

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

ROY FULLARD,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 00-509
	:	
ARGUS RESEARCH LABORATORIES,	:	
INC.,	:	
	:	
Defendant.	:	

Reed, S.J.

June 6 , 2001

MEMORANDUM

Plaintiff Roy Fullard (“Fullard”) filed this lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging that he was terminated from his position with Argus Research Laboratories, Inc. (“Argus”) because of his race. Presently before the Court is the motion of defendant for summary judgment (Document No. 16), pursuant to Rule 56 of the Federal Rules of Civil Procedure, the response, reply and sur-reply thereto. For the following reasons, the motion will be granted.¹

I. Background²

Fullard, an African-American, was hired by Argus on or about April 14, 1997 as a Quality Assurance (“QA”) Auditor. QA Auditors review the company’s animal research to ensure that it is conducted according to industry and company protocols. Fullard essentially

¹ Because this case raises a federal question, jurisdiction is proper pursuant to 28 U.S.C. § 1331.

² The facts laid out in this opinion are based on the evidence of record viewed in the light most favorable to the plaintiff Roy Fullard, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon University v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

claims that his manager, Kathleen Moran (“Moran”), unfairly reprimanded him on many occasions for engaging in activities for which his white co-employees were not similarly rebuked. He further alleges that he was placed on probation and ultimately discharged for discriminatory reasons. Fullard contends that he was terminated in a manner inconsistent with Argus’ usual practice of giving employees the tools to improve and keeping them in its employ in an effort to help them succeed. Argus essentially contends that both Fullard and a similarly situated white employee, Sharon Gogel (“Gogel”), were placed on probation for causing disruptions in the department and challenging Moran’s authority. Gogel had transferred into Moran’s division around the same time that Fullard began his employment. Gogel worked out her problems and was retained. Fullard, on the other hand, would not accept the terms of his probation and continued to work the least hours of anyone in the department. Thus Argus maintains that Fullard’s termination was not the result of racial discrimination, but rather his own conduct.

II. Legal Standard

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, “the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Furthermore, “summary judgment will not

lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. at 250.

On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 176 (1962)). The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” Matsushita, 475 U.S. at 586, and must produce more than a “mere scintilla” of evidence to demonstrate a genuine issue of material fact and avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Analysis

Plaintiff claims defendant intentionally discriminated against him because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The legal standard for a section 1981 case is identical to the standard in a Title VII case. See Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n. 5 (3d Cir. 1983); Bullock v. Children’s Hospital of Philadelphia, 71 F. Supp. 2d 482, 485 (E.D. Pa. 1999). Thus, I will analyze Fullard’s claim only under Title VII below; however, my analysis and conclusions are equally applicable to his claim of discrimination in violation of section 1981. See Harris v. Smithkline Beecham, 27 F. Supp. 2d 569, 576 (E.D. Pa. 1998) (applying same standard to Title VII, § 1981, PHRA and ADEA claims).

Fullard may sustain his Title VII claim by presenting direct evidence of racial discrimination or by using circumstantial evidence that would allow a reasonable factfinder to

infer discrimination. See Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 n. 4 (3d Cir. 1995); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 244-46, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (establishing framework for mixed motive cases that involve direct evidence); McDonnell Douglas Corp., v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (establishing framework for pretext cases that involve circumstantial evidence).³ discrimination.

In the absence of direct evidence of discrimination, a plaintiff may proceed under the burden shifting paradigm of McDonnell Douglas and its progeny. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 643-44 (3d Cir. 1998). To survive summary judgment, the plaintiff must first prove by a preponderance of the evidence that a *prima facie* case of discrimination exists. See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000).

To establish prove a *prima facie* case of race discrimination, Fullard must show that (1) he is in a protected class, (2) is qualified for the position, (3) suffered an adverse employment action, and (4) was discharged under circumstances that give rise to an inference of unlawful discrimination. See Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 357 (3d Cir. 1999); Waldron

³ Direct evidence is overt or explicit evidence which directly reflects discriminatory bias by a decision-maker. See Armbruster v. Unisys Corp., 32 F.3d 768, 778-79, 782 (3d Cir. 1994) (analogizing direct evidence to the proverbial “smoking gun”). Indirect evidence is evidence of actions or statements from which one may reasonably infer discrimination. See Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994). Here, plaintiff has only presented indirect evidence of race. None of plaintiff’s evidence “proves [race] discrimination without inference or presumption.” Nixon v. Runyon, 856 F. Supp. 977, 983 (E.D.Pa. 1994) (quoting Brown v. East Miss. Elec. Power Ass’n, 989 F.2d 858, 861 (5th Cir. 1993)).

v. SL Indus., Inc., 56 F.3d 491, 494 (3d Cir. 1995). Common circumstances giving rise to an inference of unlawful discrimination include the hiring of someone not in the protected class as a replacement or the more favorable treatment of similarly situated colleagues outside of the relevant class. See Bullock, 71 F. Supp.2d at 487.

