

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

PATRICK HOLNESS	:	
Plaintiff,	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 98-2484
	:	
PENN STATE UNIVERSITY	:	
	:	
Defendant.	:	

GREEN, S.J.

May 5, 1999

MEMORANDUM - ORDER

Presently before the Court is Defendant Penn State’s Motion for Summary Judgment and Plaintiff’s response thereto. For the reasons outlined below, the Motion for Summary Judgment will be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

When deciding a motion for summary judgment, the Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532, 536 (3d. Cir 1994). Therefore, the Court will present the relevant facts of this case from Mr. Holness’ perspective.

Patrick Holness is a citizen of Jamaica who became a permanent resident of the United States in 1990. He obtained employment at Penn State University on June 30, 1995 and worked as a part-time janitor until his supervisor, Bea Taliferro, discharged him on June 11, 1996.

During his employment at Penn State, Mr. Holness applied for promotions to full-time

positions on three separate occasions. First, he unsuccessfully applied for a full-time, Grade 9, Group Leader position in December 1995. After Penn State chose another candidate for the Group Leader position, Bea Taliferro encouraged Mr. Holness to apply for a full-time, Grade 10, Janitorial Worker position in January 1996. In January 1996, Mr. Holness submitted a second application seeking full-time employment with Penn State. This time, Penn State hired another part-time employee with seniority over Mr. Holness. When two Grade 10 Janitorial Worker positions became available in April 1996, Mr. Holness submitted a third application for a full-time position, believing that he would be chosen this time because he was one of the two most senior part-time janitorial employees at Penn State. Ms. Taliferro interviewed Mr. Holness for a full-time position in April 1996. Shortly thereafter, Mr. Holness learned that his third attempt to obtain a full-time position was unsuccessful. Penn State chose Martha Clemmons, a part-time worker with seniority over Mr. Holness and Joan Rhoades who began her part-time employment with Penn State in February 1996.

After learning that Penn State hired Ms. Clemmons and Ms. Rhoades to fill the full-time positions, Mr. Holness met with Ms. Taliferro to discuss the reasons for his rejection. During that meeting, Ms. Taliferro allegedly stated that Penn State did not select Mr. Holness because “he did not know how to talk and he did not have a drivers license.” (Pl.’s Ex. in Opp’n to Summ. J. , Ex. S-1 at 61.) In response to that statement, Mr. Holness informed Ms. Taliferro that a drivers license was not required for the full-time positions and also pointed out that he did, in fact, “know how to talk.” Id.

On May 21, 1996, Mr. Holness filed a dual complaint with the Equal Employment Opportunities Commission (“EEOC”) and the Pennsylvania Human Relations Commission

(“PHRC”) alleging that Penn State discriminated against him by denying him promotions in January and April of 1996 “because of his National Origin (Jamaican)” and because “the workers complained that [he] didn’t know how to talk . . .” (Pl.’s Ex. in Opp’n to Summ. J., Ex. Q). In the charge of discrimination, Mr. Holness also explicitly denied having difficulty speaking, stating that “contrary to Respondent’s [Penn State’s] position I do know how to talk and do communicate without difficulty.” Id.

Mr. Holness subsequently brought the administrative documents to work with him to obtain advice and information from his brother, who also worked as a full-time janitor for Penn State. Mr. Holness also held several conversations with co-workers about the charges of discrimination he filed against Penn State. The last conversation he had about the discrimination charges occurred on June 7, 1996.

When Mr. Holness reported for work on June 11, 1996, Ms. Taliferro called him into her office and fired him. During this meeting, Ms. Taliferro allegedly offered the following explanation for Mr. Holness’ discharge: “management came to the conclusion that [you are] a troublemaker and that you are going to be a problem . . .” (Pl.’s Ex. in Opp’n to Summ. J. , Ex. S-1 at 87.) Furthermore, Ms. Taliferro reportedly indicated that she was aware that Mr. Holness filed charges of discrimination against Penn State. The actual EEOC complaint, however, was not served upon Penn State until June 25, 1996, fourteen days after Mr. Holness’ termination.

