

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

RONALD ZAPPAN, : CIVIL ACTION  
Plaintiff :  
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v. :  
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PENNSYLVANIA BOARD OF :  
PROBATION AND PAROLE, :  
WILLIAM WARD, JAMES ROBINSON :  
GARY SCICCHITANO, EDWARD :  
JONES, and VERONICA THOMAS :  
Defendants : NO. 00-1409

MEMORANDUM AND ORDER

McLaughlin, J.

November \_\_\_\_, 2002

The plaintiff, Ronald Zappan, alleges that he was retaliated against by the Pennsylvania Board of Probation and Parole ("the Board") because he would not assist the defendants in discriminating and retaliating against African American employees.

Currently pending before the Court is the motion for summary judgment of all the defendants except Veronica Thomas.<sup>1</sup> The Court grants summary judgment for the defendants.

Mr. Zappan alleges that his direct supervisor, Willie E. Jones, made discipline requests of Mr. Zappan that

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<sup>1</sup> The summary judgment motion was filed on behalf of all the defendants except Veronica Thomas. When the Court refers to "the defendants" in this decision, it refers to all the defendants except Veronica Thomas.

discriminated against African American subordinates.<sup>2</sup> In counts one, six, and seven of his amended complaint, Mr. Zappan claims that he was retaliated against in violation of Title VII, 42 U.S.C. § 2000e, et seq. ("Title VII"), the First Amendment, and the Pennsylvania Human Rights Act, 43 Pa. Cons. Stat. Ann. § 955 ("PHRA"), because he complained about the requests to Mr. Jones, Gary Scicchitano, James Robinson, and Veronica Thomas. Because Mr. Zappan cannot establish a prima facie case for his Title VII and First Amendment claims and because he cannot show he was discriminated against in a way that allows liability to be imposed on individuals under the PHRA, these three claims fail.

In count three of his Amended Complaint, the plaintiff alleges that he was disciplined without being afforded procedural due process. This claim fails because the essential requirements of due process were complied with when Mr. Zappan was disciplined as Mr. Zappan was given notice and an opportunity to respond.

Mr. Zappan alleges in count five of his Amended Complaint that he was denied equal protection, but he cannot show he was treated differently than other similarly situated individuals. This claim, therefore, also fails.

Count two of the plaintiff's Amended Complaint claims that he was discriminated against in violation of the Age

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<sup>2</sup> The plaintiff's amended complaint referred to Mr. Jones as "Edward Jones," but it appears that Mr. Jones's name is "Willie E. Jones."

Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA"), but this claim was dismissed in its entirety on October 2, 2001.

Finally, the plaintiff concedes that there was not a substantive due process violation as alleged in count four of his Amended Complaint.

## I. BACKGROUND

### A. The Undisputed Facts

The Pennsylvania Board of Probation and Parole's operations are divided into three regions - Eastern, Central, and Western.<sup>3</sup> Each region is divided into districts. There is a district director in charge of each district. Def. Facts Ex. 7.<sup>4</sup>

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<sup>3</sup> In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

<sup>4</sup> Hereinafter, Exhibits to Defendants' Statement of Uncontested Material Facts in Support of Their Motion for Partial Summary Judgment will be labeled "Def. Facts Ex." followed by the exhibit number and page number. The Exhibits to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment will be labeled "Pl. Ex." followed by the exhibit number

The events in this case occurred in the Philadelphia District of the Eastern Region. This district is divided into three divisions - South, Northeast, and Northwest. A Deputy District Director manages each division. Each division consists of units managed by Parole Supervisors. Parole Agents and clerical staff work in each unit. Def. Facts Ex. 7.

The plaintiff, Ronald Zappan, began working for the Board in January 1972 as a Parole Agent. In 1985, the Board promoted Mr. Zappan to Parole Supervisor. In April 1990, the Board promoted Mr. Zappan to Deputy District Director. In his role as the Philadelphia District's Deputy Director, Mr. Zappan managed the South Division. Def. Facts Ex. 6, at 190-92.

In March 1995, Willie E. Jones was promoted by the Board to Allentown Deputy District Director. Mr. Zappan and others challenged the selection procedure used by the Board by filing an appeal with the State Civil Service Commission. In June 1996, the Commission found the procedure used to promote Mr. Jones improper, and the Allentown Deputy District Director position was vacated. Def. Facts Ex. 5; Def. Facts Ex. 11.

In April 1997, Mr. Jones was selected to be the

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and page number. The Exhibits to Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment will be labeled "Def. Ex." followed by the exhibit letter and page number. References to the transcript from the October 4, 2002 oral argument on this motion are indicated as "Tr." followed by the transcript's page number.

Philadelphia District Director.<sup>5</sup> This selection made Mr. Jones the plaintiff's direct supervisor. Mr. Jones and Mr. Zappan are both white males. Def. Facts Ex. 6, at 6, 23. 191; Def. Facts Ex. 7.

