

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

CHARLES G. ASTREE, : CIVIL ACTION  
: :  
Plaintiff, : :  
: :  
v. : :  
: :  
UNITED STATES DEPARTMENT OF : :  
JUSTICE, BUREAU OF PRISONS, : :  
: :  
Defendant. : NO. 98-118

M E M O R A N D U M

**Padova, J.**

August 4, 2003

Plaintiff, a Physician's Assistant formerly employed by Defendant, brings this action for racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C.A. §§ 2000e - 2000e-17 (West 1994 & Supp. 1998). Plaintiff alleges that he was given negative employment references as a result of racial discrimination and in retaliation for his filing an Equal Employment Opportunity Commission ("EEOC") claim. Presently before the Court is Defendant's Motion for Summary Judgment. For the reasons discussed below, Defendant's Motion will be granted.

## **I. Facts and Procedural History<sup>1</sup>**

Plaintiff, a Physician's Assistant, began working for Defendant, Bureau of Prison's ("BOP") Federal Correctional Institution, Schuylkill ("FCI Schuylkill"), in Minersville, Pennsylvania, on May 15, 1994.<sup>2</sup> As a new employee, he was subject to a one year probationary period. (EEOC Tr. at 189.) During the first several months of his employment Plaintiff's supervisor was Dr. Stanley Runkle. (Pl.'s Deposition ("Dep.") at 91-92.) Plaintiff respected Dr. Runkle and got along well with him. (Id.) While working under Dr. Runkle, Plaintiff states that he received satisfactory performance evaluations. (Pl.'s Dep. at 98.) In October 1994, Dr. David Malinov became the new Clinical Director of FCI Schuylkill. (EEOC Tr. at 112.) Plaintiff and Dr. Malinov often disagreed about modes of medical treatment. (Pl.'s

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<sup>1</sup> The facts set forth are developed from the record before the Court. The record consists of Defendant's Motion for Summary Judgment and the exhibits annexed thereto, Plaintiff's Verified Complaint, and Plaintiff's EEOC Complaint and the exhibits annexed to it. Although only portions of Plaintiff's deposition transcript and the transcript of the EEOC hearing were attached to Defendant's Motion, Defendant subsequently submitted complete copies of each to the Court, and they are made part of the record.

<sup>2</sup> A Physician's Assistant is not licensed to practice medicine, but rather works under the medical license of a supervising physician. In this case the Physician's Assistants worked under the license of the Clinical Director of FCI Schuylkill. While under the license of a supervising physician, the physician's assistant is granted certain medical privileges, such as the ability to prescribe medications.

Dep. at 103; EEOC Tr. at 122-124, 134-139.) Plaintiff often argued with Dr. Malinov because he believed Dr. Malinov's clinical methods to be antiquated. (Id.)

Between January and February 1995, Defendant began to have serious concerns regarding Plaintiff's work performance, especially with respect to his prescribing habits. Both Dr. Malinov and Arturo Reynaldo, the Assistant Health Services Administrator, said they had discussions with Plaintiff regarding these deficiencies. (EEOC Tr. at 115, 117-118, 145-146, 149; Def.'s Mem. Supp. Mot. Summ. J. ("Def.'s Mem.") Ex. 4-8.)

On February 21, 1995, Plaintiff was terminated. (Pl.'s EEOC Compl. Ex 13.) In its letter of termination, signed by the Warden of FCI Schuylkill, George Wigen, Defendant states that Plaintiff was terminated for "unsatisfactory performance." (Id.) The termination letter, explains that Plaintiff's shortcomings included, "prescribing too much medication, prescribing too little medication, prescribing incorrect medications, failing to respond to a medical emergency, failing to follow proper medical procedures, and failing to perform the duties of a Camp Physicians Assistant." (Id.) The letter further states that Plaintiff was counseled by Dr. Malinov and Mr. Reynaldo, but that his performance did not improve. (Id.)

