

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

WILLIE CARTER,	:	CIVIL ACTION
	:	NO. 02-7326
Plaintiff,	:	
	:	
v.	:	
	:	
JOHN E. POTTER,	:	
POSTMASTER GENERAL	:	
UNITED STATES POSTAL SERVICE,	:	
	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

DECEMBER 21, 2004

Willie Carter ("plaintiff") is an African-American male who suffers from progressive generative arthritis, a lumbar disease of the back. Plaintiff is a former employee of the United States Postal Service (the "USPS" or "defendant"), and he alleges that while he was employed by the USPS, the USPS unlawfully discriminated against him in several ways: (1) failing to accommodate his medical condition, (2) terminating him because of his medical condition, age and/or race, and (3) retaliating against him after he requested accommodation for his medical condition and complained to the Equal Employment Opportunity Commission (EEOC), both of which are protected activities under

federal law. Based on these alleged unlawful acts, plaintiff filed this action under the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621 et seq. Before the Court is defendant's motion for summary judgment. For the reasons that follow, the motion will be granted in part and denied in part.

I. BACKGROUND

The following facts are undisputed or viewed in the light most favorable to plaintiff. Plaintiff began employment as a full-time mail carrier for the USPS on or about August 8, 1970. He continued working full time for twenty-five years, or until October 2, 1995. On or about that time, plaintiff developed extreme pain in his hips and back.¹ His doctor then informed him that he was suffering from progressive generative arthritis, which detrimentally affects his ability to lift, walk and stand. Because of his arthritis and pursuant to his doctor's advice, plaintiff took leave from work for the month of October.

Upon returning to work on November 6, 1995, plaintiff submitted to a standard USPS "fitness for duty" examination,

¹ Plaintiff worked for the USPS for a total of 29 years, counting his part-time and full-time work. Plaintiff worked at Kingsessing station in Philadelphia, Pennsylvania, for the vast majority of his career.

conducted by Dr. Evangelista, the Medical Unit Officer for the USPS in Philadelphia. Dr. Evangelista determined that plaintiff had not fully convalesced and was thus unable to perform his regular duties as a mail carrier. Dr. Evangelista suggested, and plaintiff requested, a postal cart as a device to assist plaintiff in performing his duties as a carrier. Plaintiff was not reassigned as a carrier, however. Instead, he was assigned light duty consisting of mail "casing," or preparing and sorting the mail for delivery. Plaintiff performed this light-duty task from November 1995 to February 1996. The parties dispute whether plaintiff adequately performed his light-duty task during this time period.

On February 15, 1996, plaintiff received a letter signed by four of his supervisors stating, "Please be advised at this time, Kingsessing station does NOT have any LIGHT DUTY WORK for any employee. If your medical condition changes to FIT FOR FULL DUTY, work shall be provided for you at that time." Plaintiff claims that he satisfactorily performed his light duty assignments and was placed on forced leave because of his disability, age, race, and/or in retaliation for his requesting a mail cart. He supports his claim by pointing to certain younger Caucasian employees under similar circumstances whom the USPS allegedly accommodated with light-duty tasks or otherwise.

Although the February 15, 1996 letter informs plaintiff

that light duty was not available for any employee, the USPS now contends plaintiff was placed on leave because he was unable to adequately perform his light-duty tasks. Specifically, the USPS asserts plaintiff was completing his mail casing in four to five hours, although the USPS required casing to be completed in two and one-half hours. The USPS also claims plaintiff's supervisors informed plaintiff that his performance of light duty was not satisfactory and recommended that plaintiff seek a "change of craft," but plaintiff insisted he could adequately perform his duties.

II. THE LEGAL STANDARD

A court may grant summary judgment only when "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 judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" only if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). An issue of fact is "genuine" only when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. In determining whether there exist genuine issues of

material fact, all inferences must be drawn, and all doubts must be resolved, in favor of the non-moving party. Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 264 F.3d 302, 305-06 (3d Cir. 2001) (citing Anderson, 477 U.S. at 248).

Although the moving party bears the burden of demonstrating the absence of a genuine issue of material fact, in a case such as this, where the non-moving party is the plaintiff and, therefore, bears the burden of proof at trial, that party must present affirmative evidence sufficient to establish the existence of each element of his case. Id. at 306 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Accordingly, a plaintiff cannot rely on unsupported assertions, speculation, or conclusory allegations to avoid the entry of summary judgment, see Celotex, 477 U.S. at 324, but rather, the plaintiff "must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial," Jones v. United Parcel Serv., 214 F.3d 402, 407 (3d Cir. 2000).

