

Branch, supervised by John Jedwabney. From approximately 1994 to July 1999 Cassaday was plaintiff's first line supervisor while plaintiff was an accountant in the Resource Management Office. Donnelly was plaintiff's second line supervisor from November 1994 until July 1999.

Plaintiff filed this action on October 3, 2003, after failing to prevail in an EEOC proceeding addressing five formal complaints he filed against the Army Corps of Engineers between April and August 1999.² In plaintiff's pro se complaint he wrote, "I am filing this lawsuit to appeal the decision by EEOC." The EEOC decision addressed the following seven incidents of discrimination and retaliation alleged by plaintiff:

- 1) he was denied off-site Corps of Engineers Financial Management Systems (CEFMS) training from August 19-21, 1998;
- 2) his supervisor William Cassaday harassed him by telling him he wanted to "ride all over Florida on a paid vacation by the government;"
- 3) he was denied an upgrade to a GS-11 position on August 30, 1998;
- 4) his supervisor William Cassaday openly attacked, humiliated and harassed him about his leave on April 12, 1999;³
- 5) he was not provided an opportunity to attend CEFMS training on or about April 26, 1999;
- 6) he was not selected for a GS-510-11 Staff Accountant position on May 31,

²Plaintiff's allegations were investigated and testimony was taken at a fact-finding conference on January 27 and 28, 2000. On November 2, 2001 an Amended Order of Judgment was entered in favor of defendant. The EEOC affirmed the final order on July 2, 2003.

Plaintiff's suit was timely filed. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-16(c), an alleged victim of discrimination may file a complaint in federal district court either (1) within thirty days of final action by the EEOC or (2) after 180 days pass from the filing of the administrative complaint, if there is no final agency action.

³In his Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, plaintiff does not appear to discuss or respond to defendant's arguments regarding the fourth incident listed here.

1999

7) he was reassigned from his GS-510-9 Accountant position in the Resource Management Office to a GS-511-9 Auditor position in the Internal Review Office.

A. First Incident: Non-Attendance at the August 1998 Training

Plaintiff alleges that he was denied the opportunity to attend CEFMS training in Jacksonville Florida in August 1998 because of his race. Other than his own statements that he felt he was denied training because he was African-American, plaintiff has provided no additional evidence to support his allegation that the decision to allow another employee to attend the training in his place was based on his race. Plaintiff's pay and job duties were not impacted by his failure to attend the training.

Defendant asserts that plaintiff was selected to attend the training, but that he ultimately did not travel to the training because he did not complete his travel orders for the training after his request for a rental car was denied. Plaintiff's rental car request was denied because it was not cost effective for the government and because shuttle transportation was available. A rental car was not authorized for the employee who ultimately attended the training in plaintiff's place or for other employees attending the training.

B. Second Incident: Alleged "Ride All Over Florida" Comment

Plaintiff alleges that in response to his request for a rental car, Cassaday replied that he wasn't going to give him a rental car to "ride all over Florida." He asserts that the statement, which Cassaday denies having made, was a "racist slur." The only basis for plaintiff's allegation of race discrimination is his own feeling that this statement was racist. Plaintiff also alleges that the incident was retaliatory as Cassaday had been involved in some of plaintiff's previously filed

EEOC complaints.

C. Third Incident: August 30, 1998 Failure to Promote to GS-11 Position

On August 30, 1998, Diane Vallone, who is Caucasian, was promoted to a GS-3-43-11 management analyst position. Plaintiff alleges that he was discriminated against when she was promoted because he believed he was equally or better qualified than Vallone for the position. He alleges his nonselection was also a reprisal for his prior protected activities involving Donnelly. Plaintiff has not produced any evidence of his and Vallone's relative qualifications for the GS-11 position or of Donnelly's role in determining that Vallone should be promoted.

Defendant asserts that plaintiff was not working in the same branch of the Resource Management Office as Vallone and that he was not performing the same types of duties as Vallone was prior to her promotion. Defendant further asserts that Vallone, who was employed in the Budget Manpower Management Branch, was upgraded to a GS-11 because her supervisor Jedwabney's review of her position revealed that she was already performing the duties of a GS-11. Her job description was thus revised to accurately reflect her responsibilities and the GS-11 position was not advertised because Vallone was upgraded through an accretion of duties.

