

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

<b>BETH PICKENS,</b>	:	<b>Civil Action</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>DONNA A. TANOUE, Chairman, and</b>	:	
<b>FEDERAL DEPOSIT INSURANCE</b>	:	
<b>CORPORATION,</b>	:	
	:	<b>No. 98-3437</b>
<b>Defendants.</b>	:	

**MEMORANDUM**

**DUBOIS, J.**

**JULY 10, 2000**

**I. INTRODUCTION**

Plaintiff Beth Pickens (“plaintiff”) brings this action pursuant to the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 et seq. In her Complaint, plaintiff alleges that her employer--the Resolution Trust Corporation (“RTC”)<sup>1</sup>--discriminated against her on the basis of her age and in retaliation for filing a complaint with the RTC’s Equal Employment Opportunity office (“EEO office”). Defendants denied liability and offered three reasons for the RTC’s actions: (1) plaintiff committed misconduct; (2) plaintiff was insubordinate; and, (3) plaintiff threatened her supervisors.

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<sup>1</sup>The RTC ceased operations on December 31, 1995, pursuant to 12 U.S.C. §1441a(m)(1). The Federal Deposit Insurance Corporation (“FDIC”) is named as the successor to the RTC. See McAllister v. RTC, 201 F.3d 570, 572 n.1 (5th Cir. 2000); RTC v. Fidelity and Deposit Co. of Maryland, 205 F.3d 615, 615 (3d Cir. 2000) (noting in case caption that the FDIC is the statutory successor in interest to the RTC).

The case was tried non-jury beginning June 26, 2000. On the first day of trial, plaintiff withdrew her age discrimination claim and proceeded only with her retaliation claim. Based on the following Findings of Fact and Conclusions of Law, the Court finds in favor of defendants and against plaintiff on the retaliation claim and will enter judgment in favor of defendants on that claim. The Court's Findings of Fact are set forth in Section II, infra. The Court's Conclusions of Law are set forth in Section III, infra.

## **II. FINDINGS OF FACT**

1. The RTC employed plaintiff in its Valley Forge, Pennsylvania, office as a Grade 13 LG<sup>2</sup> attorney from December 28, 1992 until March 21, 1995. Plaintiff handled pension and employee benefits matters for the RTC.

2. Upon starting work at the RTC, plaintiff's first level supervisor<sup>3</sup> was Tom Mahoney, who worked in the RTC's Somerset, New Jersey, office. Mahoney left the RTC in the Spring of 1993 and Jodi Mignotti served as plaintiff's first level supervisor on an interim basis until February, 1994. In February, 1994, Tony Pagano became plaintiff's first level supervisor. Plaintiff's second level supervisor from 1992 until early 1995 was Steve Burns, who worked in the Valley Forge office of the RTC. In early 1995, Burns was transferred to a position as senior counsel on corporate affairs, remaining at the Valley Forge office. After Burns was transferred, plaintiff's second level supervisor was William Gramlich.

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<sup>2</sup>An RTC employee's "Grade" denoted his or her pay level; an "LG" or "liquidation grade" employee had a fixed contractual term, i.e., a scheduled termination date.

<sup>3</sup>A "first level supervisor" at the RTC was an employee's immediate supervisor. A "second level supervisor" was the first level supervisor's immediate superior. This terminology continued through the RTC chain of command.

3. On December 1, 1993, plaintiff wrote an e-mail to Grant Moy--an RTC staff attorney in Washington, D.C.--discussing plaintiff's opinion of Edward Gerber, Richard Manning and Robert Mounts--all RTC employees in Washington D.C. (Defense Exhibit 1). In her e-mail, plaintiff said, "In my seven years of public finance...I have never met or even come close to the level of incompetence, ineptness, and unprofessional behaviour of the Gerber, Becker and Mounts trio. ...[I]t would not be worth the effort to do a cost benefit analysis on the national underfunding issue. It would be way over their heads. If I ever do one, it will not go to the three boys."