On June 4, 1997, Mr. Jones assigned six Pardon Board investigations to each of the three Philadelphia Deputy District Directors, including Mr. Zappan. These investigations were to be completed by July 10, 1997. Mr. Zappan's division did not complete all of the investigations by the July 10, 1997 deadline or by several extended deadlines. Def. Facts Ex. 22; Def. Facts Ex. 24.

There was a unit in Mr. Zappan's division responsible for opening Parole Re-entry Program ("PREP") cases. In the fall of 1997, there was a backlog of PREP cases. Mr. Jones assigned more clerical staff to Mr. Zappan's unit to assist with the backlog of cases. At some point, the backlog was eliminated, but by February 1998, there was another backlog of cases. Def. Facts Ex. 23; Def. Facts Ex. 27, at 25.

In early February 1998, Mr. Jones asked Mr. Zappan to discipline subordinates that were not doing their job. Mr. Zappan thought that Mr. Jones's intentions were "to terminate

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<sup>5</sup> The State Civil Service Commission administered an objective test to fifteen candidates before filling the Philadelphia District Director position. Mr. Zappan took the objective test and received the lowest score of the individuals taking the test. Def. Facts Ex. 20.

employees that were not meeting up to the standards of the Board." Def. Facts Ex. 9, at 14. Mr. Zappan testified that Mr. Jones made "a general statement [that] the individuals were not doing their jobs." According to Mr. Zappan, Mr. Jones "was sick and tired of poor work performance and . . . his plans were to terminate [these individuals]." Def. Facts Ex. 9, at 19.

Mr. Jones and Mr. Zappan were scheduled to meet with certain employees who Mr. Jones believed were not doing their job. According to Mr. Zappan, Mr. Jones "mentioned . . . only . . . Darryl Rankin at that point, and the other individuals that weren't doing their jobs." Def. Facts Ex. 9, at 19-20.

Mr. Zappan believed "that the individuals that . . . [Mr. Jones] was alluding to [in the discipline requests], had taken suits against the Board." Def. Facts Ex. 9, at 20. Mr. Zappan testified that he and Mr. Jones "had a discussion in reference to several individuals taking out a suit against the Board and getting settlements." Def. Facts Ex. 9, at 15. According to Mr. Zappan, Mr. Jones's response was "I don't give a damn what they got, if they're not doing their job, I'm going to have them terminated." Def. Facts Ex. 9, at 20. Before this conversation, Mr. Jones was unaware of any discrimination suits or settlements between a group of African American agents and the Board. Def. Facts Ex. 4, at 14-15.

According to Mr. Zappan, although Mr. Jones only

mentioned Mr. Rankin by name, Mr. Zappan thought that the individuals to whom Mr. Jones was alluding to with his discipline request were Henry Watkins, Howrhu Self, and Darryl Rankin. These individuals were African American employees working in Mr. Zappan's division. Mr. Watkins and Mr. Rankin were Parole Supervisors, and Mr. Self was a Parole Agent. Def. Facts Ex. 6, at 127; Def. Facts Ex. 9, at 14-15.

On February 11, 1998, Mr. Zappan conducted a pre-disciplinary conference with Mr. Watkins.<sup>6</sup> The conference was to discuss Mr. Watkins reporting late for work on February 6, 1998, Mr. Watkins's failure to follow certain Board procedures, and Mr. Watkins's failure to "keep adequate controls or assign overdue Pardon Board investigations to his staff for completion." Def. Facts Ex. 12.

On February 17, 1998, Mr. Zappan wrote Mr. Jones an email stating that he had recommended a verbal reprimand for Mr. Watkins. Mr. Zappan wrote it had "come to the point for discussion and upgraded disciplinary action regarding this employee." Mr. Zappan continued stating that, "The Pardon Boards are still not completed and my perception is that no arrangements had been made for staff completion." Mr. Zappan concluded that,

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<sup>6</sup> It is not clear whether Mr. Jones made discipline requests of Mr. Zappan before or after Mr. Watkin's pre-disciplinary conference. The Court does not resolve this dispute.

"This borders on insubordination or the fact that the employees behavior continues to be nonchalant in completing past and present directives given to [him] by myself or . . . the District Director." On February 18, 1998, Mr. Zappan wrote Mr. Jones a memorandum summarizing the situation with Mr. Watkins and recommending a verbal reprimand. The Board gave Mr. Watkins a written reprimand. Def. Facts Ex. 6, at 306-11; Def. Facts Ex. 12.

Mr. Jones and Mr. Zappan also discussed the performance of Hugh Young, a white employee. Mr. Jones did not feel that Mr. Young was doing his job. After this conversation, Mr. Jones did not ask Mr. Zappan to discipline Mr. Young. Mr. Zappan does not know if Mr. Jones ever disciplined Mr. Young. Def. Facts Ex. 9, at 28-29.

