie* retaliation claim under Title VII, [plaintiff] must allege that (1) she engaged in a protected activity, (2) her employer took adverse action against her "either after or contemporaneous with [her] protected activity," and (3) "a causal connection [exists] between [her] protected activity and [her employer's] adverse action."

*Lee v. Gecewicz*, 1999 U.S. Dist. LEXIS 7317, *12 (E.D. Pa. 1999), *citing Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500, 506 (3rd Cir. 1997). In this matter, there are two instances of retaliation. Initially, Plaintiff was terminated as a result of her opposition to Defendant's harassment/gender discrimination. Second, Plaintiff was denied the opportunity to complete her final day's work after she threatened to file a complaint with the EEOC.

Plaintiff will address the latter instance first. Plaintiff's threat to file a complaint with the EEOC constitutes protected conduct under Title VII. *See EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3rd Cir. 1997).

Plaintiff also was subjected to an adverse job action, in that, after she threatened to make the EEOC complaint, she was sent home and not permitted to finish working the day. In *Burlington Northern and Santa Fe Railway Company v. White*, the Supreme Court held that an

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[2] Plaintiff's claim under the Pennsylvania Human Relations Act is subject to the same analysis as her Title VII claim. *See e.g., Paich v. Nike, Inc.* 2008 U.S. Dist. LEXIS 20339, *20, fn. 2 (W.D. PA. March 12, 2008 ) (Ambrose, J.)

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action by an employer can be considered materially adverse if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 126 S. Ct. 2405, 2415, 165 L. Ed. 345, 359, 2006 U.S. LEXIS 4895, *26-27. Under *Burlington Northern*, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.*, 126 S. Ct. 2415. Federal Appellate courts have held that a suspension *with pay* constitutes an adverse employment action under the ADEA. *See Hairston v. Gainsville Sun Publishing Co.*, 9 F.3d 913, 920 (11th Cir. 1993) ("[P]laintiff was the subject of an adverse employment action; he was suspended with pay for thirty days.") In this matter, Plaintiff was sent home early, and not permitted to complete the day. This was, in essence, a paid suspension for the remainder of her last day's employment, and establishes the second element of Plaintiff's claim.

Finally, *Defendant has admitted* that Plaintiff was sent home as a direct consequence of her threat to file an EEOC complaint. Defendant's Vice President admitted at his deposition that Plaintiff was sent home because she threatened to complaint to the EEOC. Such an admission is sufficient to establish causation.

In any event, the fact that Plaintiff was sent home immediately upon her threat to file the complaint is sufficient to demonstrate causation. "[T]emporal proximity may provide an evidentiary basis from which an inference of retaliation can be drawn" by the factfinder." *Moore v. City of Philadelphia*, 461 F.3d 331, 352 (3rd Cir. 2006). In cases where the adverse job action occurs rapidly after the protected activity, temporal proximity is sufficient to establish causation. *See Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3rd Cir. 1989). Temporal proximity is not always sufficient to establish causation unless the timing is "unusually suggestive". *Zelinski v.*

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*Pennsylvania State Police*, 108 Fed. Appx. 700, 706 (3rd Cir. 2004). However, the Third Circuit has held that when the retaliatory conduct takes place within two days of the protected activity, temporal proximity *alone* is sufficient to establish causation. *See Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3rd Cir. 1989). In this case, the temporal proximity is far closer than two days. The challenged retaliation took place immediately. Accordingly, such proximity is unusually suggestive, and properly establishes causation.

There is no need to address the issue of pretext, and Defendant has not proffered any alternative reason for telling Plaintiff to leave early.

In its memorandum, Defendant raises the issue of a *de minimis* violation. In support of this argument, Defendant cites a 2006 case from outside this District. Not only does this case have absolutely no precedential value in this Court, but the case was decided under the Sixth Circuit's analysis of retaliation in *White v. Burlington Northern and Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2005). That decision defined an adverse job action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at p. 798.

That is no longer the law. While the decision was affirmed by the Supreme Court, the standard of adverse job action was modified in *Burlington Northern* and the "de minimus" reasoning Defendant and the *Biefelt* court embrace no longer applies in retaliation claims.