D. Fourth Incident: April 12, 1999 Leave

Plaintiff originally alleged that Cassaday approached him "somewhere in the vicinity of [] the copier" on April 12, 1999 and that he "openly verbally attacked, intimidated and harassed" him because he took annual leave on Friday and Monday and then called in sick on Tuesday. Defendant alleges that Cassaday approached plaintiff in order to resolve a disparity between a timesheet noting that plaintiff had been at work on April 5 and a leave request plaintiff submitted for the same day. Cassaday testified that he neither raised his voice nor spoke to plaintiff in the

vicinity of other employees.

E. Fifth Incident: Non-Attendance at April 1999 Training

In addition to the CEFMS training in Florida, plaintiff alleges he was not given the opportunity to attend the Financial Management for Emergency Management Programs Training offered in April 1999. Defendant asserts that the employees who attended the CEFMS training were selected to attend the training program because it was a follow-up course to the 1998 CEFMS training. Plaintiff admits that to his knowledge only employees who attended the first course attended the second course. According to plaintiff's testimony at the initial fact-finding conference an African-American budget analyst was among the employees who attended the training.

F. Sixth Incident: May 1999 Failure to Promote to GS-11 Staff Accountant Position

A GS-11 staff accountant was needed in the Resource Management Office in Spring 1999 because of an increase in Superfund work. Donnelly was named the subject matter expert for the employee selection process and Major Kevin Elliott was the selecting official. Donnelly developed a selection plan for the position using as a model a plan previously developed by Elliot. In this instance Donnelly was selected as the subject matter expert rather than Cassaday out of a desire to avoid any potential for bias or favoritism. It was known that Cassaday and plaintiff had a strained relationship and Cassaday would have been plaintiff's first-line supervisor if he had been selected for the GS-11 position.

The GS-11 position was advertised and Donnelly specifically informed plaintiff of the job opening. Both plaintiff and Helene Wasakanes, a Caucasian, applied for the position using the automated Resumix system. The candidates' Resumix applications included their resumes,

training, position descriptions, grade levels and performance appraisals. Defendant alleges that the information submitted to Resumix was the only information used in the review of candidates. Personnel files and other sources of information about the candidates were not considered.

Using the Resumix information, Donnelly determined the candidates' relevant knowledge, skills and abilities and rated each of the five components of the candidates' qualifications on a scale of 0-4, resulting in a maximum score of 20 points per candidate. Because plaintiff's application received a score of 15 and Wasakanes' application received a score of 20, she was ultimately awarded the position. Wasakanes was given higher scores than plaintiff on her ability to provide program accounting advice, her knowledge of accounting system software and her ability to communicate orally and in writing.

Plaintiff asserts that "[i]t is completely inconceivable that Mr. Donnelly expects a reasonable person to believe he made his entire decision . . . solely from the resumes submitted." However, he has not submitted evidence that Donnelly considered outside information in making his decision or that outside information should have been used in the hiring process. Plaintiff has also not submitted evidence to support his allegation that his abilities and experience made him better qualified than Wasakanes for the GS-11 position.

G. Seventh Incident: Reassignment to Internal Review Office

On July 9, 1999, two months after filing an EEOC complaint regarding Wasakanes' promotion, plaintiff was sent a notice of a proposed reassignment to a GS-9 auditor position in the Internal Review Office due to a decline in the Resource Management Office's workload and a concurrent need for an auditor in the Internal Review Branch. The notice included an option to accept or decline the proposed reassignment and, if declined, to include a written response

including reasons why the reassignment should not be effected. Plaintiff accepted the reassignment without objection, signing the notice on July 19, 1999. In his new position, plaintiff received the same pay and his hours and tour of duty were unchanged. Plaintiff admitted that his new supervisor treated him fairly. He was also advised by the Merit Systems Protection Board that the reassignment was not a downgrade or an adverse action. Plaintiff now alleges the reassignment resulted from discrimination and was also in retaliation for his prior EEOC complaints.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. The Supreme Court has recognized that the moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The nonmoving party may not rest upon the mere allegations or denials of the party’s pleading. See Celotex, 477 U.S. at 324.⁴