After his conversations with Mr. Jones regarding discipline for employees that were not doing their jobs, Mr. Zappan had separate conversations with Gary Scicchitano, Director of the Bureau of Human Resources for the Board; James Robinson, Director of the Office of Probation and Parole Services; and Veronica Thomas, Eastern Regional Director of the Board. Def. Facts Ex. 6, at 61, 124, 126.

Mr. Zappan told Mr. Scicchitano that Mr. Jones asked for discipline to be taken against certain individuals. Mr. Zappan stated that he thought the discipline might violate an out

of court settlement in which the Board stipulated that it would not discipline these individuals without an independent arbitrator. Mr. Scicchitano stated that he was not aware of any prior settlement. Def. Facts Ex. 6, at 121; Def. Facts Ex. 3, at 85.

Mr. Zappan asked Mr. Scicchitano if he could refrain from imposing the discipline requests of Mr. Jones that he thought were unwarranted. Mr. Scicchitano told him that he would have to put any objections to the discipline requests in writing. Def. Facts Ex. 6, at 121.

Mr. Zappan told Mr. Robinson that Mr. Jones was asking Mr. Zappan to "take unwarranted discipline against several individuals in [his] district." Def. Facts Ex. 6 at 61. Mr. Zappan also "advised [Mr. Robinson] of the fact that there was a prior out of court settlement which stipulated that any discipline taken against these individuals would have to have an independent arbitrator prior to issuing discipline." Def. Facts Ex. 6 at 61-62. Mr. Robinson informed Mr. Zappan that he was not aware of the prior settlement, and that Mr. Zappan needed to discuss any problems with discipline demands with Mr. Jones. Def. Facts Ex. 6, at 62, 124.

During a telephone call with Ms. Thomas, Mr. Zappan stated that Mr. Jones's was making discriminatory requests that Mr. Zappan believed might violate the prior settlement. Ms.

Thomas responded that she was unaware of the prior settlement. She told Mr. Zappan to discuss the matter further with Mr. Jones if he had concerns or needed more guidance. Def. Facts Ex. 6, at 124, 126.

Mr. Zappan never had any conversations with the defendant, William Ward, Chairman of the Board, regarding the discipline requests of Mr. Jones. Def. Facts Ex. 6, at 51-56.

On February 23, 1998, Mr. Jones told Mr. Zappan that he should not be late for work. On March 12, 1998, Mr. Zappan was 45 minutes late for work because of an accident on Interstate 95 South. He discussed the incident with Mr. Jones on March 16, 1998. Def. Facts Ex. 9, at 90-95, 99-100.

Mr. Jones wrote a memorandum to his supervisor, Ms. Thomas, regarding the March 16, 1998 meeting he had with Mr. Zappan. Mr. Jones recommended that Mr. Zappan be issued a written reprimand for violating the Board's Code of Conduct. Def. Facts Ex. 29. The Board considered Mr. Jones's memorandum, and on April 15, 1998, the Board issued Mr. Zappan a written reprimand and charged him with leave for the forty-five minutes he reported late to work on March 12, 1998. Def. Facts Ex. 18.

In March 1998, Mr. Zappan's secretary, Linda Jackson, was reassigned to Ms. Thomas.<sup>7</sup> During the time that Mr. Zappan

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<sup>7</sup> The parties disagree on the timing of the reassignment of Mr. Zappan's secretary. The Court assumes for purposes of this motion that the reassignment occurred when the plaintiff claims

did not have a secretary, he used other clerical staff within his division to perform the work done by Ms. Jackson. After four months, Marie Farley was assigned to be Mr. Zappan's secretary. Def. Facts Ex. 6, at 204, 206, 208-10; Pl. Ex. 4 at ¶ 15.

On March 26, 1998, Mr. Jones's requested from Mr. Zappan a report by March 30, 1998 on why there were PREP cases that were unopened in Mr. Zappan's division. Mr. Zappan submitted the report on April 1, 1998 without informing Mr. Jones that the report would be late. Def. Facts Ex. 9, at 118, 121-22.

Mr. Zappan was thirty minutes late to work on April 1, 1998 because of traffic on Interstate 95. Def. Facts Ex. 37, at 2; Def. Facts Ex. 35.

On April 7, 1998, Mr. Jones submitted an employee performance review for Mr. Zappan covering the period of March 1997 to March 1998. The overall rating given to Mr. Zappan by Mr. Jones on the employee performance review was "Needs Improvement." Def. Facts Ex. 21.

In the employee performance review, Mr. Jones wrote additional comments. Mr. Jones wrote that Mr. Zappan did not handle inquires properly or demonstrate a clear understanding of his position responsibilities. Additionally, Mr Jones wrote that Mr. Zappan's supervision of his division "consistently fail[ed] to meet quality and quantity expectations." According to Mr.

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that it happened.

Jones, monthly reports from Mr. Zappan's division were consistently late, and Mr. Zappan generally failed to monitor the timeliness requirements of work in his division. Def. Facts Ex. 21.

