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

CLIFTON GLENN,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 03-6578
HORGAN BROTHERS, INC. and RON FRANKS,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **JUNE 24, 2005**

Presently pending before this Court is the Defendant's, Horgan Brothers, Inc. ("Horgan Brothers"), Motion for Summary Judgment. For the following reasons, Horgan Brothers' Motion will be granted.

I. BACKGROUND

On December 3, 2003, the Plaintiff, Clifton Glenn ("Glenn"), filed his Complaint with this Court after exhausting his administrative remedies. (See Compl. ¶¶ 11-13). Plaintiff's Complaint contains three counts, specifically: violations of Title VII (Count I); violations of 42 U.S.C. § 1981 (Count II); and violations of the Pennsylvania Human Relations Act ("PHRA") (Count III).

This case arises from Glenn's employment as a construction laborer with Horgan Brothers, a concrete contractor. On June 24, 2002, Glenn began working for Horgan Brothers. As an employee of Horgan Brothers, Glenn worked along side his co-workers and together they formed a paving crew for driveways. The paving crew worked in and around Montgomery

County, Pennsylvania. On July 30, 2002, after he finished work at a job site, Glenn headed towards his automobile. Upon arriving at his vehicle, Glenn saw a rope in the shape of a hangman's noose hanging inside his car.[1] (Compl. ¶ 17). Glenn alleges that upon seeing the noose, he approached his co-workers and the construction foreman Matt DelConte ("DelConte"). Plaintiff asserts that DelConte told him that the co-Defendant, Ron Franks ("Franks"), had placed the noose in the vehicle. Franks was a co-worker of Glenn and worked on the same paving crew. In addition to Franks placing the noose in Glenn's vehicle, Glenn alleges that Franks previously made racist and discriminatory remarks to Glenn while on the job.[2]

After the July 30, 2002 incident, Glenn contacted Joe Horgan ("Horgan"), vice-president of Horgan Brothers, to report the incident. After being contacted by Glenn, Horgan began an investigation. First, Horgan spoke with Glenn, Franks and DelConte about the incident. Then, Horgan instructed two administrative employees of Horgan Brothers, Frank Innaurato ("Innaurato") and Linda Dowie ("Dowie"), to further investigate Glenn's complaint.

On August 7, 2002, Innaurato and Dowie conducted interviews to investigate Glenn's complaint, including interviewing Glenn and Franks. On August 8, 2002, Horgan reassigned Glenn from the paving crew to Horgan Brothers' recycling facility (the "facility"). There is a disputed issue of fact as to whether Glenn asked to be reassigned. According to

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[1] There is some disagreement as to whether the rope was in the shape of a hangman's noose or in the shape of a slipknot used by the paving crew in the course of their duties. However, as Glenn is the non-moving party in this Motion, all fact issues must be resolved in his favor. Thus, for the remainder of this Memorandum Opinion, I will assume that the rope found in his vehicle was in the shape of a hangman's noose.

[2] For example, Plaintiff asserts that on one occasion, Franks called him "jerky boy." (Dep. Glenn at 115). Additionally, on an unspecified number of occasions, Glenn asserts that Franks called him "boy." (Id. at 121).

Horgan, Glenn stated that he no longer felt comfortable on the crew nor did he feel comfortable working alongside Franks. (Dep. Joe Horgan, 48-49). According to Glenn, no one ever asked him about his thoughts on remaining with the crew. (Aff. Glenn ¶ 10). Plaintiff asserts that this reassignment was in retaliation for his harassment complaint. Horgan Brothers maintains that the reassignment was initiated so as to eliminate the possibility of future racial incidents before the investigation into Glenn's complaints could be completed.

At the facility, concrete and asphalt from demolished buildings and the milling of streets is prepared, crushed and recycled into usable material. Glenn was assigned to the facility and his tasks included removing items from the stockpiles of concrete and blacktop that could not be recycled and would cause damage to the recycling equipment. After working at the facility for a few hours on August 8, 2002, Glenn walked off the job site and did not return to work for Horgan Brothers in any capacity. Ultimately, on August 12, 2002, after Glenn had not returned, Horgan Brothers gave notice to Glenn that his employment with Horgan Brothers was terminated for his failure to show up. Even after Glenn did not return to work, Horgan Brothers continued its investigation into Glenn's complaint. Ultimately, Horgan Brothers promulgated a new harassment policy and suspended Franks for three days.[3]

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[3] The parties have stipulated to the fact that before the July 30, 2002 incident, Horgan Brothers did not have a specific racial harassment policy in place. (Pl.'s Response Def. Horgan Brothers' Mot. Summ. J., Ex. H). Rather, the policy in place before July 30, 2002 stated the following:

> Policy:
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> It is the policy of Horgan Brothers, Inc. to maintain a written policy regarding the conduct of each employee and their behavior during working hours.

