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United States District Court,  
E.D. Pennsylvania.

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION, Plaintiff,  
and  
Danita KENT-BYRD, Plaintiff-Intervenor,  
v.  
WYETH PHARMACEUTICAL, Defendant.

No. Civ.A. 03-2967. | March 11, 2004.

#### Attorneys and Law Firms

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Erin M. O'Neill, John E. Quinn, Reed Smith LLP, Philadelphia, PA, for Defendant.

#### Opinion

### MEMORANDUM

BUCKWALTER, J.

\*1 Presently before the Court is Defendant Wyeth Pharmaceutical's Motion for Summary Judgment, Plaintiff Equal Employment Opportunity Commission's and Plaintiff-Intervenor Danita Kent-Byrd's Opposition thereto and Defendant's Reply Brief in Support of its Motion. For the reasons set forth below, Defendant's motion is granted in part and denied in part.

#### I. BACKGROUND

During the summer of 2001, Defendant Wyeth Pharmaceutical ("Wyeth") had two vacant positions for Senior Credit Analysts in its Treasury, Credit and Accounts Receivable Department ("Credit Department"). Wyeth decided to fill those positions by promoting two internal Credit Analysts. In September 2001, after reviewing the credentials of every Credit Analyst within the Credit Department, David Nemeth—the head of the Credit Department—selected two candidates for the

promotions—Michael Lorek (Caucasian) and Michelle Clegg (Caucasian). Plaintiff-Intervenor Kent-Byrd ("Kent-Byrd")—an African-American—is a Credit Analyst and was considered for the promotion, but Nemeth ultimately decided not to choose her.

After being denied the promotion, Kent-Byrd complained to Wyeth that she should have been promoted over Clegg. Kent-Byrd filed an internal Assurance of Fair Treatment complaint with Wyeth, alleging that she was denied the promotion because of her race. After an investigation, a case summary was prepared and Wyeth informed Kent-Byrd that there was no merit to her claims and that the promotion decisions were appropriate.

Kent-Byrd alleges that in or around February, 2002, Wyeth began to retaliate against her for making discrimination allegations. Specifically, Kent-Byrd claims that her immediate supervisor—Brad Lucas—started to criticize her for arriving late to work.

On or around May 7, 2003, Plaintiff Equal Employment Opportunity Commission ("EEOC") filed a complaint in this Court, alleging violations of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. On or around August 6, 2003, Kent-Byrd filed an intervenor complaint raising the same claims as EEOC and raising a separate claim that Wyeth retaliated against her for filing an internal discrimination complaint. Kent-Byrd also asserted her claims under the Pennsylvania Human Relations Act.

#### II. STANDARD OF REVIEW

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

\*2 The ultimate question in determining whether a motion for summary judgment should be granted is "whether reasonable minds may differ as to the verdict." *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 129 (3d Cir.1998). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."

Anderson, 477 U.S. at 248.

III. DISCUSSION

A. Retaliation Claim

Kent-Byrd alleges that Wyeth retaliated against her after she filed an internal complaint alleging racial discrimination. Specifically, Kent-Byrd claims that "Defendant subjected Ms. Kent-Byrd to retaliatory actions by the Regional Credit Manager, Brad Lucas, when he confronted her about her arrival and departure time." (Intervenor Compl. ¶ 27.) "Ms. Kent-Byrd admitted to occasionally being 5-10 minutes late but Ms. Kent-Byrd was the only employee confronted on this matter, although she was not the only employee who arrived a few minutes late to work." (Id.)

In order to establish a prima facie case of illegal retaliation, a "plaintiff must show: (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 567-68 (3d Cir.2002).

Kent-Byrd has shown that she engaged in a protected employee activity—filing an internal Assurance of Fair Treatment Complaint. Kent-Byrd has not, however, presented any evidence that she suffered an adverse action after or contemporaneous with her protected employee action. Kent-Byrd's sole allegation is that in February, 2002 her supervisor verbally confronted her regarding her tardiness. (Intervenor Compl. ¶ 27.) Kent-Byrd admitted, however, that she never suffered any adverse employment action. During her deposition, Kent-Byrd testified as follows:

Q: Now, as a result of Brad Lucas speaking with you in the beginning of February 2002 regarding your attendance, did you receive any form of disciplinary action?

A: No

(Kent-Byrd Tr. at 127-28.)

Oral reprimands, without anything more, are not enough to constitute an adverse employment action. *Weston v. Pennsylvania*, 251 F.3d 420, 431 (3d Cir.2001)(holding that two written reprimands merely placed in an employee's personnel file do not materially change the terms and conditions of employment to create an adverse employment action). Plaintiff has not shown any evidence that she suffered any type of adverse employment action, and Plaintiff has not shown that genuine issues of fact

exist for trial. Accordingly, summary judgment is granted to Wyeth regarding this claim.<sup>1</sup>

<sup>1</sup> Kent-Byrd has also failed to establish causation. Kent-Byrd admitted during her deposition that she was repeatedly late for work. In fact, during January, 2002—the month before her oral reprimands—Kent-Byrd admitted that she was likely late for work over 2/3 of the days. (Def.'s Br. at 28; See Intervenor Compl. ¶ 27.) Kent-Byrd has not presented any evidence of a causal connection between the oral reprimands and her discrimination claim. Rather, the evidence shows that the reprimands were a direct result of Kent-Byrd's repeated tardiness.

