IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BARBARA CONLEY,	:	
	:	**C.A. NO: 08C-09-026 (RBY)**
Plaintiff,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE, et al.,	:	
	:	
Defendants	:	

Submitted: December 17, 2010
Decided: January 11, 2011

Upon Consideration of Defendants'
Motion for Summary Judgment
GRANTED

AMENDED
OPINION AND ORDER

Ronald G. Poliquin, Esquire, Young, Malmberg & Howard, P.A., Dover, Delaware for Plaintiff.

Jennifer Oliva, Esquire, Department of Justice, Dover, Delaware for Defendant.

YOUNG, J.

Conley v. State of Delaware
C.A. No: 08C-09-026
January 11, 2011

SUMMARY

Plaintiff Barbara Conley was hired by the Delaware Division of State Police ("DSP") in 1983. Following her resignation in 2007, Conley filed a complaint naming the Delaware Department of Safety and other individual officers as defendants.[1] Conley's complaint alleges claims of employment discrimination and retaliation, as well as a claim for First Amendment retaliation. Following the close of discovery, DSP filed the instant motion for summary judgment. For the reasons set forth below, DSP's motion is **GRANTED**.

FACTS

Barbara Conley has been employed by the Delaware Division of State Police since 1983. On August 1, 2001, Conley was promoted to the rank of Captain and assigned to DSP Headquarters in Dover, Delaware, where she assumed the position of Director of the Traffic Control Section ("TCS"). As Director, Conley was responsible for supervising two sworn officers and approximately seven civilian employees.

In September 2003, DSP assigned Lieutenant John Campanella to TCS to fill the position of Deputy Director. Shortly after his arrival, several female employees expressed concerns about Campanella's behavior to Conley. Conley decided that these initial complaints were part of the staff's unfamiliarity with Campanella; and that, with time, the staff would adjust to his personality.

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[1] The Delaware Department of Safety does not exist. The Delaware Division of State Police is itself a Division of the Delaware Department of Safety and Homeland Security.

Campanella's behavior grew increasingly inappropriate in the months that followed. Campanella told off-color jokes, talked at length about his experiences with prostitutes, and seemed to revel in debating the utility of laws regulating adult establishments. Ultimately, Campanella's behavior forced Conley to ask her then-immediate supervisor, Major Mark Seifert, to transfer Campanella out of TCS.

In response to Conley's complaint, DSP Internal Affairs ("IA") initiated an investigation into Campanella's behavior, which resulted in Campanella being disciplined and transferred out of TCS. As the investigation proceeded, however, several TCS employees, including Campanella, raised questions concerning Conley's inappropriate work behavior, including her propensity to make inappropriate sexual and derogatory comments about her co-workers and supervisors. IA responded to these revelations by initiating a separate investigation into Conley's conduct.

IA's investigation into Conley's behavior revealed the following incidents: (1) Conley referred to the male Troopers who had been promoted to Major as "assholes" and "fucking dickheads" to her subordinates; (2) made routine sexual references to both male and female employees; (3) made disparaging remarks about the alleged sexual orientation of another female Captain; (4) brought a sexually suggestive "gag gift" to work; and (5) sketched a picture depicting part of the female anatomy, which she then shared with Campanella.

Conley later admitted to engaging in some of this behavior, and IA's investigation concluded that she had engaged in unprofessional conduct. On September 17, 2004, IA formally charged Conley with three counts of conduct unbecoming an officer and one count of sexual harassment. Conley invoked her right

under the *Law Enforcement Officers' Bill of Rights* ("LEOBOR"), and requested a Division Trial Board to defend the charges.

The Board conducted a hearing in March 2005, during which Conley was represented by counsel, called witnesses, and presented her own defense. In April, the Board issued a written decision substantiating (1) two of the three conduct unbecoming charges; (2) a third charge of conduct unbecoming for the lesser-included offense of poor judgment; and (3) the sexual harassment charge for the lesser-included offense charge of conduct unbecoming. The Board recommended that Conley be reprimanded, suspended for 12 days, and placed on disciplinary probation for a year. An independent officer was designated to review the case, and concurred with the Board's findings and penalty.

Before the Board's final decision was released, on October 27, 2004, Conley filed a 42 U.S.C. § 1983 complaint in federal district court, alleging that a former DSP supervisor had twice failed to promote her because of her sex. The case went to a jury, which rejected Conley's claim of sex discrimination and returned a verdict in favor of DSP on June 14, 2006. During the trial, several DSP employees testified that Conley had engaged in sexually harassing behavior over the course of her DSP career by subjecting co-workers to unwelcome physical contact and crude sexual remarks.