On July 1, 1996, Mr. Holness returned to the EEOC and filed charges of retaliatory discharge against Penn State, alleging that Penn State supervisory personnel labeled him a “troublemaker” and the decision to discharge him stemmed from Ms. Taliferro’s belief that “she and [Mr. Holness] were not going to get along . . .” Id. The affidavit accompanying the charge of

retaliation alleged that Bea Taliferro knew of the administrative charge of discrimination filed against Penn State when she fired Mr. Holness.

Mr. Holness subsequently received a right to sue letter from the EEOC and filed this action in federal district court alleging that Penn State (1) discriminated against him because of his race in violation of 42 U.S.C. §1981; (2) discriminated against him because of his race, national origin, and disability in violation of The Pennsylvania Human Relations Act (PHRA), 43 Pa. C.S.A. §951 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and 42 U.S.C. 121112; (3) discharged him in retaliation for filing discrimination charges in violation of Title VII and 42 U.S.C. § 1981; and (4) violated the common law of Pennsylvania¹.

Defendant Penn State now moves for summary judgment on all counts of the Plaintiff's complaint.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is properly granted to the moving party 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 genuine issue as to any material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

A party seeking summary judgment always bears the initial responsibility of identifying the basis for its motion, along with evidence clearly demonstrating the absence of a genuine issue

¹ Plaintiff voluntarily withdrew the common-law claims in Counts VII, VII[I], and IX of the Complaint. (Pl.'s Br. In Opp'n to Mot. For Summ. J. at 29).

of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the moving party has satisfied this requirement, Rule 56(e) of the Federal Rules of Civil Procedure requires the nonmoving party to supply sufficient evidence, not mere allegations, for a reasonable jury to find in the nonmovant's favor. Olson v. General Elec. Astrospace, 101 F.3d 947, 951 (3d. Cir. 1996). This evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 256, 106 S.Ct. at 2514. It is important to note that "this standard is applied with added vigor in employment discrimination cases where intent and credibility are crucial issues." Stewart v. Rutgers, The State University, 120 F.3d 426, 431 (3d. Cir. 1997).

Progressing to the specific issues raised in this case, Defendants move this court for summary judgment arguing that: 1) Holness cannot pursue a claim for disability and race discrimination because he failed to exhaust his administrative remedies; 2) the discrimination claims based on Mr. Holness' race and national origin fail because he cannot establish a *prima facie* case; 3) Holness' claims for retaliation must fail because he cannot make out a *prima facie* case and cannot show that the reason for his termination was pretextual; and 4) for various reasons, Mr. Holness' state law claims fail as a matter of law.

B. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The dual administrative complaint alleges that Penn State failed to promote Mr. Holness because he "did not know how to talk" . . . and because of his national origin (Jamaican)." (Pl.'s Ex. in Opp'n to Summ. J. , Ex. Q.) After receiving right to sue letters from the administrative agencies, Mr. Holness filed a complaint in this Court, alleging in Counts III and V that Defendant Penn State, through its agent employees, failed to promote him in violation of the Americans

with Disabilities Act, 42 U.S.C. § 12112 and Pennsylvania Human Relations Act (PHRA), 43 Pa.C.S.A. § 951 *et. seq.* Counts I, III, and V of Mr. Holness' complaint allege that Penn State discriminated against him on the basis of his race and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, 42 U.S.C. § 1981, and PHRA, 43 Pa.C.S.A. § 951 *et. seq.* Penn State now moves for Summary Judgment on the disability and racial discrimination claims, arguing that Mr. Holness failed to exhaust his administrative remedies.

Before a plaintiff may file suit in federal court under Title VII, the ADA, or the PHRA, he must exhaust all applicable administrative remedies by filing a charge with the appropriate state and/or federal agency. Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878-79 (3d Cir. 1990). The limits of the federal court action are "defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Antol v. Perry, 82 F.3d 1291, 1295 (3d. Cir 1996). However, when a claim is not specifically presented in the administrative charge of discrimination, the test for whether that claim can be presented to the district court is "whether the acts alleged in the subsequent suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Id. (citing Waiters v. Parsons, 729 F.2d 233 (3d Cir. 1984)(*per curiam*)).