Mr. Jones stated that problem solving was "by far [Mr. Zappan's] weakest area." Mr. Jones commented that Mr. Zappan failed to recognize problems and lacked initiative to resolve the problems he did recognize. According to Mr. Jones, he consistently reminded Mr. Zappan about his assignments, and Mr. Zappan's only response was to forward Mr. Jones's email to someone else. Mr. Jones also wrote that Mr. Zappan did not follow up on problems. Def. Facts Ex. 21.

In commenting on Mr. Zappan's work habits, Mr. Jones noted that there were areas in Mr. Zappan's division that were "in a state of disarray," including the PREP unit which was "the primary example of where [Mr. Zappan] consistently failed to meet work expectations." From a supervision standpoint, Mr. Jones noted that Mr. Zappan "consistently failed to ensure compliance with established procedures or directives and/or initiate any corrective actions when necessary." Def. Facts Ex. 21.

Mr. Jones also mentioned Mr. Zappan's lateness and that Mr. Jones had taken disciplinary action against Mr. Zappan because of his lateness. Def. Facts Ex. 21.

Mr. Zappan had an opportunity to write his own comments

on the employee performance review. He wrote that he wanted to meet with other supervisors higher in the chain of command to discuss the review because he felt the review discredited and stigmatized him. On April 14, 1998, Mr. Zappan met with Mr. Jones regarding the employee performance review. On April 24, 1998, Mr. Zappan met with Ms. Thomas regarding the employee performance review. Def. Facts Ex. 6, at 271, 275; Def. Facts Ex. 9, at 39-41, 44-46, 50, 52-54, 69-73; 76; Def. Facts Ex. 21.

On April 8, 1998, Mr. Zappan wrote Mr. Jones a memorandum regarding a pre-disciplinary conference that Mr. Zappan held with Mr. Self, one of the subordinates that Mr. Zappan believed was the subject of Mr. Jones's discipline requests. At the conference, Mr. Zappan and Mr. Self discussed Mr. Self's "failure to adhere to his supervisor's orders to transfer required cases from his caseload as directed since January 1998 by his supervisor several times within this period." Additionally, Mr. Self "did not comply with his supervisor's orders to remain in the office on restriction on March 30, 1998 until his work project was completed." Mr. Self "left the work site at 5:00 P.M. without advising his supervisor that he was leaving." Mr. Zappan wrote that, "This is direct insubordination." At the conference, Mr. Self "stated that this conference was illegal due to the terms of his past lawsuit which specified that no action can be taken without a Special

Arbitration Board." As a result of this conference, Mr. Zappan recommended a minimum of a two day suspension for Mr. Self. The Board gave Mr. Self a three day suspension. Def. Facts Ex. 12.

On April 16, 1998, a pre-disciplinary conference was conducted by Mr. Jones for Mr. Zappan. The purpose of the conference was to discuss Mr. Zappan's reporting late to work on more than one occasion, Mr. Zappan not submitting the report due to Mr. Jones on March 30, 1998 until April 1, 1998, and the reasons provided by Mr. Zappan in the April 1, 1998 report for why PREP cases remained unopened. At the conference, Mr. Zappan told Mr. Jones that the April 16, 1998 memorandum he submitted was his reply to these issues. The meeting was ended at this point. Def. Facts Ex. 35.

In the April 16, 1998 memorandum, Mr. Zappan wrote that with respect to being late to work, it took him ninety minutes to drive to work and he did his best to arrive on time.<sup>8</sup> Mr. Zappan stated that the reason the March 30, 1998 report was submitted late was because he was waiting for answers from Mr. Young. Mr. Zappan wrote that the PREP cases were unopened "due to [a] lack

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<sup>8</sup> Mr. Zappan also wrote that he should not be disciplined for coming to work late because he worked late on March 11 and 12, 1998 with Mr. Jones and Mr. Young on a report requested by Mr. Jones about the status of PREP cases in Mr. Zappan's division. Mr. Jones wrote a memorandum to Ms. Thomas in which he stated that the plaintiff chose to work late on these days to finish a report for Mr. Jones after having the assignment for approximately a week. Def. Facts Ex. 9, at 105-07; Def. Facts Ex. 35.

of requested personnel." Def. Facts Ex. 34.

On April 28, 1998, Mr. Jones wrote a memorandum to Ms. Thomas discussing Mr. Zappan's April 16, 1998 pre-disciplinary conference. Mr. Jones recommended discipline for Mr. Zappan and explained why the explanations that Mr. Zappan provided in his April 16, 1998 memorandum did not justify Mr. Zappan's actions. Mr. Jones recommended one day suspensions for being late to work on more than one occasion and failing to submit on March 30, 1998 the report requested by Mr. Jones. Additionally, Mr. Jones recommended a three day suspension for Mr. Zappan's failure to address adequately the backlog of PREP cases or explain what steps were being taken to remedy the situation. Def. Facts Ex. 35. Mr. Jones's memorandum to Ms. Thomas regarding discipline for Mr. Zappan explained why the reasons given by Mr. Zappan in his April 16, 1998 memorandum were not sufficient. Def. Facts Ex. 35.