In *Burlington Northern,* the Supreme Court promulgated a new (and far broader) standard for determining the existence of an adverse employment action in retaliation claims. *Burlington Northern & Santa Fe Railway v. White,* 126 S. Ct. 2405, 2415, 165 L. Ed. 345, 359, 2006 U.S. LEXIS 4895. In *Burlington Northern,* the Supreme Court broadened the standard so that for

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purposes of a retaliation claim, an adverse employment action is any action which "a reasonable employee would have found [to be] materially adverse" and which would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern,* 126 S. Ct. at 2415. The Court found that such actions need not even affect the terms and conditions of employment. *Burlington Northern,* 126 S. Ct. at 2412-13. In short, under *Burlington Northern,* summary judgment is not appropriate on the basis of an alleged "*de minimus*" retaliation. In any event, being sent home from work early is plainly an adverse job action that could not be classified as "*de minimus*" even under the pre-*Burlington Northern* standard.[3]

The Court in *Biefelt* never applied the current (and far broader) standard of *Burlington Northern.* Accordingly, as the decision was rendered without regard to the correct standard, it is outdated and has no bearing on the Court's analysis in this matter.

Second, Plaintiff was retaliated against for refusing to bring coffee for Mr. Blum and Mr. Shrager. There is clearly enough evidence to establish that Plaintiff suffered an adverse job action (termination) and that the temporal proximity between Plaintiff's e-mail at 8:41 a.m. and her termination at 8:50 a.m. is unusually suggestive enough to establish an issue of fact as to causation. The only issue remaining is whether Plaintiff engaged in a protected activity. The evidence is undisputed that Plaintiff informed Mr. Blum and Mr. Shrager that she did not believe that she should have to serve them coffee (although she did not oppose providing coffee to company guests in her role as receptionist). In the same e-mail, Plaintiff requested a meeting with the managers to discuss the issue. During the first face-to-face meeting with Mr. Blum after

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[3] Indeed, given Defendant's open admission to the retaliatory conduct of sending Plaintiff home from work early as a direct result of her threat to go to the EEOC, there is no genuine issue of material fact as to any possible defense Defendant may assert to Plaintiff's retaliation claim, and , Plaintiff has filed a motion for summary judgment on that claim. *See* docket items 10, 11 and 12.

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sending that e-mail, Plaintiff did, in fact, make a threat to file a charge with the EEOC. However, Defendant terminated Plaintiff before the meeting could take place. Defendant cannot hide behind an itchy trigger finger and assert that Plaintiff never made a formal complaint of sexual harassment or gender discrimination during her employment, as she was precluded from doing so before a meeting was ever scheduled. As such, the Court must consider Plaintiff's October 27, 2006 e-mail asserting that serving coffee to male management was not a part of her job as protected activity, establishing the final element of her *prima facie* case.

The analysis of pretext relating to Plaintiff's retaliation claim is identical to that set forth *supra.*, as it relates to her claims for sexual harassment and gender discrimination.

## III. **Conclusion**

In light of the foregoing, and giving Plaintiff the benefit of all reasonable inferences to be drawn from the facts set forth herein, Plaintiff respectfully requests that this Honorable Court deny Defendant's motion for summary judgment in its entirety.

Respectfully submitted,

TIMOTHY M. KOLMAN AND ASSOCIATES

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May 19, 2008

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

| | | |
|---|---|---|
| TAMARA KLOPFENSTEIN | : | CIVIL ACTION |
| Plaintiff, | : | No. 07-cv-4004 |
| v. | : | |
| | : | Honorable Berle M. Schiller, J. |
| NATIONAL SALES AND SUPPLY, LLC t/d/b/a NATIONAL SALES AND SUPPLY | : | |
| Defendant. | : | |

**CERTIFICATE OF SERVICE**

I, Rufus A. Jennings, Esquire, hereby certify that, on the date set forth below, a copy of Plaintiff's Response to Defendant's Motion for Summary Judgment was filed using the Eastern District of Pennsylvania's ECF system, causing a notice of electronic filing to be served upon the following counsel of record:

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/s/ Rufus A. Jennings, Esquire
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May 19, 2008