4. On May 20, 1994, Burns conducted a performance evaluation with plaintiff for the period covering December 28, 1992 to December 28, 1993.<sup>4</sup> (Plaintiff's Exhibit 2). Under the heading "Communication Skills" on the performance evaluation, in a section for comments, Burns stated, "Ms. Pickens is very articulate. She can improve her effectiveness and receptiveness of those she is addressing by being more aware of the tone of her voice when dealing with others who she perceives as being less competent or who disagree with her views. She should be more aware of the sensitivities of co-workers in her use of language. Her terse writing style may sometimes be confused with sarcasm." As part of this evaluation, Burns gave plaintiff scores of 3 with respect whether she "[d]isplays skill in oral expression of ideas, adapting to the listener and situation, clarity of expression, effective use of language" and "[w]rites well: writing is clear, correct, well organized, complete, appropriate in style and

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<sup>4</sup>In his testimony at trial, Burns stated that ordinarily a first level supervisor would conduct a performance review. Burns stated that he conducted this performance review because plaintiff's first level supervisor for the year in question had changed and because plaintiff's first level supervisor for part of the year--Tom Mahoney--did not work in the same office as plaintiff and did not therefore interact with her on a regular basis.

language.” A score of 3 meant that “[t]he employee has demonstrated ability to the extent expected of a competent employee and you would recommend him/her for another position in which the ability is important.”

5. In the Summer, 1994, the position of Assistant General Counsel at the Valley Forge office of the RTC became available. Two RTC employees, Jim Williamson and Judith Thomsen, were interviewed for the position by Ellen Kulka--RTC General Counsel. Prior to their interviews with Kulka, Williamson and Thomsen met with James Barker--Deputy General Counsel of the RTC. Barker informed Williamson and Thomsen that Kulka was concerned with Burns' and plaintiff's interactions with RTC staff in Washington. During Thomsen's interview with Kulka, Kulka said there were two employees in the Valley Forge office whose judgment and behavior concerned her, but she did not identify those employees by name. Thomsen was ultimately hired, first as Acting Assistant General Counsel and then as Assistant General Counsel for the Valley Forge office of the RTC.

6. In August, 1994, Thomsen met with Pagano to discuss Thomsen's concerns about plaintiff's interaction with RTC staff in Washington. As a result of this meeting, on August 12, 1994, Pagano informed Manning, McCarty and Mounts that he would be the “Valley Forge Legal Division point of contact for all pension/employee benefits matters.” Pagano only implemented this policy for pension/employee benefits matters--the only matters handled by plaintiff--leaving unchanged the procedures for resolution, intervention, and other areas of work under Pagano's supervision. As a result of this policy, Pagano, rather than plaintiff, communicated with RTC staff in Washington--a change from the previous policy under which plaintiff had to inform Pagano before she contacted staff in Washington directly.

7. In September, 1994, Pagano recommended six of his subordinates, including plaintiff, for promotion from Grade 13 to Grade 14. As part of this process, Pagano undertook to evaluate these employees and, on October 11, 1994, Pagano conducted an interim annual performance evaluation of plaintiff. (Plaintiff's Exhibit 28). In the comments section of the "Communications Skills" portion of the evaluation, Pagano stated, "Ms. Pickens is very articulate, and she has improved somewhat in her demeanor when dealing with others. She can still improve in this area, however, when dealing with others who she views as incompetent and those who express disagreements with her views. She should also be more aware of the sensitivities of co-workers in her use of language and tone of voice. Her written product of late has been entirely appropriate in both style and language." As part of the evaluation, Pagano gave plaintiff a score of 3 with respect to whether she, "[d]isplays skill in oral expression of ideas, adapting to the listener and situation, clarity of expression, effective use of language;"<sup>5</sup> he gave her a score of 2 with respect to whether she "[w]rites well: writing is clear, correct, well organized, complete, appropriate in style and language." A score of 2 meant that "[t]he employee has demonstrated ability to a degree that is clearly above that expected of a competent employee and you would recommend him/her for another position in which the ability is important." Burns approved this performance evaluation on October 11, 1994.

8. On October 12, 1994, Thomsen met with Pagano and expressed surprise that Pagano had recommended plaintiff for promotion. Thomsen told Pagano that she would not approve plaintiff's promotion. As a result of this meeting, on October 13, 1994, Pagano withdrew plaintiff's promotion recommendation.

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<sup>5</sup>See pg. 3-4, ¶ 4, supra., for the meaning of a score of 3.

