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

FRANK S. BERKOSKI	:	CIVIL ACTION
	:	
v.	:	NO. 3:CV-95-1807
	:	
ASHLAND REGIONAL MEDICAL CENTER	:	Magistrate Judge Durkin

BRIEF OF DEFENDANT, ASHLAND REGIONAL MEDICAL CENTER, IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

Plaintiff, Frank Berkoski (hereinafter "Berkoski"), brought this action in the United States District Court for the Middle District of Pennsylvania, contending that Defendant, Ashland Regional Medical Center (hereinafter "Ashland"), demoted him from his position as a supervisor in the chemistry laboratory because of his age and his sex. Berkoski also contends that Ashland permitted the creation of a sexually hostile environment and constructively terminated him. Ex. "A". Discovery in this case has concluded. The Court has scheduled this matter for trial in October, 1998.

Ashland has submitted a Motion for Summary Judgment contending Berkoski has produced insufficient evidence to support a jury verdict in his favor on the issues which he must establish to prove a cause of action based on either age or sex discrimination. Ashland demoted Berkoski from his position as a supervisor in its laboratory because he lacked a B.S. degree. Berkoski concedes this. He challenges the authority of Ashland to establish job criteria for its employees even when it fairly applies those criteria. According to Berkoski, the fact that the

Federal Government has set forth minimum criteria for his position requires Ashland to adopt that minimum criteria. If Ashland refuses to do so, Berkoski asserts that he is entitled to damages for sex and age discrimination.

All other individuals who held the same positions as Berkoski had a B.S. degree. The employees of Ashland, John Motsney ("Motsney"), then the Laboratory Manager, Jack Dettleff ("Dettleff"), Vice President of Human Resources, Kalman Feinberg, M.D. ("Feinberg"), Medical Director of the laboratory of Ashland, all believed that at the time they developed the criteria for the position held by Berkoski that he had a B.S. degree. Only after they implemented the criteria did they discover that Berkoski lacked a B.S. degree. Ex. "D" at 79-81; Ex. "F" at 33. Berkoski, in his job application, misled Ashland into believing that he did have a B.S. degree. Ex. "I".

Berkoski asserts that Ashland, through Motsney, his immediate supervisor, treated women more favorably than it treated him. But, the undisputed evidence establishes that any employee who failed to meet the new job criteria developed by Ashland received a demotion. Roseanne Devine ("Devine"), a female medical technologist at Ashland, lacked the requirements for her position after the promulgation of the new criteria. She received an immediate demotion. Unlike Berkoski, Ashland also reduced her pay. Ex. "G" at 87-88. Berkoski never received a reduction of pay, even though his demotion required a substantial diminishment of his salary. Ex. "A". Therefore, Berkoski received better treatment than a comparable female employee.

During the time period which Berkoski asserts that Motsney desired to drive him out of Ashland because of his age (over 40), and his sex (male), Berkoski concedes that he tried to resign from his supervisor position on May 30, 1992. Motsney convinced Berkoski to rescind his resignation, according to Berkoski's sworn testimony. Ex. "C", at 85, 106.

Suzanne Paul ("Paul"), who replaced Berkoski, as chemistry supervisor at Ashland, had a B.S. degree. Ex. "Y" at 10. Berkoski lacked such a degree. Every laboratory supervisor, male and female, had a B.S. degree except for Berkoski.

Berkoski contends that Motsney disciplined him more severely than a female employee, Helen Bushick ("Bushick"). Berkoski claims that Motsney overlooked mistakes made by Bushick, but concedes that he did not overlook mistakes of other female employees. Ex. "C" at 109. In 1993, Bushick was 58 years old, fourteen (14) years older than Berkoski. Ex. "EE" and Ex. "A", para. 1. The employment records of Bushick show that Ashland fired Bushick for various mistakes that she made. Ex. "G" at 121-122. It subjected her to a series of disciplinary actions between 1991 and 1995, which exceed in number those imposed upon Berkoski. Ex. "FF".

Berkoski also asserts that the mere reduction in the number of males employed in the laboratory at Ashland establishes discrimination based on sex against him. The undisputed record, however, demonstrates that women outnumber men in the medical laboratory field. Ex. "O". No Court anywhere has ever based a finding of sex-based discrimination or permitted a jury to return such a finding from the mere disparity in the numbers of male and female employees.

Berkoski's contentions boil down to one proposition. He asks this Court to substitute its judgment and his judgment for the job criteria established by Ashland. He asks that this Court take away from Ashland the ability to determine that its employees need a college degree for certain positions. He asks that a jury be able to find discrimination based on age or sex from Ashland's imposition of a college degree requirement. This perverts the entire purpose of the

Congressionally enacted bans on age and sex discrimination. Berkoski asks this Court to do what no Court has every done before and provides no good reason for doing so.

II. STATEMENT OF THE FACTS

The Commonwealth of Pennsylvania employed Berkoski as a medical technologist supervisor in the chemistry laboratory at Ashland State General Hospital. Ex. "B". The Commonwealth of Pennsylvania privatized Ashland State General Hospital on February 15, 1992. A new entity, Ashland Regional Medical Center ("Ashland"), came into existence and operated the hospital as a private institution. Ex. "D" at 19-20. As of February 15, 1992, all former employees of Ashland State General Hospital, including Berkoski, were terminated. All former state employees, including Berkoski, who desired to work for Ashland, the private hospital, had to submit an employment application as if applying for a new job, which they were. Ex. "E" at 10-11.

Berkoski submitted an application for employment with Ashland for his previous position at Ashland State General Hospital, a supervisor in the chemistry lab. Ex. "I". In his employment application, Berkoski falsely implied that he had graduated from a four year college and had obtained a B.S. degree. He stated that the last year of college he attended was the fourth and under "diploma or type of degree," he responded "yes." Ex. "I".

Dettleff, Vice President of Human Resources at Ashland, and Motsney, the Manager of the laboratory at Ashland, participated in the decision to hire Berkoski. They both believed that he had a B.S. degree.

Ashland created a new wage classification system within a few months after it came into existence. During the same time period, it also developed job descriptions for the various positions. Ex. "D" at 42; Exs. "K", "L", "M".

Ashland required that all occupants of the position of Medical Technologist Supervisor have a B.S. degree in medical technology. Ex. "L" at 40. The position of Clinical Laboratory Technician, under Ashland's job classification plan, required an Associate Degree or graduation from a certificate level training program for medical laboratory technicians. Ex. "M". Feinberg, Motsney and Dettleff had the primary role in the creation of new requirements for the positions in the laboratory. They all believed when they created the requirements for the B.S. degree, that Berkoski had a B.S. degree. Ex. "F" at 33; Ex. "D" at 79-81.

Ashland required that all employees establish that they have the required criteria for their jobs. Berkoski failed to produce proof of a B.S. degree. Berkoski did not have a B.S. degree. Ex. "C" at 168-169. Thus, Dettleff, Motsney and Feinberg first discovered that Berkoski lacked a B.S. degree and the other qualifications for his position as chemistry supervisor, only after they had promulgated in writing the requirements of a B.S. degree to the employees at Ashland.

Ashland concluded that a B.S. degree should be required for the position of Staff Medical Technologist based on independent review of the position and based upon its view that such a requirement contributed to the performance of that job. Ashland believed that requiring a B.S. degree added to the reputation of the hospital and its ability to perform its functions. Exs. "D" at 66 to 68. Ashland provided for an alternative means of qualifying for the position by accepting a satisfactory grade in the HHS-HEW proficiency examination. Exs. "K", "L", "M".

In creating these standards for the various positions in the laboratory, Ashland intended to exceed the minimum requirements established for testing personnel by the Clinical Laboratory Improvement Act of 1988 Amendments ("CLIA '88"), legislation enacted by Congress to amend the original 1967 Act. Congress had as its purpose ensuring quality services by laboratories providing care to Medicare beneficiaries. CLIA '67 set minimum requirements of education and

experience which individuals employed in clinical laboratories had to meet. The CLIA '88 amendments likewise established minimum requirements for various personnel in laboratories. Exs. "KK", "LL". Nothing in CLIA '88, or any other statute, prevented a laboratory from exceeding the standards established by Congress. Congress intended the standards as a floor, not as a ceiling. Exs. "KK", "LL".

After the creation of the new job classifications, Ashland discovered that Berkoski failed to meet the requirements for the position of Medical Technologist Supervisor in the chemistry laboratory. Exs. "D" at 79; "F" at 28. On December 22, 1992, Ashland informed Berkoski of its new job reclassification plan and provided him 30 days to produce evidence he had a B.S. degree. Exs. "C" at 118; Ex. "Q". Dettleff informed Berkoski that his credentials would otherwise entitle him to the position of a Grade 5 Laboratory Technician, unless he could produce evidence of a four year degree or HEW certification. Ex. "R".

In early January, 1993, Ashland demoted Berkoski from the position of chemistry supervisor solely because he did not have a B.S. degree. Exs. "G" at 68, 122; "F" at 52. Ashland never reduced Berkoski's pay and benefits. Until the day he voluntarily resigned, he continued to receive the pay and benefits of a Chemical Supervisor in the laboratory. Exs. "C" at 137, 142; "D" at 83-84; "G" at 65.

On January 15, 1993, Berkoski filed a grievance with the union concerning his demotion. He alleged inappropriate demotion and no recognition of credentials. Exs. "C" at 114-115; "R". Berkoski never indicated to the union or anyone else at Ashland that Ashland or Motsney had discriminated against him because of his age or sex. Ex. "R"; Exhibit "C" at 115. Berkoski thereafter withdrew his grievance and failed to pursue it.

Dettleff and Motsney made several attempts to find a way to qualify Berkoski as a Medical Technologist under the new job classifications without violating the objective requirements of the classification plan. Ex. "D" at 76-77, 81. By letter dated February 4, 1993, Dettleff set forth for Berkoski three means by which he could qualify as a Medical Technologist under Ashland's requirements. Berkoski failed to establish that he could meet any of the three means of fulfilling these requirements. Ex. "C" at 168-169, 176-179.

In January, 1993, Ashland hired Paul for the position of Chemistry Supervisor to replace Berkoski. Paul had a B.S. degree. Ex. "Y" at 10, 21.

Ashland placed the chemistry supervisor position on "hold" until March, 1993 because of a grievance filed by Debra Ann Brokenshire ("Brokenshire"). Ex. "Y" at 23. Brokenshire, a 40 year old female, filed a grievance because she believed that she should have received the position of chemistry supervisor instead of Paul. In response to the grievance, Ashland reposted the position and held new interviews. Ex. "T" at 13, 15. Motsney informed her that her interest in the position constituted a waste of time because she failed to meet the requirements for the position. Ex. "T" at 17.