Shortly after the jury returned a verdict against Conley, several civilian and uniformed TCS employees reported that Conley's inappropriate behavior in the office and at work-related social events had continued. Because Conley's sexual harassment allegations were egregious and raised by her subordinates, DSP

suspended Conley effective August 14, 2006 with full pay and benefits, and initiated another IA investigation into her behavior. On February 2, 2007, IA formally charged Conley with five counts of sexual harassment, one count of conduct unbecoming, and one count of poor judgment. IA informed Conley that a Division Trial Board should be convened pursuant to her LEOBOR rights. Conley refused to invoke her LEOBOR right to the Trial Board, and on February 12, 2007, Conley voluntarily retired from DSP effective March 1, 2007.

On March 19, 2007 Conley filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") alleging sex discrimination and retaliation in violation of Title VII of the *Civil Rights Act of 1965*. As required by Delaware Law, DSP referred Conley to the Council on Police Training ("COPT") for decertification proceedings on June 7, 2007.[2] After holding a 11 *Del. C.* § 8404(a) hearing, during which Conley appeared and presented a defense, a COPT Hearing Board issued a written decision. The Board unanimously concluded that "the charges of Conley's misconduct—if proven true had she gone to a Division Trial Board—would so undermine the public trust that she should be decertified as a police officer in Delaware." The Council approved of the Hearing Board's findings and decertified Conley on November 13, 2007.

Without reaching a determination regarding Conley's charge of discrimination, the EEOC issued Conley a right to sue letter on June 16, 2008. Conley filed her first complaint on September 16, 2008, which she has since amended. Conley's complaint

[2] 1 *Del. Admin. C.* § 801-4.0.

alleges that she was forced to retire after many instances of discrimination and retaliation for filing her 2004 lawsuit. These claims are brought under Title VII of the Acts of Congress, known as the Civil Rights Act of 1964. Conley also alleges that the individual Defendants – Major Harry Downes, Lieutenant Colonel Mark Seifert, Colonel Thomas F. MacLeish, Captain James Paige, and Captain Paul Smentkowski – violated her Constitutional right to file a lawsuit by engaging in this relation. Discovery closed on October 1, 2010, and the State Defendants (collectively, "DSP") have now filed the instant Motion for Summary Judgment with this Court.

STANDARD OF REVIEW

The Court will grant summary judgment for the defendant if it concludes there is no genuine issue as to any material fact.[3] Facts that could alter the outcome are 'material', and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.[4] The moving party bears the initial burden of showing that no material issues of fact are present.[5]

Once that showing is made, the burden shifts to the nonmoving party to demonstrate that there are genuine material facts in dispute: "[i]f the movant puts in the record facts which, if undenied, entitle h[er] to summary judgment, the burden

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[3] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[4] *Horowitz v. Fed. Kemper Life Assur. Co*., 57 F.3d 300, 302 n.1 (3d Cir. 1995).

[5] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

shifts to the defending party to dispute the facts by affidavit or proof of similar weight.[6]

The Discrimination in Employment Act ("DEA") governs claims of discrimination in Delaware, and indirectly affects this Court's review of Conley's claim.[7] Under the DEA, employment discrimination is prohibited with respect to the protected classes of race, marital status, genetic information, color, age, religion, sex and national origin.[8] Conley's amended complaint, however, alleges that DSP violated Title VII, and not the DEA, by terminating her employment on the basis of her sex.

Whether the complaint was brought pursuant to the DEA or Title VII is immaterial. In deciding cases under the DEA, Delaware courts have adopted the standards articulated by the United States Supreme Court in analyzing federal employment discrimination claims.[9] Under this rubric, Conley may establish her employment discrimination claim in either, or both, of two ways: (1) by presentation of direct evidence that DSP harbored discriminatory animus under *Price Waterhouse v. Hopkins*,[10] or (2) from evidence which creates an inference of discrimination under

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[6] *Revis v. Slocomb Indus.*, 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting *Hankins v. Temple Univ.*, 829 F.2d 437, 440 (3d Cir. 1987).

[7] *Schuster v. Derocili*, 775 A.2d 1029, 1033 (Del. 2001).

[8] Del. Code Ann. Tit. 19, § 711(a)(1) (2008).

[9] *See generally Riner v. NCR*, 434 A.2d 375 (Del. 1981); *Giles v. The Family Court*, 411 A.2d 599 (Del. 1980).