9. On December 24, 1994, Burns met with Thomsen and informed her that plaintiff would probably be filing an EEO complaint based on age discrimination. Burns testified that, upon receiving this information, Thomsen got angry, said nothing, and left the office. Thomsen testified that she did not remember when she first learned of the EEO complaint and she did not remember expressing any negative reaction or frustration about the complaint. The Court finds Burns' testimony concerning Thomsen's reaction to the news that plaintiff would probably be filing an EEO complaint not to be credible.

10. On December 28, 1994, plaintiff filed a complaint with the RTC EEO office alleging that she had not been promoted because of her age.

11. By January, 1995, all of the attorneys that Pagano recommended for promotion to Grade 14 had received such promotions. Plaintiff was not promoted because Pagano had withdrawn his recommendation for her promotion.

12. On March 1, 1995, Pagano sent an e-mail to 12 attorneys under his supervision--including plaintiff--informing them that Thomsen had extended their appointments at the RTC from a scheduled termination of June 30, 1995 to December 30, 1995.

13. On March 9, 1995, in response to a memorandum from Pagano giving her a work assignment, plaintiff walked into Pagano's office and informed him, in a raised voice, that she would not do the work that he had assigned. Plaintiff spoke in a raised voice and cursed at Pagano. Plaintiff's voice was so loud that a secretary outside the office closed Pagano's door. During the meeting, Pagano did not respond in substance to plaintiff's concerns, attempting only to calm her. The meeting concluded with plaintiff reiterating that she would not do the work.

14. Shortly after this meeting, Pagano met with Gramlich to describe Pagano's meeting with plaintiff. Pagano initiated this meeting because he felt that plaintiff's behavior--specifically the cursing and the raised voice--were inappropriate. Gramlich told Pagano to meet with plaintiff and explain to her that such conduct was unacceptable.

15. After meeting with Gramlich, on the afternoon of March 9, 1995, Pagano went to plaintiff's office to discuss their earlier meeting. Pagano initially informed plaintiff that her earlier conduct was inappropriate and would not be tolerated. Plaintiff then began to discuss with Pagano her complaints about the workplace--including her complaints about Gramlich and Thomsen. During the course of this discussion, plaintiff became excited and demonstrative. At one point, Pagano told plaintiff that she should not "shoot the messenger." Plaintiff responded that Gramlich and Thomsen were lucky that she did not have a gun, because she would be tempted to use it. Plaintiff qualified the statement by saying, "Of course, I don't mean that." Plaintiff then continued to discuss her complaints about the workplace with Pagano.

16. After his second meeting with plaintiff, Pagano again spoke to Gramlich, but did not mention plaintiff's statement about being tempted to use a gun. Gramlich told Pagano to document everything that happened that day, and Pagano began a memorandum to the file.

17. Pagano subsequently contacted an RTC personnel specialist regarding plaintiff's statement about the gun. The personnel specialist directed Pagano to RTC Circular 2410.10, dated November 14, 1994, dealing with violence in the workplace. (Defense Exhibit 12). This document defined a threat as any "gesture, oral or written expression which conveys an intent to cause physical harm to persons or property." After reading this document, Pagano concluded

that plaintiff's statement was a threat, and that he had to report that statement to Thomsen and Gramlich.

18. Thomsen was given an oral report regarding the events of March 9 on either March 13 or March 14, 1995. There is no evidence as to the source of the oral report. On March 15, 1995, Thomsen sent an e-mail to Pagano asking him to prepare a memorandum detailing the events of March 9, 1995.

19. Pagano prepared a six-page memorandum detailing all of the events of March 9, 1995, including plaintiff's alleged threat (Defense Exhibit 16), and submitted it to Thomsen on March 17, 1995. Thomsen faxed a copy of this memorandum to James Lawrence--the individual in charge of labor and employment matters for the RTC in Washington, D.C..

20. On March 21, 1995, plaintiff Thomsen spoke with Lawrence about Pagano's memorandum. Lawrence told Thomsen that she needed to determine whether the threat was real or whether it was just an example of an employee "blowing steam." Lawrence also told Thomsen that terminating plaintiff would be appropriate if Pagano's report was accurate. Thomsen stated at trial that she thought Lawrence was basing his decision on all of plaintiff's conduct, not just on the alleged threat made by plaintiff.