On May 21, 1998, the Board issued a letter suspending Mr. Zappan for five days. The reasons given for the suspension were that (1) the plaintiff was thirty minutes late to work on April 1, 1998 in violation of Mr. Jones's February 23, 1998 instructions that the plaintiff report to work every morning at 8:30 A.M.; (2) the plaintiff failed to provide the report Mr. Jones's requested on March 26, 1998 in a timely fashion by failing to submit it until April 1, 1998 instead of by the March

30, 1998 deadline; and (3) the plaintiff's work performance was unsatisfactory because of the backlog of PREP cases. Def. Facts Ex. 19.

Mr. Zappan appealed the written reprimand, the employee performance review, and the suspension to the State Civil Service Commission. On July 22, 1999, the Commission ordered the Board to expunge the employee performance review from Mr. Zappan's file and reimburse him for forty-five minutes of wages. Additionally, the Commission reversed the suspension. Def. Facts Ex. 33.

The Board appealed the Commission's decisions to the Commonwealth Court of Pennsylvania. That Court sustained the Commission's decisions with respect to the forty-five minutes of lost wages from the plaintiff's lateness on March 12, 1998 and the suspension. The Commonwealth Court reversed the Commission with respect to the employee performance review, thus reinstating the review. Def. Facts Ex. 37.

On August 25, 1998, Mr. Zappan sent Mr. Jones and Ms. Thomas a letter informing them that he planned to retire on August 28, 1998. In this letter, Mr. Zappan stated that he considered "this to be a forced retirement due to adverse conditions and treatment afforded [him] by the managers in Philadelphia." Mr. Zappan claimed he was forced to leave stating that, "It is with deep regret that [he] finalize[s] [his] career under these untimely and unwarranted circumstances." Zappan

Letter, Def. Facts Ex. 8.

B. Legal Proceedings

On June 27, 2000, the plaintiff filed an Amended Complaint with seven counts claiming that the defendants violated Mr. Zappan's rights under Title VII of the Civil Rights Act (count one), the Age Discrimination in Employment Act (count two), procedural due process (count three), substantive due process (count four), equal protection (count five), the First Amendment (count six), and the Pennsylvania Human Relations Act (count seven).

On October 2, 2001, by agreement of the parties, the Court dismissed all claims against the individual defendants in their official capacities, all of the claims against the Board except for the Title VII claim, and the ADEA claim in its entirety. The plaintiff conceded the substantive due process claim in his response to the defendants' motion for summary judgment. Pl.'s Resp. at 21. Additionally, at oral argument the plaintiff conceded his PHRA claim to the extent that it rested on age discrimination.

The remaining claims are against the Board for violating Title VII and against the individual defendants in their individual capacities for violating the plaintiff's procedural due process, equal protection, First Amendment, and

Pennsylvania Human Relations Act rights.

## II. DISCUSSION

### A. Title VII

The decision whether to grant or deny summary judgment in an employment discrimination action under Title VII is governed by the Supreme Court's burden shifting analysis in McDonnell-Douglass v. Green, 411 U.S. 792 (1973), recently clarified in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).

Under this analysis, the plaintiff must first make out a prima facie case of discrimination. Reeves, 530 U.S. at 142. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the employment action at issue. Id. Because the ultimate burden must always rest with the plaintiff, the defendant is not required to show by a preponderance of the evidence that it was, in fact, motivated by this particular reason. Rather, the defendant must merely present a reason for the action, which, if believed, would be legitimate and non-discriminatory.

In order to survive summary judgment, the plaintiff must then present evidence which shows that the proffered explanation is "unworthy of credence" or, alternatively, that the real motivation was more likely than not discriminatory. Id. at

143.; Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

### 1. Prima Facie Case

To establish a prima facie case of illegal retaliation, a plaintiff must show that: "(1) he engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action." Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); see also Abramson v. William Patterson College of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001).

#### a. Protected Activity

An employee's opposition to unlawful employment practices is protected activity under Title VII. The Third Circuit has noted that protected activity can include formal charges of discrimination filed by an employee "as well as informal protests of discriminatory employment practices, including making complaints to management . . . and expressing support of co-workers who have filed formal charges." Abramson, 260 F.3d at 288 (quoting Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (internal citations omitted)).

Opposing the conduct of the defendants cannot be protected activity if no reasonable person could have believed

that the actions taken by the defendants that the plaintiff complained about violated Title VII. See Clark County School Dist. v. Breeden, 523 U.S. 268, 271 (2001) (per curiam). In Clark County, the Supreme Court held that because no reasonable person could have believed that the underlying incident at issue violated Title VII, the employee could not make out a retaliation claim based on internal complaints about the incident.