⁴In support of his claims, plaintiff has presented the testimony of several of his co-workers. I can only consider this testimony to the extent that it constitutes their personal knowledge. Plaintiff’s co-workers’ opinion testimony is insufficient to establish that there is a genuine issue for trial. See, e.g. Keating v. Bucks Cty. Water & Sewer Auth., No. 99-1584, 2000 WL 1888770, at *4 (E.D. Pa. Dec. 29, 2000) (“Averments based on mere belief, rather than personal knowledge, must be disregarded.”).

I must determine whether any genuine issue of material fact exists. An issue is “material” only if the dispute over facts “might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party “could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (citation omitted). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

IV. DISCUSSION

Plaintiff argues defendant discriminated against him on the basis of his race and in retaliation for his prior EEOC activity. The Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a case alleging discriminatory treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).⁵ The plaintiff first

has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie

⁵Title VII makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a)(1).

In addition to his claims under Title VII, in plaintiff’s surreply in opposition to defendant’s motion for summary judgment, he argues that his complaint should be broadly construed or amended to include 42 U.S.C. Section 1981 as a basis for those race discrimination claims he makes which are not ripe for decision or which may be time barred under Title VII. Plaintiff’s Section 1981 claims can be disposed of quickly, as in Brown v. General Services Administration, 425 U.S. 820 (1976), the Supreme Court held that Title VII is the exclusive remedy for federal employees alleging employment discrimination. Therefore plaintiff cannot maintain an employment discrimination claim against his federal employer under Section 1981. See, e.g., Crumpton v. Potter, 305 F. Supp. 2d 465, 468 n.4 (E.D. Pa. 2004).

case, the burden shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee's rejection.” Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't. of Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (internal citations omitted), quoting McDonnell Douglas, 411 U.S. at 802, 804. See also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

A. Prima Facie Case

In order to prove a prima facie case of race discrimination plaintiff must show he is a member of a protected class; he suffered an adverse employment action; and that the unfavorable action gives rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802; Gaspar v. Merck & Co., Inc., 118 F. Supp. 2d 552, 555 (E.D. Pa. 2000). Plaintiff can establish the first element of a prima facie case of discrimination based on race as he is an African-American and thus is a member of a class protected by Title VII.

1. Adverse Action

Plaintiff cannot establish he suffered any adverse employment action in connection with the first, second, fourth, fifth and seventh incidents alleged in his prior EEOC proceeding and he therefore fails to establish a prima facie case of discrimination as to these claims. The Supreme Court defines an adverse employment action as a “significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits.” Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

The first and second incidents, which involved Cassaday’s decision not to authorize plaintiff’s request for a rental car for the Florida training do not constitute adverse action. To

establish an adverse employment action by the employer, plaintiff must show that the adverse action was “material.” Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 (3d Cir. 1991), citing Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 273 (7th Cir. 1996). Plaintiff’s decision not to attend the Florida training after the rental car was not authorized did not result in a significant change in his employment status. He was not fired or demoted because he refused to attend the training without a rental car. Plaintiff’s allegation that Cassaday told him he could not have a rental car to “drive all over Florida.” is also insufficient to constitute an adverse employment action. See, e.g. Robinson, 120 F.3d at 1300 (holding oral reprimands and derogatory comments failed to rise to the level of an adverse employment action).⁶

Plaintiff cannot establish that the fourth incident, his exchange with Cassaday regarding his timesheet and leave request, resulted in an adverse employment action. An adverse action does not occur when an employer questions an employee’s job performance or reminds him/her of office policies. See Seebald v. Praxair, Inc., No. 03-2172, 2004 U.S. Dist. LEXIS 2643 (E.D. Pa. Jan. 21, 2003) (“Reminding someone of office policies is a normal work-related administrative matter and is not an ‘adverse action’ within the meaning of the Act.”); Harris v. SmithKline Beecham, 27 F. Supp. 2d 569, 579 (E.D. Pa. 1998) (holding the questioning of an