“Similarly-situated” has been defined as those individuals who have engaged in the same conduct as plaintiff, “without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” Id. at 489 (citations omitted). In order to invoke a presumption of discrimination, plaintiff must show that he was subjected to less favorable treatment than the similarly situated person not within his protected class. See id. at 490.

While a plaintiff *may* make out a *prima facie* case with evidence that similarly situated individuals were treated more favorably, as the Court of Appeals clarified, however, such proof is not required. See Pivrotto, 191 F.3d at 356-57. A plaintiff can make out a *prima facie* case even without demonstrating that employees outside of the relevant class were treated more favorably, let alone that the plaintiff was replaced by someone outside of the relevant class. See id. at 357; Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 939 (3d Cir. 1997) (in ADA claim, showing favorable treatment outside of the protected class is not a required element of a *prima facie* case); Bullock, 71 F. Supp. 2d at 489. There is no rigid formulation of a *prima facie* case and the requirement may vary with “differing factual situations.” Matczak, 136 F.3d at 938 (quoting McDonnell Douglas, 411 U.S. at 802 n.13). The *prima facie* case requires “only ‘evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.’” See Pivrotto, 191 F.3d at 356 (quoting O'Connor v. Consolidated

Coin Caterers Corp., 517 U.S. 308, 312, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996)).

Nevertheless, the plaintiff must ultimately prove by a preponderance of the evidence that a *prima facie* case of discrimination exists. See Bullock, 71 F. Supp. 2d at 490. Demonstrating only a mere possibility of discrimination will not suffice. See id.

Argus does not dispute that as an African-American, Fullard is in a protected class, and that he was qualified for the position. He clearly suffered an adverse employment action when he was placed on probation, and eventually terminated. Defendant disputes the final element of this analysis - whether or not Fullard was discharged under circumstances that give rise to an inference of unlawful discrimination. Fullard points to numerous incidents in which he alleges he was unfairly singled out and which culminated in his probation and later termination on the basis of his race.⁴

First, on or about Friday, September 17, 1997,⁵ Fullard contends he was wrongly reprimanded for leaving work early. Fullard claims that after working a seven-hour day, he reached his forty hours for the week and went home just as he had seen his all his white peers do

⁴ Defendant first argues that because Moran both hired and fired Fullard, there is a presumption that no discrimination exists. Parties spend considerable time briefing this issue. Defendant relies on Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991), to support its proposition, however, the Court of Appeals for the Third Circuit has expressly declined to accord the same conclusive weight to the situation of the same person acting as hirer and firer. See Waldron v. S.L. Indus., Inc., 56 F.3d 491, 494 (3d Cir. 1995); Schmidt v. Montgomery Kone, Inc., 69 F. Supp. 2d 706, 711 (E.D. Pa. 1999).

In Waldron, the Court of Appeals concluded that “where, as in Proud, the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and *should not be accorded any presumptive value.*” Waldron, 56 F.3d at 406 n. 6 (emphasis added).

Defendant argues that Moran alone made the decision to hire and later fire plaintiff. Plaintiff counters that Moran did not have sole responsibility for either hiring or terminating plaintiff. I find that while there appears to be a dispute as to whether Moran was the sole decisionmaker for both employment decisions, the issue is not dispositive and the relevant testimony would merely serve as potentially admissible evidence.

⁵ It is judicially noted that September 17, 1997 was a Wednesday, and therefore it is likely that Fullard meant to refer to Friday, September 19, 1997.

on occasion. (Fullard Dep. at 76.) He testified at his deposition that this liberal leave policy existed in his division. (Id. at 58, 83.) Fullard further testified that he did not tell anyone he was leaving early on the day in question because he had witnessed all other QA Auditors leave early without asking permission. (Id. at 77.) At another point in his testimony, however, in response to the question, “Is it possible that the Caucasian employees asked permission before they left work with only working 7 hours in a day?” Fullard responded, “Anything is possible.” (Id. at 84.)