[10] 490 U.S. 228 (1998).

the burden-shifting framework of the *McDonnell Douglas/Burdine/Hicks* trilogy.[11] Conley has not presented direct evidence that the State harbored discriminatory animus. Therefore, the Court will analyze her claims under the burden-shifting framework of *McDonnell Douglas/Burdine/Hicks*.

The burden-shifting framework requires Conley to establish by a preponderance of the evidence a prima facie case of disparate treatment.[12] If Conley succeeds in presenting a prima facie case, the burden of production shifts to DSP to "articulate some legitimate, nondiscriminatory reason" for the unfavorable treatment.[13] If DSP produces a legitimate, nondiscriminatory reason, the burden shifts back to Conley, who can defeat summary judgment by pointing to some direct or circumstantial evience from which a rational factfinder could either: "(1) disbelieve [DSP's] articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of [DSP's] action."[14]

DISCUSSION

A. Title VII Discrimination.

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[11] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[12] *See Burdine*, 450 U.S. at 252.

[13] *McDonnell Douglas*, 411 U.S. at 802; *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994).

[14] *Sheridan v. E.I. DuPont & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996).

McDonnell Douglas requires the plaintiff to make out a prima facie case of discrimination sufficient to allow a reasonable factfinder to conclude that: (1) she belonged to a protected class, (2) she was qualified for the position that she sought or from which she was terminated, (3) she was either not selected for the position or terminated, and (4) the circumstances surrounding the non-selection and termination give rise to an inference of illegal discriminatory motive."[15] As it must, DSP concedes the first two prongs of the test: as a woman, Conley is a member of a protected class, and the record indicates that Conley was well qualified for her former position. DSP directs its challenge at the third and fourth prongs of the test.

DSP argues that Conley never suffered an "adverse employment action", i.e. she was not selected or terminated, under the third prong of the *McDonnell Douglas* test. Conley, however, argues that she suffered three such events: (1) her August 14, 2006 investigation and suspension with pay pending that investigation; (2) her February 12, 2007 voluntary resignation, which she labels a "constructive discharge"; and (3) her November 13, 2007 COPT decertification. To satisfy the third prong of the prima facie case, Conley must establish that at least one of these events (1) materially affected the terms or conditions of her employment; and (2) is attributable to her employer.

1. *The August 14, 2006 Investigation.*

The United States Supreme Court has defined an adverse employment action in the context of a sex discrimination claim as a "significant change in employment

[15] *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); *see also Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008).

status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits."[16] Conley's August 14, 2006 investigation and suspension does not meet this definition. It is well-settled that suspending an employee with full pay and benefits pending an investigation into alleged misconduct is not an actionable adverse employment action.[17] This rule relies on the presumption that the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer's disciplinary policies in appropriate circumstances.

Thus, an employee does not suffer a materially adverse change in the terms and conditions of her employment where her employer chooses to enforce its preexisting disciplinary policies in a reasonable matter. Conley alleges that DSP's enforcement of its disciplinary policies was unreasonable; contending that DSP's investigation was biased because its recommended discipline was harsher for her than it was for Campanella.

Conley's assertion overlooks her role within DSP at the time of the

[16] *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 749 (1998).

[17] *See Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) (placing employee on "administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action"); *Singletary v. Miss. Dep't of Corr.*, 423 F.3d 886, 892 (8th Cir. 2005); (suspension with no reduction in pay, grade and benefits pending investigation not an adverse employment action; *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004) ("a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action"); *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (placing employee on paid administrative leave during internal investigation of complaint consistent with employer's procedures not an adverse employment action); *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000) (placing police officer on paid administrative leave during internal investigation not an adverse employment action).

investigation. Conley was the senior officer, which made an inquiry into her conduct all the more serious. Further, Campanella was disciplined at the end of his investigation. While Campanella's discipline was not as severe as Conley's discipline, the record indicates that, due to her ability to use vacation days, Conley lost no time at work and continued on in her position after DSP's first investigation. In light of this, as well as her admissions with respect to some of the conduct reported in her first IA investigation, Conley's argument is simply persuasive.

2. *The November 13, 2007 COPT Decertification.*

Similarly, Conley's November 13, 2007 COPT decertification is not an "adverse employment action." The COPT is vested with the exclusive statutory power to suspend or revoke an individual's police certification.[18] The Council may do so where a police officer:

> "[h]as retired or resigned prior to the entry of findings of fact concerning an alleged breach of internal discipline for which the individual could have been legitimately discharged had the individual not retired from or resigned that individual's position prior to the imposition of discipline by the employing agency."[19]

DSP had a legal duty to report Conley's resignation to the COPT and its compliance with that non-discretionary obligation cannot constitute an adverse action.[20] Moreover, because COPT, not DSP, decertified Conley, DSP's action is not

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[18] 11 *Del. C.* § 8404(a).