⁶Even if plaintiff could establish that the denial of his request for a rental car and his subsequent non-attendance at the Florida training was an adverse action, he cannot establish that these incidents are sufficient to create an inference of discrimination. Plaintiff has presented no evidence that his request for a rental car for the Florida training would have been granted had he been Caucasian or that Cassaday’s decision to deny his rental car request was motivated by plaintiff’s race. Although plaintiff’s deposition testimony alleged that Caucasian employees were provided with rental cars for other training events, Cassaday testified that no employees of any race were authorized to have rental cars for the Florida training. Cf., Johnson v. Souderton Area Sch. Dist., No. 95-7171, 1997 WL 164264 at * 5 (E.D. Pa. April 1, 1997). (finding summary judgment appropriate where “[t]here was nothing other than Johnson’s bald allegation in the Amended Complaint to indicate that the events were motivated by discrimination or retaliation”).

employee's performance did not constitute an adverse action). Even if Cassaday did raise his voice at plaintiff, "[m]erely being yelled at by your supervisor does not rise to the level of an adverse employment action. Bunyon v. Henderson, 206 F. Supp. 2d 28, 30 (D.D.C. 2002), citing Colbert v. Chao, 2001 WL 710114 (D.D.C. 2001); Russ v. Van Scoyoc Assoc., Inc., 122 F.Supp.2d 29, 32 (D.D.C. 2000). "Title VII does not guarantee a work environment free of stress." Johnson v. Souderton Area Sch. Dist., No. 95-7171, 1997 WL 164264 at * 6 (E.D. Pa. April 1, 1997).⁷

The fifth alleged incident, plaintiff's non-attendance at an April 1999 training seminar, also fails to constitute an adverse action. As with the earlier training event, plaintiff was not terminated or demoted or given a decreased salary as a result of his non attendance at the Financial Management for Emergency Management Programs Training. Cassaday testified that the training was not necessary for plaintiff's position and that the training in question was a follow up to the August 1998 training in Florida. Plaintiff either asked to attend the training and said he was not interested or, if he was not asked to attend the course, as he asserts, it was because he had not attended the initial training. At the January 2000 fact-finding conference, plaintiff testified that all of the employees supervised by Cassaday who attended the April 1999 training had attended the prior training event.⁸

⁷Plaintiff appears to omit any reference to his claim regarding the alleged confrontation with Cassaday in his memorandum of law in opposition to defendant's motion for summary judgment. To defeat a motion for summary judgment, Rule 56(c) requires that the nonmoving party designate evidence of specific material disputed facts. See Celotex, 477 U.S. at 324. Because plaintiff has not done so, his claim must fail.

⁸As with the other training related incidents, even if plaintiff could establish that his having not been asked to attend the April 1999 training was an adverse action, he has not established that Caucasian employees in the Resources Management Office who had not attended the initial training were invited to attend the April 1999 training. Without specific evidence that

Plaintiff has also not established a prima facie case of discrimination based upon his transfer to the Internal Review Office, the seventh incident alleged in his prior EEOC proceeding, because the transfer does not qualify as an adverse employment action. Although a “reassignment” may constitute an adverse action under Burlington Industries Inc. v. Ellerth, 524 U.S. 742, 761 (1998), “[i]t is important to take a plaintiff’s job-related attributes into account when determining whether a lateral transfer was an adverse employment action.” DiIenno v. Goodwill Indus., 162 F.3d 235, 236 (E.D. Pa. 1998) (holding transfer of plaintiff to a job whose conditions she could not physically tolerate constituted an adverse action). Plaintiff admits that his pay, hours and benefits did not change after his transfer to the Internal Review Office. He does not allege that his new position was in any way less desirable than his previous position or that his new position had any adverse effect on the terms, conditions or privileges of his employment. “While in certain circumstances a transfer or reassignment may be a materially adverse action, . . . a purely lateral transfer, which does not involve a change in pay or a demotion in any other form, does not constitute an adverse employment action.” Mitura v. Daulton, No. 98-2006, 1999 U.S. Dist. LEXIS 3430, at *8-9 (E.D. Pa. March 18, 1999) (citations omitted). Because plaintiff does not allege that his transfer to the Internal Revenue Office had a material impact on his job conditions, he cannot establish a prima facie case of discrimination as to the transfer.