Guidelines:

1. No alcohol or illegal drugs are permitted on any job sites where Horgan Brothers, Inc. is working.
2. Only paid Horgan Brothers, Inc., employees are permitted on job sites.
3. No horseplay or sporting activities are permitted on any job site where Horgan Brother's Inc. is working. This includes during coffee and lunch breaks.

Disciplinary Action:

1. Violation or deviations from any corporate policy or procedure will be met with progressive disciplinary action, up to and including discharge, should there be repeated violations of the same rule within a 12 month period of time. Disciplinary action will be based on severity of infraction.
2. Progressive disciplinary action
   a. Written warning
   b. 1 Day suspension
   c. 3 Day suspension
   d. Discharge
3. Each written warning shall advise the employee of the nature of the violation and the correct safe practice and procedure. A copy of the violation shall be provided the employee.

(Id.).

Subsequent to the July 30, 2002 incident involving the Plaintiff, Horgan Brothers promulgated the following policy entitled Policy of Harassment of Persons in Protected Categories:

"Harassment" is related to equal opportunity in employment.

All employees are entitled to a workplace which is free of harassment which is based on race, creed, age, national origin, disability or Vietnam Era Veteran status ("Protected Characteristics").

Horgan Brothers, Inc. maintains a firm policy of total disapproval

II. STANDARD

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and the moving party is entitled to judgment as a matter of law.'" Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991)(citations omitted). The inquiry is "whether the evidence

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> of any such conduct by an employee of the Company. Included within the types of conduct prohibited by the company as harassment are the following:
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> > *The making of disparaging remarks related to a Protected Characteristic;*
> > *The use of vulgar or obscene language that would offend ordinary sensibilities and which are related to a Protected Characteristic;*
> > *Any other such contact which creates or tends to create a hostile environment based on an individual group's Protected Characteristics.*
>
> If any employee is subjected to or witnesses such conduct, she/he is urged to notify the personnel director/human resources director immediately in the same manner as addressing any other EEO problems. Any manager who becomes aware of harassment by an employee against a fellow employee is required to undertake prompt and effective corrective action. If an employee is unable or uncomfortable about discussing the issue with the director of personnel, the following individuals are available and properly trained to discuss the issue of harassment in a confidential manner: Linda Dowie, Joe Horgan, Frank Innaurato.
>
> The Company will not tolerate harassment of any nature and will investigate all reported incidents of harassment promptly and confidentially. Persons who are guilty of harassment will be subject to appropriate disciplinary action, up to and including discharge.

(Id.)(emphasis in original).

presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.[4] Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the non-movant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

While Plaintiff's Complaint asserts claims of hostile work environment, retaliation and constructive discharge under Title VII, Section 1981 and the PHRA, the analysis for the hostile work environment, retaliation and constructive discharge claims will be the same no matter which statute is used.. Indeed, "[t]he analysis of whether a hostile work environment exists is the same under Title VII, the PHRA, and § 1981." Boyer v. Johnson Matthey, Inc., No. 02-8382, 2005 WL 35893, at *12 n.17 (E.D. Pa. Jan. 6, 2005)(citing Weston v. Pa. Dep't of Corr., 251 F.3d 420, 426 n.3 (3d Cir. 2001); Barbosa v. Tribune Co., No. 01-1262, 2003 U.S.

[4] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Prof'l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

Dist. LEXIS 19483, at *11 (E.D. Pa. Sept. 23, 2003)). Additionally, the analysis with respect to a retaliation claim is the same under Title VII, Section 1981 and the PHRA. See White v. Gallagher Bassett Servs., 257 F. Supp. 2d 804, 811 n.3 (E.D. Pa. 2003)(citing Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001); Bailey v. Storlazzi, 729 A.2d 1206, 1214 (Pa. Super. Ct. 1999)). Finally, the elements for establishing a constructive discharge will be the same under Title VII, Section 1981 and the PHRA. See Riding v. Kaufmann's Dep't Store, 220 F. Supp. 2d 442, 462 n.7 (W.D. Pa. 2002)(stating same analysis applies for constructive discharge under Title VII and the PHRA)(citations omitted); Behrens v. Rutgers Univ., No. 94-358, 1996 WL 570989, at *4 (D.N.J. March 29, 1996)(stating elements of constructive discharge are the same under Title VII and Section 1981)(citations omitted). Thus, the analysis for Plaintiff's Title VII hostile work environment, retaliation and constructive discharge claims will be applicable to Plaintiff's Section 1981 and PHRA claims.