The purpose for requiring exhaustion of administrative remedies is to afford the EEOC the opportunity to settle disputes through conference, conciliation, and persuasion, allowing only those cases that cannot be resolved to advance to litigation in the courts. Id. Therefore, to exhaust administrative remedies, a plaintiff need not articulate a specific set of words or phrases; instead, the plaintiff must adequately notify the administrative agency of the need to investigate the acts later alleged in the discrimination suit. If the plaintiff fails to place the administrative

agency on notice of an act of discrimination, the opportunity to resolve the issue without court intervention is lost and the administrative remedy has not been exhausted. See Antol at 1295.

1. Disability Claims

Mr. Holness asserts that he clearly set forth his disability discrimination claims by stating “[t]he respondent [’s] reason for failing to promote me in April 1996 was that the workers complain that I don’t know how to talk . . .” (Pl.’s Ex. in Opp’n to Summ. J. , Ex. Q). Mr. Holness reasons that this statement clearly identifies his alleged speech impediment and alerts the administrative agencies of the need to investigate the alleged discriminatory acts. Therefore, it suffices to satisfy the exhaustion of administrative remedies requirement.

For purposes of determining whether exhaustion of administrative remedies occurred, however, the court must examine the entire charge of discrimination. In this case, Mr. Holness included the following statement in the charge: “I do know how to talk and do communicate without difficulty.” (Pl.’s Ex. in Opp’n to Summ. J. , Ex. Q). The explicit denial of an impairment in Mr. Holness’ ability to communicate informs the administrative agency that no disability exists. If the agency operates under the assumption that no disability exists, it would not investigate or attempt to settle disputes surrounding a claim of disability discrimination. Mr. Holness’ express denial of an existing disability in his administrative complaints is not consistent with his claims of an existing speech impediment in the current cause of action against Penn State. Therefore, the Court finds that the claims of disability discrimination found in the Plaintiff’s complaint do not fall within the scope of his prior administrative complaint or the subsequent investigation of the charges identified therein. Thus, Penn State is entitled to summary judgment on the disability claims because Mr. Holness failed to adequately exhaust his

administrative remedies.

2. Claims of Racial Discrimination

In this case, the administrative complaint stated that Mr. Holness was discriminated against because of his national origin (Jamaican). However, Mr. Holness asserts that Penn State discriminated against him not only because he was born in Jamaica, but also because he possessed particular characteristics that belong to people of the Jamaican race. Mr. Holness asserts that he explained this to the administrative officer who prepared his charge of discrimination. Therefore, the Court cannot fault him for the inaccuracy of the administrative officer's assessment of the charges Mr. Holness sought to bring against Penn State.

Ultimately, this Court must decide whether the information in the administrative complaint placed the agencies on notice of the need to investigate whether Mr. Holness was discriminated against because of his national origin and race. Here, Mr. Holness' racial discrimination claim is based on his assertion that his race is Jamaican. Similarly, his national origin claims are based on the fact that he was born in Jamaica. The two claims are very closely related.

Several courts have already recognized the difficulty in separating race and national origin. See, e.g., Castaneda v. Partida, 430 U.S. 482, 499, 97 S.Ct. 1272, 1282 (1977). Often, the two categories blend into one for the purpose of establishing discrimination. Id. Since the charge of discrimination clearly states that Mr. Holness was discriminated against because he was Jamaican, the administrative agencies had adequate notice of the need to investigate that claim, whether they believed it was based on either race, national origin, or both. Therefore, at this stage of the proceedings, the Court cannot conclude that Mr. Holness failed to adequately

exhaust his administrative remedies before filing this Title VII claim of racial discrimination against Penn State. Consequently, the Motion for Summary Judgment as it applies to the racial discrimination claim will be denied.

C. RACE AND NATIONAL ORIGIN CLAIMS

Counts III and V of the plaintiff's complaint allege that Penn State discriminated against him on the basis of his race and national origin in violation of Title VII² and the PHRA.³ The plaintiff also alleges racial discrimination in violation of 42 U.S.C. §1981⁴. The

² 42 U.S.C.A. § 2000e states:

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2

³ The Pennsylvania Human Relations Act provides in relevant part :

It shall be an unlawful discriminatory practice . . .

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability . . . to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

43 P.S. § 955.

⁴ 42 U.S.C. §1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every

burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and more recently refined in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993), is the appropriate analysis for summary judgment motions in cases alleging these violations. See Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997). Therefore, the Court will follow these firmly established principles of law relating to burdens of proof and sufficiency of the evidence in this case.