III. ANALYSIS

A. Rehabilitation Act Claim

Under the Rehabilitation Act of 1973 (the "Act"),

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be

excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794. To establish a prima facie case under the Act, a plaintiff must prove four elements: "(1) that he or she has a disability, (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she was nonetheless terminated or otherwise prevented from performing the job." Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996).

For the plaintiff to prove the first element of the prima facie case, i.e., that he has a "disability" within the meaning of the Act, he must prove that he (1) has a physical impairment that substantially limits one or more of his major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 29 U.S.C. § 705(2)(B); Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 187 (2002).² Plaintiff bases his claim on elements (1) and (3),

² Courts apply the same standards for interpreting the word "disability" in the Rehabilitation Act and the Americans With Disabilities Act (ADA). See Shiring, 90 F.3d at 832 ("The standards used to determine whether [the Rehabilitation Act] has been violated in a complaint alleging employment discrimination under [§ 794] shall be the standards applied under Title I of the Americans with Disabilities Act of 1990. . . .") (quoting 29 U.S.C. § 794(d)).

i.e., he claims that he either has, or is regarded as having, a physical impairment that substantially limits one or more of his major life activities.

On the other hand, the USPS argues that, based upon the uncontested material facts before the Court, it is entitled to judgment as a matter of law because at the time of the alleged discriminatory act plaintiff did not suffer from a "disability" within the meaning of the Act. Therefore, the argument goes, the Act did not obligate defendant to accommodate plaintiff.

1. Actual disability

The parties do not dispute that plaintiff's arthritis is a physical impairment; clearly the inflammation in his back and hips is a "condition" that affects his musculoskeletal system.³ See, e.g., Marinelli v. City of Erie, 216 F.3d 354, 360

³ A "physical impairment" is "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h).

The term "substantially limits" means:
"(i) Unable to perform a major life activity that the average person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Id. § 1630.2(j)(1).

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing,

(3d. Cir. 2000) (finding same with respect to residual pain in plaintiff's arm). At issue here is whether plaintiff's arthritis "substantially limits" a major life activity.

The Third Circuit has spoken on the issue: "[An] impairment must not only affect the way in which the plaintiff engages in [a major life activity] To the contrary, a plaintiff must establish that the impairment substantially limits the ability to engage in the activity." Id. at 361 (emphasis in original). For example, in Marinelli, the Third Circuit concluded that a plaintiff's inability to lift ten pounds did not render him disabled under the ADA. See id. at 364. In Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 186-87 (3d Cir. 1999), the Court found that a plaintiff who could stand or walk for only fifty minutes at a time was not disabled under the ADA. Similarly, in Kelly v. Drexel Univ., 94 F.3d 102, 108 (3d Cir. 1996), the Court found that a plaintiff who had a hip fracture and noticeable limp, and could not walk more than a mile without stopping, had a "comparatively moderate restriction[] on the ability to walk" and, therefore, had no disability.

hearing, speaking, breathing, learning, and working." Id. § 1630.2(h)(2)(I).

A court should consider the following factors in determining whether an individual is substantially limited in a major life activity: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id. § 1630.2(j)(2).

Plaintiff contends that his arthritis "affects" his ability to walk, stand, climb, or lift over forty pounds. Pl. Br. at 24. Moreover, his physicians stated that he was "unable to perform his present duties . . . as a letter carrier" and advised that he "avoid doing prolonged walking or climbing." Letters from Arthur M. Lerner, M.D. (Pl. Ex. 22, #4) and Bijoy K. Ghosh, M.D. (Pl. Ex. 22, #4a).