A. HOSTILE WORK ENVIRONMENT

To establish a hostile work environment claim, five elements are required. Specifically, it must be shown that "(1) the employee suffered intentional discrimination because of his or her race; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the employee; (4) the discrimination would detrimentally affect a reasonable person; and (5) the existence of respondeat superior liability." Tolani v. Upper Southampton Township, 158 F. Supp. 2d 593, 596 (E.D. Pa. 2001)(citation omitted). "In determining whether a work environment is hostile, 'the totality of the circumstances must be considered, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it reasonably

interferes with an employee's work performance.'" Id. at 596-97 (quoting Harris v. SmithKline Beecham, 27 F. Supp. 2d 569, 577 (E.D. Pa. 1998), aff'd, 203 F.3d 816 (3d Cir. 1999)). As I find that the fifth element cannot be satisfied against Horgan Brothers, I will decline to discuss the first four elements of a hostile work environment claim.

In this case, I find that the dispositive issue is whether Horgan Brothers can be found liable for Franks' actions based upon respondeat superior liability. Indeed, the United States Court of Appeals for the Third Circuit ("Third Circuit") has noted that "[e]ven if a work environment is found to be hostile, a plaintiff must show that the conduct creating the hostile work environment should be imputed to the employer." Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997). In Knabe, the Third Circuit outlined three potential bases for holding an employer liable for harassment committed by their employees. Id. at 411. First, "employers are liable for the torts committed by employees within the scope of their employment." Id. The Third Circuit noted that this type of liability is "inapposite in hostile environment cases [because] 'in a hostile environment case, the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere.'" Id. (quoting Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 107 (3d Cir. 1994)). Second, employers can be liable "if the harassing employee relied upon apparent authority or was aided by the agency relationship." Id. (citation omitted). It appears as if these first two theories of liability are not applicable to the instant case.

Similar to Knabe, however, the most relevant theory of liability applicable in this case is that "employers are liable for their own negligence or recklessness: in this context, an employer is liable for 'negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment.'" Id. (quoting Bouton, 29 F.3d at 106). "[A]n employer is liable for

an employee's behavior under [this basis] 'if a plaintiff proves that management level employees had actual or constructive knowledge about the existence of a . . . hostile work environment and failed to take prompt and adequate remedial action.'" Id. (quoting Andrews v. City of Phila., 895 F.2d 1469, 1486 (3d Cir. 1990)(citing Bouton, 29 F.3d at 107)). Thus, the issue becomes whether Horgan Brothers took prompt and remedial action after it had knowledge of the hostile work environment.

In analyzing this issue, the focus should be on whether the remedial action taken by the employer was adequate, not necessarily whether the investigation into Glenn's complaint was adequate. Indeed, the Third Circuit has noted that even when a company's investigation into complaints of harassment is lacking:

> the employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is also lacking. In other words, the law does not require that investigations into [racial] harassment be perfect. Rather, to determine whether the remedial action was adequate, we must consider whether the action was "reasonably calculated to prevent further harassment."

Id. (citing Saxton v. AT&T Co., 10 F.3d 526, 535 (7th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991);Katz v. Dole , 709 F.2d 251, 256 (4th Cir. 1983)). However, the Third Circuit has also noted that:

> there may be cases in which an employer's investigation is so flawed that it could not be said that the remedial action was adequate. For example, the investigation might be carried out in a way that prevents the discovery of serious and significant harassment by an employee such that the remedy chosen by the employer could not be held to be reasonably calculated to prevent the harassment.

Id. at 414. While an employer may take extra action to do more than is legally required to remedy the adverse effects of the employee's conduct, that is not what Title VII requires. Rather, "Title VII requires only that the employer take steps reasonably likely to stop the harassment." Id. (internal quotation marks and citation omitted).