During the first round of interviews, Ashland did not interview Richard Santer ("Santer"), a former employee of Ashland for the position. Ashland asked Santer to appear for an interview although he was not interviewed in February, 1992, until his voluntary resignation on June 3, 1993, Berkoski never informed anyone in Ashland's management or in his union, that he believed that Ashland or its employees had discriminated against him because of either his age or gender. Berkoski concedes that everyone who remained in the position of Medical Technologist or who was hired as a Medical Technologist, after privatization, had to meet the same requirements for the position that Ashland had imposed upon him. Ex. "C" at 62.

During his employment with Ashland, he received a number of written reprimands. Ex. "T" at 16; "G" at 102.

Berkoski admits that he has no knowledge of anyone hired by Ashland for the positions of medical technologist or supervisor who failed to meet Ashland's requirements for these positions. Ex. "C" at 193.

Ashland demoted anyone who failed to meet its requirements, without exception. When it discovered that Devine, employed at Ashland as a Medical Technologist, did not receive a passing grade on the HEW certification exam, Ashland immediately demoted her from the position of Medical Technologist to that of Laboratory Technician. Ashland reduced her pay accordingly. Ashland, however, never did this to Berkoski. Ex. "G" at 87-88.

Berkoski concedes that he never had any problems with Motsney at any time between 1980 and May, 1992. He also admitted that during this time he never observed Motsney discriminate against men or discriminate on the basis of age. Ex. "C" at 43-44. Berkoski never informed his union representative, Brokenshire, that he felt that Motsney discriminated against him on the basis of age and sex. Ex. "C" at 103. Berkoski did not claim at his Unemployment Compensation hearing that he felt that he had been discriminated against by Ashland on account of his age or sex. Ex. "C" at 191. Berkoski never indicated to his wife, Donna Berkoski ("D. Berkoski"), also an employee of Ashland, at any time during his employment at Ashland, that he felt that Ashland discriminated against him or that Motsney mistreated him because of his age or sex. Ex. "P" at 16. Donna Berkoski testified that she did not believe that the various errors of Berkoski were written up because of his age and because he was a male. Ex. "P" at 15. She also testified that the number of times that Berkoski was written up by Motsney were not excessive. Ex. "P" at 15.

On May 30, 1992, Berkoski told Motsney that "I would like to cease being a supervisor." Ex. "C" at 85. According to Berkoski, Motsney talked Berkoski out of resigning as Chemistry Supervisor. Ex. "C" at 106.

The only female employee whom Berkoski contends received preferential treatment over him in the laboratory was Helen Bushick. Bushick was 58 years old in 1993. Ex. "FF". According to Berkoski, Bushick received better treatment than he did in terms of discipline. However, Ashland fired Bushick for various mistakes she made, but did not fire Berkoski. Exs. "G" at 121-122; "F" at 44.

Bushick is considerably older than Berkoski. Berkoski is 49 years of age. Ex. "C" at 5. Bushick is now 63 years old.

When Berkoski contended that he had met the minimum requirements for his position as set forth by the CLIA regulations, Motsney, in an attempt to be fair, contacted the U.S. Department of Health and Human Services, Health Care Financing Administration. He inquired whether someone with Berkoski's credentials met the requirements imposed by CLIA. Ex. "II". Timothy J. Hock ("Hock"), Chief of the Survey and Certification Review branch of the Department of Health and Human Services, responded in writing that those credentials failed to meet the requirements of a technologist as imposed by CLIA. Thus, Berkoski did not even meet the minimum requirements set by CLIA. Ex. "JJ". Berkoski concedes that Hock's opinion did not arise from any animus directed toward him nor was it influenced by his age or gender. Ex. "C" at 9.

Various other employees of the laboratory were Berkoski's age or older. Berkoski identified Margaret Burke ("Burke") and Diane Catizone ("Catizone") as being older than him. He never observed any attempt to drive them from their jobs by Motsney or anyone else. Ex.

"C" at 65. Berkoski never saw any preference given to younger males by Motsney or the Ashland management. Ex. "C" at 65. Berkoski admits that Motsney did not ignore mistakes made by other women in Ashland's laboratory. Berkoski alleges only that Ashland ignored mistakes made by Bushick. Ex. "C" at 109.

Berkoski quit his job in the middle of the night on June 3, 1993. Ex. "C" at 142. He provided no prior notice to anyone. He simply walked off the job. As of the date that he quit, he had not been fired. He had not suffered any financial consequences because of his demotion. Ex. "C" at 184.

In the United States, female laboratory employees exceed in number male laboratory employees. The majority of laboratory employees are female. Ex. "O" at 144.

Ashland incorporates by reference as if set forth herein in full its Statement of Uncontested Facts.

III. STATEMENT OF QUESTIONS INVOLVED

1. Has Berkoski established a prima facie case of age or sexual discrimination, concerning his demotion, when he has not shown that he had the qualifications required for the position since he lacked a B.S. degree?

2. Has Berkoski established sufficient evidence to defeat the Motion for Summary Judgment of Ashland on the issue of age and sex discrimination when the same people who hired Berkoski allegedly discriminated against him a mere few months after they hired him?

3. Has Berkoski submitted enough circumstantial evidence to establish pretext concerning the reasons provided by Ashland for Berkoski's demotion sufficient to defeat Ashland's Motion for Summary Judgment?

4. Has Berkoski presented enough evidence to support a jury verdict in his favor on the issue of Ashland creating a hostile sexual environment in which it required him to work?

5. Has Berkoski presented sufficient evidence to support a jury verdict in his favor on the issue of constructive discharge when he has only established what he views as excessive supervision and when he has not shown that he was singled out for special treatment?

6. Has Berkoski failed to use reasonable efforts to mitigate his damages by abandoning all efforts to seek employment as of September, 1994, thus barring any recovery beyond that date?

IV. ARGUMENT

A. STANDARD TO BE UTILIZED IN DETERMINING WHETHER BERKOSKI HAS SUBMITTED SUFFICIENT EVIDENCE TO DEFEAT A MOTION FOR SUMMARY JUDGMENT AS TO HIS CLAIMS FOR SEX AND AGE DISCRIMINATION.

The United States Supreme Court has recognized two approaches to the adjudication of age and sex discrimination cases depending on whether the plaintiff has direct evidence of discrimination. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Berkoski has the ability to prove his case by either direct evidence or by circumstantial evidence aided by various presumptions created by the courts. To satisfy Berkoski's burden under the direct evidence standard Berkoski must produce evidence of the discrimination without inference or presumption. Berkoski fails to satisfy this burden if the Court must infer the unlawful discrimination from an employer's remarks. Burks v. The City of Philadelphia, 950 F.Supp. 678, 686 (E.D. Pa. 1996) (as amended, January 31, 1997). Berkoski must produce direct evidence that the "decision makers" placed substantial negative direct reliance on sex or age in reaching their decision. Price Waterhouse v. Hopkins, 490 U.S. 227, 228 (1989). Here Berkoski

has no such evidence. Berkoski only points to conduct from which he claims the Court can infer pretext.

Three steps exist in the analysis of pretext discrimination cases. First, Berkoski must establish a prima facie case of age or sex discrimination. St. Mary's Honor Court Ctr. v. Hicks, 509 U.S. 502, 506 (1993). This occurs if the plaintiff shows that (1) he is a member of a protected class, at least 40 years of age, or in the case of sex discrimination, a member of the gender which he contends the employer has discriminated against, (2) is qualified for the position, (3) suffered an adverse employment decision, and (4) in the case of a demotion or discharge, was replaced by a sufficiently younger person to create an inference of age discrimination, or replaced by a person of the opposite sex, in a case of sex discrimination. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d. Cir. 1987); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644 n. 5 (3d Cir. 1998).

Second, upon such a showing by the plaintiff, the burden shifts to the employer to produce sufficient evidence of a non-discriminatory reason for the adverse decision. Hicks, supra, 509 U.S. at 506-507. Third, if the employer makes such a showing, the plaintiff must then demonstrate that the employer's articulated reasons failed to constitute the actual reason, but is rather a pretext for discrimination. Simpson, supra, 142 F.3d at 644, f.n. 5.

Berkoski contends that the reason offered for his demotion, his lack of B.S. degree, fails to constitute the real reason why Ashland demoted him. But Berkoski misses the point totally. In pretext discrimination cases, such as this,

> ...the employer need not prove that the tendered reason actually motivated its behavior, as throughout this burden - shifting paradigm the ultimate burden of proving intentional discrimination always rests with the Plaintiff. Fuentes v. Perskie, 32 F.3d 759,

763 (3d. Cir. 1994). Quoted with approval in Simpson, supra, 142 F.3d. at 644 n. 6. (emphasis added)

42 U.S.C. §2000e-5, et seq., and the Age Discrimination in Employment Act ("ADEA"), do not impose a requirement on employers to treat all employees fairly. Instead, these laws limit their protection to cases of "invidious illegal discrimination." Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 542 (3d Cir. 1982). "Unfortunate and destructive conflict of personalities does not establish...discrimination." Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 182 (3d Cir. 1985). "Title VII eliminates

certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice." Price Waterhouse, supra, 490 U.S. 239.

The United States Court of Appeals for the Third Circuit in Ezold, supra, 983 F.2d 509, recognized substantial limitations upon the Court's evaluation of an employer's business judgment concerning criteria that the employer establishes for its employees to meet. The Court of Appeals held that Courts must focus on whether the criteria relied upon by an employer for its adverse employment decision were discriminatorily applied. The Court must refrain from questioning a employer's non-discriminatory judgment of what criteria should be applied and how they should be applied. 983 F.2d at 527-528, 531.

Berkoski asks this Court to ignore the directive issued by the United States Court of Appeals in Ezold, supra, 983 F.2d at 527-528, 531. Berkoski requests that this Court substitute its business judgment for that of Ashland. Berkoski insists that this Court should prohibit Ashland from requiring a B.S. degree for the supervisor's job in the laboratory at Ashland. Berkoski's entire claim boils down to one contention, Ashland should not be allowed to require certain educational criteria for positions at its hospital if those criteria exceed federally imposed

minimum standards. This constitutes nonsense in the extreme. Berkoski, under the cloak of claims of age and sex discrimination asks this Court to adopt national standards for various positions in private hospitals across this country. Congress has never authorized such action. It constitutes a frontal assault on private enterprise.

B. BERKOSKI HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION BASED ON EITHER AGE OR SEX, BECAUSE HE HAS NOT SHOWN THAT HE HAD THE REQUIRED QUALIFICATIONS FOR HIS POSITION AS LABORATORY SUPERVISOR.

To meet the first step required to establish a pretext discrimination case Berkoski must show a prima facie case of discrimination. To establish a prima facie case of discrimination, Berkoski must produce evidence sufficient to support a jury verdict in his favor on the issue of whether he had the required qualifications for the position from which Ashland demoted him; that of chemistry supervisor.