Although plaintiff's impairment may "affect" his ability to walk, stand, climb and lift, the impairment does not "substantially limit" his ability to engage in these activities. First, if under Marinelli a 10-pound lifting restriction did not render the plaintiff disabled, it follows a fortiori that plaintiff's 40-pound lifting restriction does not render him disabled. Second, plaintiff's inability to engage in prolonged walking or climbing is even less restrictive than those which the Third Circuit already found did not substantially limit a major life activity in Taylor and Kelly. Finally, plaintiff asserts that he could have performed his duties as a mail carrier, albeit with the assistance of a cart, which duties entail extensive walking and climbing of stairs, the very activities which he claims are affected by his impairment. This assertion militates against the finding that the arthritis in plaintiff's hips and back substantially limits his ability to "walk, stand, [and] climb." Because plaintiff's impairment does not substantially

limit his ability to engage in a major life activity, plaintiff is not disabled.⁴

2. Regarded as disabled

The relevant EEOC regulations state that "being regarded as having an impairment" means:

- (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;
- (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others

⁴ Although plaintiff's physician stated that he was unable to perform his present duties as a letter carrier, it should be noted that this limitation does not substantially impair plaintiff's ability to engage in the major life activity of working. The EEOC defines "working" as a major life activity, 29 C.F.R. § 1630.2(I), and in reference to restrictions on the ability to work, the EEOC defines "substantially limits" as: "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities," id. § 1630.2(j)(3)(I); Murphy v. United Parcel Serv., 527 U.S. 516, 523, (1999). Moreover, "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Murphy, 527 U.S. at 523 (quoting 29 C.F.R. § 1630.2(j)(3)(I)). Applying the relevant EEOC regulations to this case, the Court finds that plaintiff's evidence that he is unable to perform his particular duties as a mail carrier is an inability to perform one particular job. This limitation, as a matter of law, does not render him substantially limited in the major life activity of working. See, e.g., Murphy, 527 U.S. at 525 ("[T]he undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working.").

toward such impairment; or
(C) has none of the impairments defined in paragraph (j)(2)(I) of this section but is treated by a recipient as having such an impairment.

29 C.F.R. § 1630.2(1); see also Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 766 (3d Cir. 2004). Although plaintiff does not specifically state into which of these three categories his claim falls, the record shows that his claim must fall within (A) because plaintiff's "regarded as" claim is predicated upon his contention that he has a physical impairment that does not substantially limit a major life activity, but that defendant treats as constituting such a limitation.

To support his claim, plaintiff refers to defendant's letter dated February 15, 1996 as evidence that defendant regarded him as having a physical impairment that substantially limits one or more of his major life activities.⁵

⁵ Plaintiff also argues that the letter is direct evidence of discrimination under Costa v. Desert Palace, 539 U.S. 90 (2003). The tenor of this argument is unclear because Costa does not address the issue of when a plaintiff may prevail on a direct-evidence theory of liability. The precise issue in Costa was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under 42 U.S.C. § 2000e-2(m)." Id. at 92. That sufficiency-of-evidence issue is inapposite to the instant case.

Notwithstanding the lack of clarity regarding whether plaintiff has proffered a direct-evidence theory, the Third Circuit has instructed that "a district court should consider whether a plaintiff's claim should survive summary judgment under a Price Waterhouse direct-evidence analysis even if it is unclear whether the plaintiff raised the theory in response to a summary judgment motion. See Buchsbaum v. Univ. Physicians Plan, 55 Fed.

The letter reads as follows:

Please be advised at this time, Kinsessing Station does NOT have any LIGHT DUTY WORK for any employee. If your medical condition changes to FIT FOR FULL DUTY work shall be provided for you at that time. As of February

Appx. 40, 45, 2002 WL 31761695, at 3 (3d Cir. 2002) (non-precedential) (citations omitted). The Court will thus consider plaintiff's direct evidence theory.

In direct evidence cases, the employee alleging discrimination must produce "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." Price Waterhouse, 490 U.S. 228, 277 (1989); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1097 (3d Cir. 1995). If the employee does produce direct evidence of discriminatory animus, the burden shifts to the employer to produce evidence sufficient to show that it would have made the same decision had the illegal bias played no role in the employment decision. Price Waterhouse, 490 U.S. at 244-45; Starceski, 54 F.3d at 1096. In order to shift the burden, the plaintiff must produce evidence that is "so revealing of discriminatory animus that it is not necessary to rely upon any presumption from the prima facie case" Armbruster v. Unisys Corp., 32 F.3d 768, 778 (3d Cir. 1994). "Stray remarks in the workplace, statements by nondecisionmakers, or even statements by decisionmakers unrelated to the decisional process itself, do not constitute direct evidence of discrimination." Fakete v. Aetna, Inc., 152 F. Supp. 2d 722, 733 (E.D. Pa. 2001) (citing Starceski, 54 F.3d at 1096).

