

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

FREDDIE JOHNAKIN,	:
CIVIL ACTION	:
 	:
Plaintiff,	:
 	:
v.	:
 	:
CITY OF PHILADELPHIA, ET AL.,	:
 	:
Defendants.	:
NO. 95-1588	:

MEMORANDUM

Reed, J.

June 25, 1997

Plaintiff, Freddie Johnakin ("Johnakin" or "Plaintiff") brought this action against his former employer the City of Philadelphia ("City"), Barbara Kaplan ("Kaplan"), Executive Director of the City Planning Commission ("CPC" or "Commission") and David Baldinger ("Baldinger"), Deputy Director of the CPC (collectively referred to as "defendants"). Plaintiff alleges that the defendants discriminated against him and denied him rights protected by the Fourteenth Amendment when they terminated his employment, failed to recall him from layoff and failed to abide by a settlement agreement.

Pending before this Court is the motion of defendants for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure (Document No. 22), and the responses of the parties thereto.¹ Upon consideration of the motion of defendants and the response of plaintiff thereto, and for the reasons set forth below, the motion will be granted.

¹Defendants filed a supplemental memorandum in support of their motion for summary judgment on December 5, 1996 (Document No. 24). The Clerk of Court recorded this as a second motion for summary judgment. I have considered Document No. 24 as a reply to the opposition of plaintiff to the motion of defendants for summary judgment. Having properly considered the filing as a reply brief, the Clerk of Court is directed forthwith to remove Document No. 24 from the official list of pending motions.

I. FACTUAL BACKGROUND²

On January 7, 1980, the CPC hired plaintiff Freddie Johnakin, a black male, as a City Planner I ("CPI"). In July, 1992, pursuant to a directive from the City Director of Finance, the CPC began layoff contingency planning. In a memorandum from Kaplan to the Director of Finance dated November 20, 1992, the CPC identified nine possible candidates for layoff, including the plaintiff. In December, 1992, the Finance Department directed the CPC to reduce its expenditures before the end of fiscal year 1993 as part of the City's overall deficit reduction plan. To meet the directive, the CPC needed to reduce its staff by four positions. Two employees resigned from the CPC and one employee retired, requiring the CPC to reduce its staff by only one position. On March 18, 1993, the CPC informed plaintiff that he would be laid off effective April 2, 1993. The CPC informed plaintiff that he had the right to appeal the layoff to the Civil Service Commission.

At the time of his termination, plaintiff was the only CPI at the Commission. Johnakin had the opportunity since 1986 to be promoted automatically to City Planner II ("CPII" or "full performance planner") without a civil service examination because his position was included in the Career Advancement Series. However, Johnakin chose not to apply for the automatic advancement. He believed that the salary increase did not sufficiently compensate for the added responsibilities and stress associated with the CPII position. Advancement to CPII would also necessitate increased contact with a particular division chief who, according to plaintiff, "despised" plaintiff. In order to minimize contact with this person, plaintiff elected to forego advancement.

In 1990 and 1991, for periods of time totalling approximately fifteen months, plaintiff acted as the sole city planner for the regions to which he was assigned, requiring him to perform the duties of a CPII. On July 5, 1991, plaintiff filed an EEOC complaint

² The following facts are based on the evidence of record viewed in the light most favorable to plaintiff, the nonmoving party, as required when considering a motion for summary judgment. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 115 S. Ct. 2611 (1995).

charging racial discrimination, alleging he was harassed and forced to work outside his job designation at a City Planner II level. On May 29, 1992, the EEOC issued a no cause determination. As the result of the resignation of a CPII in late 1992, plaintiff, once again acted as the sole planner for his regions, performing at the level of a CPII during the five months immediately preceding his layoff on April 2, 1993.

The CPC elected to eliminate a CPI rather than a full performance planner because the department had been steadily decreasing in size. After carefully assessing productivity, skills, and longevity of staff, the CPC retained those planners designated with the CPII title.

District Council 47 filed a grievance on behalf of Johnakin, although he was not a member of the labor union. A series of meetings ensued with Kaplan and Union Agent Catherine Scott ("Scott") at the time of the layoff, culminating in a settlement agreement on or about April 7, 1993, which provides in relevant part:

"1. The City will provide the grievant with a position at or above his salary level of City Planner I, City Planning Commission. The grievant is being reappointed to a City position from a lay-off. The grievant will remain on the City's lay-off list and be eligible for positions for a period of six (6) months. 2. Within 14 days from the date of this Agreement, the City will offer grievant a position as described in paragraph 1."