Gogel testified at her deposition that with the exception of Fullard, she did not recall anyone being reprimanded for leaving early as long as the employee had worked a forty-hour week. (Gogel Dep. at 66.) However, she also testified that the auditors always asked permission before leaving early. (Id. at 64.) In addition, QA Auditor Heather Rabbutino (“Rabbutino”) testified at her deposition that there was no policy allowing employees to leave after working 40 hours for the week. (Rabuttino Dep. at 85.) Thus, while there may be a dispute as to whether there is a liberal leave policy at Argus, Fullard has produced no evidence beyond his subjective opinion that the policy was to be exercised without first seeking permission from a supervisor. Ultimately, Moran told Fullard not to leave early again without asking her permission. (Fullard Dep. at 77.)

The second incident occurred at a staff meeting held on or about September 20, 1997. Fullard contends that staff meetings are held in an open forum format, meaning that employees are invited to express their opinions. (Id. at 92.) At this particular meeting, Moran discussed a departmental decision to allow an auditor to work part-time from home. Fullard voiced opposition to this decision, believing it would create more work for the QA Auditors in the

office. (Id. at 93.) He could not remember whether any other auditors expressed similar objections. (Id.) After the meeting, he claims that Moran reprimanded him by telling him “never to question [her] departmental decision.” (Id. at 95.) Gogel testified, however, that she recalled that Fullard voiced his opinion and then Gogel and Kiet Luong (“Luong”), another QA Auditor, chimed in their support of Fullard’s objections, and that Moran “got really ticked off” at *all three employees* for questioning her authority. (Gogel Dep. at 74.) Rabbutino declared by affidavit that many auditors complained about the part-time policy. (Rabbutino Aff. at ¶ 6.) While it appears that Fullard subjectively believed he was singled out for a private reprimand, such a belief does not constitute evidence of discrimination. See e.g. Dill v. Commonwealth of Pa., 3 F. Supp. 2d 588, 591-92 (E.D Pa. 1998). The reasonable inference is that Moran did not tolerate employees questioning her authority, not that she held any racial animus toward Fullard. This inference finds additional support in the fact, discussed in detail below, that Moran also placed Gogel on probation in part for questioning her authority.

The next alleged incident occurred on or about September 26, 1997. Fullard needed to leave work early to pick up his son from school, however, he had not yet completed a study that was due that day. He believes that he asked two colleagues, Rabbutino and Laurie Veneziale (“Veneziale”), to review his summary and complete the page count. (Fullard Dep. at 84.) Fullard alleges that the next day, he heard from his co-employees that Moran coerced Rabbutino and Veneziale into telling her that Fullard had forced them to do his work. (Id. at 85.) Fullard could not remember whether he and Moran actually discussed the incident. (Id. at 88.) Rabbutino testified that she overheard Fullard ask Veneziale and Luong to complete the report. (Rabbutino Dep. at 89.) Regardless of whether Fullard ordered or requested co-employees to

finish his work, he does not claim that he asked permission from Moran before leaving. Thus even viewed in the light most favorable to plaintiff, the evidence shows that he left work early without permission and without finishing his assignments.

Around this time, Fullard informed Moran that he would not be able to make a morning staff meeting because he had to attend a critical phase audit. According to Fullard, all QA Auditors missed staff meetings if they needed to go to a critical-phase audit. (Fullard Dep. at 101.) Fullard testified that while he was not formally rebuffed, Moran questioned why Fullard could not finish the report at another time, but ultimately allowed him to miss the meeting. (Id.)

On or around October 31, 1997, Moran sent Fullard and another minority QA Auditor, Luong, home to change their attire because they wore jeans to work contrary to company policy. (Id. at 105.) Fullard contends that Veneziale, a white QA Auditor, was also wearing jeans, but was not asked to go home and change. (Id. at 108.) Gogel testified that Veneziale wore jeans and sneakers all the time without question. (Gogel Dep. at 59-60.) Company President Alan Hoberman (“Hoberman”) testified that while there was no dress down policy allowing jeans, he also thought it was “inappropriate” that Moran sent the two employees home to change. (Hoberman Dep. at 33.)