Plaintiff believed his termination was racially motivated and therefore filed an employment discrimination grievance with the Equal Employment Opportunity Commission. (Pl.'s Dep. at 12.) Plaintiff's initial EEOC claim was resolved by a written settlement agreement ("Agreement") in September, 1995. (Def.'s Mem. Ex. 14; Pl.'s EEOC Compl. Ex. 13.) The Agreement provided that Plaintiff's status on the SF-50 report in his personnel file would be "changed from 'Termination' to 'Resignation for personal reasons'." (Id.) This status change would allow Plaintiff to pursue other positions within the BOP. (Pl.'s EEOC Compl. Ex. 7 at 7.) In addition, Plaintiff believed that the Agreement precluded management officials at FCI Schuylkill from providing him with negative employment references, essentially limiting their reference comments to the language contained in the Agreement, i.e. that Plaintiff had resigned for personal reasons. (Pl.'s Dep. at 20-21, 26-27, 31-33, 52-53.)<sup>3</sup> Plaintiff refers

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<sup>3</sup> The Defendant states, that "[a]t bottom, [Plaintiff's] real grievance is based on a perception that the 1995 Settlement Agreement. . . contained promises of favorable job references in the future." (Def.'s Mem. at 27.) In his deposition testimony Plaintiff alleges that he was told by Quincy Heck, BOP Regional Director, and Kevin Crawfoot, EEOC Investigator, that he would be "vouchered positively." (Pl.'s Dep. at 20-21, 26-27, 31-33, 52-53.) Defendant thus suggests that Plaintiff's claim is really one for breach of contract.

While Plaintiff may very well have potentially viable claims other than the Title VII claims currently before the Court, Plaintiff's Verified Complaint cannot be read to allege a claim sounding in contract even under the most liberal construction. As noted infra, while this Court does not hold a pro se plaintiff to the same stringent pleading requirements as a litigant

to such references as "vouchering." (Id.) There is no mention of future job references in the agreement and the agreement contains an integration clause, specifically stating that, "[t]his document contains the full and complete agreement of settlement and resolution of this complaint." (Id.)

Plaintiff applied to other BOP facilities, but was unable to secure alternative employment. (Id. at 52-57.) Plaintiff believes he was "blackballed", i.e., he was given negative employment references by FCI Schuykill, in violation of his understanding of the settlement agreement and in retaliation for his filing an EEOC complaint. (Pl.'s Compl. at 3; Pl.'s EEOC Compl. Ex. 5 at 8-10.) Specifically, Plaintiff believed that Marianne Coratello, the Human Resources Director, and Dr. Malinov provided negative references to the hiring officials at the Federal Correctional Facility in Fairton, New Jersey, and the Federal Penitentiary in Atlanta, Georgia. (Pl.'s Dep. at 78-79, 110-111, 115.) He explains that although both Fairton and Atlanta were initially impressed with his qualifications and were inclined to hire him, he received no job offers after officials from these institutions contacted FCI Schuykill. (Pl.'s Dep. at 67, 76-77, 80-81.) Plaintiff therefore brought a second EEOC

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represented by counsel, it will not act as an advocate for the pro se litigant. Broadly construed, the Court reads Plaintiff's Verified Complaint as alleging claims only under Title VII, and therefore will not entertain any other potential claims such as those sounding in contract.

claim on December 20, 1995. (Id. at 59, 62; Pl.'s EEOC Compl. Ex. 1.) Subsequently, an EEOC investigation took place.

In his affidavit, Warden Wigen explained that Plaintiff was fired while on probation due to his "failure to perform his duties adequately." (Pl.'s EEOC Compl. Ex. 6 at 3.) He stated that Plaintiff's initial EEOC complaint was settled when Plaintiff agreed to drop the complaint in exchange for his status being changed from terminated to resigned on his SF-50 report. (Id. at 4.) The Warden said that although he agreed to the status change in Plaintiff's records, there was no discussion during the settlement negotiations regarding positive references on Plaintiff's behalf to prospective employers. (Id. at 4-5.) He added that he had not given Plaintiff any references, as he was never contacted in that regard. (Id. at 4.)

In her affidavit, Ms. Coratello explained that nothing in the settlement agreement or negotiations indicated management would provide Plaintiff with positive references. (Id. Ex. 9 at 5.) She further explained that when prospective employers called her for references, she told them only that Plaintiff had resigned for personal reasons. (Id. at 4-5.) She said she directed inquiries regarding Plaintiff's clinical performance to Dr. Malinov; she never gave references on Plaintiff's clinical performance because she was unfamiliar with it as she is not a physician. (Id. at 4-5.)