Brief of Defendants Ex. J. As a result of the meetings, plaintiff understood that Kaplan agreed to recall Johnakin from layoff if a CPII left the Commission and if Johnakin agreed to perform the work of a CPII.

The City did not offer plaintiff a position within the two week time frame, pursuant to paragraph two of the settlement agreement. On April 22, 1993, plaintiff filed a second EEOC complaint charging race and gender discrimination as well as retaliation for having filed a previous EEOC complaint, regarding the layoff and failure to be recalled from layoff. Although the City subsequently offered Johnakin a variety of positions, at least some of the positions offered did not meet the salary requirement set forth in the settlement agreement.

On October 5, 1995, the CPC offered plaintiff a position as Recreation Leader I at a salary which was \$642 above his salary at the time of his termination. Plaintiff asserts that, upon the advice of Scott, he declined the position because it involved evening and weekend hours. He contends that in order to satisfy the terms of the settlement agreement the City must offer him a position with the same schedule as his CPI position. Scott denies advising Johnakin not to accept the position because of its hours but rather claims to have advised him to raise a hardship issue regarding his need for regular business hours.

In May, 1994, two CPIIs resigned from the CPC. On January 17, 1995, the CPC hired a black female employee at the CPIII level. The plaintiff was not recalled after the resignations of the CPIIs or as a result of the opening at the CPIII level.

Plaintiff initiated this lawsuit on March 17, 1995. Count I of the amended complaint asserts claims against the City of race and gender discrimination and retaliation in the workplace in violation of Title VII, 42 U.S.C. § 2000e. Count II of the amended complaint asserts claims against Kaplan and Baldinger in their individual capacities of race discrimination in violation of 42 U.S.C. § 1981. Count III of the amended complaint asserts claims against Kaplan and Baldinger in their individual capacities pursuant to 42 U.S.C. § 1983 for the denial of rights protected by the Equal Protection Clause. Count IV of the amended complaint asserts claims against the City and Kaplan and Baldinger in their individual capacities pursuant to 42 U.S.C. § 1983 for violations of the Due Process Clause. Plaintiff has voluntarily withdrawn count IV against all of the defendants and claims based upon failure to recall in counts II and III against defendant Baldinger. Johnakin seeks reinstatement, injunctive relief, backpay, back fringe benefits, interest on any backpay award, compensatory damages, and attorney's fees.

II. LEGAL STANDARD

The standard for a summary judgment motion in federal court is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In addition, a dispute over a material fact must be "genuine," i.e., the evidence must be such "that a reasonable jury could return a verdict in favor of the non-moving party." Id.

The moving party has the initial burden to identify evidence that it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support the non-moving party's case." Id. at 325. If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). The court must consider the evidence of the non-moving party as true, drawing all justifiable inferences arising from the evidence in favor of the non-moving party. Anderson, 477 U.S. at 255. To defeat the motion for summary judgment, the non-moving party must offer specific facts contradicting those set forth by the movant, thereby showing that there is a genuine issue for trial. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

III. DISCUSSION

Plaintiff asserts claims of retaliation pursuant to Title VII, race and gender discrimination pursuant to Title VII and 42 U.S.C. § 1981 and denial of his rights under the

Equal Protection and Due Process Clauses pursuant to 42 U.S.C. § 1983. I will consider each claim in seriatim.

A plaintiff alleging employment discrimination may present either direct or circumstantial evidence that would allow a reasonable factfinder to infer discrimination. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 n.4 (3d Cir. 1995); see Price Waterhouse v. Hopkins, 490 U.S. 228, 244-46 (1989) (establishing a framework for mixed motives cases that involve direct evidence); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (establishing the framework for pretext cases that involve circumstantial evidence); Mardell v. Harleysville Life Ins. Co., 31 F.3d. 1221, 1225-26 & n.6 (3d Cir. 1994).

The two frameworks for analyzing direct and circumstantial evidence apply to the claims of plaintiff for race and gender discrimination claims as well as his retaliation claims. See Quiroga v. Hasbro, Inc., 934 F.2d 497, 501-02 (3d Cir. 1991), cert. denied, 502 U.S. 940 (1991); Jalil v. Avdel Corp., 873 F.2d 701, 708-09 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990). Because plaintiff points to no direct evidence of discrimination, but asserts circumstantial evidence only to support his claims, I will examine his claims under the circumstantial evidence framework.