Plaintiff's arguments on this element principally focus on the investigation techniques used by Horgan Brothers. For example, Plaintiff complains that Innaurato and Dowie were not properly trained to conduct the investigation. Additionally, Plaintiff asserts that Horgan Brothers failed to interview all the employees on the crew, including the only other African-American on the paving crew, Mann Reynolds ("Reynolds"). According to Plaintiff, Reynolds was not working with the paving crew on July 30, 2002. (Pl.'s Resp. Def. Horgan Brothers Mot. Summ. J., at 8). Plaintiff also argues that Innaurato and Dowie's investigation was insufficient because they failed to investigate other racial incidents by Franks. For example, Plaintiff asserts that Franks called him "jerky boy" and "boy." (Pl.'s Aff. Resp. Def. Horgan Brothers Inc.'s Mot. Summ. J., ¶ 4). According to Plaintiff, Franks called him "jerky boy" one time. (Dep. Glenn, at 115). The record is unclear as to how many times Franks called Glenn "boy" by Franks during Glenn's six weeks of employment with Horgan Brothers. (Id., at 116). Plaintiff asserts that DelConte heard Franks call Plaintiff these and other names, but never remedied the situation (Pl.'s Aff. Resp. Def. Horgan Brothers Inc.'s Mot. Summ. J., ¶ 4). According to Horgan Brothers, "[a]s a foreman, DelConte has no authority to hire, fire or discipline workers. He cannot schedule them, reward, punish, or give them time off. Like most foreman in the construction business, DelConte is responsible for directing the work of the crew while he works

with them." (Aff. Joe Horgan ¶ 7).[5] However, I note that as soon as Glenn complained about any racially hostile behavior to Joe Horgan arising from the July 30, 2002 incident, an investigation into Glenn's complaint began immediately. Additionally, there is nothing in the record to suggest that there were any complaints before the July 30, 2002 incident.

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[5] Indeed, Glenn appeared to confirm this during his deposition. Specifically:

Q: What did Matt [DelConte] do?
A: He was the foreman.
Q: What was Matt's job?
A: He ran the paver and supervised the rest of the crew.
Q: Supervised in what sense?
A: What do you mean?
Q: Did he hire and fire people?
A: I don't know.
Q: Did you ever see him hire and fire people?
A: Nope.
Q: Did you ever see him impose any discipline on anybody?
A: No.
Q: Give anybody a warning?
A: No.
Q: Could he give people – grant requests to take time off?
A: I don't know.
Q: Did you ever see him do that?
A: Nope.
Q: Did he ever tell you he could do that?
A: Nope.
Q: Did you ever see him give anybody a pay increase?
A: Nope.
Q: Did you ever see him recommend somebody get a pay increase?
A: No.
Q: Did you ever see him do anything other than kind of generally tell somebody, well, you work over there and you work over here in terms of supervising people?
A: No.

(Dep. Glenn 31-32).

After Horgan Brothers completed its investigation, it disciplined Franks as well as promulgated a harassment policy. See supra note 3. At the time the remedial action was carried out, however, Glenn was no longer employed by Horgan Brothers. Glenn did not give Horgan Brothers any opportunity to complete its investigation and institute remedial action, and never returned to work after the remedial action was instituted. See Knabe, 114 F.3d at 415 (stating that evidence that employee returned to work after remedial action is helpful to plaintiff's case). In this case, punitive action was taking against the purported harasser and Horgan Brothers' clarified and promulgated a racial harassment policy. (Def. Horgan Brothers' Mot. Summ. J., Ex. A ¶ 10). Based upon the foregoing action by Horgan Brothers, I conclude that Horgan Brothers' actions were reasonably calculated to stop the harassment of Franks. As previously noted, while not necessary in all circumstances, Horgan Brothers took punitive action against the harasser as well as refined a harassment policy so as to be reasonably calculated to stop further acts of harassment. Additionally, an investigation began immediately when Joe Horgan, a management level employee, found out about the harassment. Therefore, Plaintiff cannot establish respondeat superior liability against Horgan Brothers since the remedial action instituted by Horgan Brothers was promptly undertaken and reasonably calculated to stop the harassment. Thus, Plaintiff's hostile work environment claim shall not move forward.