Plaintiff can establish the adverse action element for his failure to promote claims, the

the Caucasian employees who allegedly received the training denied him were similarly situated, plaintiff cannot establish a prima facie case of discrimination. C.f., Walker v. Mitsubishi Motor Mfg. of Am., No. 03-3665, 2004 U.S. App. LEXIS 22497, at * 7 (7th Cir. Oct. 14, 2004); Read v. BT Alex Brown, Inc., No 02-10191, 2003 U.S. App. LEXIS 15201, at *13-14 (5th Cir. Jul. 30, 2003); Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649-50 (4th Cir. 2002).

third and sixth incidents alleged in his EEOC complaint because a failure to promote is one of the adverse actions defined in Ellerth, 524 U.S. at 761. Therefore I must proceed to consider whether he has shown an inference of discrimination as to each of these alleged incidents

2. Inference of Discrimination

Plaintiff fails to establish an inference of discrimination as to both the third and sixth alleged incidents of discrimination. “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.” Bullock v. Children's Hosp. of Phila., 71 F. Supp. 2d 482, 487 (E.D. Pa. 1999). To establish a prima facie case on a failure to promote claim, plaintiff must show that a similarly situated individual from a non-protected class was promoted instead of him or that some other inference of discrimination is present.

i. Vallone's Promotion

Plaintiff cannot establish a prima facie case of race discrimination as to the third incident alleged in his EEOC proceeding, his non-selection for an upgrade to the GS-11 position awarded to Vallone on August 30, 1998, because he cannot show that he was similarly situated to Vallone, the employee who received the promotion.⁹ “Similarly situated employees are ones who ‘must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.’” Martin v. Enterprise Rent-

⁹Defendant argues that no candidates other than Vallone were considered for the GS-11 promotion because a performance review determined Vallone was already performing tasks ordinarily assigned to a GS-11 employee and therefore she was upgraded to the GS-11 position “through an accretion of duties.”

A-Car, No. 00-6029, 2003 U.S. Dist. LEXIS 1191, at *15-16 (E.D. Pa. Jan. 15, 2003), quoting Morris v. G.E. Fin. Assur. Holdings., No. 00-3849, 2001 WL 1558039, at *6 (E.D. Pa. Dec. 5, 2001). Plaintiff and Vallone were members of different branches of the Resource Management Office. They did not work under the same supervisor and did not perform the same duties. Plaintiff has not presented evidence that he was equally or more qualified to perform the duties of the GS-11 position than was Vallone. Plaintiff's claim of discrimination as to the third incident alleged in his EEOC complaint thus fails to survive defendant's motion for summary judgment.

ii. Wasakanes' Promotion

Although it is a closer question, plaintiff also fails establish a prima facie case as to his claim regarding Wasakanes' promotion the sixth alleged incident.¹⁰ The Court of Appeals has held that to establish an inference of discrimination in the context of a failure to rehire, plaintiff "must establish some causal nexus between his membership in a protected class and the decision to not rehire him." Sarullo v. United States Postal Serv., 352 F.3d 789, 798 (3d Cir. 2003). In Sarullo, the Court of Appeals held that plaintiff had not established an inference of discrimination where he had "provided no evidence to rebut [the human resources manager's] affidavit stating that when he denied [plaintiff's] reinstatement he was unaware of [plaintiff's]

¹⁰The Supreme Court has held that the plaintiff's burden to establish a prima facie case is not intended to be "onerous." Burdine, 450 U.S. at 253. Considering this caveat, some courts have found that evidence that a similarly situated member of a non-protected class was promoted instead a plaintiff who was qualified for the promotion is sufficient to establish a prima facie case. C.f., Russ-Tobias v. Pa. Bd. of Prob. & Parole, No. 04-270, 2004 U.S. Dist. LEXIS 23369,, at *4 (E.D. Pa. Nov. 16, 2004), citing Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (E.D. Pa. 1995) (holding a prima facie case was established where plaintiff was a member of a protected class, she was qualified to work as a parole agent, she was terminated and a Caucasian parole agent, was not terminated for allegedly similar performance lapses).