A. Retaliation

In count I of the amended complaint, plaintiff alleges he was subjected to unlawful retaliation when the City discharged him from employment, failed to recall him from layoff and failed to abide by the settlement agreement. To establish a prima facie case for retaliation pursuant to Title VII, Johnakin must show (1) he engaged in protected activity; (2) he suffered an adverse employment decision after or contemporaneous with such activity; and (3) a causal link existed between the protected activity and the adverse decision, i.e., the discharge, the failure to be recalled from layoff and the failure of the City to abide by the terms of the settlement agreement. See Quiroga, 934 F.2d at 501; Jalil, 873

F.2d at 708. A causal link may be inferred from circumstantial evidence. Jalil, 873 F.2d at 708 (citing Burrus v. United Tel. Co., 683 F.2d 339, 343 (10th Cir.) ("The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive"), cert. denied, 459 U.S. 1071 (1982)).

1. Retaliatory Discharge. Plaintiff alleges he was discharged in retaliation for filing an EEOC claim on July 5, 1991 against the City.³ See Johnakin Aff. ¶ 3. Assuming plaintiff satisfies the first two elements of the prima facie case,⁴ Johnakin offers as proof of causal link the close proximity in time between his protected activity and discharge. Plaintiff points to the dates that (1) the EEOC completed its investigation, as marked by the mailing of its determination on June 30, 1992, and (2) Kaplan identified plaintiff as a candidate for layoff, as reflected in her memorandum of November 20, 1992. Thus, according to plaintiff, the retaliation occurred only five months after protected activity. The dates plaintiff utilizes to establish a causal link are not the relevant dates recognized by the Court of Appeals for the Third Circuit. The date to establish the protected activity is not final determination by the EEOC but rather filing of the original EEOC complaint. See Woodson v. Scott Paper Co., 109 F.3d 913, 921 (3d Cir. 1997); Robinson v. SEPTA, 982 F.2d 892, 895 (3d Cir. 1993); Jalil, 873 F.2d at 708. Similarly, the relevant date for the adverse action is not when the Commission initially considered Johnakin for termination, but when the actual termination occurred. See Woodson, 109 F.3d at 921; Robinson, 982 F.2d at 895; Jalil, 873 F.2d at 708. Consequently, the relevant dates for establishing a causal link are the date that Johnakin filed his EEOC complaint, July 5, 1991 and his termination, April 3, 1993, representing a time span of one year and nine months.

³The EEOC claim charged the City with racial discrimination for harassment and being forced to work outside his job description. See Johnakin Aff. Ex. A. On May 29, 1992, the EEOC issued a no cause determination. See Johnakin Aff. Ex. B.

⁴Plaintiff engaged in protected activity by filing an EEOC complaint on July 5, 1991. See Johnakin Aff. Ex. A. Plaintiff was discharged effective April 2, 1993. See Brief of Defendant Ex. D.

In Robinson, the Court of Appeals for the Third Circuit held that one year and ten months was temporally remote and could not establish a causal link without a finding that the employer engaged in a "pattern of antagonism" between the protected activity and termination. Robinson, 982 F.2d at 894-95; see Woodson, 109 F.3d at 920-21. Plaintiff has not alleged or presented evidence of such a pattern of antagonism. Having found there is no temporal proximity between the protected activity and the discharge, and in the absence of an alleged pattern of antagonism, plaintiff has failed to establish the third element of the prima facie case, a causal link, in his retaliatory discharge claim.

2. Failure to Recall. Plaintiff alleges that the City retaliated by failing to recall him from layoff when two CPIIs resigned from the Commission in May, 1994 and the CPC subsequently hired a CPIII in January, 1995. Plaintiff contends that he engaged in protected activity by filing the second charge of discrimination on April 22, 1993. See Johnakin Aff. Ex. J. He contends that he was adversely affected when the Commission failed to recall him after the resignation of two CPIIs in May, 1994, and the hiring of a black woman as a CPIII in January, 1995. Plaintiff asserts that the causal link is established by the proximity of thirteen months between his protected action and the Commission's failure to recall him. Plaintiff bolsters his argument by alleging that Kaplan promised to recall him "if a planner II left in community planning and if he would agree to perform full performance duties." Brief of Plaintiff at 6.