B. RETALIATION/CONSTRUCTIVE DISCHARGE

In addition to his hostile work environment claims against Horgan Brothers, Plaintiff alleges that his reassignment to the facility on August 8, 2002 was in retaliation for his lodging a complaint against Franks for racial harassment. Three elements are required to establish a prima facie case of retaliation. Specifically, "'[t]o establish discriminatory retaliation

under Title VII, a plaintiff must demonstrate that: (1) he engaged in activity protected by Title VII; (2) the employer took an adverse employment action against [him]; and (3) there was a causal connection between [his] participation in the protected activity and the adverse employment action.'" Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997)(quoting Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995)). Additionally, Plaintiff asserts that he was constructively discharged from employment by the frustration, betrayal and anger he felt when he was reassigned to the facility. In the context of deciding this case, Plaintiff's retaliation and constructive discharge claims are legally interrelated in that they each share an essential element with respect to the prima facie case, namely showing a tangible adverse employment decision. See Riding, 220 F. Supp. 2d at 462 (footnote omitted). Indeed, Plaintiff combines his arguments for his retaliation and constructive discharge claims in his response to Horgan Brothers's Motion for Summary Judgment. (See Pl.'s Response Def. Horgan Brothers' Mot. Summ. J., at 9-10). Thus, the main area of contention between the parties is whether Joe Horgan's decision to reassign Glenn to the facility on August 8, 2002 constituted an adverse employment action.

> At the outset, I note that:
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> > [w]hile there is no bright line rule, the Supreme Court has defined an adverse employment action as "a significant change in employment status, such as failing to promote . . . [or] reassignment with significantly different responsibilities." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Our Court of Appeals has added "transfers, demotions," and employment decisions that significantly "alter an employee's compensation, terms conditions or privileges of employment" to the definition. Robinson, 120 F.3d at 1300.

Mihalik v. Eckerd Corp., No. 03-6002, 2005 WL 35918, at *4 (E.D. Pa. Jan. 7, 2005). "'A

purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either.'" Farmer v. Camden City Bd. of Educ., No. 03-685, 2005 WL 984376, at *13 (D.N.J. March 28, 2005)(quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)); see also, O'Neal v. Brownlee, No. 03-5535, 2004 WL 2827052, at *6 (E.D. Pa. Dec. 9, 2004)("While in certain circumstances a transfer or reassignment may be materially adverse action, . . . a purely lateral transfer, which does not involve a change in pay or a demotion in any other form, does not constitute an adverse employment action.")(citation omitted). While

> direct economic impact is an important factor in deciding whether an employer's action is a tangible adverse employment action, but "it is not the sine qua non. If an employer's act substantially decreases an employee's earning potential and causes significant disruption in his or her working conditions, a tangible adverse employment action may be found."

Riding, 220 F. Supp. 2d at 462 (quoting Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152-54 (3d Cir. 1999)). Additionally, "[t]ransfers and reassignments without loss of pay, benefits or other direct or immediate economic consequences may often been deemed to have passed this objective threshold, and qualify as an adverse employment decision." Id. (citations omitted).

The courts have also noted that "[a] plaintiff who voluntarily resigns may assert a claim of constructive discharge when the employer's allegedly discriminatory conduct creates an atmosphere that is the constructive equivalent of a discharge." Id. (citing Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992)). "The resignation is treated as if it were an outright dismissal by the employer, rendering the resignation an 'adverse employment action,'

which can serve as the basis for discrimination or retaliation claims." Id. (citing Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167-68 (3d Cir. 2001); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084-85 (3d Cir. 1996)). As the court noted in Riding, claims of retaliation and constructive discharge frequently overlap. Id. (citations omitted). More specifically:

> There is an objective threshold that must be crossed, prima facie, by plaintiff in each case: the employer's action which forms the factual foundation of each claim must work some serious and substantial tangible harm, which alters an employees compensation, terms, conditions or privileges of employment, and, in the case of a claimed constructive discharge, makes working conditions so unpleasant or intolerable that a reasonable person in the employee's shoes would resign.

Id. However, the Third Circuit has also noted that "[i]t follows that not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Robinson, 120 F.3d at 1300. Indeed, the Third Circuit continued by noting that "[c]ourts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation constitute 'adverse employment action.'" Id. (citing Williams, 85 F.3d at 273 ; McDonnell v. Cisneros, 84 F.3d 256, 258 (7th Cir. 1996)).