Here, plaintiff's reliance on the February 15, 1996 letter as direct evidence of discrimination is misplaced. The letter's reference to plaintiff's "medical condition" is not "so revealing of discriminatory animus" based on plaintiff's alleged disability that plaintiff need not rely on a presumption from a prima facie case. This is so because the letter's reference to plaintiff's medical condition is not necessarily evidence that the USPS relied on an "illegitimate criterion" in reaching its decision. As the Court finds that plaintiff is not disabled under the Rehabilitation Act (under either an actual or "regarded as" theory), defendant could not have relied on plaintiff's actual disability, or any perceived disability, in deciding to place plaintiff on leave; therefore, defendant did not rely on an "illegitimate criterion." Because plaintiff cannot proceed on a direct-evidence theory, he must proceed under the McDonnell Douglas paradigm.

15, 1996, this shall be your last day until you are FIT FOR FULL DUTY.

Pl. Ex. 13 (capitals in original).

Plaintiff argues that the defendant's knowledge of his medical condition, i.e., the physical impairments that limited his ability to walk, climb and lift, amounted to defendant's regarding him as having a "disability" within the purview of the Act. The Court disagrees.

Although the letter's reference to plaintiff's "medical condition" demonstrates that the defendant has knowledge of plaintiff's medical condition, arthritis, the "mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." Kelly, 94 F.3d at 109; see also Nerosa v. Storecase Merchandising Corp., No. Civ.A.02-440, 2002 WL 1998181 at *7 (E.D. Pa. Aug. 28, 2002) ("That defendant knew plaintiff was incapable of engaging in heavy lifting, pushing or pulling would not demonstrate that the employer perceived her as being disabled."). Further, defendant's statement in the letter, "If your medical condition changes to FIT FOR FULL DUTY, work shall be provided for you at that time," demonstrates only that the USPS regarded plaintiff as being unable to perform his full mail carrier duties. Plaintiff does not dispute that his arthritis

precluded him from performing his full mail carrier duties, and his physicians stated such in their letters to the USPS. See Letters from Arthur M. Lerner, M.D. (Pl. Ex. 22, #4) and Bijoy K. Ghosh, M.D. (Pl. Ex. 22, #4a). The February 15, 1996 letter, therefore, shows only that the defendant regarded plaintiff as having the impairment he actually had, i.e., an arthritic condition rendering him unable to perform his full mail carrier duties. As the Supreme Court has stated, for a plaintiff to state a claim under a "regarded as" theory,

it is necessary that a covered entity entertain misperceptions about the individual--it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often "resul[t] from stereotypic assumptions not truly indicative of ... individual ability."

Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999)

(citations omitted). Plaintiff has offered no evidence to show that the USPS maintained any such misperception.

Additionally, the recent Williams case, where the Third Circuit concluded a material dispute of fact existed as to whether an employer regarded its employee as disabled, is distinguishable. See 380 F.3d 751. In Williams, a police officer for the Philadelphia Housing Authority (PHA) was diagnosed with Major Depressive Disorder, leading the PHA's psychologist to recommend that the officer not carry a firearm

for a period of three months. See id. at 757, 766. The record established that the PHA perceived the officer's mental condition as precluding him not only from carrying a firearm but also from having access to firearms or being around others carrying firearms. See id. at 766. The Third Circuit concluded that a material dispute of fact existed as to whether the officer was regarded as disabled because PHA mistakenly perceived plaintiff's limitations to be "far greater" than his actual limitations. See id.

The instant case is unlike Williams because, here, the USPS was not mistaken about the extent of plaintiff's limitations caused by his arthritis. In fact, both plaintiff and defendant have the same understanding of the extent of plaintiff's limitations and both relied on plaintiff's physicians' statements that plaintiff cannot perform his full mail carrier duties without the assistance of a mail cart. Compare Murphy, 527 U.S. at 522 (holding that a person is regarded as disabled if the employer "mistakenly believe[d] that the [plaintiff]'s actual, nonlimiting impairment substantially limits one or more major life activities" (quoting Sutton, 527 U.S. at 489)).