[19] 11 *Del. C.* § 8404(a)(4)(e)(2).

[20] 1 *Del. Admin. C.* § 801-4.0 (requiring any Chief of Police to notify the COPT "in writing. . .of the employment or termination of any police officer under his/her command").

fairly attributable to her employer. Title VII prohibits "employers" from engaging in certain "unlawful employment practices."[21] COPT was not, and has never been, Conley's employer. As such, Conley's claim must fail on this ground as well.

3. *The February 12, 2007, Resignation.*

Conley's February 12, 2007 voluntary resignation, which she claims is a "constructive discharge," similarly fails to satisfy the definition of an "adverse employment action." The constructive discharge inquiry is an objective one: to conclude that a resignation is a constructive discharge, the Court must "find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign."[22] In *Clowes v. Allegheny Valley Hosp.*,[23] the Third Circuit identified several factors indicative of constructive discharge: (1) threat of discharge; (2) suggesting or encouraging resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; and (6) unsatisfactory job evaluations. Conley has not alleged or presented evidence of any of these factors.

Assuming exclusively for the purposes of the argument that Conley could meet her burden of establishing a prima facie case for discrimination under Title VII, the burden would shift to DSP to proffer a "legitimate non-discriminatory" reason for its

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[21] 42 U.S.C. § 2000e-2(a).

[22] *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984).

[23] 991 F.2d 1159 (3d Cir. 1993).

actions.[24] DSP has amply satisfied this requirement. Conley's subordinate employees reported that she engaged in sexually harassing work place behavior that created a hostile work environment. DSP initiated multiple investigations into Conley's conduct, which largely substantiated these allegations. Because EEOC Guidelines state that an employer must take all reasonable steps to prevent harassment from occurring in the employment setting, it follows that, on notice of the allegations regarding Conley, DSP was obligated to take some action to protect its employees.[25]

The Court is satisfied that DSP's investigatory actions were both reasonable and appropriate. Thus, the burden again shifts to the plaintiff to demonstrate, by a preponderance of the evidence, that the employer's rationale is merely pretextual. To do this, the plaintiff must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated reasons; or (2) believe that an invidious discriminatory reason was more likely that not a motivating or determinative cause of the employer's action."[26]

To avoid summary judgment, Conley's evidence rebutting DSP's proffered legitimate reasons must allow a factfinder reasonably to infer that each of DSP's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action. If Conley accomplishes this, she

[24] *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 n.2 (3d Cir. 1997).

[25] 29 C.F.R. § 1604.11(f).

[26] *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

will survive summary judgment without needing to come forward with additional evidence of discrimination beyond her prima facie case.[27]

The ultimate focus of this inquiry is on whether the plaintiff has met her burden of showing that the employer has discriminated against a member of a protected class.[28] The law does not command employers to be wise or efficient or even rational - it only restricts them from making employment decisions motivated by discriminatory animus.[29] To that end, Conley must cast "substantial doubt" upon the proffered legitimate reason by demonstrating "such weaknesses or implausibilities, inconsistencies, incoherences, or contradictions in [DSP's] proffered legitimate reasons for its action [such] that a reasonable factfinder could rationally find them 'unworthy of credence.'"[30] This standard arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.[31] It places a heavy burden on plaintiffs.[32]

The only evidence that Conley has presented that undermine DSP's proffered non-discriminatory reasons for terminating her employment is the allegedly

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[27] *Id.*

[28] *Burdine*, 450 U.S. at 253.

[29] *Fuentes*, 32 F.3d at 764.

[30] *Id.* (quoting *Ezold v. Wolf, Block, Shorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992)); *see also Sheridan*, 100 F.3d at 1071 (endorsing *Feuntes*).

[31] *Feuntes*, 32 F.3d at 765 (quoting *Ezold*, 983 F.2d at 531).