Berkoski has no evidence that he possessed the qualifications Ashland mandated for this position. It is undisputed that Berkoski did not meet Ashland's requirements for the position.

After Ashland came into existence in February, 1992, it determined that it needed to establish job criteria and a wage scale for its employees. Feinberg, Motsney and Dettleff developed criteria for the positions in the laboratory. They concluded that a supervisor needed a B.S. degree. They felt that a B.S. degree provided the supervisor with a greater depth of knowledge to problem solve and help other employees and not merely open a book and push a button. Ex. “F” at 66, 68. When Feinberg, Motsney and Dettleff developed the criteria for positions in the laboratory, they had no idea that Berkoski failed to meet those criteria. They discovered this only after they adopted and implemented the job criteria. Ex. “F” at 79.

Berkoski's job position as Medical Technologist Supervisor required a B.S. degree. Exs. "L"; "T" at 40. Berkoski concedes this. Berkoski admits that he lacked the essential requirement for his job, a B.S. degree. Ex. "C" at 168-169.

While conceding that he lacks the qualifications for his job required by Ashland, Berkoski attacks the validity of the qualifications. He contends that the requirement of a B.S. degree has no merit. He asserts that his experience more than makes up for his lack of formal education. This fails to establish that Berkoski met the qualifications for his position. Berkoski has no right to require that this Court substitute his view of what the qualifications should be for his position for what his employer has determined the qualifications need to be.

The federal courts that have dealt with this issue have rejected the position of Berkoski and have granted summary judgment in similar factual situations where the plaintiff-employee has not been able to meet the required qualifications for his job position. In Coleman v. Toys "R" Us, Inc., 976 F.Supp. 713 (N.D. Ohio, 1997), employees sued the employer for age discrimination based on their demotions. The employer contended that the employees lacked the qualifications for the positions that they held. The employer had revised the qualifications for the department head position from which it had demoted the employees. The employees had performed the jobs for a substantial period of time before the employer had subsequently changed the qualifications for the job. The revised positions required supervisory leadership and communications skills. The court concluded that the plaintiffs must demonstrate their qualifications based on the new requirements for the position. The only evidence the plaintiffs presented to demonstrate that they were qualified for the positions consisted of past performance reviews which showed that they had met the expectations of the employer for the department head position as it had existed prior to the change in qualifications. The court concluded that

this failed to defeat the employer's motion for summary judgment. Although relevant to show that the plaintiffs had the qualifications for their positions before the department head position upgrade, plaintiffs failed to provide any information \as to whether they possessed the ability to perform the job as department head under the revised criteria. The court held that the plaintiffs had not shown a prima facie case of discrimination since they had not established their qualifications for the position. The court applied this test even though it recognized the subjective nature of the qualifications involved.

The analysis of the court in Coleman, supra, 976 F.Supp. at 719, applies here. Berkoski concedes that he does not possess a B.S. degree. This constitutes an objective qualification for his job. He disputes the necessity for the requirement of a B.S. degree. Nevertheless, he admits that he lacked that qualification. Thus, he lacked the qualifications required for the position of chemistry supervisor. Ashland demoted him from that position because he did not have a B.S. degree which it determined was necessary and required for the position of chemistry supervisor.

In Dale v. Chicago Tribune, Co., 797 F.2d 458 (7th Cir. 1986), cert. denied ___ U.S. ___, 107 S.Ct. 953 (1987), the defendant-employer terminated a managerial employee who the company had employed for twenty-six years. Until the last few years, the employee had performed satisfactorily. Plaintiff sued for age discrimination. The defendant contended that it had changed its expectations of the employee's job position and it communicated the change in its expectations to the plaintiff. The employer asserted that the plaintiff had not been able to meet the new performance standards. The United States Court of Appeals for the Seventh Circuit upheld the grant of summary judgment on behalf of the employer, concluding that the plaintiff had not made out a prima facie case because he had not shown that he had met a

necessary element required to establish a prima facie case, that he possessed the qualifications for his job. 797 F.2d at 462-465.

That analysis applies here and requires the grant of summary judgment in favor of Ashland. Berkoski concedes he lacked the college degree required by Ashland for the chemistry supervisor position that he occupied.

In Pfeifer v. Lever Brothers Co., 693 F.Supp. 358 (D.Md. 1987), an employee sued his employer for age discrimination contending that the employer terminated him because of his age and replaced him with an employee substantially younger than him. The employer asserted that the employee had failed to perform his job at a level which met the employer's legitimate expectations. The court concluded that since the defendant had produced evidence that the employee had not performed at the required level for several years, the employee had failed to make out a prima facie case of age discrimination because he had not shown that he had the required qualifications for the job he occupied. Id. at 693 F.Supp. at 363.

Thus, many courts have concluded that a plaintiff in a discrimination case has neglected to establish his qualifications for his job for purposes of a prima facie claim of age or sex discrimination even when the qualifications controversy depends on subjective factors imposed by the employer. Here, Ashland does not claim that Berkoski failed to meet subjective standards of performance. Instead, it relies on the objective failure of Berkoski to have a B.S. degree. Thus, as a matter of law, Berkoski has not shown that he has the qualifications required for his job. In fact, Berkoski admits that he did not possess the B.S. degree required by Ashland for the position. He has failed to set forth a prima facie case of age or sex discrimination. Nothing remains for a jury to try or decide as Berkoski has no ability to prove his claim under any set of circumstances.

C. BERKOSKI HAS FAILED, AS A MATTER OF LAW, TO ESTABLISH SUFFICIENT EVIDENCE THAT ASHLAND'S REASONS FOR DEMOTING HIM CONSTITUTED A PRETEXT SINCE THE SAME PEOPLE WHO HIRED BERKOSKI MADE THE DECISION TO DEMOTE HIM.

Berkoski has failed to establish his claim arising from age and gender discrimination because the same people who Berkoski contends demoted him because of his age and sex, and harassed him because of his age and sex, were the ones who hired him a few months before fully knowing his age and gender. This creates a strong presumption that Ashland did not discriminate against Berkoski because of his age and sex. It constitutes sufficient evidence by itself to defeat Berkoski's assertion that the reasons provided by Ashland for his demotion are pretextual. See Proud v. Stone, 945 F.2d 796 (4th Cir. 1991).

As a result of privatization, Ashland had to determine whether to rehire the former employees of Ashland State General Hospital. As of February 15, 1992, Ashland State General Hospital had terminated all its former employees, including Berkoski. Ex. "C" at 29. Ashland hired Berkoski in February, 1992. At that time, he submitted an employment application. Ex. "G" at 86; Exhibit "B". Motsney and Dettleff approved the hiring of Berkoski. According to Berkoski, they also demoted him in December, 1992. He also contends that they either participated in or approved of his harassment in 1992 and 1993. Thus, any inference of a discriminatory motive fails to apply as a matter of law. Berkoski lacks the ability to establish discrimination based either upon sex or age. No genuine issues of material fact exists concerning this question.

Three different United States Courts of Appeal have reached this result in cases identical, in all respects, to that of Berkoski. In Proud v. Stone, 945 F.2d 796 (4th Cir. 1991), the plaintiff

contended that the defendant fired him from his position because of his age after employing him for six months. The plaintiff conceded that the same individual who had fired him had hired him. No dispute existed that the individual who fired the plaintiff knew his age when he hired him. The United States Court of Appeals for the Fourth Circuit upheld the dismissal of the plaintiff's case concluding that since the same person who had hired the plaintiff had fired him, no evidence existed that the plaintiff's age had motivated the employer. The Court, speaking through Judge Wilkinson, stated:

> In order to decide this case, we need not engage in a point-by-point rebuttal of each of plaintiff's manifold contentions. Instead, we examine the district court's ruling in light of the essential prerequisites for any plaintiff's recovery in an ADEA action. Any ADEA plaintiff must make the elementary showings that he is a member of a protected group and that he has suffered unfavorable employment action taken by an employer covered by the Act...As the additional key requirement, a plaintiff must prove that age was 'a determining factor' in the employer's decision to take the adverse action...
>
> In assessing whether Proud established that age was a motivating factor for his discharge, we focus on the undisputed fact that the individual who fired Proud is the same individual who hired him less than six months earlier with full knowledge of his age. One is quickly drawn to the realization that '[c]laims that employer animus exists in termination but not in hiring seem irrational'. From the stand point of the putative discriminator, [i]t 'hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.' Donohue & Siegelman, the Changing Nature of Employment Discrimination Litigation, 43 Stan. L.Rev. 983, 1017 (1991). Therefore, in cases where the hirer and the firer are the same individual and the termination of employment occurs in a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer. While we can imagine egregious facts from which a discharge in this context could still be proven to have been discriminatory, it is likely that the compelling nature of the inference arising from facts such as these will make cases involving the situation amenable to

> resolution at an early stage. Here Klauss was responsible for the hiring and firing of Proud within a six-month time frame, and the evidence of his enumerated job deficiencies in a supervisory position makes any inference of discriminatory animus unwarranted. Id. at 797 and 798. (Emphasis added).

In Proud, supra, 945 F.2d 796 Judge Wilkinson, writing for the Court, indicated that the analysis utilized in Proud in no way conflicted with the scheme of proof for a Title VII case set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Judge Wilkinson concluded that the proof scheme set out in that case is designed to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case. But Judge Wilkinson warned:

> Courts must, however, resist the temptation to become so entwined in the intricacies of the proof scheme that they forget that the scheme exists solely to facilitate determination of 'the ultimate question of discrimination vel non.'...When the hirer and the firer are the same individual, there is a powerful inference relating to the 'ultimate question' that discrimination did not motivate the employer, and the early resolution of this question need not be derailed by strict fealty to proof schemes. Id. at 945 F.2d at 798. (Emphasis added).

According to Judge Wilkinson, in Proud, supra, 945 F.2d 796, although the proof scheme is not necessary to resolution of the issues of discrimination on the facts set forth in Proud, the effect of the inference created by these facts are just as strong when the proof scheme is used. Judge Wilkinson indicates that the proof scheme involves three steps. First, the plaintiff must establish a prima facie case of discriminatory discharge. Once the plaintiff has done that, the defendant bears the burden to articulate a legitimate, non-discriminatory reason for the action taken. If the defendant meets that burden, plaintiff then has the burden to show that the proffered reason was pretextual. Id. at 945 F.2d at 798. Judge Wilkinson concludes his analysis by stating:

> The relevance of the fact that the employee was hired and fired by the same person within a relatively short time span comes at the third stage of the analysis. To reiterate in only slightly different terms what has previously been discussed, this fact creates a strong inference that the employer's stated reason for acting against the employee is not pretextual. The plaintiff still has the opportunity to present countervailing evidence of pretext, but in most cases involving this situation, such evidence will not be forthcoming. In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.
>
> Our holding advances the aims of the statute. For almost any employer, there will be cases where an individual hired for a position does not meet the employer's expectation and a termination ensues. If former employees in these situations bring ADEA claims that are allowed to proceed to trial, employers may fear that a costly suit is possible even when there are completely legitimate reasons for a discharge. When this is coupled with the fact that individuals are far more likely to bring suits for discriminatory discharge than for discriminatory failure to hire, there is a grave risk that employers who otherwise would have no bias against older workers will now refuse to hire them in order to avoid meritless but costly ADEA actions. See Donohue & Siegelman, supra, at 1024. Courts must promptly dismiss such insubstantial claims in order to prevent the statute from becoming a cure that worsens the malady of age discrimination. Id. at 945 F.2d at 798. (Emphasis added).