Associate Warden Michael Fedorowicz stated in his affidavit that he provided some references regarding Plaintiff's job performance to potential employers, but he referred most of the calls to Dr. Malinov. (Id. Ex. 7 at 5, 7.) Mr. Fedorowicz stated that in these references, he indicated that Dr. Malinov refused to grant Plaintiff privileges under his physician's license because the Clinical Director had concerns about Plaintiff's ability to adequately perform his job. (Id. at 5-6, EEOC Tr. at 182.)

In his affidavit, Dr. Malinov stated that he told potential employers that Plaintiff was "medically incompetent." (Pl.'s EEOC Compl. Ex 8 at 4.) Dr. Malinov explained that Plaintiff's race and EEOC activity played no part in his evaluations of plaintiff in the references he provided. (Id. at 4.) In fact, at the EEOC hearing, Dr. Malinov said that he had not known that Plaintiff filed an EEOC complaint. (Id. at 6.) Dr. Malinov explained that Plaintiff "made many, many mistakes in his prescribing habits," would not take criticism, repeated his mistakes, did not follow suggestions, fought with him and "just refused to do what he was told." (Id.) Finally, he stated that he had counseling sessions with Plaintiff, and that he had no idea why Plaintiff would believe he discriminated against him. (Id. at 7-8.)

A hearing before an EEOC Administrative Judge was held on July 17, 1997, at which Plaintiff was represented by counsel. (Def. Mot. Ex. 12.) At the hearing, only Plaintiff's retaliation claim was addressed.<sup>4</sup>

At the EEOC hearing, Dr. Malinov testified that although he had disagreements with other Physician's Assistants, his disagreements with Plaintiff were different because Plaintiff did not follow his suggestions and kept on making the same mistakes. (Id. at 124.) He stated that while he did not expect "total agreement" during the discussions he had with Plaintiff, unlike other Physician's Assistants, Plaintiff "fought" with him and "took offense" to Dr. Malinov's suggestions. (Id. at 133-34.) Dr. Malinov explained that he "felt as though he were banging his head against the wall." (Id. at 139.)

Further, Dr. Malinov stated that he counseled Plaintiff on his mistakes, but that he was uncertain of the documentation methods of the BOP, and therefore did not formally document all

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<sup>4</sup> The Administrative Judge held at the outset of the hearing that Plaintiff's racial discrimination claim was barred by the July 8, 1996 class action settlement agreement of Enzor v. Reno, which stipulated to the dismissal of all race discrimination claims brought against the BOP by African American employees employed on or about January 15, 1993. (Def.'s Mem. Ex 18 at 5; EEOC Tr. at 4.) She therefore refused to allow testimony on racial bias and, hence, the only testimony elicited at the hearing was in regard to Plaintiff's retaliation claim. (Id.) The following persons testified at the hearing in that regard: Plaintiff; Francisco Ortiz, a Physician's Assistant FCI Schuykill; Dr. Malinov; Mr. Reynaldo; and, Mr. Fedorowicz.

of these discussions. (EEOC Tr. at 119-120.) In these counseling sessions, Dr. Malinov did not specifically mention that the problems that Plaintiff was having ultimately could affect his employment. (Id.)

Plaintiff stated that he argued with Dr. Malinov because he was "liable for the care of the inmates as much as Dr. Malinov." (Id. at 28.) He further stated that "there [were] times that [Malinov's] mode of therapy, his clinical knowledge, to [Plaintiff], [was] very insufficient. And therefore, [Plaintiff came] up with the most current updated informations. . . And there [were] times, like, [Dr. Malinov] refused to accept it." (Id.) Plaintiff stated that his disagreements with Dr. Malinov were often based on their differing modes of therapy, and he explained that his medical opinions and modes of treatment were guided by The Family Practice Handbook, while Dr. Malinov followed the Physician's Desk Reference. (Id. at 205-09.) Finally, Plaintiff stated that he was never formally counseled by Dr. Malinov. (Id. at 100.)