‘race, color, national origin, age, or prior EEO activity’” Id. at 799. As in Sarullo, plaintiff’s evidence of race discrimination in this case consists solely of his own assertion that he was not promoted because of his race. Under Sarullo, plaintiff thus fails to establish the inference of discrimination element of his prima facie case because he has not established a causal link between his race and the decision to promote Wasakanes instead of him.

B. Pretext

Even if plaintiff could make out a prima facie case of race discrimination as to Wasakanes’ promotion, plaintiff’s claim could not survive summary judgment as he has failed to establish that defendant’s non-discriminatory reason for failing to promote him was pretextual. Defendant has articulated a legitimate non discriminatory reason for plaintiff’s non-promotion in that he was less qualified for the position than the other applicant. Wasakanes’s job application received a total score of twenty points while plaintiff’s application scored only fifteen points. Plaintiff ranked lower than Wasakanes when the candidates’ experience and performance ratings were compared. Plaintiff must therefore establish that defendant’s legitimate reasons for promoting Wasakanes were only a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 802, 804. He must either: (1) point to some evidence that discredits the proffered reasons, either circumstantially or directly; or (2) adduce evidence, whether circumstantial or direct, that discrimination was more likely than not a motivation or determinative cause of the adverse employment action. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

In order to meet the first prong of Fuentes, plaintiff must show “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy

of credence.” Jones v. Sch. Dist. of Phila., 198 F.3d 403, 413 (3d Cir. 1999), quoting Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-1109 (3d Cir. 1997). Plaintiff has not presented any reliable evidence from which I could reasonably conclude that defendant’s reason for promoting Wasakanes rather than plaintiff is false. In awarding the promotion to Wasakanes defendant considered only the information submitted by plaintiff and Wasakanes through the Resumix system. Plaintiff has not presented evidence that defendant considered the two candidates’ applications under different sets of standards or that race played a factor in the determination of the candidates’ application scores.

In order to sustain a claim under the second prong of Fuentes, plaintiff must show that “discrimination was more likely than not a motivating or determinative cause of the adverse employment action.” Because plaintiff has not presented evidence other than his own subjective beliefs or the opinions of his coworkers to establish that defendant has previously discriminated against him or against other persons in his protected class or that the defendant treated other similarly situated employees not within the protected class more favorably, he fails to rebut defendant’s legitimate non-discriminatory reason. Jones, 198 F.3d at 413, quoting Simpson v. Kay Jewelers, 142 F.3d 639, 645 (3d Cir. 1998).

C. Retaliation Claims Under Title VII

To establish a prima facie case of retaliation under Title VII, plaintiff must show that he engaged in a protected employee activity; that the agency took an adverse employment action after or contemporaneous with the protected activity; and that a causal link exists between her protected activity and the agency’s adverse action. See Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 323 (3d Cir. 2000). The EEOC race discrimination and reprisal claims at

issue in this lawsuit¹¹ qualify as protected activities but as demonstrated above, plaintiff has not established that the agency took an adverse action subsequent to his filing of five out of seven of his EEOC complaints. Plaintiff's retaliation claims for the first, second, fourth, fifth and seventh incidents alleged in his EEOC complaint thus fail to survive defendant's summary judgment motion. "[N]ot everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir., 1997) (internal quotations omitted), citing Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996). See also Keen v. D.P.T. Bus. Sch., No. 00-3758, 2002 U.S. Dist. LEXIS 232, at *31 (E.D. Pa. Jan. 9, 2002) (holding defendant's alleged acts of retaliation failed to meet the standard of adverse employment action).

Plaintiff's retaliation claims as to the third and sixth alleged incidents also fail because plaintiff has failed to establish the required causal link between the filing of his EEOC complaints and his two failure to promote claims. Plaintiff has not presented specific facts other than his own allegations or the opinions of his co-workers to suggest that defendant's decisions not to promote him to the positions in question were made in retaliation for his EEOC filings.

D. Additional Allegations

In addition to the claims discussed above, in plaintiff's brief in opposition to defendant's motion for summary judgment, plaintiff makes several further allegations of discrimination.