In her opposition brief, Plaintiff alleges for the first time that she suffered additional retaliatory adverse employment actions. Specifically, Plaintiff alleges the following: (1) her supervisor criticized her work performance; (2) she received a rating of "3" which stands for "Solid Performer" during her performance review for 2003;<sup>2</sup> (3) she received a smaller raise at the end of 2003 than she did in 2002;<sup>3</sup> and (4) she was removed from working on a large account.

<sup>2</sup> Kent-Byrd began working at Wyeth in 1998 and received a rating of "3" or "Solid Performer" every year of her employment. It is undisputed that her rating did not decline after she complained of discrimination.

<sup>3</sup> Despite receiving a raise at the end of 2003, Kent-Byrd alleges that she suffered an adverse employment action because her *pay increase* was .05% lower than her pay increase from the year before. Kent-Byrd received a 2.50% increase for 2003 compared to a 2.55% increase for 2002. (Def.'s Reply Br. at 19.) Kent-Byrd has supplied no authority stating that a pay increase is actually an adverse employment action. Regardless, the Court does not find that a minuscule decline (.05%) in pay increase amounts to an adverse employment action.

\*3 Kent-Byrd's bald allegations, however, fail as a matter of law because she cannot assert new claims for the first time in her opposition brief. None of these claims were included in her EEOC charge or her complaint in this Court. Kent-Byrd had ample opportunity to amend her complaint but failed to do so. Furthermore, Wyeth went through the entire discovery period without knowing of these claims. Discovery is now closed, and Wyeth cannot be expected to defend against claims that were never raised prior to Kent-Byrd's opposition brief.

Additionally, Kent-Byrd's new claims would fail regardless of her failure to properly raise them. Kent-Byrd has failed to show any evidence or authority

that would enable her to survive summary judgment. Kent–Byrd’s new allegations are unsupported by evidence, and Kent–Byrd has failed to show that any genuine issues of fact exist for trial.

**B. Discrimination Claim**

When a plaintiff alleges discrimination regarding the denial of a promotion, the plaintiff must carry the burden of establishing a prima facie case. “Thus, the plaintiff must establish that he or she (1) belongs to a protected category; (2) applied for and was qualified for a job in an available position; (3) was rejected; and (4) after the rejection the position remained open and the employer continued to seek applications from persons of plaintiff’s qualifications for the position.” *Bray v. Marriott Hotels*, 110 F.3d 986, 990 (3d Cir.1997). If the plaintiff meets these requirements, then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the decision to deny plaintiff the promotion. *Id.* If the employer meets its burden, “then the plaintiff must produce evidence from which a reasonable factfinder could conclude either that the [employer’s] proffered justifications are not worthy of credence or that the true reason for the employer’s act was discrimination.” *Id.*

In the instant case, the parties do not dispute whether Kent–Byrd can establish a prima facie case or whether Wyeth offered a legitimate, nondiscriminatory reason for its decision. Rather, the parties dispute whether Kent–Byrd can establish that Wyeth’s proffered legitimate nondiscriminatory reason is pretext for discrimination. In an effort to show pretext, Kent–Byrd spends a significant portion of her brief raising a series of issues that she argues shows Wyeth’s proffered reason is “inconsistent, implausible and unworthy of credence.” (Pl.’s Br. at 23.)

In analyzing each of the issues raised by Kent–Byrd, the Court cannot find as a matter of law that Kent–Byrd proved pretext or that Wyeth proved the absence of pretext. The Court does find, however, that Kent–Byrd has satisfied her burden of showing that genuine issues of fact exist regarding “pretext.” Accordingly, summary judgment cannot be granted to Wyeth concerning this issue.

**IV. CONCLUSION**

For the foregoing reasons, Defendant’s motion for summary judgment is granted in part and denied in part. An appropriate order follows.

**ORDER**

\*4 AND NOW, this 11<sup>th</sup> day of March, 2004, upon consideration of Defendant Wyeth Pharmaceutical’s Motion for Summary Judgment (Docket No. 13), Plaintiff Equal Opportunity Commission’s and Plaintiff–Intervenor Danita Kent–Byrd’s Opposition thereto (Docket No. 15) and Defendant’s Reply Brief (Docket No. 16), it is hereby ORDERED that Defendant’s Motion for Summary Judgment is GRANTED in part and DENIED in part. With regard to Plaintiff–Intervenor’s retaliation claims, Defendant’s motion is GRANTED and judgment in entered on behalf of Defendant and against Plaintiff–Intervenor. With regard to all other claims, Defendant’s motion is DENIED.