Berkoski's claim presents a factual pattern identical to that faced by the United States Court of Appeals for the Fourth Circuit in Proud, supra, 945 F.2d 796. The policy reasons that supported the decision of the United States Court of Appeals for the Fourth Circuit apply to Berkoski's causes of action against Ashland.

Berkoski concedes that Motsney and Dettleff knew Berkoski's age and his sex, that he was a male, when they hired him. Why would they hire him in February, 1992, knowing of his age and sex, if they intended to discriminate against him on the basis of his age and gender a

mere few months later? This makes no sense. It fails as a matter of law to state a cause of action.

In Lowe v. J.B. Hunt Transport, 963 F.2d 173 (8th Cir. 1992), the United States Court of Appeals for the Eighth Circuit adopted the analysis of the United States Court of Appeals for the Fourth Circuit in Proud, supra, 945 F.2d 796. In Lowe, the plaintiff contended that his employer had fired him because of his age. Lowe worked for J.B. Hunt, his employer, for about two years. Lowe was almost 52 years old when he was hired and almost 54 when he was fired. J.B. Hunt stated that the reason for plaintiff's discharge was the falsification of a petty-cash report. The same company officials who hired Lowe, also made the decision to fire him. Lowe presented no direct evidence that age constituted a determining factor in his firing. His evidence consisted of his showing that the reason given by the employer for his firing was not the true reason. Lowe argued that it was reasonable to infer that the employer's asserted justification was a mere pretext.

The United States Court of Appeals for the Eighth Circuit concluded that Lowe had made out a prima facie case. Lowe was within the protected age group. His job performance was satisfactory. He was replaced by a younger person after his dismissal. In response to the asserted justification for his dismissal, Lowe argued that the shortage in the petty-cash fund was small, that he was not even accused of having taken the money for himself, that his performance ratings, up until the time he was discharged, had been good, that less severe methods of discipline were available, and that another, similarly situated employee was simply disciplined, rather than fired.

The Court refused to accept this evidence of pretext. Judge Arnold, writing for the Court, stated:

> In general, a plaintiff may rebut a defendant's asserted justification either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the proffered explanation is unworthy of belief. (citations omitted).
>
> The general rules as to the shifting burdens of production and persuasion in discrimination cases, however, are not to be applied woodenly, as if they were themselves statutory law. They are simply aids designed to make it easier to decide questions of fact about intent and motive....The evidence that plaintiff claims is inconsistent with defendant's proffered justification is thin, but perhaps sufficient, all other things being equal, to defeat a motion for a directed verdict. In the present case, however, all other things were not equal. The most important fact here is that plaintiff was a member of the protected age group both at the time of his hiring and at the time of his firing, and that the same people who hired him also fired him. See Proud v. Stone, 945 F.2d 796 (4th Cir. 1991). If plaintiff had been forty when he was hired, and sixty-five when he was fired, obviously this fact would not be so compelling. But here, the lapse of time was less than two years. It is simply incredible in light of the weakness of plaintiff's evidence otherwise, that company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later. Id. at 963 F.2d at 174 and 175. (emphasis added)

The Court indicated that perhaps the defendant-company had over reacted since the shortage was small and the plaintiff had agreed to pay for it out of his own pocket. The Court viewed this as not relevant because the question to be decided was whether the defendant fired the plaintiff on account of his age. It was not whether he was fired for insufficient reasons in some general sense. Id. at 963 F.2d at 175.

The analysis of the United States Court of Appeals for the Eighth Circuit in Lowe, supra, 963 F.2d 173, applies to Berkoski's claim. It is simply incredible that Motsney and Dettleff,

who approved the hiring of Berkoski, knowing his age and knowing he was a male, had suddenly developed an aversion to people of his age and to males, a few months later.

In LeBlanc v. Great American Insurance Co., 6 F.3d 836 (1st Cir. 1993), the United States Court of Appeals for the First Circuit, upheld the district court's granting of a motion for summary judgment against a plaintiff who contended that his employer, an insurance company, had fired him because of his age. The Court of Appeals concluded that the plaintiff had failed to establish a cause of action since the individual who fired the plaintiff had promoted him less than two years before. The Court indicated that the plaintiff failed to establish why the employer would develop an aversion to older people in less than two years.

That analysis applies here. Berkoski has no ability to offer an explanation as to why Ashland hired him knowing of his age and sex and yet supposedly demoted him because of his age and sex, ten months later. This factual circumstance creates a strong presumption in favor of Ashland not having discriminated against Berkoski. It prevents Berkoski from showing pretext as a matter of law.

D. ASHLAND HAS SHOWN A NONDISCRIMINATORY REASON FOR ITS DEMOTION OF BERKOSKI.

In order to rebut the presumption afforded to Berkoski because of his establishing a prima facie case, since Berkoski has failed to show he has a B.S. degree, the qualification for his job, he has not set forth a prima facie case of discrimination. Ashland needs to show by sufficient evidence that it had a nondiscriminatory reason for demoting Berkoski. Ashland has met this burden. Ashland has established that it demoted Berkoski because he lacked a B.S.

degree. Thus, Berkoski, in order to defeat the Motion for Summary Judgment of Ashland, has to show sufficient evidence of pretext to support a jury verdict in his favor on this issue.

E. BERKOSKI HAS PRODUCED INSUFFICIENT EVIDENCE TO ESTABLISH THAT THE REASONS FOR HIS DEMOTION, HIS LACK OF A BACHELOR OF SCIENCE DEGREE, CONSTITUTED A PRETEXT.

To survive summary judgment when the employer has articulated legitimate nondiscriminatory reasons for its action, the Plaintiff must produce:

> ...some evidence, direct or circumstantial, which a factfinder could reasonably (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause for the employer's actions. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994).

To discredit the employer's articulated reason, the plaintiff must point to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons that a reasonable factfinder could rationally find then 'unworthy of credence' and hence, infer that the proffered nondiscriminatory reason 'did not actually motivate' the employer's actions." Ezold, supra, 983 F.2d at 531.

To show that discrimination was more likely than not a cause for the employer's action, the plaintiff must produce evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that age or gender was a motivating or determinative factor in the employment decision. Simpson v. Kay Jewelers, supra, 142 F.3d at 644, 645. A plaintiff's own belief or feeling that he is the victim of unfair treatment fails to defeat a motion for summary judgment. Momah v. Albert Einstein Medical Center, 978 F.Supp.

621, 630 (E.D. Pa. 1997). The court lacks the ability to substitute its judgment for that of the employer. Simply the belief that a qualification has no basis, or that an employer overreacted to conduct of an employee, does not constitute grounds for a Court to deny a motion for summary judgment based on the finding of pretext. Jones v. American Travelers Corp., 896 F.Supp. 463, 467 (E.D. Pa. 1995).

As the United States Court of Appeals for the Third Circuit noted in Billet v. Cigna Corp., 940 F.2d 812, 828 (3d Cir. 1995),

> [a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision.
> Without some evidence to cast this doubt, this court will not interfere in an otherwise valid management decision. To require less would be to expose to litigation every management decision impacting on a protected party.

Merely reciting that age or sex discrimination was the reason for the decision, fails to make it so. Billet v. Cigna Corp., supra, 940 F.2d at 816. The employer's proffered reason cannot be proved to be a pretext for discrimination unless the plaintiff establishes a basis from which the trier could conclude "both that the reason was false, and that discrimination was the real reason." Hicks, supra, 509 U.S. at 515; Rocco v. American Long Wall Corp., 965 F.Supp. 709, 713 (W.D. Pa. 1997). If the plaintiff only establishes that the employer's decision was wrong or mistaken, he fails to meet his burden. Fuentes, supra, 32 F.3d at 765.

In carrying his ultimate burden of persuasion in a pretext case, the employee must establish a basis from which the trier of fact can conclude by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and/or gender and the employer's adverse decision; that is, that age and/or sex actually played a role in the employer's

decision-making process and had a determinative influence on the outcome of the process. Rocco, supra, 965 F.Supp. at 713.

An examination of the evidence produced by Berkoski shows that he fails to meet the aforementioned requirements. He has not shown pretext with sufficient admissible evidence to support a jury verdict in his favor on this issue.

Berkoski seems to rely primarily upon his belief that Ashland demoted him from his position as a Medical Technologist Supervisor because he failed to meet the requirements of the CLIA regulations. Ashland did not demote him for this reason. It demoted him because he did not have a B.S. degree, a requirement for his job. Thus, the issue of the CLIA regulations upon which Berkoski submits expert testimony and heavily relies, constitutes an irrelevancy. It is a red herring that has nothing to do with the reason for his demotion.

But, assuming arguendo that it did, Ashland had every reason to demote Berkoski for failing to satisfy the CLIA '88 regulations. Berkoski did not meet those requirements. Berkoski's expert testimony on this issue fails to create a genuine issue of material fact. Motsney consulted with the U.S. Department of Health and Human Services, Health Care Financing Administration. He inquired whether someone with Berkoski's credentials met the requirements imposed by CLIA or could be grandfathered. Ex. "II". Timothy J. Hock, Chief of the Survey and Certification Review Branch of the Department of Health and Human Services, responded in writing that those credentials failed to meet the requirements of a Medical Technologist mandated by CLIA. Ex. "JJ". Thus, Berkoski did not even meet the minimum requirements of CLIA. Ashland had the right to rely upon a letter from the United States Government. Whether the government provided accurate information is besides the point. A

reasonable employer would make employment decisions based upon written information supplied by the United States Government concerning an interpretation of regulations issued by the United States Government. No court anywhere has ever found pretext based upon an employer's reliance upon the United States Government's interpretation of its own regulations.

Berkoski has presented no evidence that anyone younger than him received preferential treatment, except to assert that Paul, who assumed his former position, was younger than he. He concedes that Paul had a B.S. degree, a requirement for the position, which he did not. Ex. "T" at 18. This defeats his argument that Paul received preference because of her age.