In a Title VII case, the plaintiff carries the burden of establishing a *prima facie* case of unlawful discrimination. Fuentes v. Perskie, 32 F. 3d 759, 762 (3d. Cir 1994)(citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 2748 (1993)). Demonstrating a *prima facie* case is not onerous; it merely requires that the plaintiff establish facts adequate to permit an inference of discrimination. Id. This is accomplished by showing (1) that the plaintiff belongs to a protected class; (2) that he applied and was qualified for a job for which the employer was seeking applicants and despite his qualifications he was rejected; and (3) that nonmembers of the protected class were treated more favorably. Id.⁵ If the plaintiff succeeds in establishing a *prima*

State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C.A. § 1981 .

⁵ Ultimately, whether all four elements are established or not, a Title VII plaintiff has established a *prima facie* case when “sufficient evidence is offered to allow the court to infer that if the employer’s actions remain unexplained, it is more likely than not that such actions were based on impermissible reasons.” E.E.O.C. v. Metal Serv. Co., 892 F.2d 341, 347 (3d Cir. 1990).

facie case, the burden then shifts to the defendant to “articulate some legitimate, nondiscriminatory reason for the employer’s rejection.” Id.

To accomplish this, the defendant employer must introduce admissible evidence that clearly sets forth nondiscriminatory reasons for the plaintiff’s rejection. St. Mary’s Honor Ctr. v. Hicks, at 502, 113 S.Ct. at 2742. If the defendant’s proffered reasons for its employment decision creates a genuine issue of fact, the presumption of discriminatory intent drops from the case. Id. At that time, the burden shifts back to the plaintiff to prove that the employer’s reason for the employment action was actually pretextual. See Fuentes at 762.

1. *Prima Facie* Case

a. Protected Class

Mr. Holness asserts that Penn State discriminated against him because he was Jamaican and his Jamaican status identifies his national origin. National origin is defined broadly as including, but not limited to, “the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1 Mr. Holness was born in Jamaica and speaks with a Jamaican accent. (Pl.’s Ex. in Opp’n to Summ. J. , Ex. S.) He clearly possesses, at the very least, the linguistic characteristics of his place of national origin. By virtue of his national origin, therefore, Mr. Holness clearly meets the “member of a protected class” requirement of establishing a *prima facie* case under Title VII.

Mr. Holness also asserts that he is a victim of racial discrimination; he bases this claim on his belief that his race is Jamaican. During Mr. Holness’ deposition, counsel for Penn State asked him, “What race do you refer to when you say your race and national origin?” (Pl.’s Opp.

to Mot. for Summ. J., Ex. S at 123). Mr. Holness answered, “Jamaican” and stated that he did not consider himself “African-American.” Id. He further explained that he did not intend to claim that the discrimination occurred because of his skin color; instead, he believed that Penn State discriminated against him for one reason. He was Jamaican. Id.

Unlawful discrimination must be based on a plaintiff’s objective appearance to others, not his subjective feeling about his own ethnicity. See Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d. Cir. 1991), cert. denied, 502 U.S. 1066, 112 S.Ct. 956 (1992)(finding that “discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits.”) Mr. Holness argues that a person born in Jamaica may suffer discrimination, not merely because of the color of his skin, or because of linguistic traits, but because he possessed other characteristics common to Jamaican born persons. This type of discrimination is not based on national origin; it is based on race.

The word “race” has been defined as “a group of persons related by common descent, blood, or heredity.” Webster's New Dictionary and Thesaurus 262 (Concise ed. 1990). It follows then, that race is not limited to a person’s skin tone. As the Court stated in Bennun, *supra*, a plaintiff establishes membership in a protected racial class, for purposes of Title VII, by showing objective evidence that some superficial characteristic, common to persons belonging to his asserted class of persons, caused the employer to judge him based on stereotypical ideas and beliefs, not merit. See Bennun v. Rutgers State Univ., at 173. Therefore, it is possible for an African-American supervisor to racially discriminate against a Jamaican born employee who shares the same skin color, but altogether different cultural norms, language, and other more