The conduct that the plaintiff contends was discriminatory was Mr. Jones's instruction that Mr. Zappan should discipline subordinates that were not doing their job. The plaintiff claims that his protected activity was complaining to Mr. Jones, Mr. Scicchitano, Mr. Robinson, and Ms. Thomas about Mr. Jones's "discriminatory" conduct. Under Clark County, Mr. Zappan's opposition to Mr. Jones's request could only be protected activity if a reasonable person must be able to believe that Mr. Jones's conduct was discriminatory.

The request made by Mr. Jones was a general demand not based on race. He wanted people who were not doing their jobs to be terminated regardless of their race. Mr. Jones made no reference to either the race of individuals who needed to be disciplined or even to specific individuals who were all of one race. It was the plaintiff who concluded that Mr. Jones's demands were racially motivated because the plaintiff decided that Mr. Jones was referring to three African American employees

even though Mr. Jones did not mention these people.

Even if Mr. Jones demands were actually directed at the three individuals that Mr. Zappan thought were the subject of the demands, Mr. Jones was not discriminating against the individuals. Mr. Zappan acknowledges that Mr. Watkins and Mr. Self were in need of discipline going so far as to tell Mr. Jones that both employees were guilty of insubordination. Mr. Zappan also recommended discipline for both employees that only differed marginally from what each employee received. It is not discrimination to seek discipline for employees who are guilty of insubordination.

With respect to the individuals mentioned by name in the conversation between Mr. Jones and Mr. Zappan - Mr. Rankin and Mr. Young - there is no evidence that Mr. Jones acted discriminatorily towards either employee. Mr. Zappan stated that Mr. Rankin was mentioned because he was already scheduled for a pre-disciplinary conference of his own. Discussing discipline for an individual who is already scheduled for a pre-disciplinary conference is not discriminatory. As to Mr. Young, Mr. Jones did talk about Mr. Young's performance with Mr. Zappan, but he never requested Mr. Zappan to discipline Mr. Young. The conversation with Mr. Zappan about the performance of a subordinate is not discriminatory conduct without more.

Additionally, Mr. Jones was unaware of any prior

settlement between the African American employees and the Board. Although at oral argument, the plaintiff's counsel argued that Mr. Jones was retaliating against the employees for bringing the prior lawsuit, there is no evidence in the record that Mr. Jones knew of the prior suits or settlement before he discussed with Mr. Zappan disciplining any employees.

The concern that the plaintiff expressed in his conversation with Mr. Jones and his later conversations with Mr. Robinson, Mr. Scicchitano, and Ms. Thomas was that imposing discipline on the African American employees violated a settlement agreement. The plaintiff's concern is almost more that the settlement agreement was being breached than that there was discrimination.

Because there is no evidence of conduct by the defendants that would allow a reasonable person to find a violation of Title VII, opposing the defendants' conduct is not protected activity.

b. Adverse Employment Actions

An adverse employment action is an action taken by an employer that is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

The plaintiff argues that the Board took the following adverse employment actions: (1) reassigning the plaintiff's secretary, (2) leaving the plaintiff without secretarial support for four months, (3) forcing the plaintiff to work overtime, (4) issuing a written reprimand for the plaintiff's being late to work, (5) issuing a negative employee performance review for 1997-98, and (6) suspending the plaintiff for five days.

Reassignment of one's secretary, being left without clerical support, and having to work overtime are not the type of actions that are serious and tangible enough to be adverse employment actions. The Court, however, assumes for the purposes of this motion that the suspension, the written reprimand, and the employee performance review constitute adverse employment actions.

c. Causation

Mr. Zappan rests his causation argument on the temporal proximity between his alleged protected activity and the adverse employment actions. Plaintiff's Opp. at 45-46; Tr. 24-27.

Although temporal proximity can be used to infer causation, it is enough by itself only if it is unusually suggestive. Krouse v. American Sterlizer Co., 126 F.3d 494, 507 (3d Cir. 1997). The Court is aware of one case in which the Third Circuit found temporal proximity alone to be enough to

establish causation. In that case, the adverse employment action occurred two days after the protected activity, and there were no allegations of any wrongdoing by the employee in those two days. Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989).

Mr. Zappan's protected activity was in February 1998. The first adverse employment action occurred in April 1998. This makes the time difference between the protected activity and the adverse employment actions two months. The timing is not unusually suggestive enough to demonstrate causation without more evidence. The two month separation in the present case is much different from the two day separation in Jalil.

As the two month separation between the protected activity and the adverse employment action is not unusually suggestive enough to establish causation, the plaintiff has failed to show the causation element of a Title VII prima facie case.<sup>9</sup>

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<sup>9</sup> The Court notes that the Third Circuit has looked beyond temporal proximity when determining if the causation element is met in certain situations. See, e.g., Weston, 251 F.3d at 432; Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280-81 (3d Cir. 2000). However, evidence other than temporal proximity is often the type of evidence that would be used to show a legitimate non-discriminatory reason for an employment action is a pretext. See Weston, 251 F.3d at 432. The Court analyzes the other evidence that could be relevant to causation in the separate section on pretext. Because the Court finds that the reasons offered by the defendant were not a pretext, the other evidence would also not support an inference of causation.