Berkoski admits that no younger men in Ashland's laboratory received preferential treatment. Ex. "C" at 43-44. Berkoski states the reason that he believes that Motsney discriminated against him because of his age is that: Motsney insisted that he have a college degree for the position of Medical Technologist; that Motsney failed to offer him six (6) years to obtain a degree; that Motsney never asked him why he did not go back to school; and because young people have college degrees. Ex. "C" at 58. This constitutes nonsense. It fails to show pretext on Motsney's part. It offers no basis for a jury to disbelieve Ashland's reason for demoting Berkoski, his failure to have a B.S. degree. Motsney did not develop that requirement by himself. Dettleff and Feinberg had equal participation. None of them knew that Berkoski lacked a college degree when they developed the criteria for Berkoski's job classification. They believed that he in fact had a college degree based on his employment application. Exs. "D" at 79-81; "F" at 33. That employment application gave the distinct impression that Berkoski had graduated from college. Ex. "I".

The only female employee whom Berkoski contends received preferential treatment over him in the laboratory was Bushick. Bushick was 58 years old in 1993. Ex. "FF". According to Berkoski, Bushick received better treatment than he did in terms of discipline. This fails to survive an examination of the record. Ashland fired Bushick for various mistakes she made. But, it did not fire Berkoski. Exs. "G" at 121-122; "F" at 44. Joseph Rusnak ("Rusnak") testified at his deposition that Berkoski had the same problems as Bushick with mixed cultures and streaking plates. Ex. "H" at 59.

Berkoski's own wife, Donna Berkoski, testified that she did not believe that the various errors of her husband were written up because of his age or because he was a male. Ex. "P" at 15. She also testified that the number of times that Berkoski was written up by Motsney was not excessive. Ex. "P" at 15.

When Berkoski tried to resign after one incident in which Motsney disciplined him in May, 1992, Motsney talked him out of resigning. Ex. "C" at 85, 106. How does this constitute discrimination based on age or sex? If Motsney wanted Berkoski out, why did he not accept his resignation as a supervisor? Berkoski lacks the ability to answer this question in a manner supportive of his claim. While Berkoski claims that mistakes of Bushick were overlooked by Motsney, he admits that the mistakes by other females were not. Ex. "C" at 109. Berkoski admits that several of the women in the laboratory remaining after he left were older than he. Ex. "C" at 65. Bushick, whom Berkoski contends received preferential treatment, was fourteen years older than he. His argument that Bushick received preferential treatment substantially impairs his age discrimination claim. The only employee whom he contends received preferential treatment was significantly older than he. Ex. "FF".

Berkoski admits that the May, 1992 error, for which he received counseling, and no other form of discipline, was not made up. He also concedes that it was not unreasonable for Motsney to have believed that he made an error. Ex. "C" at 81, 152.

Although insufficient evidence exists to show any favorable treatment to Bushick, the mere favorable treatment of one employee outside a protected class, fails to constitute sufficient evidence of pretext to defeat a motion for summary judgment. In Simpson, supra, 142 F.3d 639, the United States Court of Appeals for the Third Circuit concluded that a plaintiff's argument in an age discrimination case that another manager in a similar position received more favorable treatment than she did, failed to show that the defendant employer had fired the plaintiff as a result of her age. The manager who received the more favorable treatment was substantially younger than the plaintiff. The United States Court of Appeals concluded that the mere favorable treatment of one younger manager, as compared to one older manager, may not be sufficient to infer age discrimination. The Court concluded that the plaintiff employee could not show that the employer's reason was pretextual by picking and choosing a person she perceived as a valid comparator who is allegedly treated more favorably and completely ignoring a significant group of comparators who are treated equally or less favorable than she.

Here, Berkoski attempts to do what the plaintiff in Simpson did. He picks and chooses among his fellow employees to attempt to find one employee who was treated better than he. Berkoski ignores other employees outside the protected group who were treated the same as he was or who were treated less favorably than he was. Ashland fired Bushick for making mistakes. It did not do the same to Berkoski. Devine, a female, lacked the requirements for her position after the promulgation of the new criteria established by Ashland. She received an

immediate demotion. Unlike Berkoski, Ashland reduced her pay. Berkoski never received a reduction of pay. Thus, Berkoski received better treatment than two comparable female employees. Berkoski ignores these facts because he must; they defeat his claims.

Berkoski may attempt to show pretext by asserting that Brokenshire obtained the position of the laboratory manager at Ashland in March, 1997, although she lacked a Bachelor of Science degree. First, this occurred five years after the events upon which Berkoski bases his cause of action against Ashland. Berkoski has no ability to relate events five years later to show discrimination in 1992 and 1993.

Second, Brokenshire obtained a job that had different qualifications than that of a laboratory supervisor. Brokenshire's largely administrative job did not require the level of technical competence and proficiency that Berkoski's job did. Brokenshire, as lab manager, depended upon the individual lab supervisors for the scientific proficiency needed to operate the lab on a day-to-day basis.

In Simpson, supra, 142 F.3d 639, the United States Court of Appeals for the Third Circuit concluded that evidence that nonmembers of a protected class were treated more favorably than a member of the protected class, failed to constitute sufficient evidence to defeat a Motion for Summary Judgment in a factual situation identical to the one now before this Court. The Court held that in determining the sufficiency of such evidence, the focus has to be on the particular criteria or qualifications identified by the employer as the reason for the adverse action. Id. at 639. According to the Court:

> The employee's positive performance in another category is not relevant, Id., and neither is the employee's judgment as to the importance of the stated criterion. ... Furthermore, the Court does

> not subjectively weigh factors it considers important ... [r]ather, the plaintiff must point to evidence from which a factfinder could reasonably infer that the plaintiff satisfied the criterion identified by the employer or that the employer did not actually rely upon the stated criterion. Id. at 142 F.3d at 647.

In Simpson, supra, plaintiff relied completely on evaluation scores in arguing that as compared to another employee, her allegedly superior performance and less favorable treatment discredited her employer's proffered reasons for a demotion. But, according to the Court, the employer did not represent that it relied on the evaluation scores. Thus, according to the Court, Simpson's view of her performance, as measured by evaluation scores, is not relevant.

That analysis applies here. Berkoski stresses his experience and competency in performing his job. He contends incidents of his misconduct were exaggerated and blown out of proportion. He argues that he had better qualifications for his job than anyone else. Ashland did not rely on these factors. They constitute irrelevancies. Ashland demoted Berkoski for one reason only; his failure to possess a B.S. degree.

In Simpson, supra, plaintiff argued that the use of sales quotas as the criterion for her performance was suspect. She claimed that using performances on sale quotas was inconsistent with evaluation scoring and pointed to the fact that despite another employee having satisfied her sales quota more often than Simpson, the other employee's evaluation scores in all sales criteria were equal to or below Simpson's. Thus, according to Simpson, meeting a sales quota was not determinative of the adequacy of a manager's performance. The United States Court of Appeals rejected this argument concluding that implicit in it is the contention that evaluation scores are more indicative of performance than sales quotas. The Court held that whether sales quotas or evaluation scores are a more appropriate measure of a manager's performance is not for the

Court to decide. Accord Healy v. New York Life Ins. Co., 860 F.2d 1209, 1216 ("Our inquiry...is not an independent assessment of how we might evaluate and treat a loyal employee.")

That analysis applies here. Berkoski challenges the use of a college degree as a criterion for his ability to perform as a supervisor. This Court lacks the ability to find pretext on such a basis. Ashland has the ability to pick any qualifications it desires. Its decisions cannot be second guessed by this Court. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1109, 2202 (3d Cir. 1997). ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the reason is [discrimination]").

Berkoski also contends that when Paul assumed his job duties, Ashland demanded less from her than it did from Berkoski. This fails to support a claim of pretext for two separate reasons. First, it in now way deals with the issue of demotion. Ashland did not demote Berkoski because he had failed to perform his job in a satisfactory manner. It demoted Berkoski solely because he lacked the qualifications for his job. He did not have a B.S. degree. Thus, the issue of his duties as compared to the duties of Paul, has nothing to do with the demotion decision and cannot support a claim of pretext.

Second, no evidence exists that Paul had substantially different duties than Berkoski. Berkoski has not submitted any evidence on this issue.

Neither the expert report of Frank P. Adams ("Adams"), nor the expert report of Marilyn Kay Boutillier ("Boutillier") supports a jury verdict in favor of Berkoski on the issue of pretext. Adams' report constitutes his inadmissible opinion that the deposition testimony of the various witnesses supports a claim of pretext. Adams analyzes the deposition testimony and decides

whom to believe and who not to. This hardly constitutes an issue appropriate for an expert. He utters legal conclusions and decides the probative value of the evidence. The entire report of Adams constitutes inadmissible legal conclusions. It also fails to address issues appropriate for expert testimony. If this Court finds a genuine issue of material fact exists, it is within the jury's provenance to decide the issues addressed by Adams.

The expert report of Boutillier, deals with an issue that has no relevance to this case. Boutillier contends that Berkoski met the requirements of the CLIA '88 regulations for his position and should have been grandfathered into that position. This fails to constitute the reason that Ashland demoted him. Ashland had the ability to impose higher requirements upon its personnel than the minimum standards mandated by the federal government. No one disputes this. No one can dispute this. Ashland determined that its supervisors needed a college degree. Berkoski lacked this degree. Whether or not he met the requirements of CLIA, has nothing to do with Ashland's determination. It fails to constitute evidence of pretext.

Donna Berkoski, Frank Berkoski's wife, who also worked in the Ashland laboratory, does not believe that Berkoski's errors were written up because of his age or because he was male. Ex. "P" at 15. Donna Berkoski believes the number of times that Berkoski was written up was not excessive. Ex. "P" at 15. Berkoski contends that he was forced to work longer hours than Paul, but his own wife admits Berkoski worked overtime because he wanted to finish everything before he left for the day. No one forced him to work overtime. No one prevented him from receiving overtime. Ex. "P" at 16-17.

Berkoski also contends that because Motsney never told him to take the HEW exam, that this shows that Ashland's reason for demoting him, because he lacked a B.S. degree, constitutes

pretext. This makes no sense whatsoever. The HEW exam was given two times in the late 1970's and early 1980's. At neither time was Motsney Berkoski's supervisor. He had nothing to do with whether or not Berkoski or other employees took the exam. He had no idea at either time that Berkoski lacked a B.S. degree. Ex. "G" at 88.

Berkoski also contends that the failure to interview Santer for the position of chemistry supervisor, after Berkoski's demotion, shows discriminatory intent based on sex against Berkoski. Failure to interview Santer has nothing to do with the decision to demote Berkoski because he lacked a B.S. degree. One has no logical connection to the other. The evidence also fails to support the position of Berkoski concerning the interview of Santer. When Ashland reposted Berkoski's position for a second time because of the grievance filed by Brokenshire, Motsney offered Santer the chance to interview for the chemistry supervisor position. Santer declined to be interviewed. Exs. "G" at 102; "U" at 26. Santer conceded that Paul had almost as much experience as he did. Ex. "U" at 49. Santer also testified that Motsney discriminated against both men and women in the laboratory. Ex. "U" at 74. According to Santer, Motsney was looking for docile employees regardless of gender. Ex. "U" at 75.