Mr. Reynaldo testified that he too supervised Plaintiff, although his supervision was more administrative than clinical. (Id. at 144-45.) He said that he did not give any references to potential employers regarding Plaintiff and that he was unaware Plaintiff had filed an EEOC Complaint over his dismissal. (Id. at 145.) Reynaldo said that he informally counseled Plaintiff

several times on what he considered performance shortcomings, and that he formally counseled him on January 10, 1995. (Id. at 145, 147, 157.) He stated that Plaintiff over-medicated and under-medicated patients, failed to respond to a medical emergency and incorrectly filled out inmate medical charts. (Id. at 145-50.) Reynaldo further stated, that before January 10, 1995, Plaintiff was not given an "unsatisfactory" log entry because such an entry would have automatically resulted in his dismissal as Plaintiff was a probationary employee. (Id. at 150-51.) Both Reynaldo and Fedorowicz stated that probationary employees do not receive progressive discipline, such as official reprimands or suspensions, before being terminated. (Id. at 163-64, 191-93.)

At the conclusion of the proceedings, the Administrative Judge recommended a finding of no retaliation. (Def.'s Mot. Ex. 18 at 5.)

On October 24, 1997, the Department of Justice rendered a final agency decision, rejecting Plaintiff's claim. (Def.'s Mot. Ex. 18.) The decision interpreted Plaintiff's allegations as claims for retaliation and racial discrimination. (Id. at 1.) The Department reversed the determination of the Administrative Judge that Plaintiff's racial discrimination claim was barred by the settlement agreement in Enzor v. Reno, and therefore, also considered Plaintiff's claim for racial discrimination. (Id. at 9-10.) The Department noted that while the Administrative Judge

had refused to hear evidence regarding this claim, the investigative record was sufficiently developed to allow it to make a substantive decision on the merits of the discrimination claim. (Id. at 10.) The Department found no merit to either of Plaintiff's contentions. (Id.) Plaintiff thereafter initiated this suit.

## II. STANDARD OF REVIEW

Summary judgment "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 judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,

477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, then the non-moving party bears the burden of demonstrating that there are disputes of material fact that should proceed to trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). To meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on allegations or denials in the pleadings. Celotex, 477 U.S. at 324. Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

### **III. DISCUSSION**

Plaintiff, who proceeds pro se, has not responded to Defendant's motion for summary judgment. The Court notes at the outset that pro se plaintiffs are allowed greater leeway and held to less stringent standards in pleadings and procedure than are plaintiffs who are represented. See Haines v. Kerner, 404 U.S.

519 (1972)(reversing 12(b)(6) dismissal and allowing pro se prisoner with inartfully pleaded complaint to offer supporting evidence). That said, however, even under this less stringent standard,

Under Rule 56, a nonmoving party must adduce through affidavits or otherwise "more than a scintilla of evidence" that a material fact remains in dispute. Conclusory statements in affidavits about the existence of facts do not provide the kind of evidence required to successfully oppose summary judgment. Although a non-movant such as [Mr. Astree] is not required under Rule 56 to dispute every assertion in the movant's affidavits, he must provide or point out some affirmative evidence in the record that substantiates his claim. Here, in light of the extensive records introduced by defendant[], [Mr. Astree] cannot resist summary judgment based on [the] bare assertion[s] of [discrimination and retaliation] in his own affidavit, [deposition, and EEOC hearing testimony].

Pearson v. Vaughn, 984 F. Supp. 315, 316 (E.D.Pa. 1997)(internal citations omitted).

In order for Plaintiff to prevail on a claim for racial discrimination or retaliation, he must demonstrate by a preponderance of the evidence that FCI Schuylkill's actions were prompted by race or reprisal. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510 (1993). Therefore, the Court's ultimate inquiry is whether or not Plaintiff has shown that FCI Schuylkill gave Plaintiff negative employment references because he is black or because he filed an EEOC complaint. Id.

Because Plaintiff presents a pretext case, arguing essentially that the BOP's proffered reasons for negatively

vouchering him were fabricated in order to veil a discriminatory motive, the burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) applies. The United States Court of Appeals for the Third Circuit ("Third Circuit") interpreted the McDonnell Douglas approach in the context of summary judgement motions in Fuentes v. Perskie, 32 F.3d 759 (3d Cir.1994).