Plaintiff is not required to exhaust his administrative remedies as to his additional race

¹¹Plaintiff has filed "almost 30" EEOC complaints during his career with the Army Corps of Engineers. The claims at issue here are claims 34, 35, 36, 37, 38 and 39 in the Philadelphia District Equal Employment Opportunity Office Complaint Report as of November 2004. (D's Repl. Br. Exh. L).

discrimination claims before raising them here so long as they fall “fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.” Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996). “Where discriminatory actions *continue after* the filing of an EEOC complaint . . . the purposes of the statutory scheme [requiring exhaustion of administrative remedies] are not furthered by requiring the victim to file additional EEOC complaints and restarting the 180 day waiting period [to bring suit].” Walters v. Parsons, 729 F.2d 233, 237 (E.D. Pa. 1984) (emphasis added).

With the exception of one incident, however, plaintiff’s allegations of further discriminatory actions predate the filing of the EEOC complaint at issue here.¹² I am barred from considering these allegations because they were not timely filed in this Court. “The Supreme Court has stated that discrete discriminatory acts, such as termination, failure to promote, denial of transfer, or refusal to hire, are not actionable if time barred, even if they are related to acts in timely filed charges.” Sessa v. Sears Roebuck & Co., Inc., No 03-5477, 2004 U.S. Dist. LEXIS 20067, at *8-9 (E.D. Pa. Sep. 30, 2004), citing Amtrak v. Morgan, 536 U.S. 101, 114 (2002). (internal quotations omitted).

Plaintiff also alleges that he was discriminated against when he was not promoted after Barry Topham, plaintiff’s supervisor from 1994 through March of 2004, recommended him for promotion. I find that the allegations in this claim do not so overlap with the allegations in plaintiff’s earlier complaints that it fairly falls within the scope of his prior complaints. “[T]he

¹²These allegations include vandalism of plaintiff’s office space in or around 1994, a supervisor’s reference to him as “boy” prior to October 1993 and the failure to upgrade plaintiff to a higher class of duties and pay schedule while he was a staff accountant in the Resource Management Office when two of his Caucasian co-workers had been upgraded in 1994 and 1995.

parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination, including new acts which occurred during the pendency of the proceedings before the Commission.” Robinson v. Dalton, 107 F.3d 1018, 1025-26 (3d Cir. 1997), quoting Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1978) (citations omitted). Plaintiff’s claims that he was discriminated against in his new position in a different department are not so related to his claims of discrimination under different supervisors in the Resource Management Office that they could reasonably be viewed as an extension of the discrimination claims alleged in his prior EEOC proceeding. Further, he has not shown that the EEOC investigation arising out of his prior EEOC proceedings uncovered evidence which would support his claims of failure to promote under Topham. See Kasali v. J.P. Morgan/Chase/Manhattan Mtge. Corp., 04-500, 2004 U.S. Dist. LEXIS 20336 at *1 n.1 (E.D. Pa. Oct. 4, 2004) (holding plaintiff had not alleged in her EEOC charges any claims that could reasonably be expected to grow into allegations of a pattern and practice of harassment, discrimination, and/or retaliation). But see Williams v. Univ. of the Scis. in Phila., No. 02-7085, 2004 U.S. Dist. LEXIS 21481, at *11-13 (E.D. Pa. Sept. 30, 2004) (finding retaliation claims fell within the scope of the investigation that could reasonably be expected to grow out of his charge of discrimination).¹³

As already noted plaintiff cannot overcome the issues of timeliness and ripeness through the assertion of a claim under 42 U.S.C. Section 1981 because Title VII is the exclusive remedy for employment discrimination for federal employees. See Brown v. General Servs. Admin., 425 U.S. 820 (1976).

¹³Further, plaintiff’s claim of failure to promote under Topham is already pending in a new proceeding before the EEOC in which no final action has yet been taken.

IV. CONCLUSION

Viewing the facts in the light most favorable to plaintiff, I find that there is no genuine issue of material fact as to whether any of the incidents alleged in his EEOC proceeding were motivated by discrimination based on his race or retaliation for his EEOC filings and will grant defendant's motion for summary judgment.