superficial traits. The Court finds the Supreme Court’s reasoning in St. Francis College v. Al-Khazraji instructive on this point. In St. Francis College v. Al-Khazraji the Court concluded that discrimination solely because of a person’s ancestry or ethnic characteristics is racial discrimination. St. Francis College v. Al-Khazraji, 481 U.S. 604, 107 S.Ct. 2022 (1987)(holding that 42 U.S.C. §1981 reaches discrimination against an individual because “he is a part of an ethnically and physiognomically distinctive sub-grouping of persons.”) Viewing the evidence in the light most favorable to the plaintiff in this case, the Court finds that Mr. Holness may proceed with his claims of racial discrimination because a genuine issue of material fact exists as to whether he is a member of a protected class by virtue of his assertion that his race is Jamaican.

b. Qualification and Rejection

While employed by Penn State, Mr. Holness contends that he was qualified to fill one of the vacant full-time positions because he performed the same janitorial duties required of persons hired to fill the full-time vacancies in the Technical Services Department. (Pl.’s Ex. in Opp’n to Summ. J. , Ex. C). Penn State disagrees, arguing that Mr. Holness’ inability to satisfactorily complete his work assignments made him unqualified to fill the full-time positions. Therefore, despite Mr. Holness’ part-time employee status and experience working in the technical services department, Penn State rejected his applications for the two vacant janitorial positions and hired two other non-Jamaican applicants.

To survive summary judgment, Mr. Holness must demonstrate that a genuine issue of material fact exists as to whether he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. Mr. Holness disputes the fact that his work was unsatisfactory and claims that Penn State never informed him of any

complaints concerning performance as a part-time janitorial employee. Since the technical service vacancy announcements listed general qualifications for the full-time janitorial positions, and Mr. Holness established that he met these qualifications when Penn State hired him to fill the part-time janitorial service worker positions, a genuine issue of material fact exists as to whether his job performance rendered him unqualified to fill the full-time positions at issue in this case.

c. Nonmembers of the protected class treated more favorably

Despite his alleged qualification for the position of full-time janitorial worker, Penn State rejected Mr. Holness' application and filled the positions with two non-Jamaican applicants; both were African-American. Mr. Holness claims that Penn State's Technical Service hiring policy required that full-time technical service vacancies would be filled with the most senior part-time staff members applying for the positions. Since he was one of the two most senior part-time staff members in April 1996, Penn State should have chosen him to fill one of the two vacant positions. Instead, the positions were filled by an applicant with no previous janitorial experience and an applicant whose experience and training in janitorial services were comparable to his. He contends that these applicants were selected because they were African-American and any assertion that he was a poor candidate is simply untrue. On summary judgment, these assertions are sufficient to show that a genuine issue of material fact exists as to whether the selected applicants were treated more favorably than Mr. Holness.

Therefore, sufficient evidence exists to allow the court to infer that if the Penn State's actions remain unexplained, it is more likely than not that such actions were based on impermissible reasons. See E.E.O.C. v. Metal Serv. Co., *supra*.

2. Defendant's Burden

Once the plaintiff establishes evidence raising an inference of unlawful discrimination, the burden shifts to the defendant to rebut this inference by presenting legitimate, nondiscriminatory reasons for its employment action. Fuentes v. Perskie, at 762. This intermediate burden is "exceedingly light." Id. To meet this burden, Penn State points out that it rejected Mr. Holness' applications for full-time employment because Mr. Holness did not satisfactorily perform his work duties. (Def.'s Mem. in Supp. of Summ. J. at 8). To prove this assertion, Penn State proffered the deposition testimony of Bea Taliferro, Mr. Holness' direct supervisor, wherein Ms. Taliferro identified various reasons for her dissatisfaction with his work performance. These reasons included failure to complete assigned tasks, unsatisfactory completion of assigned tasks, and Mr. Holness' inability to improve even after repeated attempts to "work with him" to enhance his job performance. (Pl.'s Ex. in Opp'n to Summ. J. , Ex. S-5). In this case, if Mr. Holness' work was unsatisfactory, a legitimate reason exists for Penn State's decision to hire other applicants. Therefore, Penn State meets its "light" burden of showing a legitimate, nondiscriminatory reason for the employment action.