## 2. Pretext

Even if the plaintiff established a prima facie case, the defendants presented legitimate, non-discriminatory reasons for giving the plaintiff a written reprimand, issuing the employee performance review, and suspending the plaintiff. The plaintiff could survive a summary judgment motion if he can show that these reasons were a pretext. This can be done by showing that the reasons were unworthy of credence or alternatively that the reasons were more likely than not discriminatory. See Fuentes, 32 F.3d at 764.

Mr. Zappan received the written reprimand for being late to work on March 12, 1998 after a pre-disciplinary conference discussing the lateness. The employee performance review came after Mr. Zappan was late turning in reports, failed to supervise subordinates to ensure that work was being completed in a timely fashion, and oversaw a division with a backlog of cases. Finally, Mr. Zappan was suspended for reporting to work late, submitting a report late when Mr. Jones gave a fixed deadline, and failing to provide an explanation that Mr. Jones deemed satisfactory as to why there was a backlog of PREP cases.

The plaintiff concedes that on February 23, 1998 he was told not to be late to work and that he was late on March 12, 1998 and April 1, 1998. He also admits that the report due to Mr. Jones on March 30, 1998 was not submitted until April 1, 1998

and that he did not inform Mr. Jones that the report would be late. Because the plaintiff concedes these facts, the legitimate, non-discriminatory reasons for the defendants' actions are worthy of credence to the extent that the reasons rely on these facts.

Additionally, there is no other evidence showing that the legitimate, non-discriminatory reasons offered by the defendants were really discriminatory. Mr. Zappan was late in turning in reports to Mr. Jones between June 1997 and April 1998. There also was a backlog of cases in Mr. Zappan's division. Mr. Zappan was not disciplined until April 1998 after he was given opportunities to catch up on his reports and the backlog of cases. Even after the employee performance review, Mr. Jones provided Mr. Zappan with opportunities to explain why he was having problems at work. Mr. Jones's actions in providing Mr. Zappan with opportunities to rectify problems does not demonstrate that the reasons given by the defendants for their actions were really discriminatory.

The plaintiff cannot show protected activity or causation as required to make out a prima facie case under Title VII. Even if the plaintiff established a prima facie case, he has not shown that the defendants' legitimate, non-discriminatory reasons were a pretext. The Court, therefore, grants summary judgment to the Board on the Title VII claim.

B. PHRA

Individuals can be held liable under the PHRA if they "aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice." 43 Penn. Cons. Stat. § 955(e).

The individual defendants cannot be held liable under the PHRA because the Court found that the Board did not engage in unlawful employment discrimination practices under Title VII. The individual defendants could only be held liable for aiding and abetting the unlawful practices. The individual defendants could not aid and abet unlawful practices that did not exist.

Summary judgment, therefore, is granted to the individual defendants on the PHRA claim.

C. First Amendment

Governmental action against an individual in retaliation for exercising his First Amendment rights is actionable under 42 U.S.C. § 1983. To prevail on this retaliation claim, a public employee, such as Mr. Zappan must establish: (1) that there was protected activity, (2) that the plaintiff's interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees, and (3) the protected activity was a substantial or

motivating factor in the alleged retaliation. Baldassare v. New Jersey, 250 F.3d 188, 194-95 (3d Cir. 2001).

To satisfy the protected activity prong, the plaintiff's speech must be about a matter of public concern. For a complaint about discrimination to be a matter of public concern, it must sufficiently contain allegations of illegal discrimination. See Barber v. CSX Dist. Serv., 68 F.3d 694, 702 (3d Cir. 1995). As with the Title VII claim, the evidence does not allow for a finding that Mr. Zappan engaged in protected activity by opposing illegal discrimination because the discipline demands that Mr. Zappan opposed were not discriminatory in nature.

Additionally, the speech was not a substantial or motivating factor in the actions that the defendants took. The Third Circuit has looked at Title VII causation standards in evaluating whether a factor is a "substantial or motivating factor" in the First Amendment context. For instance, the Court of Appeals in Azzaro v. County of Allegheny, 110 F.3d 968, 981 (3d Cir. 1997), held that the same facts and considerations were relevant in evaluating causation under Title VII and the First Amendment. As the plaintiff was not able to establish causation for his Title VII claim, his First Amendment claim also fails because he cannot show that his speech was a substantial or

motivating factor in the actions taken by the defendants.<sup>10</sup>

Summary judgment, therefore, is granted to the individual defendants on the First Amendment claim.