Berkoski asserts that Ashland should have made a reasonable accommodation permitting him time to obtain his B.S. degree. This would have taken several years. No court anywhere has ever interpreted Title VII or the ADEA to require such a result. Suspending the requirements for the position of chemistry supervisor for several years fails to constitute a reasonable accommodation. Ashland had the right to insist that its employees meet the qualifications required for their jobs immediately.

Berkoski contends that Ashland offered the chemistry supervisor position to Paul four months before it demoted him. He has no evidence to support this proposition. He simply makes this statement. He needs admissible evidence. He has none. Paul denies it. Motsney denies it. Ashland denies it. No one confirms it. Supposedly, Paul told Rossi that she had this job offer. But Rossi denies that Paul ever told him that. Ex. "O" at 137-138. Ashland has done the impossible in this case. It has proved a negative. It never offered the chemistry supervisor position to Paul before it demoted Berkoski.

In Elmore v. Clarion University of Pennsylvania, 933 F.Supp. 1237 (M.D. Pa. 1996), the court rejected the pretext argument offered by plaintiff, a professor, who alleged that the defendant University had terminated her because of her race. The University contended that she had failed to perform adequately and relied on student evaluations. Plaintiff responded by arguing that the student evaluations constituted pretext. The Court, in granting summary judgment for the defendant University, concluded that even if the plaintiff had established the unreliability of the student evaluations, that fact did not support a conclusion that Clarion did not actually rely on them in deciding not to renew the plaintiff. According to the Court, the reliability of student evaluations in deciding who is and who is not an effective teacher, is irrelevant to the issue of whether or not the defendant University acted appropriately in terminating the plaintiff.

That analysis applies here. Berkoski, in attacking the viability of the requirement of a B.S. degree, fails to show pretext as a matter of law.

In Murre v. A.D. Dick Co., 625 F.Supp. 158 (N.D. Ill. 1985), the Court rejected an argument similar to that made by Berkoski. Plaintiff contended that the defendant employer

failed to rehire him based on his age. Defendant employer asserted that he lacked the new qualifications that the employer had imposed for engineering positions. The employer required a B.S. degree in engineering and some direct experience in microprocessing. Plaintiff challenged the legitimacy of the defendant's need for these credentials. The Court held that this failed to show pretext as a matter of law and granted summary judgment in favor of the employer. The Court concluded that the effort of the plaintiff was fundamentally misguided. The Court stated:

> The ADEA was not intended to allow judicial review over the reasonableness of an employer's business judgments...unless those business judgments are used to mask unlawful discrimination. Id. at 166.

The Court also found unconvincing as evidence of pretext that the defendant only began to require educational credentials in 1983. The Court concluded that changes in managerial policy are a legitimate basis on which to base employment decisions. Recent changes in that policy fail to create a triable issue as to pretext, according to the Court. Id. at 625 F.Supp. at 166. Accord Williams v. Perry, 907 F.Supp. 838 (M.D. Pa. 1995). (Plaintiff cannot show pretext by attacking the validity of standards imposed by employer).

F. BERKOSKI HAS FAILED TO PRODUCE SUFFICIENT EVIDENCE TO WITHSTAND A MOTION FOR SUMMARY JUDGMENT CONCERNING HIS CLAIM THAT ASHLAND SUBJECTED HIM TO A SEXUALLY HOSTILE ENVIRONMENT.

Berkoski contends that Ashland created an environment sexually hostile to him as a male. To establish a hostile work environment, Berkoski must produce sufficient evidence to support a jury verdict on the following issues: (1) that he suffered intentional discrimination because of his gender; (2) that the discrimination was pervasive and regular; (3) that the

discrimination detrimentally affected him; (4) that the discrimination would detrimentally affect a reasonable person of the same gender in that position; and (5) that there exists respondeat superior liability on the part of the employer. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

Berkoski has failed to produce sufficient evidence to support a jury verdict in his favor on the first, second and fourth factors. First, he has not shown that he has suffered intentional discrimination because of his gender. The mere fact that a work environment may prove to be intolerable to a particular employee does not necessarily implicate Title VII since the civil rights laws do not guarantee a working environment free of stress. Waite v. Blair, Inc., 937 F.Supp. 460 (W.D. Pa. 1995). As the United States Court of Appeals for the Seventh Circuit explained in Vore v. Indiana Bell Tel. Co., Inc., 32 F.3d 1161, 1162 (7th Cir. 1994):

> Federal law provides that an employee is to be free from racial discrimination in the work place, which includes freedom from a racially-hostile work environment. It does not guarantee an utopian work place, or even a pleasant one. If the work place is unsavory for any reason other than hostility generated on the basis of race, gender, ethnicity, or religion, no federal claim is implicated. In short, personality conflicts between employees are not the business of the federal courts.

In reviewing the record for evidence of intentional discrimination sufficient to create a hostile work environment, the Court must look at the overall scenario, including the frequency of the discriminatory conduct, and its severity, whether the conduct is physically threatening or a mere offensive utterance, and whether it unreasonably interfered with plaintiff's work performance. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-24 (1993); Faragher v. City of Boca Raton, ____ U.S. ____, 118 S.Ct. 2275, 2283 (1998).

An application of these factors to this case shows that Berkoski has failed to establish sufficient evidence to support a jury verdict in his favor on the issue of a hostile environment intentionally directed toward him because of his gender. Berkoski contends that Ashland created a sexually hostile work environment for him because Motsney had dated a female co-worker, because Motsney made remarks concerning a female co-worker's physical attributes to other co-workers, because Motsney, in his capacity as Laboratory Supervisor, repositioned his office furniture into a space previously utilized as the lounge and into the path of access to the ladies' bathroom, which caused male employees not to use the lounge, because Motsney offered office space within his own office to female supervisors, but did not offer it to male supervisors, because Motsney made statements to co-workers within the laboratory department concerning his infatuation with Ms. Jeanne Capparell ("Capparell") and took her to the Christmas 1992 holiday office party as his date, because Motsney refused to take appropriate corrective measures against a female employee of the laboratory department even though the female was making excessive errors and because Motsney demoted Berkoski because he lacked the qualifications for his job. Berkoski also contends that Motsney, commencing in September, 1992 until his last day of work on June 3, 1993, subjected him to unreasonable scrutiny of his work performance, accused him of inadequate work performance and instituted various disciplinary proceedings against him.

An examination of the record shows that Berkoski has insufficient evidence to support a jury verdict in his favor on any of these accusations. No indication exists that Motsney made repeated comments concerning Ms. Teah Carpenter's ("Carpenter") physical attributes to other co-workers. In fact, he married Ms. Carpenter. How does his making comments concerning Ms.

Carpenter create a sexually hostile work environment directed toward males? It would seem to work the other way. Yet no female employees have complained. Berkoski stated under oath that Carpenter never received preferential treatment from Motsney. Ex. "C" at 205. Thus, how could statements made by Motsney concerning Carpenter and his dating of Carpenter, outside the laboratory, create a sexually hostile environment directed toward males? It cannot. It did not. No Court has ever concluded that the treatment of females in a sexually disparaging manner creates a hostile environment toward males.

Motsney never repositioned his office furniture into a space previously utilized as the lounge and into the path of access to the ladies' room. Ex. "G" at 109. This constitutes nonsense. If need be, Ashland will produce photographs which establish that this never occurred. Berkoski knows better than to make these outrageously false accusations for which he has no support.

When Motsney became Laboratory Manager in 1991, he moved his office furniture out of the office which he shared with Feinberg, the Director of Pathology. Feinberg needed privacy. Motsney needed more space. He moved the furniture into his own office which had formerly been used as a lab classroom. Ex. "G" at 111. The only change that Motsney made concerning the employees' lounge, was to turn the women's lounge into a shared employees' lounge for both men and women because the men's locker room was very tiny. The men essentially had no lounge before Motsney acted. Both men and women continued to have their own separate designated bathrooms. The new lounge was for both men and women and contained a refrigerator, a table, coffee pot, and utensils. Ex. "G" at 112-113. Motsney never had a desk in the lounge. At times, lab meetings would be held in the lounge. Ex. "G" at 114.

Even if Berkoski could prove these allegations concerning the employees' lounge, how does this create a sexually hostile atmosphere toward males? If anything, it appears directed toward females.

Motsney made the extra desk in his office open to everyone. Rusnak's deposition establishes this. Ex. "E" at 16-18; Ex. "H" at 52.

No indication exists that Motsney imposed more duties upon Berkoski than he did upon Paul. Berkoski worked overtime because he desired to. No one forced him to work overtime. No one prevented him from putting in for overtime. His own wife testified to this. Ex. "P" at 16-17.

No evidences exists that Capparell received preferential treatment from Motsney. She did not. Ex. "T" at 26; Ex. "E" 26. Motsney gave Capparell more work to do than he did the male supervisors. Ex. "E" at 26.

No evidence exists that Motsney ever dated Capparell. No evidence exists that Motsney ever made suggestive comments about her to others. Even if he did date her on one occasion, and even if he did make suggestive comments about her, this fails as a matter of law to create a sexually hostile environment for males. These comments were not directed toward Berkoski as a male. They were not directed toward Berkoski at all. Ashland challenges Berkoski to find a Court decision from any jurisdiction of the United States which has concluded that comments made about females can create a sexually hostile environment toward males. No such Court decision exists.

Berkoski also contends that Motsney disciplined him on three occasions during a period of approximately one year. Berkoski's own deposition testimony shows this contention lacks

any basis in fact. Berkoski admits that the May, 1992 error that he made was not made up and that it was not unreasonable for Motsney to believe that he made an error. Ex. "C" at 81. Berkoski concedes that Motsney believed that Berkoski misidentified a specimen. Ex. "C" at 152. Berkoski admits that Dr. Chen See also concluded that he had made a mistake. Ex. "C" at 8. Berkoski believes that Dr. Chen See wanted him terminated because he lacked a B.S. degree.

On May 16, 1993, Berkoski contends Motsney accused him of an error. He concedes that he made the error but alleges that it was a systematic error that was not his fault. Ex. "C" at 136.

On the night prior to Berkoski's quitting on June 3, 1993, Motsney accused him of misdiagnosing Earl Fetter. Fetter had hyperlipidemia. He had high triglycerides. The cloudiness in his blood caused problems with the instruments misinterpreting it. Berkoski asked the person running the test to rerun it several times, which the person did. Berkoski then asked that it be tried on a backup instrument which did not exist. He then requested that the person go back and re-stick the patient. He then simply indicated that it should be reported. He contends that although it was a systematic error, which was not his fault, that Motsney believed that the specimen had been misidentified. Berkoski agreed at his deposition that there could be a reasonable dispute as to whether or not it was Berkoski's fault between two persons acting in good faith. Ex. "C" at 144-144, 152-155. He admits that the results he obtained were impossible. He concedes that any technician getting those results should have known that there was something wrong. Ex. "C" at 158-159.