In light of the foregoing, plaintiff has failed to established that he is "disabled" within the meaning of the Rehabilitation Act under either an actual or "regarded as" theory. Defendant's motion for summary judgment will therefore

be granted with respect to plaintiff's Rehabilitation Act claim.⁶

B. Exhaustion of Plaintiff's Retaliation Claim

In addition to plaintiff's underlying Rehabilitation Act claim, plaintiff alleges that the USPS retaliated against him in violation of the Rehabilitation Act, which adopts the standard for retaliation applied under the Americans with Disabilities Act (ADA). See 29 U.S.C. § 794(d). Defendant argues that the Court should dismiss this claim because plaintiff has failed to exhaust his administrative remedies with respect to this claim.

The scope of plaintiff's civil action must be limited to the acts alleged in plaintiff's prior administrative charge(s) or a reasonable investigation arising from those charge(s). See Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976) ("The 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 proceedings before the Commission.") (internal

⁶ Having found that plaintiff is not disabled within the meaning of the Rehabilitation Act, plaintiff has failed to establish a prima facie case under the Act. Therefore, there is no need to analyze the second prong of plaintiff's prima facie case--whether he was "otherwise qualified" to perform the essential functions of the mail carrier position, and the third prong--whether defendant failed to provide plaintiff reasonable accommodation.

citations omitted). Thus, a plaintiff fails to exhaust his administrative remedies if the acts alleged in the lawsuit are not "fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." See Antol v. Perry, 83 F.3d 1291, 1295 (3d Cir. 1986) (quoting Walters v. Parsons, 729 F.2d 233 (3d Cir. 1984)).

The Court finds that the plaintiff's retaliation claim is within the scope of his prior EEOC charges, or a reasonable investigation arising therefrom. Plaintiff's initial EEOC complaint (and its handwritten addendum) allege disability, age and race discrimination. The facts of plaintiff's retaliation claim are virtually identical to the facts of his disability claim and, therefore, are within the scope of the initial EEOC complaint or a reasonable investigation arising therefrom. Accordingly, plaintiff has exhausted his administrative remedies for his retaliation claim, and the Court will proceed to analyze the merits of his claim.

C. Plaintiff's Pretext Claims of Retaliation, Age Discrimination and Race Discrimination

The merits of plaintiff's retaliation claim are analyzed under the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This analysis also applies to plaintiff's claims of illegal age and race discrimination.

1. The McDonnell Douglas analysis

Under McDonnell Douglas the plaintiff must first "produce evidence that is sufficient to convince a reasonable factfinder to find all of the elements of a prima facie case." Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)). If the plaintiff establishes a prima facie case, "the burden of production (but not the burden of persuasion) shifts to the defendant, who must then offer evidence that is sufficient, if believed, to support a finding that it had a legitimate, nondiscriminatory reason for the discharge." Id. (citing Hicks, 509 U.S. at 506-07). If the defendant articulates a legitimate, non-discriminatory reason for the adverse employment action, the employer satisfies its burden of production. See id. (citing Hicks, 509 U.S. at 507-08). The plaintiff may then "survive summary judgment . . . by submitting evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's actions." Id. at 1108 (citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). With regard to the showing required of plaintiff,

To discredit the employer's proffered reason, however, the plaintiff cannot simply show that

the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons." While this standard places a difficult burden on the plaintiff, "it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.

Fuentes, 32 F.3d at 765 (internal citations omitted). Finally, courts should keep in mind that "[a]lthough intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quoting Tex. Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

2. The merits of plaintiff's retaliation claim

Plaintiff argues that the USPS illegally retaliated against him by placing him on leave on February 15, 1996. Specifically, he argues that defendant's reason for placing him on leave--that plaintiff was not adequately performing his light

duty assignment--was a pretext for defendant's illegal retaliatory animus.⁷ In addition, plaintiff argues that defendant failed to grant him a change of craft, even after plaintiff was placed on leave, despite plaintiff's continued requests for such action, and that this failure constitutes retaliation for his requesting a mail cart, requesting a change of craft and/or complaining the EEOC.

For plaintiff to establish a prima facie case of illegal retaliation, he must prove: (1) he engaged in a protected employee activity; (2) he suffered an adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection exists between the employee's protected activity and the employer's adverse action. See Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997).