Plaintiff offers no evidence as to who filled the positions that were vacated by the two CPIIs or whether, in fact, they were filled at all. Furthermore, plaintiff offers no evidence that he was qualified to fill the CPIII position, two full levels above his own classification. Therefore, I find that plaintiff has failed to show he was adversely affected by the decision of the CPC. Accordingly, I find that the evidence of record is insufficient to support a prima facie claim of retaliation with regard to the failure of the City to rehire plaintiff.

3. Failure to Abide by the Settlement Agreement. Plaintiff alleges that the failure of the City to abide by the terms of the settlement agreement dated on or about April 7, 1995, to find a suitable position within fourteen days of the agreement, was retaliatory. According to plaintiff, he engaged in protected activity by filing this lawsuit on March 17, 1995 and suffered harm when the City failed to offer him a position within two weeks of the date of the settlement agreement.⁵ Plaintiff directs this court to the short time span between the two events as evidence of a causal link. However, the parties reached the amicable settlement agreement after plaintiff engaged in protected activity. There is absolutely no evidence that the City reached the terms of the settlement agreement with no intention of abiding by them. I conclude that a reasonable factfinder would have to engage in speculation and conjecture to infer retaliatory intent from the sparse record presented by plaintiff on this issue. Accordingly, I find that the alleged failure to abide by the terms of the settlement agreement is more akin to a breach of contract claim than a retaliation claim. Therefore, I will grant motion for summary judgment with regard to the retaliation claims asserted by plaintiff.

B. Race and Gender Discrimination

Plaintiff contends that the City engaged in race and gender discrimination in violation of Title VII when it terminated his employment and failed to recall him from layoff. Plaintiff also contends that this same conduct constitutes a violation of 42 U.S.C. § 1981 on the part of Kaplan and Baldinger. A § 1981 claim entails the same elements of proof as required under a Title VII action. See Weldon v. Kraft, Inc., 896 F.2d 793, 796 (3d Cir. 1990); Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983), cert.

⁵Particular terms of the settlement agreement are in dispute. Plaintiff asserts that "the City was obligated to offer [him an actual] job" with business hours similar to his hours at the Commission. Johnakin Aff. ¶ 11 (emphasis in original). There is no term in the settlement agreement providing that job opportunities were to have hours similar to plaintiff's previous position. Nevertheless, plaintiff offers evidence that the City failed to abide by the undisputed terms of the agreement in providing a job opportunity at or above his salary level as a CPI, within two weeks of the agreement. Johnakin Aff. ¶ 11.

denied, 496 U.S. 892 (1984); O'Brien v. City of Philadelphia, 837 F. Supp. 692, 699 (E.D. Pa. 1993). Accordingly, the Title VII claim for race and gender discrimination and the § 1981 claim will be discussed together.

Pursuant to the three step, burden shifting analysis established by the Supreme Court in McDonnell Douglas, Johnakin must first set forth a prima facie case of discrimination by showing that (1) he belongs to a protected class; (2) he was qualified for the job from which he was discharged or for which he applied; (3) he suffered an adverse employment decision; and (4) other employees not in a protected class were treated more favorably. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993) (citing Jackson v. University of Pittsburgh, 826 F.2d 230, 233 (3d Cir. 1987), cert. denied, 484 U.S. 1020 (1988)); Mardell, 31 F.3d at 1225 n.6; Kelly v. Drexel Univ., 907 F. Supp. 864, 873 (E.D. Pa. 1995), aff'd, 94 F.3d 102 (3d Cir. 1996).

Once the plaintiff has established a prima facie case, "the burden of production transfers to the defendant to 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Mardell, 31 F.3d at 1225 n.6 (quoting McDonnell Douglas, 411 U.S. at 802); see also Hudson v. Pennsylvania Turnpike Comm'n, No. Civ.A.95-5786, 1996 WL 668524, at *9 (E.D. Pa. Nov. 14, 1996). The employer's relatively light burden of production is met with evidence which, if taken as true, "would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

After such a showing by the defendant, the burden of production shifts back to the plaintiff to show by a preponderance of evidence that the proffered reasons for the unfavorable employment decision were not the true reason but were a pretext for discrimination. Id. To defeat the motion for summary judgment of defendant, plaintiff must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an

invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 331 (3d Cir. 1995). In evaluating the proffered reasons of defendants for terminating plaintiff, it is not the role of the court to determine whether the employer's decision was "wise, shrewd, prudent, or competent." Fuentes, 32 F.3d at 765. Rather, plaintiff must point the court to "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." Id. (quotations and internal citations omitted).