21. On March 21, 1995, Gramlich summoned plaintiff to his office and gave her a memorandum from Thomsen stating that plaintiff was being terminated for misconduct. Gramlich asked plaintiff to sign this letter and she refused. Plaintiff was subsequently escorted to her office and out of the building by a security guard.

22. Between March 9, 1995 and March 21, 1995, RTC did not implement any additional security measures at its Valley Forge office in response to plaintiff's alleged threat. Thomsen,



Gramlich and plaintiff all continued to report to work as normal and no external measures--such as the introduction of metal detectors or additional guards--were implemented.

23. As a result of her dismissal, plaintiff suffered damages in the amount of \$71,000.

### **III. CONCLUSIONS OF LAW**

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332. Venue is proper in this Court based on 28 U.S.C. § 1391.

2. The ADEA states in part, “It shall be unlawful for an employer to discriminate against any of his employees ... because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.” 29 U.S.C. § 623(d).

3. The procedural framework in ADEA retaliation cases follows that of Title VII disparate treatment cases as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). See Barber v. CSX Distribution Services, 68 F.3d 694, 701 (3d Cir. 1995). To establish a prima facie case of retaliation, a plaintiff must show: (1) that she was engaged in protected conduct; (2) that she was subject to an adverse employment action subsequent to such activity; and, (3) that a causal link exists between the protected activity and the adverse action. See id.

4. If plaintiff establishes a prima facie case of retaliation, the burden shifts to defendant to produce evidence that plaintiff was terminated for a legitimate, non-discriminatory reason. See Reeves v. Sanderson Plumbing, – U.S. --, 2000 WL 743663 at \*5 (June 12, 2000); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

5. Once defendant has produced a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff must be given a “full and fair opportunity to demonstrate, through presentation of his own case and through cross-examination of the defendants’ witnesses, that the proffered reason was not the true reason for the employment decision,” and that retaliation was the real reason. St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507-08 (1993).

6. The ultimate burden of proving intentional discrimination by a preponderance of the evidence always remains with plaintiff. The Court may disbelieve defendant’s legitimate, non-discriminatory reason and still conclude that there has been no retaliation. See Reeves, 2000 WL 743663 at \*8;St. Mary’s Honor Center, 502 U.S. at 510-11.

7. Plaintiff was engaged in protected activity under the ADEA--filing her complaint with the RTC EEO office on December 28, 1994.

8. Plaintiff was subject to an adverse employment action subsequent to such activity--her employment was terminated on March 21, 1995.

9. Plaintiff failed to prove that a causal link exists between her filing a complaint with the EEO office and her termination.

10. Defendants offered three facially legitimate, non-discriminatory reasons for plaintiff’s termination: (1) insubordination; (2) unprofessional conduct; and, (3) making a threat against Thomsen and Gramlich.

11. The claimed termination of plaintiff based on the alleged threat against Thomsen and Gramlich was pretextual.

12. The termination of plaintiff based on insubordination and unprofessional conduct was not pretextual.

13. Plaintiff was legitimately terminated by RTC for insubordination and unprofessional conduct.

#### **IV. DISCUSSION**

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court announced a basic framework for courts to follow in cases arising under Title VII of the Civil Rights Act. That framework has been summarized as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ Third, should the defendant carry this burden, the plaintiff must then 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. Newman v. GHS Osteopathic Inc., 60 F.3d 153, 156 n.3 (3d Cir. 1995) (internal citation omitted).

This framework applies with equal force to claims arising under the ADEA. See id. at 157.

To establish a prima facie case of retaliation under the ADEA, plaintiff must prove: (1) that she engaged in protected conduct; (2) that she was subject to an adverse employment action subsequent to such activity; and, (3) that a causal link exists between the protected activity and the adverse employment action. See Barber, 68 F.3d at 701. There was no dispute at trial that plaintiff engaged in protected conduct when she filed her EEO complaint and that her termination constituted an adverse employment action subsequent to such protected conduct.

In determining whether a causal link exists between a protected activity and an adverse employment action, a court must consider whether the “proffered evidence, looked at as a whole,

may suffice to raise the inference.” Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997). In making such a determination, a court must bear in mind it “is not limited to timing and demonstrative proof, such as actual antagonistic conduct or animus” in determining whether the plaintiff has made out such a claim. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000).