[32] *Sullivan v. Nationwide Life Ins. Co.*, 2010 WL 2654673, at *8 (D. Del. July 16, 2010).

suspicious timing between the resolution of Conley's civil trial and the institution of DSP's second investigation into Conley's behavior. Conley alleges that because the investigation followed immediately on the heels of the result of her civil trial, a reasonable factfinder could infer that DSP's investigation was founded on mere pretext. The Court finds that this evidence is not enough to overcome Conley's heavy burden. The timing of the investigation would be highly probative - if it were presented in concert with other direct or circumstantial evidence. While Conley admonishes the Court not to view her claims in isolation, she fails to provide any credible evidence to lead her claim out of the wilderness. The Court finds that Conley has not provided sufficient evidence to meet this aspect of her burden under *McDonnell Douglas*. As such, Conley's claim under Title VII fails.

B. Title VII Retaliation.

To establish a prima facie case of retaliation, a plaintiff must show: (1) she engaged in a protected activity; (2) after or contemporaneous with engaging in that protected activity, she was subjected to an adverse employment action; (3) the adverse action was "materially adverse; and (4) there was a causal connection between her protected activity and the adverse action.[33] Conley claims she engaged in protected activity by filing her (1) March 2004 complaint against Campanella; (2) her October 2004 lawsuit; and (3) her March 19, 2007 EEOC charge. She asserts that DSP retaliated against her for engaging in protected activity by (1) investigating her

[33] *Gude v. Rockford Ctr. Inc.*, 699 F. Supp. 2d 671, 683 (D. Del. 2010) (citing *Hare v. Potter*, 220 Fed. Appx. 120, 128 (3d Cir. 2007)).

in 2004; (2) investigating and suspending her in August 2006; (3) forcing her to resign effective March 1, 2007, and (4) decertifying her as a police officer.

The Court finds that Conley is able to sustain any one of these claims. First, because Conley's deposition testimony indicates that neither she nor anyone else believed that Campanella had engaged in sexual harassment or any other conduct unlawful under Title VII, her 2004 complaint cannot constitute a Title VII protected activity. But even assuming it did, any alleged retaliatory action that occurred *on or before* May 23, 2006, is time-barred. To proceed with a Title VII discrimination action, a plaintiff "must file a charge of discrimination with the [EEOC] within 300 days of the occurrence of the unlawful act or within 180 days if the individual is in a state that has no administrative agency to resolve discrimination claims."[34]

Because Delaware has such an agency, the appropriate filing time is 300 days.[35] Any discriminatory act occurring outside the applicable charge-filing limitations period is considered "merely an unfortunate event in history [having] not present legal consequences."[36] Although Conley alleges that she filed her EEOC charge on February 20, 2007, the EEOC stamped the charge as received on March 19, 2007. The timeliness of an EEOC charge filing is determined by the date the EEOC receives the charge; not the date the plaintiff alleges she filed the charge.[37] Conley filed her

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[34] *Wright v. ICI Ams. Ins.*, 813 F. Supp. 1083, 1086 (D. Del. 1993).

[35] 19 *Del. C.* § 711.

[36] *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

[37] 29 C.F.R. § 1601.13; *see also Johnson v. Host Enter., Inc.*, 470 F. Supp. 381, 383 (E.D. Pa. 1979).

charge on March 19, 2007, which means the 300-day limitations period for the filing of that charge extends back to May 23, 2006. Consequently, Conley's 2004 IA investigation is time-barred.

Third, as explained *infra*, DSP neither "constructively discharged" nor decertified Conley. As a result, neither of these allegedly adverse actions is of any moment here. Fourth, neither Conley's 2004 investigation nor her 2006 investigation and suspension with pay constitutes a retaliatory "adverse action" under *Burlington N. & Santa Fe Ry. Co. v. White*.[38] In *Burlington*, the Supreme Court held that, to establish a retaliatory adverse action, "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."[39] Since *Burlington*, at least one federal circuit has held that placing an employee on "administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action."[40]

Fifth, even if Conley could establish a retaliatory adverse action, she cannot establish a causal link between any protected activity and any alleged retaliatory action. A plaintiff can establish the requisite causal connection by showing a close

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[38] 548 U.S. 53 (2006).

[39] *Id.* at 68.

[40] *Joseph*, 465 F.3d at 91; *see also Tarr v. FedEx Ground*, 2010 WL 4230712, at *5 (3d Cir. Oct. 27, 2010) (investigation of employee "not adverse, let alone materially adverse" action).

temporal proximity between the protected activity and the alleged retaliatory conduct or by submitting "circumstantial evidence…that give[s] rise to an inference of causation."[41] Conley claims that her August 2006 investigation and suspension and March 2007 constructive discharge were retaliatory actions for filing her March 2004 complaint against Campanella and her October 2004 lawsuit. This would mean that DSP retaliated against her 29 and 26 months after she complained about Campanella and 22 and 29 months after she filed her lawsuit. This time period is too far removed.[42]

Finally, Conley's March 19, 2007 EEOC charge presents a different, yet nonetheless fatal, causation problem. The only retaliatory action Conley alleges occurred on or after March 19, 2007 is her November 13, 2007 COPT decertification. Because Conley fails to allege any retaliatory action attributable to DSP, her employer, that occurred contemporaneous with or after March 19, 2007, the filing of her EEOC charge cannot form the basis of any actionable claim.