Fuentes dictates that Plaintiff bears the initial burden of establishing a prima facie case of employment discrimination. Fuentes, 32 F.3d at 763. If Plaintiff makes a prima facie showing, the burden of production then shifts to the BOP "to articulate some, legitimate, nondiscriminatory reason for the employer's rejection." Id. (citation omitted). The BOP satisfies this burden "by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Id. If the BOP carries this relatively light burden by articulating a legitimate reason, however, "the burden of production rebounds to the plaintiff, who must now show, by a preponderance of the evidence, that the employer's explanation is pretextual." Id.

Before delving further into the legal analysis of Plaintiff's claims, the Court must parse out the persons whom Plaintiff identifies as responsible for providing him with

negative job references based on racial animus or retaliation. The Court notes that, quite obviously, only those persons employed by the BOP who actually provided Plaintiff with negative job references could be found to have done so due to racial animus. And, only those persons who knew of Plaintiff's initial EEOC complaint prior to providing Plaintiff with a negative job reference could be found to have done so in retaliation for his having filed the claim.

That said, the persons Plaintiff identifies as responsible parties are: Dr. Malinov; Ms. Coratello; Warden Wigen; Associate Warden Fedorowicz; and, Assistant Health Care Administrator Reynaldo. Of these five individuals, the evidence shows that only Dr. Malinov and Mr. Fedorowicz gave Plaintiff negative job references.<sup>5</sup> Further, only Mr. Fedorowicz had knowledge of Plaintiff's initial EEOC claim when he proffered a negative reference regarding Plaintiff. Therefore, based on the Rule 56 record, with regard to Plaintiff's racial discrimination claim, the only persons who could be potentially liable are Dr.

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<sup>5</sup> The only evidence regarding Ms. Coratello was that she told potential employers that Mr. Astree had resigned for personal reasons, and referred any calls regarding Mr. Astree's clinical performance to Dr. Malinov. Her testimony in that regard is corroborated by Dr. Malinov and Mr. Fedorowicz. (EEOC Tr. at 129, 185.) Both Warden Wigen and Mr. Reynaldo stated that they were not contacted to provide references for Plaintiff. (Pl.'s EEOC Compl. Ex. 6 at 4; EEOC Tr. at 145.)

Malinov and Mr. Fedorowicz. Regarding Plaintiff's retaliation claim, the only potential wrongdoer is Mr. Fedorowicz.

A. Prima Facie Case:

(i) Racial Discrimination

To establish a prima facie showing that the BOP's actions in giving Plaintiff negative job references were based on racial discrimination under Title VII, Plaintiff must show: (i) that he belongs to a racial minority; (ii) that he was qualified for the job for which he was applying, and thus entitled to positive employment references; (iii) that, despite his qualifications, he was given negative employment references from FCI Schuylkill; and (iv) that, FCI Schuylkill gave positive employment references to non-members of the protected class who had Plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824; Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992).<sup>6</sup>

Defendant argues that Plaintiff has failed to establish a prima facie case of racial discrimination because there is no evidence in the record that non-members of the racial minority

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<sup>6</sup> The Supreme Court noted that the prima facie standard set forth in McDonnell Douglas is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [the instant] respondent is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas, 411 U.S. at 802, n. 13.

were treated more favorably than Plaintiff. Indeed, there is no evidence in the record to suggest that FCI Schuykill, and in particular Dr. Malinov or Mr. Fedorowicz, gave more positive job references to white former employees, than to black former employees.

Even though Plaintiff has failed to establish his prima facie case, the Court will continue its inquiry and assume that Plaintiff has met his initial burden. The Court conducts this exercise on Plaintiff's behalf, as he is proceeding pro se, and in light of the fact that at the administrative hearing, Plaintiff's counsel was unable to elicit testimony on the issue of racial bias. See supra note 3. For the reasons discussed below, however, the Court must dismiss Plaintiff's claim in any event, as he has failed to provide evidence to rebut Defendant's proffered legitimate reasons for its actions.