Since Berkoski admits that Motsney acted in good faith all three times that he indicated that Berkoski had made an error, Berkoski has not shown a sexually hostile environment.

Berkoski did not receive any discipline as the result of any of these three errors. He was not suspended. He was not fined.

In Ward v. Ridley School District, 940 F.Supp. 810 (E.D. Pa. 1996), a male school custodian brought a Title VII action against a school district, his employer, alleging that male co-workers harassed him creating a sexually hostile work environment. The Court granted the school district's motion for summary judgment contending that the harassment of the co-workers was not directed at the custodian because of his gender. The Court held that when a male employee seeks to prove that he has been sexually harassed by a person of the same sex, he carries the burden of proving that the harassment was directed against him because of his sex. The principle way in which this burden may be met is with proof that the harasser acted out of sexual attraction to the employee. Conduct directed toward an employee of the same gender as the harasser, can have sexual content or innuendo and indeed may be offensive. But unless such conduct is directed toward an employee because of his or her status as a man or woman, it does not implicate Title VII.

In Ward, supra, plaintiff contended that various co-workers physically abused him by banging his head against a wall, by physically pushing him up against a wall and punching him in the chest and stomach and by threatening him with a pocket knife. The Court concluded that this failed to constitute harassment based on his sex.

That analysis applies here. Berkoski has failed to show that the conduct that he complains of was directed toward him because of his sex. A substantial portion of the conduct he contends created a hostile sexual environment was directed towards female employees and was arguably offensive to them, not to him.

In Waite v. Blair, Inc., 937 F.Supp. 460 (W.D. Pa. 1995), plaintiff contended that the employer created a sexually hostile environment toward her based on supervisors and co-workers yelling at her, treating her inconsiderately and never taking her complaints seriously. The Court granted summary judgment concluding that such conduct failed to emanate from discriminatory treatment based on the national origin of the plaintiff, who was Korean.

That analysis applies here. Berkoski contends that Motsney supervised him too closely and disciplined him when he failed to deserve it. He also asserts that Motsney directed inappropriate conduct towards females by making comments about their body parts and by changing the location of the lounge and his office. None of this conduct establishes that Motsney attempted to harass Berkoski because of his gender. The only possible evidence of gender based harassment consists of the transformation of the female lounge into a lounge for males and females. But even this fails to survive examination. Previously, the males had no real lounge. Motsney took away the female lounge and made it into a lounge for both males and females. They both retained their own bathrooms. This fails to constitute sufficient evidence of intentional conduct based on gender. If discriminatory, it appears directed toward the female employees.

Second, Berkoski has not shown that the alleged discrimination was pervasive and regular. He complains about three incidents during one year for which he was allegedly unfairly disciplined. He does not contend that he was forced to use the lounge on a regular basis. Previously he had no lounge available to him. He has not shown that the harassment of him occurred on a daily, weekly or even monthly basis. He has alleged at best isolated and sporadic conduct.

In Bedford v. SEPTA, 867 F.Supp. 288 (E.D. Pa. 1994), the Court granted summary judgment on a hostile sexual environment claim brought by a female police officer against her employer, SEPTA. Plaintiff contended that SEPTA had created a sexually hostile environment based on the conduct of a doctor employed by SEPTA. During a routine physical performed by a SEPTA physician to assess the plaintiff's fitness for duty, plaintiff contended that the physician intentionally placed a stethoscope under her brassiere and pressed his pelvic area against her buttocks while examining her back. Four other women examined by the physician over the two days that the physical examinations were conducted had similar complaints. Plaintiff complained about the incident to SEPTA management. A SEPTA employee investigated the complaint and forced the plaintiff to reenact what happened. Plaintiff felt embarrassed and demeaned. The Court granted summary judgment concluding that the two incidents failed to meet the pervasive standard required for a sexually hostile environment. The Court noted that in virtually all the reported cases in which a sexually hostile work environment claim had been sustained, the plaintiff was subject to repeated acts of harassment in the physical area in which she performed her duties.

Here, Berkoski has only alleged isolated incidents of harassment. He has not established a hostile work environment based on his gender.

Third, Berkoski has not shown that the harassment would have detrimentally affected a reasonable person of the same protected class in his position. It is difficult to believe that three incidents of a supervisor indicating that you made a mistake when you yourself conclude that he could have reached that decision without being biased against you, constitutes the creation of a hostile work environment that affects your ability to perform. It is also difficult to believe that a

reasonable person would conclude that alleged harassment toward female employees would affect him as a male in such a way as to render him unable to perform his duties.

G. BERKOSKI HAS FAILED TO ESTABLISH SUFFICIENT EVIDENCE TO SUPPORT A JURY VERDICT IN HIS FAVOR ON THE ISSUE OF CONSTRUCTIVE DISCHARGE.

Berkoski contends that Ashland constructively discharged him when he resigned on June 3, 1993. He depends upon the same conduct to establish constructive discharge as he relied upon to show a hostile environment based on his gender. As previously indicated in Section F of the brief dealing with the hostile environment claim, Berkoski has no evidence to support these contentions. Consequently, he cannot show constructive discharge because he cannot show that he was subjected to the unreasonable conduct that he alleges. See pages 47-52 herein. Even if he establishes to this Court's satisfaction that he can show a jury sufficient evidence to support a finding that Ashland did subject him to the conduct which he asserts caused him to resign, this conduct fails to support a claim for constructive discharge as a matter of law. In Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984), the United States Court of Appeals for the Third Circuit adopted an objective test to determine whether an employee was constructively discharged from employment. According to the Court, constructive discharge occurs if the conduct complained of would have the foreseeable result of rendering the working conditions so unpleasant and difficult that a reasonable person in the employee's shoes would resign.

In Clowes v. Allegheny Valley Hospital, 991 F.2d 1159 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit rejected a constructive discharge claim in a situation almost identical to that presented by Berkoski. In Clowes, the plaintiff, a nurse, contended that

her supervisor forced her to resign because of her age. She received a jury verdict in her favor. The United States Court of Appeals for the Third Circuit reversed the jury verdict and directed that judgment be entered in favor of defendant/hospital because it concluded that the nurse failed to establish constructive discharge as a matter of law. Clowes claimed that her supervisor singled her out for especially close and harsh supervision. In particular, she contended that her supervisor unfairly criticized her for ineptitude in starting IVs. According to the supervisor, the plaintiff too often had to take more than a single needle injection or stick in order to start an IV. But Clowes claimed that she was not doing any more sticks than anyone else on the staff. Clowes also alleged that her supervisor followed her around the hospital and recorded the number of sticks she made with each patient, but that the supervisor made no effort to keep track of the number of sticks made by other nurses. Indeed, Clowes asserted that the supervisor remained in the hospital after Clowes' day shift ended in order to check every one of her patients to see if she could find anything that Clowes did wrong. Clowes testified that the supervisor would write down everything that Clowes did or said. In addition, Clowes claimed that the supervisor spoke to her in a demeaning, condescending manner different from that employed with the rest of the staff and that the supervisor criticized her sharply in the presence of other nurses. Clowes also pointed to the fact that her supervisor's written evaluations often assessed her as fair although she had never before received an evaluation of less than good.

Clowes claimed that a result of this treatment she began to suffer from depression and related symptoms and required psychiatric and other medical treatment. In 1987 the supervisor and the plaintiff had a meeting concerning Clowes' alleged deficiencies. The supervisor instructed Clowes to submit a list of written goals. She was also informed that her performance

would be reviewed periodically and that any problem would be discussed. In addition, her supervisor told her that disciplinary action would be taken if she did not improve. Shortly thereafter Clowes submitted written goals, as well as a response to her supervisor's criticism. Her last day of work at the hospital was November 12. Beginning on November 13, Clowes took vacation and sick leave and was later placed, at her own request, on temporary part-time status due to medical reasons. At the end of November, Clowes began working at a nursing home. In March, 1988, she submitted a grievance to the hospital, but it was rejected as being untimely.

In entering judgment for the hospital and reversing the jury verdict in favor of Clowes, the United States Court of Appeals for the Third Circuit stated:

> ....
>
> Moreover, it is significant, in our view, that Clowes's complaints focused exclusively on Malloy's allegedly overzealous supervision of her work. Clowes has not brought to our attention a single case in which a constructive discharge has been found based solely upon such supervision. While we do not hold that an employer's imposition of unreasonably exacting standards of job performance may never amount to a constructive discharge, we are convinced that a constructive discharge claim based solely on evidence of close supervision of job performance must be critically examined so that the ADEA is not improperly used as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards. Id. at 991 F.2d at 1161 and 1162. (Emphasis added).

The analysis of the United States Court of Appeals in Clowes, supra, requires that summary judgment be entered in favor of Ashland and against Berkoski. Like the employer in Clowes, Berkoski depends upon the unfairness of his supervision to establish a cause of action for constructive discharge based on gender discrimination.

In a very similar factual situation, in McWilliams v. Western Pennsylvania Hospital, 717 F.Supp. 351 (W.D. Pa. 1989), the district court granted the motion of the hospital for summary judgment. In that case the plaintiff contended that her supervisor and the hospital had discriminated against her and had constructively discharged her because of her being Irish. She set forth two comments that her supervisor had made of a derogatory nature towards people of Irish origin. In addition, the plaintiff contended that her supervisor harassed her upon her return to work from a serious injury by continuing to assign her tasks in disregard of lifting restrictions imposed upon the plaintiff by her physical condition. The plaintiff also alleged that her supervisor changed her seat, placing her in front of an air conditioner despite medical restrictions to the contrary. She presented other examples of harassment including her supervisor's interference with the plaintiff's attempt to obtain other hospital jobs, her supervisor's interference with the plaintiff's attendance at safety committee meetings, threats of her supervisor to dock her time card when she was late, disciplining her in front of other employees and not informing her that she had been selected for a display writer program which would have transferred plaintiff to another department. The last action about which the plaintiff complained occurred in December, 1984. Her supervisor changed the plaintiff's holiday schedule which interfered with her arrangements for a doctor's appointment and a holiday party. The plaintiff made a potential scheduling switch with another employee. Her supervisor refused to approve of the change. At that point plaintiff resigned.