3. Pretext

When the defendant meets its burden of showing a legitimate, nondiscriminatory reason for the employment action, the burden shifts back to the plaintiff to demonstrate that the defendant intentionally discriminated against him. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993). This can be accomplished by proving that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825 (1973).

In this case, Penn State proffered informal evaluations of Mr. Holness' work in

support of the decision to hire other applicants to fill the full-time technical service positions. Although Penn State does not require supervisors to perform official evaluations of their part-time employees, Ms. Taliferro asserts that she often evaluated Mr. Holness' work and kept personal notes of her dissatisfaction with his work performance. These records of Mr. Holness' poor work performance prompted Penn State to reject his application for full-time employment.

Mr. Holness contends, however, that Penn State's assertions regarding his work performance are mere excuses; the real reason for his rejection is intentional discrimination. In support of this assertion, Mr. Holness points out that Bea Taliferro provided an explanation for his rejection when she declared: "you don't know how to talk and you don't have a driver's license." (Pl.'s Ex. in Opp'n to Summ. J. , Ex. S-1 at 61-62). Mr. Holness concludes that this reference to his inability to communicate represents Ms. Taliferro's bias against him because he is Jamaican. Moreover, Mr. Holness asserts that Penn State never gave him verbal or written indication that his work was unsatisfactory. He contends, therefore, that Penn State is attempting to fabricate the allegations of poor work performance to hide their acts of intentional discrimination.

Penn State disputes that Ms. Taliferro ever discriminated against Mr. Holness because of his Jamaican origin. In fact, Penn State points out that a number of its Technical Service employees are of Caribbean descent. Significantly, these workers, including the plaintiff's brother whose national origin is Jamaican, received promotions while under Ms. Taliferro's supervision. In response to these claims, Mr. Holness points out that his brother, who has been a resident of the United States longer than he, speaks with a less pronounced accent. Therefore, the fact that he or other employees with accents received promotions is not dispositive of his

claims of discrimination.

Essentially, pretext is not demonstrated by simply showing that the employer was mistaken. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3d Cir.1992), cert. denied, 510 U.S. 826, 114 S.Ct. 88 (1993). Instead, the record is examined for evidence of inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons. See Sempier v. Johnson & Higgins, 45 F.3d 724, 731 (3d. Cir. 1995). In the instant case, Penn State asserts that it fired Mr. Holness due to poor work performance. Mr. Holness disputes those claims, arguing that Bea Taliferro's statement about his ability to communicate provides direct evidence of Penn State's discriminatory motive for failing to promote him. Therefore, according to Mr. Holness' reasoning, Penn State's assertions that he failed to properly perform his work are pretextual.

At the summary judgment stage, the Court must resolve conflicting evidence in favor of the nonmovant. Thus, despite Penn State's claims of nondiscriminatory motive, the Court finds that a genuine issue of material fact exists as to whether discriminatory animus caused Penn State to hire non-Jamaican candidates to fill the two vacant full-time positions. Consequently, Penn State's motion for summary judgment on the national origin and racial discrimination claims will be denied.

D. RETALIATORY DISCHARGE

Title VII forbids an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation . . . under this subchapter." 42 U.S.C. § 2000e-3(a). Similarly, Section 5(d) of the PHRA also prohibits an

employer from discriminating against an individual because the individual has opposed any practice forbidden by the act or made a charge under the Act. 43 Pa. C.S.A. § 955.

To establish a case of unlawful retaliation, a plaintiff must show that 1) he engaged in protected activity; 2) he suffered an adverse employment action either after or contemporaneous with his protected activity; and 3) a causal connection exists between his protected activity and the employer's adverse action. Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500 (3d. Cir. 1997). To meet the causal link requirement, the plaintiff must at least establish that the employer was actually aware of the protected expression at the time the employer took adverse employment action against the plaintiff. Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir.1997).