#### (ii) Retaliation

To establish a prima facie case of retaliation, Plaintiff must show that: (1) he was engaged in a protected activity; (2) the employer took an adverse employment action against Plaintiff after or contemporaneous with his engagement of that protected activity; and (3) a causal link existed between the protected activity and the adverse employment actions. Quiroga v. Hasbro,

Inc., 934 F.2d 497, 501 (3d Cir. 1991) (citing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989)).

Defendant alleges that Plaintiff has not satisfied the prima facie element of his retaliation claim. Defendant does not dispute that Plaintiff engaged in a protected activity, by filing his initial EEOC claim. (Def.'s Mem at 21.) Nor does it dispute that negative references were provided to other BOP facilities. (Id.) However, Defendant disputes that Plaintiff has proven the third element of his prima facie case, that is that a causal connection exists between BOP's providing negative employment references and the Plaintiff's engaging in the protected activity.

As noted, the only potential BOP employee who could be found to have given Plaintiff a negative reference in retaliation for Plaintiff's filing an EEOC claim would be Mr. Fedorowicz, as the evidence shows that only he had knowledge of Plaintiff's EEOC activity. At the hearing and in his affidavit, Mr. Fedorowicz flatly denied this allegation. (Pl.'s EEOC Compl. Ex. 7 at 7; EEOC Tr. at 183.) Plaintiff has provided no evidence to the contrary, and in fact does not ever suggest, in his affidavit, hearing testimony or deposition, that he believed Mr. Fedorowicz to be motivated by racial animus or retaliatory motives. Rather, he suggests that the Associate Warden was merely going along with the crowd. (Pl's Dep. at 141-142, 144.)

Again, however, for the purposes of this decision, the Court will assume that Plaintiff has met his prima facie burden of establishing a retaliation claim. As with his racial discrimination claim, Plaintiff's retaliation claim must fail as he has not presented evidence to rebut BOP's proffered legitimate reasons for its negative references.

B. Justification

In support of its Motion, BOP proffers the following non-discriminatory justification for its negative employment decisions regarding Plaintiff: namely, that Plaintiff was not competent in his role as a Physician's Assistant. Defendant argues that the record is replete with documentation of Plaintiff's deficiencies in his job performance while employed at FCI Schuylkill.

The deficiencies illuminated in the BOP's letter of termination, in memoranda from BOP employees, and in the affidavits and hearing testimony of Plaintiff's superiors included: mistakes in his prescribing habits (Def.'s Mem Ex. 13 at 6.); refusal to accept criticism (id.); repetition of the same mistakes (id.); over-medicating and under-medicating inmates (EEOC Tr. at 132; Pl.'s EEOC Compl. Ex. 13 at 6); failure to follow proper medical procedures (id.); failing to respond to a

medical emergency (id.); and, poor record-keeping (Def.'s Mem. Ex. 8.)

Dr. Malinov testified at the EEOC hearing that, compared to the other physician's assistants that he supervised, Plaintiff "didn't follow [his] suggestions," and "kept making the same mistakes." (Id. at 124.) He continued, "I think my biggest worry was the fact that he just didn't listen. He just refused to accept constructive criticism." (EEOC Tr. at 139.) He further stated that "overall. . . I was fearful that at some point in time, Mr. Astree was going to kill someone," by overdosing or underdosing medications to an inmate. (EEOC Tr. at 134.) He said that he was "very, very worried" and "fear[ed]. . . a possible disaster." (EEOC Tr. at 138.)

The record indicates that Dr. Malinov's negative references were based on his perception of Plaintiff's performance. His belief that Plaintiff was incompetent is a legitimate, non-discriminatory reason for giving Plaintiff negative references which has no relation to Plaintiff's race or prior EEOC activity.