Plaintiff argues that he satisfies the prima facie elements of retaliation because (1) he engaged in protected activities by requesting reasonable accommodation in late 1995

⁷ It should be noted that plaintiff's failure to establish that he was disabled within the meaning of the Rehabilitation Act or ADA does not preclude him from pursuing a retaliation claim. See Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 191 (3d Cir. 2003) ("[T]he ADA protects one who engages in the [a protected] activity without regard to whether the complainant is 'disabled.'"). Additionally, the right to request accommodation in good faith is a protected activity under the ADA. Id. ("The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC . . .").

and early 1996, and complaining to the EEOC in March 1996, (2) he suffered adverse employment actions when he was placed on leave on February 15, 1996, and subsequently denied a change of craft, and (3) a causal connection between (1) and (2) exists under the circumstances because there is a close temporal proximity between plaintiff's requests for accommodation and the adverse employment actions. Although plaintiff clearly meets the first two elements of a retaliation claim, plaintiff's argument presents a significant issue as to whether a causal connection exists between plaintiff's protected activity and the adverse employment actions. Plaintiff offers no direct evidence of retaliatory animus. Instead, he asserts that the timing of, and other circumstances surrounding, the adverse employment actions of placing him on leave and denying him a change of craft suffices to permit a reasonable factfinder to infer retaliatory animus.

It is true that in some cases, a close temporal proximity between the protected activity and the adverse employment action may establish a causal link. See Shellenberger, 318 F.3d at 189. Yet, "the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred." Id. at n.9.

In this case, the record reveals that plaintiff requested accommodation in the form of a mail cart in November 1995, and that he engaged the EEOC's conciliatory mechanisms in

March 1996. It is alleged that, in retaliation, he was placed on leave on February 15, 1996 and subsequently denied a change of craft throughout 1996. Although the nexus between the protected activities alleged and the adverse employment actions is not "unusually suggestive," there is other evidence which bolsters plaintiff's ability to prove his case of retaliation. See Shellenberger, 318 F.3d at 189.

One, plaintiff has shown that one of his supervisors was aware that plaintiff requested an accommodation in the form of a mail cart and a change of craft, and that plaintiff had contacted his EEOC counselor in March 1996. This same supervisor was one of the primary decisionmakers in the decision to place plaintiff on leave on February 16, 1996, and in failing to grant plaintiff a change of craft throughout 1996.

Two, as further proof of a nexus between plaintiff's protected activities and the adverse employment actions, plaintiff points out that while the February 15, 1996 letter terminating plaintiff's light duty assignment refers to the lack of light duty assignments for any employee as the reason for the termination, defendant now claims that the termination was because of plaintiff's poor performance. Evidence that the employer gave inconsistent reasons for terminating the employee may be relied upon to show a connection between the protected activity and the adverse employment action. See Farrell v.

Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000).

Viewing the record as a whole, the Court concludes plaintiff has established a prima facie case for retaliation. The somewhat suggestive timing combined with other circumstances would permit a reasonable factfinder to infer retaliatory animus.

Once plaintiff establishes a prima facie case, defendant must proffer a legitimate, nondiscriminatory reason for the adverse employment actions. Here, defendant claims plaintiff was placed on leave and denied a change of craft because of poor performance. The defendant's stated version satisfies its burden of production.

In response to the defendant's alleged justification for the adverse employment action, plaintiff introduced specific evidence to cast doubt on the reason proffered by the USPS for the adverse employment actions. For example, as discussed above, plaintiff points to the portion of the February 15, 1996 letter stating, "Kinsessing Station does NOT have any LIGHT DUTY WORK for any employee." The letter states lack of available work as the reason for placing plaintiff on leave. Nonetheless, plaintiff's four immediate supervisors later testified in a hearing and/or in depositions that plaintiff was placed on leave not because of a lack of light duty work, but because he was not timely casing his mail.

These conflicting reasons for terminating plaintiff

rise to the level of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the defendant's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes, 32 F.3d at 764. The defendant's motion for summary judgment will therefore be denied with respect to plaintiff's retaliation claim.