C. First Amendment Retaliation.

When examining a public employee's 42 U.S.C. § 1983 claim of retaliation for engaging in First Amendment protected activity, the federal courts follow a three-step

[41] *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 302 (3d Cir. 2007).

[42] *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (temporal proximity must be "very close" and twenty-month gap between protected activity and adverse action "suggests, by itself, no causality at all"; *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007) (three-month gap insufficient;) *Andreoli v. Gates*, 482 F.3d 641, 650 (3d Cir. 2007) (five-month gap insufficient); *Morrissey v. Luzerne County Cmty. Coll.*, 117 Fed. Appx. 809, 816 (3d Cir. 2004) (six-month gap insufficient); *Williams v. Phila. Hous. Auth. Police Dept.*, 380 F.3d 751, 760 (3d Cir. 2004) (two-month gap insufficient).

burden shifting analysis.[43] First, the employee must show that (1) the activity is in fact protected and (2) the protected activity "was a substantial factor in the retaliatory action."[44] The burden then shifts to the employer, which may "defeat the employee's claim by demonstrating that the same adverse action would have taken place in the absence of the protected conduct."[45] Conley contends she engaged in protected First Amendment activity by filing her (1) March 2004 Campanella complaint; (2) October 2004 lawsuit; and (3) March 19, 2007 EEOC charge. She further asserts that DSP retaliated against her for engaging in such protected activity by (1) investigating her in 2004; (2) investigating and suspending her in August 2006; (3) forcing her to resign effective March 1, 2007, and (4) decertifying her as a police officer. Conley fails to establish her claim, for the following reasons.

First, any First Amendment retaliatory action that Conley alleges occurred on or before September 16, 2006, regardless of whether it constitutes an actionable retaliatory action, is time-barred. Although Section 1983 does not contain a statute of limitations, the United States Supreme Court has determined that the applicable limitations period is the period determined by each state for personal injury actions.[46] The statute of limitations for personal injures in Delaware is two years.[47] Further, the

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[43] *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005).

[44] *Id.*

[45] *Id.*

[46] *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

[47] 10 *Del. C.* § 8119; *McDowell v. Del. State Police*, 88 F.3d 188, 190 (3d Cir. 1996).

Section 1983 limitations period begins to run "from the time when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action."[48]

Conley filed her original complaint on September 16, 2008. As a result, all of Conley's alleged adverse actions that occurred prior to September 16, 2006, including her 2004 investigation and August 14, 2006 investigation and suspension are time-barred. Second, DSP neither "constructively discharged" nor decertified Conley, and, as a result, neither instance is actionable. Third, notwithstanding whether Conley's March 19, 2007 EEOC charge constitutes protected activity, no retaliation claim based on that activity is actionable because Conley does not allege that any of the named State Defendants took any adverse action against her on or after March 19, 2007.

Fourth, even assuming Conley engaged in protected activity and has established an actionable retaliatory action, she cannot demonstrate that her protected activity was a substantial factor in any alleged adverse action. "To establish the requisite causal connection, a plaintiff usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link."[49] The Plaintiff may also show causation "from the evidence gleaned from the record as a whole."[50]

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[48] *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991).

[49] *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007).

[50] *Id.*

Conley has failed to meet this burden. Conley has adduced no evidence from which a jury could find that her 2004 complaint or lawsuit was a substantial motivating factor in DSP's 2006 decision to investigate and suspend her. Nor can Conley point to any evidence from which a jury could find that her March 17, 2007 EEOC charge filing was a substantial motivating factor in DSP's decision to comply with its legal obligation to report her voluntary resignation to the COPT.[51]

CONCLUSION

For the foregoing reasons, DSP's Motion for Summary Judgment is **GRANTED**.

SO ORDERED 11th day of January, 2011.

/s/ Robert B. Young
J.

RBY/sal
cc: Counsel
File

[51] *Nead v. Union County Educ. Servs. Comm'n*, 378 Fed. Appx. 175, 177 (3d Cir. 2010) (no retaliatory causation where an entity is required by law to make a report).