At trial, plaintiff failed to establish a causal link between her EEO complaint and her termination by a preponderance of the evidence. Plaintiff’s termination occurred almost three months after she filed her EEO complaint. In the interim, plaintiff’s contract, along with the other Grade 13 LG attorneys in the Valley Forge office, was extended from June 30, 1995 to December 30, 1995. The only evidence that plaintiff offered of animus towards her on the basis of her EEO complaint was Burns’ testimony relating to a conversation he had with Thomsen on December 24, 1994. At that time, he said he told Thomsen that plaintiff would probably file an EEO complaint based on age discrimination. In response, Thomsen reportedly got angry, said nothing, stood up and left the office. The Court concludes that such evidence falls short of meeting plaintiff’s burden of proving the requisite causal connection.

Defendants offered three legitimate, non-discriminatory reasons for plaintiff’s termination--insubordination, unprofessional conduct, and making a threat. The Court concludes, based on the evidence presented at trial, that plaintiff proved the alleged threat made by plaintiff to Pagano on March 9, 1995 was a pretextual reason for her dismissal. The evidence at trial revealed first that the context in which plaintiff made the statement about using a gun against Gramlich and Thomsen was such that the statement could not reasonably have been interpreted as a threat. In response to a statement about “shooting the messenger,” plaintiff

extended the metaphor, saying that her superiors were lucky she did not have a gun because she would be tempted to use it. This context, coupled with plaintiff's almost immediate disclaimer, "Of course, I don't mean that," leads ineluctably to the conclusion that the statement that plaintiff made was not a threat.

Moreover, it is clear from the actions of plaintiff's supervisors that her statement was not treated as a threat. Pagano did not immediately report the statement to Gramlich--one of the persons allegedly threatened--despite meeting with him shortly after the alleged threat was made. Thomsen, the other person allegedly threatened, was not even notified of the threat against her until the following week--March 13 or March 14 at the earliest. Moreover, even after having been told of the threat, Thomsen and Gramlich did nothing to indicate that they were treating the statement as a serious threat. They did not place plaintiff on administrative leave or restrict her access to the RTC office, they did not stay away from the office themselves, and they did nothing to immediately increase security at the RTC office. Thus, the Court concludes that plaintiff's supervisors did not view her statement as a threat and their justification of her termination on that ground was a pretext.

Plaintiff, however, has offered no evidence that defendants' other reasons for her dismissal--insubordination and unprofessional conduct--were pretextual. At trial, on cross-examination, Thomsen said that she understood Lawrence's statement that dismissal would be an appropriate action to relate to all of plaintiff's behavior, not just to her alleged threat. Plaintiff had a history at the RTC of unprofessional conduct, including the e-mail she sent to Moy regarding Gerber, Becker and Mounts. Plaintiff's behavior was sufficiently problematic that Pagano found it necessary to stop her from communicating with RTC staff in Washington, a

protocol different from that applicable to the other employees under his supervision. Moreover, plaintiff's actions on March 9, 1995--yelling and cursing at Pagano and refusing to do work assigned to her--constitute both insubordination and unprofessional behavior. Under all the evidence, the Court concludes that plaintiff was legitimately terminated for insubordination and unprofessional conduct.

An appropriate order follows:

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

<b>BETH PICKENS,</b>	:	<b>Civil Action</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>DONNA A. TANOUE, Chairman, and</b>	:	
<b>FEDERAL DEPOSIT INSURANCE</b>	:	
<b>CORPORATION,</b>	:	
	:	<b>No. 98-3437</b>
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, to wit, this 10th day of July, 2000, following a non-jury trial in this case, for the reasons set forth in the attached Memorandum, the Court **FINDS IN FAVOR** of defendants Donna A. Tanoue and Federal Deposit Insurance Corporation on the claim that defendants retaliated against plaintiff Beth Pickens in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

It is **FURTHER ORDERED** that judgment is **ENTERED** in favor of defendants Donna A. Tanoue and Federal Deposit Insurance Corporation and against plaintiff Beth Pickens on plaintiff's claim that defendants retaliated against her in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

It is **FURTHER ORDERED** that plaintiff's claim that defendants Donna A. Tanoue and Federal Deposit Insurance Corporation discriminated against her on the basis of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), voluntarily withdrawn by plaintiff at trial, is **DISMISSED WITH PREJUDICE**.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**