3. Plaintiff's age and race discrimination claims

For plaintiff to establish a prima facie case of employment discrimination, he must show (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subjected to an adverse employment action despite being qualified; and (4) the adverse employment action occurred under circumstances that raise an inference of unlawful discrimination. See Waldron v. SL Indus., 56 F.3d 491, 494 (3d Cir. 1995) ("[A] plaintiff must initially establish a minimal prima facie case--essentially, that he or she is a member of a protected class and was qualified for an employment position, but that he or she was either not hired for that position or was fired from it 'under circumstances that give rise to an inference of unlawful discrimination.'") (quoting Burdine, 450 U.S. at 253).⁸

⁸ The Third Circuit has "repeatedly emphasized that the requirements of the prima facie case are flexible," Pivirotto v. Innovative Sys., 191 F.3d 344, 357 (3d Cir. 1999), and "must be

Plaintiff belongs to a protected class under the ADEA and Title VII because he was 52 years of age at the time of the alleged discriminatory action and is an African American.⁹

Plaintiff contends that he was "qualified" for the job, and that

tailored to fit the specific context in which it is applied," Sarullo v. U.S. Postal Serv., 352 F.3d 789, 798 (3d Cir. 2003). In particular, the fourth element of a plaintiff's prima facie case--that an adverse employment action occurred under circumstances that give rise to an inference of unlawful discrimination--can be satisfied in several ways, depending upon the circumstances of the case. See, e.g., Sarullo, 352 F.3d at 798 (holding that in firing or refusal-to-hire cases, plaintiff satisfies fourth element of prima facie case by showing that "the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position"); Pivirotto v. Innovative Sys., 191 F.3d 344, 357 (3d Cir. 1999) (holding that in reduction-in-force cases, plaintiff satisfies fourth element of prima facie case by showing that plaintiff "was discharged, while the employer retained someone outside the protected class") (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 503 (3d Cir. 1996)); id. (stating that a plaintiff may satisfy fourth element of prima facie case without proving that employees outside the protected class were treated more favorably, or that plaintiff herself was replaced by someone outside the protected class) (citing Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 939 (3d Cir. 1997).

⁹ The decision to place plaintiff on leave was made by his four immediate supervisors, three of whom are members of the same protected classes as plaintiff. Supervisors Whitney, Wright and Talley are African-American and were over the age of forty when plaintiff was placed on leave. This fact is not dispositive of plaintiff's discrimination claims, but it is relevant and it does not help plaintiff's claims. See Burch v. WDAS AM/FM, 2002 WL 1471703, at *7 (E.D. Pa. June 28, 2002) ("The decision to terminate plaintiff was made by someone . . . who is a member of the same protected class who then selected someone else in that class to replace plaintiff. While this does not per se foreclose a claim of discrimination, it certainly does not help to sustain plaintiff's claim.") (citing Pivirotto, 191 F.3d at 353-54).

he suffered an adverse employment actions in that he was placed on leave and denied a change of craft. Finally, he argues that substantially younger and/or Caucasian employees were treated more favorably than he was, thus permitting an inference of age discrimination.

As to whether plaintiff was qualified for the light duty position, the parties argue extensively about whether plaintiff adequately performed his mail sorting duties during the three months he performed them. These arguments "impermissibly conflate [the] stated reason for firing plaintiff with the prima facie requirement that [h]e be qualified for the job." Taylor v. Airborne Freight Corp., No. 98-6313, U.S. Dist. LEXIS 11475, at *4 (E.D. Pa. May 24, 2001). The parties' dispute over whether plaintiff adequately performed his mail casing tasks is not a dispute over plaintiff's objective qualifications for the job, but rather one over adequacy of performance. See Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir.1989) (holding that employers' defenses such as insubordination, poor performance, and misconduct are more logically raised to rebut plaintiff's prima facie case; these defenses are "plainly [] not something the plaintiff must disprove to succeed at the first level of proof"). Performance issues such as those before the Court are best suited for analysis under the pretext prong of the McDonnell-Douglas paradigm. See Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983

F.2d 509, 523 (3d Cir. 1992) ("[A] dispute [over qualifications] will satisfy the plaintiff's prima facie hurdle of establishing qualification as long as the plaintiff demonstrates that "[he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made.'").

Plaintiff may satisfy the qualification requirement by showing that he possessed the necessary "training and experience for the job from which he was discharged." Turner v. Schering-Plough Corp., 901 F.2d 335, 342 (3d Cir. 1990). The Court concludes that plaintiff is qualified for the job of mail casing by virtue of his 29 years of experience with the U.S. Postal Service, the fact that he was casing the mail route for which he previously delivered mail, and based upon several USPS evaluations that determined "plaintiff was among the upper half of carriers" in terms of meeting the requisite mail casing productivity requirements.