Furthermore, the record indicates that Malinov was not the only person concerned with Plaintiff's work performance. Mr. Reynaldo also counseled Plaintiff on his job performance. (EEOC Tr. at 145, 147, 157.) Mr. Reynaldo wrote memos to the file which documented his discussions with Plaintiff. (Def.'s Mem. Ex. 6, 7, 8.) These memos document Mr. Reynaldo's concerns regarding

Plaintiff's overdosing and underdosing of medication, Plaintiff's mishandling of a medical emergency, and Plaintiff's misdiagnosis of an inmate. (Id.) In addition, the record contains a memo from a fellow physician's assistant to Dr. Malinov discussing Plaintiff's misdiagnosis of an inmate (id. Ex. 9), and a memo from a Correctional Officer to his Captain describing Plaintiff's failure to respond to a medical emergency in a timely fashion. (Id. Ex. 10.) The record also establishes that the BOP's concerns about Plaintiff's performance pre-dated Dr. Malinov's arrival. Plaintiff's performance log indicated that on September 27, 1994, one month before Dr. Malinov began at FCI Schuylkill, Plaintiff was counseled for making several mistakes in entries on inmate medical charts, and for placing inmates on permanent idle.<sup>7</sup> (Pl.'s EEOC Compl. Ex. 17.)

In light of all of the above, the BOP has satisfied its burden of articulating a legitimate, non-discriminatory reason for providing Plaintiff with negative job references.

### C. Pretext

As indicated, BOP has satisfied its relatively light burden of articulating a legitimate reason for its employment decision. The burden of production now rebounds to Plaintiff to show, by a

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<sup>7</sup> Idle is a designation whereby an inmate is excused from working. According to the performance log, permanent idle is a designation that does not exist in the BOP. (Id.)

preponderance of the evidence, that BOP's explanation is pretextual. In Fuentes, the Third Circuit set forth what a plaintiff must adduce to survive a motion for summary judgment when the defendant offers a legitimate reason for its action in a "pretext" discrimination case.

[T]he plaintiff generally must submit evidence which: (1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Id. at 762.

Fuentes also addresses the nature and quantum of evidence that Plaintiff must adduce on the issue of pretext.

[T]he plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the [defendant's] articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the [defendant's] action. . . [A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. . . [T]he 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.

Id. at 764-765 (internal quotations and citations omitted). Furthermore, "To discredit [the BOP's] proffered reason, [Plaintiff] cannot simply show that [the BOP's] decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated [the BOP], not whether [the BOP] is wise, shrewd, prudent, or competent." Id. at 765.

The Court finds that Plaintiff has not come forward with competent evidence, as defined in Fuentes, to demonstrate that a genuine issue of fact exists as to pretext. Plaintiff's "evidence," when boiled down to its essence, is simply that racial discrimination and/or retaliation had to be the basis for Defendant's conduct because there is no other reason to justify its behavior. Essentially, Plaintiff argues that Dr. Malinov's actions were racially motivated because prior to Dr. Malinov's arrival, while Dr. Runkle was Clinical Director, Plaintiff received favorable reports, but after Dr. Malinov's arrival Plaintiff was considered medically inept. At his deposition, Plaintiff testified that he believed that Dr. Malinov was afraid that with Plaintiff around, Dr. Malinov would be found to be incompetent; that Dr. Malinov was protecting his turf by scapegoating Plaintiff; that Dr. Malinov was insecure and racially motivated; and, that Dr. Malinov found it "incomprehensible that a black person is trying to question his judgment." (Pl.'s Dep. at 129-131.) However, Plaintiff offers

no factual evidence to bolster these naked assertions. As noted, Dr. Malinov denies that race had anything to do with his evaluation of Plaintiff's clinical performance, and has articulated a legitimate non-discriminatory reason for his actions.

Clearly, bare assertions of discriminatory motives do not meet the Fuentes standard. Plaintiff has utterly failed to demonstrate any weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendant's proffered legitimate reasons for their conduct with respect to Plaintiff's termination or to it's providing Plaintiff with negative job references.

Because Plaintiff has failed to submit any evidence which tends to negate or cast doubt on BOP's proffered legitimate non-discriminatory reasons for its action, he has failed to meet his burden of persuasion and both his racial discrimination and retaliation claims will be dismissed.

An appropriate order follows.

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

CHARLES G. ASTREE,	:	CIVIL ACTION
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	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES DEPARTMENT OF	:	
JUSTICE, BUREAU OF PRISONS,	:	
	:	
Defendant.	:	NO. 98-118

**O R D E R**

**AND NOW**, this 8th day of January, 1999, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 13), and all responses thereto, **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

\_\_\_\_\_  
John R. Padova, J.