In the context of this case, I find that a reasonable jury could not find that Glenn's reassignment to the facility on August 8, 2002 amounted to an "adverse employment action." Plaintiff was a laborer and worked with hot asphalt while on the paving crew. Such work required Glenn to pave, handle and work with hot asphalt sometimes as hot as 300 degrees

Fahrenheit. Working on the paving crew required Glenn to be around unpleasant fumes as well. While the parties differ as to whether Glenn requested to be removed from the paving crew, Glenn no longer wanted to work alongside Franks. (Pl.'s Resp. Def. Horgan Brothers Mot. Summ. J., Ex. C ¶ 10). There is absolutely nothing in the record to suggest that Glenn's compensation, benefits or terms of employment were affected in anyway by the reassignment on August 8, 2002. Thus, I find as a matter of law that Plaintiff's dissatisfaction with his reassignment does not amount to the type of significant disruption in Glenn's working conditions or significantly alter his work responsibilities so as to become an adverse employment action. See Robinson, 120 F.3d at 1300 (noting that not everything that makes an employee unhappy qualifies as a basis for a discrimination suit).

The recycling facility, like the paving crew, was a regular part of Horgan Brothers' business and other employees, including members of the Horgan family have worked at the facility. (Dep. Joe Horgan, at 52-53). Additionally, I note that Plaintiff worked at the facility for only a few hours on the morning of August 8, 2002 before walking off the job. Plaintiff's reassignment to the facility was only temporary since a laborer is assigned to work at the facility upon a request from the facility manager. See Bermingham v. Song Corp. of Am., 820 F. Supp. 834, 842 n.18 (D.N.J. 1992), aff'd, 37 F.3d 1485 (3d Cir. 1994); Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 504-05 (W.D. Pa. 1988), aff'd, 856 F.2d 184 (3d Cir. 1988); Ferguson v. E.I. DuPont de Nemours & Co., 560 F. Supp. 1172, 1201 (D. Del. 1983)("Even if causality was established, [plaintiff] has not established that she was subjected to an adverse employment action. Her transfer was only temporary and she retained her pay and benefits. Had she been permanently reassigned or received a reduction in pay, this element

would be established.")(citation omitted). While the location and exact duties of Glenn might have been different at the facility when one compares his duties on a paving crew as opposed to working at the facility, I find as a matter of law that Glenn's duties as a construction laborer were not so significantly different so as to constitute an adverse employment action based upon this reassignment. See Mihalik, 2005 WL 35918, at *4 (stating that the Supreme Court has identified that reassignment with significantly different responsibilities can constitute an adverse employment action). As Plaintiff has failed to show that his reassignment to the facility on August 8, 2002 was an adverse employment action, I will grant Horgan Brothers Motion as to Glenn's retaliation claim.

Plaintiff also has failed to show a material issue of fact as to whether Horgan Brothers made working conditions at the facility "so unpleasant or intolerable that a reasonable person in employee's should would resign." Riding, 220 F. Supp. 2d at 463. The work completed at the facility is a regular part of Horgan Brothers' business and laborers regularly work there. As such, a construction laborer in Glenn's shoes would not be forced to resign based upon the working conditions at the facility since as a construction laborer, he routinely worked in the construction business. As previously noted, Plaintiff's retaliation and constructive discharge claims are interrelated. Plaintiff cannot show that Horgan Brothers made working conditions so unpleasant or intolerable that a reasonable person in Glenn's shoes would have resigned. I find that no reasonable jury could conclude that this reassignment to the facility constituted working conditions that were so unpleasant or intolerable towards Glenn as it related to his previous work on the paving crew. Thus, I will grant Horgan Brothers' Motion with respect to this final claim.

IV. CONCLUSION

I have analyzed the relevant claims of the Plaintiff using the appropriate summary judgment standard. After concluding that Plaintiff's Title VII, Section 1981 and PHRA claims could be similarly analyzed, I then examined Plaintiff's hostile work environment, retaliation and constructive discharge claims. After analyzing the applicable law with respect to these claims, I conclude that Horgan Brothers' Motion for Summary Judgment should be granted for all of Plaintiff's claims against it.

An appropriate Order follows.

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

CLIFTON GLENN,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 03-6578
HORGAN BROTHERS, INC. and RON FRANKS,	:	
Defendants.	:	

ORDER

AND NOW, this 24th day of June, 2005, upon consideration of Defendant's, Horgan Brothers, Inc., Motion for Summary Judgment (Doc. No. 19) as to all three counts of Plaintiff's Complaint against it, and the Response thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly Sr. J