Finally, plaintiff has offered sufficient evidence to satisfy this fourth and final prong of his prima facie case. First, plaintiff offered evidence to show that after he was placed on leave but before he retired, the USPS recruited individuals with qualifications similar to plaintiff's to fill certain full- and light-duty positions sought by plaintiff. Second, the record reveals that plaintiff's carrier position was taken over by a person outside of plaintiff's protected classes.

Third, plaintiff offered evidence to show that several of plaintiff's substantially younger and/or non-African American co-employees at Kingsessing station were, unlike plaintiff, granted a mail cart to assist them in delivering mail, permitted to remain on light duty after plaintiff was placed on leave, or granted a change of craft. See, e.g., Sarullo, 352 F.3d at 798 (concluding that plaintiffs may satisfy fourth element of prima facie case by showing that "the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position" sought by plaintiff); Pivirotto v. Innovative Sys., 191 F.3d 344, 357 (3d Cir. 1999) (stating that a plaintiff may satisfy fourth prong of prima facie case even "without demonstrating that employees outside of the relevant class were treated more favorably," or that the plaintiff "was replaced by someone outside of the relevant class") (citing Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 939 (3d Cir. 1997)).

The plaintiff having satisfied each prong of his prima facie case, the burden of production thus shifts to the USPS to proffer a legitimate, non-discriminatory reason for the adverse discrimination action. Plaintiff's four supervisors argue inadequate performance as a legitimate, nondiscriminatory explanation for placing him on leave and denying him change of craft.

As with plaintiff's retaliation claim, however, plaintiff has offered evidence that would allow a factfinder to reasonably disbelieve the articulated legitimate reason, or believe that invidious discriminatory reason was more likely than not a determinative cause of the defendant's action. For the same reasons stated in connection with plaintiff's retaliation claim, the Court finds that the defendant's conflicting reasons for placing plaintiff on leave constitute "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the defendant's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes, 32 F.3d at 764.

In addition, plaintiff offers the testimony, from a prior administrative hearing, of the now-deceased Shop Steward Joe Simpson. Mr. Simpson testified that, based on his review of the "daily work load analysis sheets," "plaintiff was among the upper half of carriers," in terms of meeting his mail casing productivity requirements. Further, Mr. Simpson, whose responsibilities included answering the telephones for USPS, testified that he received no "late mail" complaints from customers living on the mail route for which plaintiff sorted mail.

Plaintiff also offers an affidavit of his co-worker Leonard Thomas, Jr., who stated, "I observed that Mr. Carter had

no difficulty in performing his casing duties Mr Carter was a role model to me in terms of his time, attendance, dependability and work performance." Finally, plaintiff offers evidence that he was never formally disciplined under the procedures of the collective bargaining agreement and that he received a USPS Service Award upon retiring. For all of these reasons, the Court concludes that plaintiff has cast doubt upon the veracity of defendant's reason for the adverse employment actions. Accordingly, defendant's motion for summary judgment will be denied with respect to plaintiff's claims of age and race discrimination.

IV. CONCLUSION.

For the reasons set forth above, the Court finds that plaintiff's Rehabilitation Act claim fails as a matter of law, and summary judgment will be granted in favor of defendant on this claim. As to plaintiff's claims of retaliation and age and race discrimination, the Court concludes that the evidence would permit a reasonable factfinder to conclude that the USPS intentionally retaliated against plaintiff for engaging in a protected activity and discriminated against plaintiff because of age and race. Therefore, defendant's motion for summary judgment is denied as to these three claims. An appropriate order follows.

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

WILLIE CARTER,	:	CIVIL ACTION
	:	NO. 02-7326
Plaintiff,	:	
	:	
v.	:	
	:	
JOHN E. POTTER,	:	
POSTMASTER GENERAL	:	
UNITED STATES POSTAL SERVICE,	:	
	:	
Defendant.	:	

Order

AND NOW, this **21st** day of **December, 2004**, upon consideration of defendant's Motion for Summary Judgment (doc. no. 30) and plaintiff's response thereto, it is **ORDERED** that the Motion is **GRANTED in part and DENIED in part** in accordance with the Court's Memorandum of today's date.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.