1. Prima Facie Case. Plaintiff established a prima facie case of discrimination by showing (1) that he is a black man; (2) that he was qualified for the CPI job from which he was discharged;⁶ (3) that he suffered an adverse employment decision; and (4) other employees not in protected classes were more favorably treated. See Josey, 996 F.2d at 638; Kelly, 907 F. Supp. at 872. Plaintiff has also stated a prima facie case for his claim pursuant to 42 U.S.C. § 1981. See Weldon, 896 F.2d at 796.

2. Articulated Reasons of Defendant. By establishing a prima facie case, a plaintiff eliminates the most common nondiscriminatory reasons for the adverse employment action and creates a presumption of discrimination. See Kelly, 907 F. Supp. at 875 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981)). With the prima facie case established, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. The City proffered two reasons for laying off

⁶Plaintiff claims the CPC engaged in discrimination when it failed to recall him from layoff. It is unclear whether plaintiff possessed the requisite qualifications to fulfill the positions available after his discharge. However, for purposes of this motion, I will assume plaintiff satisfies the prima facie case relating to his discharge and his failure to be recalled from layoff.

plaintiff, economic necessity and the need to keep full performance planners in light of a shrinking department.

a. Economic necessity. In July, 1992, the City Director of Finance issued a directive to the CPC to begin planning for a layoff of its staff. Brief of Defendants Ex. 1. In December, 1992, the Finance Department directed the Commission to reduce its expenditures by eliminating four positions before the end of fiscal year 1993 as part of the City's overall deficit reduction plan. Kaplan Aff. ¶¶ 2, 3. In the intervening months, three staff members left the Commission's employ so the Commission was forced to reduce staff by only one position. Kaplan Aff. ¶ 4.

b. Need to retain full performance planners. The Commission elected to eliminate a CPI rather than a full performance planner because the department had been steadily decreasing in size from a high of 76 to a target of 53. Kaplan Aff. ¶ 12. After carefully assessing productivity, skills and longevity of staff, Kaplan determined that it was essential to retain those planners who were most productive, functioning at the full performance or CPII level. Kaplan Aff. ¶ 4. The Commission did not believe it could afford to give up one of its limited number of positions to a CPI who could only be expected to perform at a limited level. Kaplan Aff. ¶ 16. Choosing to terminate plaintiff based upon his lower position as CPI, in contrast with the higher designation of CPII and its increased responsibility, is a legitimate, nondiscriminatory reason for the Commission's actions. See Healy v. New York Life Ins. Co., 860 F.2d 1209, 1213-14 (3d Cir. 1988) (finding that an employer's selection for layoff based on determination that another employee was more qualified to handle the post reduction in force responsibilities is a legitimate business reason), cert. denied, 490 U.S. 1098 (1989); Kelly, 907 F. Supp. at 875 (finding that the need to eliminate one of three employees to meet budgetary needs by terminating person with lowest level of computer skills is a legitimate business reason).

3. Burden of Plaintiff to Show Pretext. After finding that the defendants have articulated a legitimate nondiscriminatory reason for the employment decision, the burden shifts back to the plaintiff to show that the proffered reasons of the defendants are pretext for discriminatory animus and that the Commission terminated Johnakin for racial or gender reasons. See Fuentes, 32 F.3d at 763; Kelly, 907 F. Supp. at 875-76. Plaintiff proffers several attacks on the employer's articulated nondiscriminatory reasons for the adverse employment decisions.

a. Lack of advanced notice or warning. Plaintiff was the only employee in the CPI category at the time of his termination. He contends that the Commission should have warned him in advance that his job category alone would be subject to layoff. If he had been notified in advance that only CPIs would be affected by the layoff, then he would have applied to advance automatically to CPII. Johnakin Aff. ¶ 7. Plaintiff further alleges that he was "lulled" by the Commission into believing that all planners would be subject to layoff. By the Commission's failure to inform him of its decision to restrict layoffs to CPIs, the plaintiff concludes "[t]hose actions, to me, clearly were racial and sexual, in terms of being discriminatory; and retaliation for my persona, my personality, my outspokenness, my demeanor, and my sharpness as a planner." Johnakin Dep. at 89.