Defendant Penn State moves for summary judgment arguing that Mr. Holness failed to make out a *prima facie* case for retaliation because he cannot show that a causal connection exists between his protected activity and the employer's adverse action. Specifically, Penn State argues that Mr. Holness was frequently counseled about his poor job performance and Ms. Taliferro contemplated discharging him long before the filing of the EEOC complaint. In fact, Ms. Taliferro claims that she discussed discharging Mr. Holness with her direct supervisor on May 16, 1998, five days before Mr. Holness filed a charge of discrimination with the EEOC. Penn State also argues that it did not know about Mr. Holness' claims of discrimination until it received the EEOC complaint on June 25, 1996. Since Penn State made its decision to fire Mr. Holness at least 14 days prior to receiving notice of the discrimination charges filed against it, they argue that there is no genuine issue of material fact as to whether retaliation caused Mr. Holness' discharge.

In his complaint, Mr. Holness alleges that Penn State fired him in retaliation for filing a complaint with the EEOC on May 21, 1996. In support of these claims, Mr. Holness alleges that he told several coworkers about his EEOC complaint on June 7, 1996. Upon returning to work for his next scheduled shift, on June 11, 1996, Mr. Holness maintains that Ms. Taliferro discharged him. He further asserts that Ms. Taliferro responded to his request for an explanation for his discharge by stating that he was a “trouble maker” and she could not get along with him. (Pl.’s Ex. in Opp’n to Summ. J., Ex. R). In the same conversation, Mr. Holness alleges that Ms. Taliferro also admitted that she knew of his recent filing of a complaint with the EEOC.

The key to determining whether the evidence establishes a *prima facie* case of retaliatory discharge centers on whether Penn State knew of Holness’ protected activity before it made the decision to fire him and whether it made its decision based on that knowledge. Penn State argues that it planned to discharge Mr. Holness before it learned of the EEOC complaint. Mr. Holness, on the other hand, argues that Ms. Taliferro admitted she had knowledge of the complaint at the time of his discharge. Since all conflicting evidence must be resolved in favor of the nonmovant without engaging in credibility determinations, the Court must accept Mr. Holness’ assertions as true. Therefore, a genuine issue of material facts exists as to the causal connection between Mr. Holness’ discharge and the filing of the EEOC charge.

Once a *prima facie* case is established, the Court may infer that retaliatory animus exists until the employer comes forth with evidence of a legitimate reason for the adverse employment action. Here, Penn State asserts that Mr. Holness’ continued poor work performance led to his discharge. In support of these assertions, Penn State proffered work sheets evidencing several occasions when Mr. Holness’ work was unsatisfactory. An accompanying affidavit of Bea

Taliferro outlined the dates upon which she counseled Mr. Holness about his unsatisfactory work. (D.'s Mot. for Summ. J., Ex. A and B). Based on these assertions, the Court finds that Penn State satisfied its obligation to show a legitimate reason for Mr. Holness' discharge.

To survive summary judgment, Mr. Holness must ultimately show that a genuine issue of material fact exists as to whether Penn State retaliated against him for filing a charge of discrimination against it. To prove that retaliation formed the basis for his discharge, Mr. Holness claims that Bea Taliferro told him when she fired him that he was being fired because he was a "troublemaker" and that she knew he filed a complaint with the EEOC. Penn State denies this claim. However, taking Mr. Holness' allegations as true, as it must, the Court finds that a genuine issue of material fact exists as to whether Penn State's dissatisfaction with Mr. Holness' work was pretextual. Thus, Defendant Penn State's motion for summary judgment on the claims of retaliatory discharge will be denied.

III. CONCLUSION

For the foregoing reasons, Defendant Penn State's motion for summary judgment is granted in part and denied in part. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK HOLNESS :
 :
 Plaintiff, :
 :
 : **CIVIL ACTION**
 :
 :
 v. : **NO. 98-2484**
 :
 :
 PENN STATE UNIVERSITY :
 :
 :
 Defendant. :

ORDER

AND NOW, this 5th day of May 1999, upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's response thereto, IT IS HEREBY ORDERED that Summary Judgment is :

1. GRANTED as to Counts III, IV, V of the Complaint, only as they pertain to claims of disability discrimination; and
2. DENIED as to Counts I, II, III, IV, V and VI of the Complaint as they pertain to

claims of racial and national origin discrimination and retaliatory discharge.

IT IS FURTHER ORDERED that Counts VII, VIII, and IX of the Complaint are DISMISSED. Entry of final judgment is deferred pending resolution of the remaining issues in this case.

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.