On January 16, 1998, Moran requested that Fullard remove a zodiac sign he had hanging in his cubicle. (Fullard Dep. at 137.) Gogel apparently had the same sign hanging in her cubicle and was never asked to remove it. (Id.) Moran claims she was unaware of Gogel’s sign. (Id.)

Underlying each of these episodes was the fact that Fullard worked less hours than the rest of the full-time QA Auditors. Fullard testified that he knew that overtime work would sometimes be required in his job. (Fullard Dep. at 58.) Hourly records indicate that with the

single exception of the month of July, 1997, Fullard worked the least amount of hours on any full-time employee in his division. (Def.'s Ex. K.) He is the only full time QA Auditor who *never* worked 45 hours or more a week. (Id.) From the week ending April 19, 1997 through Fullard's last week of employment which was the week ending January 24, 1998, Fullard worked a total of 1641.70 hours. (Id.) The other full-time co-employees respectively worked: 1834.20 hours, 2565.50 hours, 2033.70 hours, and 1911.10 hours.⁶ (Id.)

While none of these episodes taken alone resulted in any disciplinary action, it appears that the cumulative effect of these incidents led Fullard's on a ninety day probation and ultimate termination.⁷ Before the probation decision was made, Moran had communicated with the Director of Human Resources, Marie DiDaniels ("DiDaniels") in September of 1997, that *both* Fullard *and* Gogel were disrupting the Department and questioning her authority. (DiDaniels

⁶ Fullard argues that this Court cannot consider the summary of time records presented by Argus because they are not admissible evidence for summary judgment purposes. (Def.'s Ex. K.) Specifically, he appears to argue that since the actual records are kept in Massachusetts the summaries were created during litigation and therefore cannot qualify as business records admissible under Federal Rule of Evidence 803(6). Defendant aptly responds by filing an affidavit of Carol Kline ("Kline"), the current Director of Human Resources including the original records from which the summary was prepared. Defendant also rightly directs this Court to Federal Rule of Evidence 1006 which allows for the admission of summary documents. Thus, Defendant has demonstrated the admissibility of the summary of time records.

Fullard also argues that the documents are actually billing records, thus claiming that Fullard was actually working more than 40 hours a week if he was billing 40 hours most weeks. This Court notes that the same could be said of the rest of the QA Auditors who were clearly working many more hours than Fullard if they were billing many more hours than Fullard. While Fullard may gain points for creativity, the record still clearly shows that his hours (both in actual time and in billables) pale in comparison to his co-workers.

Fullard also contends that there existed no clear overtime schedule. (Fullard Dep. at 58.) However, the summary records clearly show that his co-employees managed to put in more overtime hours despite the possible lack of scheduling.

Finally, Fullard posits that he was simply a more efficient worker. (Id.) However, even viewed in the light most favorable to plaintiff, the record still indicates that Fullard worked (and billed) the least amount of hours in his division.

⁷ It is unclear whether the jeans episode occurred before or after the review. It likely occurred afterwards because plaintiff contends that it occurred on October 31st and he sent an e-mail regarding his review on October 30th. (Def.'s Ex. P.) Thus, both the jeans incident and the removal of the zodiac sign incident occurred during Fullard's probation period.

Dep. at 39.) The record does not include descriptions of specific incidents illustrating Moran's problems with Gogel. Gogel and Fullard also complained to DiDaniels that Moran was showing favoritism to Rabuttino and not managing her department well. (Id. at 40-41.) As a result of these office problems, Argus hired an outside consultant, Robert Eddy ("Eddy"), to work with Moran. Eddy suggested that Moran place *both* Gogel *and* Fullard on an extended trial period. (Def.'s Ex. M.)

In late October, Moran, DiDaniels and Fullard met for Fullard's six-month review, at which point Fullard was placed on a three-month probation period. The following areas were outlined as goals for improvement: (1) regular attendance, (2) devoting the needed time, (3) accepting responsibility, (4) cooperating with all coworkers, (5) maintaining a courteous professional manner with all coworkers, (6) working as a team member, and (7) functioning on a stage that plans and sets appropriate priorities rather than from a directive. (Def.'s Ex. 0.)

In addition, Argus made the following available to Fullard in an effort to help him improve: (1) Conflict, Criticism [sic], and Anger audiotope, (2) Communication that works audiotope, (3) Making Teamwork Work audiotope, (4) How to Deal With Anger book, (5) Your Attitude is Showing book, (6) Conflict Management book, and (7) Working with Difficult People book. (Id.)