Absent contractual provisions to the contrary, courts are unwilling to impose a notice prerequisite on employers prior to termination for poor performance. Ragland v. Rock-Tenn Co., 955 F. Supp. 1009, 1018-19 (N.D. Ill. 1997); see also Rand v. CF Indus., Inc., 42 F.3d 1139, 1145 (7th Cir. 1994) (employee could not rely on employer's failure to inform him of poor performance before discharge where employer had no policy obligating it to do so). It is undisputed that at no time between the date officials of the CPC became aware of the necessity of layoffs and the date plaintiff was notified of his termination, did any official of CPC tell plaintiff that he would be laid off if he did not take action to advance

to CPII.⁷ Johnakin Aff. ¶ 7. Although the CPC did not terminate plaintiff for poor performance, I find the reasoning from the Seventh Circuit persuasive. Plaintiff cites no legal authority or contractual provision, and this Court has found none, to support his contention that the Commission was required to notify him in advance of its decision to eliminate the CPI job category. Without this legal obligation, any inference of discriminatory intent by a factfinder would be speculation. Therefore, plaintiff fails to demonstrate that defendants' failure to warn of the imminent layoffs constitutes pretext of discrimination.

b. Plaintiff was the sole employee in the affected job category. As the only individual in the CPI category, plaintiff concludes that Kaplan chose to subject CPIs only to termination in order to accomplish her "objective of ridding the Commission of plaintiff on the basis of race and/or sex." Brief of Plaintiff at 12. To support his contention, plaintiff highlights that his college degree, his veteran status, his job performance and his attendance would make him competitive with the CPIIs. Johnakin Dep. at 88. Plaintiff concludes he should have been considered in the same level as CPIIs.

Plaintiff's alleged seniority is based on his own admittedly estimated calculations, including years of employment at the Commission, military service and performance.⁸ See Johnakin Aff. ¶ 6; Ex. C(1)-C(5). Plaintiff offers no evidence of official seniority ranking of staff members by the Commission itself. Regardless of the accuracy of

⁷Defendant contends Johnakin had the opportunity since 1986 to advance to CPII without taking the civil service exam; all he need do was fill out the application. Kaplan Aff. ¶¶ 14, 15.

⁸Plaintiff failed to include military service in calculating his seniority and that of other employees. Johnakin Aff. Ex. C(1)-C(5). Exhibit 4 attached to the memorandum of plaintiff is an unidentified chart listing performance ratings of employees. Brief of Plaintiff Ex. 4. The column labeled "Performance" includes two ratings for each employee, a descriptive term and a number, although there is no indication as to significance or meaning of the ratings given. Apparently plaintiff used the performance ratings from the unidentified chart to value the seniority of each employee. However, plaintiff does not reveal the source of this chart and whether or not it is an official source for employment decisions at the CPC. For these reasons, the data provided by plaintiff is of doubtful reliability.

his calculation of seniority, the subjective estimations by plaintiff of his own qualifications and skills do not permit an inference that the Commission used its articulated reason as a mask to cover discriminatory animus. See Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("The plaintiff's own view of his performance is not at issue; what matters is the perception of the decision maker."); Kelly, 907 F. Supp. at 877.

c. Plaintiff had been performing the duties of a CPII for approximately five months at the time of his termination. Plaintiff asserts that on a total of three occasions in 1990, 1991, and again for the five months preceding his termination, he was the sole planner in the regions to which he was assigned and performed at the level of a CPII during those intervals. Johnakin Aff. ¶ 10. In addition, he asserts that the job descriptions for CPI and CPII in effect during his employment closely resembled each other, containing three major differences only: a CPI assists rather than leads representation of a planning area; a CPI does not make recommendations on plans; and a CPI has less overall responsibility than a CPII. Johnakin Aff. ¶ 10 & Exs. D, E. Therefore, plaintiff asserts that he should have been considered as having a CPII personnel designation for purposes of determining the layoff.