#### D. Procedural Due Process

Section 1983 allows a plaintiff to recover for procedural due process violations, but this claim "is dependent upon the denial of a constitutionally protected property or liberty interest." Piecknick v. Pennsylvania, 36 F.3d 1250, 1256 (3d Cir. 1994).

When a plaintiff has a protected property interest, a pre-deprivation hearing of some sort is generally required to satisfy due process concerns.<sup>11</sup> The process need not always be elaborate, depending, in part, on the importance of the interests at stake and on subsequent proceedings. The essential requirements of due process are notice and an opportunity to respond. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." Cleveland Bd. of Educ. v.

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<sup>10</sup> Because there was no protected activity and the alleged protected activity was not a substantial or motivating factor in the alleged retaliation, the Court expresses no view on whether the plaintiff's interest outweighed the employer's countervailing interest.

<sup>11</sup> The defendants do not appear to dispute that the plaintiff had a property interest in his employment, and the Court assumes that he does for the purposes of this motion.

Loudermill, 470 U.S. 532, 545-547 (1985).

The plaintiff has alleged that he was denied procedural due process because the defendants deprived him of his property interest in his employment as Deputy District Director, by wrongfully disciplining him without providing adequate procedural protections. Each time Mr. Zappan was disciplined, however, he received adequate process.

Mr. Zappan was provided with adequate notice and an opportunity to respond to the employee performance review. Mr. Zappan was allowed to write his own comments on the employee performance review. He also met with Mr. Jones on April 14, 1998 and Ms. Thomas on April 24, 1998 to discuss the employee performance review. The meeting to discuss the employee performance review and the opportunity for Mr. Zappan to write in his own comments provided the plaintiff with notice and an opportunity to respond.

With respect to the written reprimand, Mr. Zappan discussed his March 12, 1998 tardiness on March 16, 1998 with Mr. Jones. Mr. Zappan had notice and an opportunity to respond being able to discuss the event underlying the reprimand with Mr. Jones.

With respect to the suspension, the plaintiff submitted memoranda stating his position as to why disciplinary action should not be taken. Mr. Zappan also was given a pre-

disciplinary conference on the issues underlying the suspension at which time he elected to rest on the memoranda he submitted instead of discussing the issues with Mr. Jones. Mr. Zappan was given notice and an opportunity to respond before the suspension. The defendants comported with procedural due process before suspending Mr. Zappan.

The Court, therefore, grants summary judgment to the individual defendants on the procedural due process claim because Mr. Zappan was afforded the essential requirements of procedural due process with respect to the actions taken against him by the defendants.

#### E. Equal Protection

In order to prevail on a claim under section 1983 for a denial of equal protection, the plaintiff must demonstrate that he received different treatment from that received by other individuals similarly situated. Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). The plaintiff must also show that the different treatment was based upon an improper motive such as membership in a protected class. Id.

The plaintiff claims that he was treated differently than other individuals, namely white Deputy District Directors at the Board. He also claims that the different treatment was retaliation for the plaintiff's refusal to participate in the

defendants' discrimination and retaliation against the African American employees.

Mr. Zappan has not pointed to record evidence suggesting that he was treated differently from other similarly situated supervisors. He states in his brief that "other directors were provided with clerical staff, and thus were not responsible for clerical duties, in addition to their usual job duties." Pl.'s Opp. at 25. There is no record cite, however, to support this. Even if there were record evidence on this matter, this would only apply to Ms. Thomas, who re-assigned his secretary, and does not implicate Mr. Jones, Mr. Scicchitano, or Mr. Robinson.

Because the plaintiff has not produced evidence to support his equal protection claim against any of the individual defendants, summary judgment on the equal protection claim is granted to all of the individual defendants.

An appropriate order follows.

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

RONALD ZAPPAN, : CIVIL ACTION  
Plaintiff :  
 :  
v. :  
 :  
PENNSYLVANIA BOARD OF :  
PROBATION AND PAROLE, :  
WILLIAM WARD, JAMES ROBINSON :  
GARY SCICCHITANO, EDWARD :  
JONES, and VERONICA THOMAS, :  
Defendants : NO. 00-1409

ORDER

AND NOW, this day of November, 2002, upon consideration of the defendants' Motion for Summary Judgment (Docket No. 50), the plaintiff's opposition thereto, and supplemental filings by the parties, and following oral argument, IT IS HEREBY ORDERED that:

1. The motion is GRANTED and JUDGMENT IS HEREBY ENTERED for the all of the defendants except for Veronica Thomas and against the plaintiff for the reasons set forth in a memorandum of today's date.

2. The Omnibus Motion in Limine by Defendant Pennsylvania Board of Probation and Parole, Defendant William Ward, Defendant James Robinson, Defendant Gary Scicchitano, and Defendant Edward Jones (Docket No. 59) is DENIED as moot.

3. The plaintiff shall inform the Court by November 26, 2002, how it intends to proceed in this case with respect to Veronica Thomas.

BY THE COURT:

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MARY A. MCLAUGHLIN, J.