The Court held that this failed to set forth a cause of action based on constructive discharge and granted the motion for summary judgment of the employer. According to the Court:

> Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee...is not, however, guaranteed a working environment free of stress. The employee discrimination laws require as an absolute precondition to suit that adverse employment action have occurred. They cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting....
>
> In short, we conclude that although plaintiff's work environment may have been intolerable, it was not attributable to discriminatory acts against Irish individuals. As plaintiff testified, Kurtz just did not like her...Though this may be unfortunate in an employment context, it 'is not cognizable under the Civil Rights Act...' (citation omitted). We hold that a constructive discharge claim under Title VII does not arise when conditions of employment are intolerable and an individual resigns without more. Id. at 717 F.Supp. at 356, 357. (Emphasis added).

Based on the analysis of both the Clowes and McWilliams decisions, Berkoski has failed to demonstrate that his resignation on June 3, 1993 was anything but a voluntary resignation, not a constructive discharge. Neither allegations of oversupervision or close job scrutiny will support a constructive discharge claim; and the "frustrations, challenges and disappointments" which Berkoski may perceive he faced at Ashland do not a constructive discharge claim make.

H. BERKOSKI HAS FAILED TO USE REASONABLE EFFORTS TO MITIGATE HIS DAMAGES BY ABANDONING ALL EFFORTS AT SECURING EMPLOYMENT AS A MEDICAL TECHNOLOGIST SINCE ENTERING NURSING SCHOOL IN SEPTEMBER, 1994.

A Title VII claimant is under a statutory duty, pursuant to §706(g) of the Civil Rights Act, 42 U.S.C. §2000e-5(g), to mitigate damages, and "to use reasonable diligence in finding other suitable employment. Ford Motor Company v. Equal Employment Opportunity

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Section 706(g), 42 U.S.C. §2000e-5(g) provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the

Commission, 458 U.S. 219, 231, 102 S.Ct. 3057, 3865 (1982). The Supreme Court stated, "[a]lthough the unemployed ... claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied." Id. at 231-32, 102 S.Ct. at 3065-66. Likewise, a plaintiff presenting a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, et seq., has under a similar duty to mitigate damages. Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1004-1005 (3d Cir. 1988).

While the duty falls to the plaintiff (employee) to use reasonable efforts to mitigate his damages, the defendant (employer) has the burden to establish "that plaintiff failed to mitigate his damages" in order to limit or bar an award of back pay to the plaintiff. Carden, supra, 850 F.2d at 1004-1005. The employer must demonstrate that the plaintiff failed "to exercise reasonable diligence in seeking employment substantially equivalent to the position he lost." Carden, supra, 850 F.2d at 1005, quoting Ford, 458 U.S. at 231, 102 S.Ct. at 3065. See also Nord v. U.S. Steel Corp., 758 F.2d 1462, 1470 (11th Cir. 1985); Clark v. Frank, 960 F.2d 1146, 1152 (2d Cir. 1992); Hansard v. Pepsi-Cola Metropolitan Bottling Co., Inc., 865 F.2d 1461 (5th Cir. 1989), cert. denied, 493 U.S. 842, 110 S.Ct. 129.

Federal courts, considering the issue of mitigation of damages by a Title VII claimant who voluntarily acts to remove himself from the job market--as in this case, going to school in the pursuit of an entirely different career--have held that the employee who does so, has failed to mitigate his damages. In Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985), the plaintiff had

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back pay otherwise allowable."

applied for a position with the Army Corps of Engineers, and then filed suit under Title VII alleging sex discrimination when she was denied the position. The Court of Appeals upheld a grant of summary judgment in favor of the defendant on the grounds that, once the plaintiff applied for, was admitted to and then commenced her attendance at law school, she was no longer "ready, willing and available for employment." Id. at 492. Such a claimant, the court noted, "is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position she or he lost." Id. at 492, citing Nord, 758 F.2d at 1470. The Court of Appeals in Miller found that the plaintiff, in eschewing other employment in favor of attending law school, had "removed herself from the job market," and accordingly, the lower court's grant of summary judgment on that basis was proper. 766 F.2d at 492-93.

Numerous courts have similarly held. See e.g., Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) (plaintiff who opts to attend school, instead of making reasonable efforts to find suitable employment, is not entitled to a back pay award); Washington v. Kroger Company, 671 F.2d 1072 (8th Cir. 1982) (upholding lower court determination that employee who chose to attend school full-time had removed herself from the job market, and was therefore not entitled to back pay while attending school); United States v. Wood, Wire & Metal Lathers Local 46, 328 F.Supp. 429, 444 (S.D.N.Y. 1971) (discharged employee who returns to school is no longer "ready, willing and available" for employment); Equal Employment Opportunity Commission v. Local 638, 674 F.Supp. 91 (S.D.N.Y. 1987) (employee who abandons his willingness to search for work, and instead, opts to attend school, does not meet his duty to mitigate during the time he is in school).

The common thread running through the cases which have considered a claimant's full time enrollment in school in regard to the duty to mitigate his or her damages, is the question of whether, in attending school, the claimant has made him or herself unavailable for work, has "absented" themself from the job market, and is no longer "ready, willing and available" for employment. In Hanna v. American Motors Corp., 724 F.2d 1300 (7th Cir. 1984), the Seventh Circuit found that an award of back pay was not entirely precluded by the plaintiff's enrollment in school because the facts demonstrated that he was still "ready, willing and available for employment." In Hanna, following his discharge, the plaintiff spent four months looking for work, then enrolled in college full time. He attended school for one semester, dropped out, sought employment for another nine months, and then again commenced classes. This evidence, the court held, demonstrated that the plaintiff in Hanna, although enrolled at various times in school, was "ready, willing and available" for employment, and hence, his school attendance was not a bar to an award of back pay. Id. at 1303-1305, 1310. Quite unlike Frank Berkoski in this case, the plaintiff in Hanna was found to have remained available for work, and affirmatively demonstrated on two separate occasions, his willingness to place employment in his original field ahead of his schooling for a new career. Frank Berkoski's position with regard to continued efforts in his original field, are completely contrary to the plaintiff in Hanna.

There is no dispute whatsoever that the Plaintiff, Frank Berkoski, in September, 1994 took himself entirely out of the job market, enrolled in school, committed himself to pursuing a degree in nursing, and once and for all abandoned his former profession in the field of medical technology. Berkoski, upon commencing his nursing education, indisputably abandoned all

efforts to seek or secure employment as a Medical Technologist or Medical Technologist Supervisor:

Q: When did you start attending nursing school?

A: I started in September of 1994.

Q: So you left Ashland in June 1993?

A: Right.

* * *

Q: When you went to nursing school, did you go full time?

A: Yes.

Q: Did you continue to job hunt as -- for positions as a medical technologist while you were in nursing school?

A: Once I started nursing school, no.

Q: So from September 1994 until the time you graduated from nursing school, which I believe was -- when?

A: May of '97.

Q: -- you did not look for positions as a medical technologist, correct?

A: Correct.

Q: Did you look for any other job, full-time positions, in any occupation during the time you were in nursing school?

A: It was an impossibility to look for anything in nursing school. Nursing school took every moment of my waking hours. I couldn't look for anything. And <u>once I started nursing school, it was the point of no return</u>.

Ex. “C” at 21-23.

Berkoski, commenced his nursing education in September, 1994. Thereafter, he made no further efforts to secure employment as a Medical Technologist, removing himself from the job market completely at that time.

Without any admission that Plaintiff is entitled to any damages for any period of time, it is clear that the Plaintiff has failed to exercise any efforts, let alone reasonable efforts, to secure suitable employment since at least the time of his entrance to nursing school in September, 1994. It is unquestionable that the Plaintiff, following September, 1994 was no longer "ready, willing and available" for employment, and consequently entitled to no damages for the period following his entrance to nursing school.

As the Third Circuit in Carden explained, "[a]n individual who attends school as a full-time student does so in order to gain some type of future pecuniary advantage. ... When monetary expectations are directed only towards the future, back pay cannot legitimately be claimed since no present compensation can be expected." 850 F.2d at 1005. By abandoning his search for a job in the medical technology field, and choosing instead to attend nursing school full-time, and making no efforts to find a job for a three year period, Frank Berkoski chose to focus his efforts upon a "future pecuniary advantage," while at the same time, opting for a complete change of career in the process.

The United States Court of Appeals for the Third Circuit has explained that, as a general matter, "a plaintiff may satisfy the 'reasonable diligence' requirement by demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing and available to accept employment." Booker v. Taylor Milk Company, Inc., 64 F.3d 860, 865 (3d Cir. 1995), citing Hutchinson v. Amateur Electric Supply, Inc., 42 F.3d 1037, 1044 (7th Cir.

1994); Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989). Therefore, the undisputed failure to remain available for suitable employment, the removal of one's self entirely from the job market, may be logically seen as the failure to satisfy the 'reasonable diligence' requirement. Indisputably, Frank Berkoski, following his enrollment in nursing school, and admitted abandonment of the job market for medical technologists entirely, failed to exercise 'reasonable diligence' or any diligence at all.

A number of Circuits have adopted the rule that where, in cases such as the one involving Frank Berkoski, the defendant proves that the plaintiff has made no reasonable efforts to secure suitable employment, the availability of such employment is not relevant, and the employer need not prove the state of the job market. See e.g., Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991); Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990) (both holding similarly that where an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially comparable employment.) As the Second Circuit explained, in adopting this principle:

> The underlying rationale is that an employer should not be saddled by a requirement that it show other suitable employment in fact existed--the threat being that if it does not, the employee will be found to have mitigated his damages--when the employee, who is capable of finding replacement work, failed to pursue employment at all.

Greenway v. Buffalo Hilton Hotel, ___ F.3d ___, 1998 WL 210677, at *8 (2d Cir. April 30, 1998).

Here, it is not disputed that Frank Berkoski, once he commenced his training as a nurse in September, 1994, removed himself from the job market, and abandoned all efforts at securing employment as a Medical Technologist or Medical Technologist Supervisor. In Berkoski's own words: "Once I started nursing school, it was the point of no return." There is no need for this Court to determine whether Berkoski's efforts, following his enrollment in nursing school in September 1994 were indicative of "reasonable diligence" or whether he, from that point onward, was "ready, willing and available" for suitable employment. Frank Berkoski was neither ready nor willing for any employment, and was completely unavailable once he reached "the point of no return" in September 1994, and determined that he would abandon his former career in medical technology.

Accordingly, there exists no genuine issue of material fact in regard to Frank Berkoski's status following his enrollment in nursing school in September, 1994: he had taken himself completely out of the job market, was no longer "ready, willing and available" for suitable employment in the medical technology field, and exercised no diligence whatsoever, let alone reasonable diligence, to secure employment as a Medical Technologist or Medical Technologist Supervisor. Therefore, Ashland, respectfully requests that its motion for summary judgment be granted as to damages, and enter an order limiting damages recoverable (if any) to the period between June, 1993 and September, 1994.

V. CONCLUSION

In the light of the foregoing, Ashland respectfully requests that its Motion for Summary Judgment be granted.

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DATED: August 11, 1998