Kaplan stated that the decisionmaking process involved assessment of the productivity, skills and longevity of the staff in relation to current and projected workload of the agency. Kaplan Aff. ¶ 6. Kaplan made her final decision based upon designated job descriptions and the level of performance that could be expected from each. Kaplan Aff. ¶ 16. Although the job descriptions of CPI and CPII are similar, plaintiff himself admits that the CPII position involves more responsibility and stress. Johnakin Aff. ¶ 8. Even if plaintiff had at prior times performed at the CPII level while his personnel designation was a CPI, which demonstrated his ability to function as a full performance planner, the employer could not expect or rely on such performance when his CPI job designation did not require it. In light of the decreasing budget, with its attendant effects on personnel, Kaplan made the

decision to retain those who could be expected to handle the increased responsibilities. See Healy, 860 F.2d at 1219 (holding that retaining a younger and better qualified employee was a legitimate nondiscriminatory reason for laying off an older employee whose position was consolidated with another position during a company-wide reduction in force). Finally, even if plaintiff could outperform the retained employees, this Court does not review the business decision of an employer for its prudence or shrewdness but only for discriminatory criteria. See Kelly, 907 F. Supp. at 877. Having failed to produce evidence of discrimination in the decisionmaking process of the CPC, plaintiff has failed to defeat the motion for summary judgment with regard to his claims pursuant to Title VII and 42 U.S.C. § 1981.

C. Constitutional Deprivation

Plaintiff contends that defendants Kaplan and Baldinger violated the Equal Protection Clause and the City, Kaplan and Baldinger violated the Due Process Clause pursuant to 42 U.S.C. § 1983, by laying off plaintiff and by failing to recall plaintiff from layoff.⁹

1. Equal Protection. "To bring a successful claim under 42 U.S.C. § 1983 for a denial of equal protection, plaintiff[] must prove the existence of purposeful discrimination. [He] must demonstrate that [he] 'receiv[ed] different treatment from that received by other individuals similarly situated.' Specifically to prove sexual discrimination, a plaintiff must show that any disparate treatment was based upon [his] gender." Keenan v. City of Philadelphia, 983 F.2d 459, 465 (3d Cir. 1992) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990) (citations omitted)); see also Sims v. Mulcahy, 902 F.2d 524, 538 (7th Cir.) (holding that to establish a prima facie case of racial discrimination under § 1983 in violation of the Equal Protection Clause, a plaintiff must show that he was a member of a protected class, that he was similarly situated to members

⁹Plaintiff voluntarily withdrew Baldinger from the claim alleging violation of his rights under the Equal Protection Clause with respect to failing to recall him from layoff. Brief of Plaintiff at 22.

of the unprotected class and that he was treated differently from members of the unprotected class), cert. denied, 498 U.S. 897 (1990). A plaintiff alleging a violation of the Equal Protection Clause bears a heavier burden of proof than a plaintiff claiming discrimination under Title VII. Sims, 902 F.2d at 538.

Plaintiff alleges that the specific violation of equal protection was "his right to be free from a layoff that is race and/or sex based." Brief of Plaintiff at 22. To support this claim plaintiff states that "Kaplan and Baldinger participated in the decision to layoff plaintiff and they each knew of the implications of the layoff decision in terms of race and sex discrimination." Id. Plaintiff offers no evidence other than the defendants' knowledge that layoff would affect only plaintiff.

Plaintiff's contentions fail to establish a prima facie case. Although plaintiff is a member of a protected class, he was not similarly situated to members of an unprotected class. It is undisputed that plaintiff was the only CPI at the Commission. Kaplan Aff. ¶ 12; Johnakin Aff. ¶ 7. Plaintiff's title as well as the nature and responsibilities of his position as a CPI reveal that he was not similarly situated to the CPIs or higher level employees at the Commission. Therefore, plaintiff fails to establish a prima facie case for violation of the Equal Protection Clause.

2. Due Process. Plaintiff voluntarily withdrew count IV based on the Due Process Clause against all defendants. Brief of Plaintiff at 22-23. Therefore, I will grant summary judgment as to this count.

IV. CONCLUSION

In summary, plaintiff has not established a prima facie case to support his claims of retaliation by the City as to the discharge of plaintiff, failure to recall plaintiff from layoff or failure to abide by the settlement agreement. In addition, plaintiff has failed to provide evidence that the Commission engaged in employment discrimination based upon

his race or gender or violated his equal protection rights. Accordingly, summary judgment will be granted in favor of the defendants and against plaintiff.

An appropriate order follows.