Fullard refused to sign the review because he did not agree with the critique. On October 30, 1997, Fullard sent an e-mail to Moran stating, "I will return the review but I will not sign this document because I do not agree at all." (Def.'s Ex. P.) The following exchange occurred at his deposition:

Q: Did you interpret the ... review [] as requiring you to take certain steps to

improve your performance?

A: I didn't interpret anything, because I did not agree.

Q: Did you interpret it as meaning if you didn't do certain things, you might not be employed by the company?

Q: As I just stated, I did not interpret it any way, because I did not agree. It was a simple I do not agree.

(Fullard Dep. at 121.) Fullard also testified that he told Hoberman that he "couldn't work over 40 hours until we could resolve these problems [with Moran]." (Id. 136-37.)

Despite this clear evidence of noncompliance, Fullard argues that it is relevant that he never stated to Moran that he was unwilling to work overtime. (Pl.'s Resp. at 10.) I note first that Moran testified that Fullard did tell her that he would not work overtime. (Moran Dep. at 38.) In addition, DiDaniels testified that when she, Moran and Fullard met for his six month review, Fullard "attempted to refute things [Moran] said, and indicated that he would not be compliant with some of her direction." (DiDaniels Dep. at 60.) Carol Kline ("Kline"), who succeeded DiDaniels, also testifies that Fullard told her that "as long as [Moran] was in charge of that department, [Fullard] would not work overtime." (Kline Dep. at 30.) Moreover, while Fullard never directly testified that he told Moran he was not going to work beyond 40 hours per week, he also never denied making such a statement. More importantly, the evidence clearly shows by Fullard's own admissions that he refused to accept the areas which Moran had highlighted as needing improvement, two of which were "regular attendance" and "devoting the needed time." His hours did not increase, and Moran continued experiencing problems with him. (DiDaniels Affidavit at ¶ 8.) Even viewed in the light most favorable to Fullard, the record is clear that Fullard acted in defiance of his probation, including refusing to work overtime. Fullard was terminated on January 28, 1998.

Approximately one month before Fullard was placed on probation, Gogel was similarly disciplined. The goals outlined for Gogel were as follows: (1) keeping to business issues rather than interpersonal goals, (2) working for the good of the department rather than on a personal level, (3) bringing problems/concerns through the proper channels, (4) slowing down and thoroughly comprehending the processes of your work, (5) completing the training file documentation, (6) revising the critical phase forms, and (7) revise two chapters in the critical phase training manual. (Def.'s Ex. 0.) Gogel was given the exact same audiotapes and books as Fullard had received. (Id.)

In stark contrast to Fullard's reaction to probation, Gogel, despite her disagreement with Moran's evaluation of her work, signed her review and worked on her identified weaknesses. (Gogel Dep. at 99-104.) Specifically, the following exchange occurred during Gogel's deposition:

Q. Now, I know you said you disagreed with this review. Did you ever tell Ms. Moran or Ms. DiDaniels or anyone else that you wouldn't take any action in response to this review?

....

A. Absolutely not.... I take constructive criticism to heart....I tried my best to do the things on here.

(Id. at 103-04.) Before the end of her ninety day probationary period, Gogel transferred to a different department within Argus and was never terminated.

Fullard argues that Gogel is a similarly situated employee outside his protected class who was more favorably treated. The differing responses Gogel and Fullard had to their respective probations lead me to conclude that plaintiff cannot present evidence from which a reasonable jury could conclude that Gogel was a similarly situated white employee who was more favorably

treated than Fullard. Gogel was not similarly situated because she behaved quite differently from Fullard. The fact that Gogel accepted criticism, irrespective of the fact that she felt the criticism may not have been warranted, and worked to change her workplace problems with Moran, distinguish their conduct. See Bullock, 71 F. Supp. 2d at 490 (defining “similarly situated”).⁸

I also conclude that the fact that Moran placed both a white employee and an African-American employee on probation, coupled with the fact that both employees perceived this action as unfounded, creates an inference that Moran was not treating Fullard less favorably which Fullard has not contradicted. Put another way, because Moran clashed not only with Fullard, who is African American, but also with a white employee, the only reasonable inference is that Moran was struggling to manage her department, not that she had any racial animus.⁹ The fact that she suffered from management problems is supported by the fact that Argus hired an outside consultant to help her. The Company President conceded that he told Moran she needed to improve her management skills. (Hoberman Aff. at ¶ 5.) Poor management, however, does

⁸ Fullard also attempts to compare himself to Moran, who suffered from management problems, but was not fired. The record, however, contains no evidence concerning how Argus treated Moran as an employee. It is unknown if she was ever placed on probation, and if so, how she responded. Thus there is insufficient evidence to conclude whether or not Moran could be compared to Fullard

⁹ Fullard spends considerable time briefing the fact that during her deposition, Moran was unable to recall many of the events which led to Fullard’s termination and needed her memory refreshed. This Court acknowledges that Moran did indeed struggle with her memory and that much of the evidence produced by Argus comes from deposition testimony of other Argus employees recalling their conversation with Moran at the time of Fullard’s employment at Argus.

Fullard argues that the deponents lacked first-hand knowledge of the events and that such evidence is therefore inadmissible as hearsay for the purposes of summary judgment. Defendant counters that Argus is not offering such evidence for the truth of the matter asserted, but rather to show Moran’s state of mind. This Court agrees with defendants that such evidence would be admissible for those purposes.

In addition, I note that much of Argus’ evidence also concerns Fullard’s own deposition testimony and an e-mail where he conceded that he disagreed with and refused to accept his probation.

not constitute an intent to racially discriminate.¹⁰

Fullard also alleges that his termination was contrary to Argus' policy of helping employees become better at their job instead of firing them. This Court finds that all the evidence shows that Argus gave both Fullard and Gogel a second chance, and that only Gogel took advantage of the opportunity. Thus, there is no permissible inference that Argus treated Fullard differently.

The remaining incidents on which Fullard relies likewise fail to demonstrate inferences of racial animus. As to the day Fullard left early, he was unable to point to any evidence that there was a company policy of liberal leave without first seeking permission. As to the reprimand regarding his voicing his opinion at the staff meeting, the evidence shows that Moran did not tolerate *any* employee questioning her authority. As to the day Fullard left early because of his son, the evidence still shows that Fullard left work without permission and before completing his work. All that remains is that Moran unfairly questioned why he was missing a meeting, and two incidents which occurred after Fullard was placed on probation: the time he was sent home to change out of his jeans, and the time he was forced to remove a zodiac sign from his work station. At best, these incidences show that Argus was occasionally fastidious with respect to managing Fullard's conduct, but they could not lead a reasonable factfinder to conclude that Fullard had proven by a preponderance of the evidence that plaintiff suffered racial

¹⁰ On a similar vein, Fullard suggests that it is somehow relevant that he does not recall whether he was told about the six month review and testified that the initials on the document claiming that he understood the policy were not his. (Fullard Dep. at 69.) While Fullard's memory may serve to raise a dispute as to whether he was in fact shown the six month review policy, the record also shows that Gogel was also reviewed after six months, thus I find no inference of intentional discrimination with respect to whether the six-month review was valid.

discrimination.¹¹

IV. Conclusion

For the foregoing reasons, this Court concludes that no reasonable jury could, upon the evidence proffered by plaintiff, find that he was discriminated against by his employer because of his race; thus, the motion of defendant for summary judgment will be granted. An appropriate order follows.

¹¹ Fullard also turns to Gogel's statement in her affidavit that she believed that Fullard treated differently because of his race. (Gogel Aff. at 2.) As this Court has concluded, however, Fullard has failed to direct this Court to incidents which would persuade a reasonable factfinder to find that Argus discriminated against Fullard because of his race.

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

ROY FULLARD,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ARGUS RESEARCH LABORATORIES, INC.,	:	
	:	
Defendant.	:	NO. 00-509

ORDER

AND NOW on this 6th day of June, 2001, upon consideration of the motion of defendant Argus Research Laboratories, Inc., for summary judgment (Document No. 16) pursuant to Rule 56 of the Federal Rules of Civil Procedure, the responses, reply, and sur-reply thereto, and having concluded for the reasons set forth in the foregoing memorandum that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, it is hereby **ORDERED** that the motion is **GRANTED**.

JUDGEMENT is hereby **ENTERED** in favor of Argus Research Laboratories, Inc. and against Roy Fullard.

This is a final order.

LOWELL A. REED, JR., S.J.