

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

SCOT TURGEON,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 99-4401
	:	
MARRIOTT HOTEL SERVICES,	:	
INC.,	:	
	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, J.

DECEMBER 27, 2000

Presently before this Court is the Motion for Summary Judgment filed by the Defendant, Marriott Corporation ("Defendant"), the former employer of Plaintiff Scot Turgeon ("Plaintiff"). Plaintiff, a white male, was employed as a Mechanic 2 ("M-2") in Defendant's Engineering Department located at the Marriott Hotel and Convention Center in Philadelphia, Pennsylvania, from December 4, 1996 through March 13, 1998.¹ On June 4, 1998, Plaintiff dual-filed a complaint of race discrimination against Defendant with the Philadelphia Commission on Human Relations ("PCHR") and with the Equal Employment Opportunity Commission ("EEOC"). (Def.'s App. Ex. 41.) The PCHR and EEOC determined that Plaintiff's charges were unsubstantiated. (Def.'s App. Ex. 1, Ex. 11). On June 3, 1999,

¹On March 7, 1998, Plaintiff was suspended without pay and then dismissed on March 13, 1998.

the EEOC issued Plaintiff a right to sue letter and Plaintiff subsequently filed suit in this Court. In his Complaint, Plaintiff alleges that he was discriminatorily discharged in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 et seq., ("Title VII"), the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981") and the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, et seq. ("PHRA"). For the reasons that follow, the Defendant's motion is granted.

I. FACTS.

Plaintiff alleges that he was the victim of reverse race discrimination throughout his fifteen-month employment with Defendant. (Compl., ¶ 11.) Plaintiff points to a number of such events where he was allegedly subjected to discriminatory and less favorable treatment by Defendant.

In one instance, Plaintiff was assigned to drain and clean the lobby fountain along with two other employees. (Turgeon Dep. at 141.) Plaintiff states that, after a while, he was forced to perform this task alone because he was not assigned help and he could not find anyone to help him. (Id. at 141-43.) The entire draining and cleaning took approximately four to five hours to perform. (Id. at 145.)

In another instance, sometime in early 1997 when Plaintiff was installing a "smoke eater" in the cafeteria, some flame retardant material fell to the floor. (Id. at 121, 330.)

Plaintiff asked three black housekeeping employees for assistance in cleaning up the debris, but they refused to help Plaintiff, stating that it was not their job. (Id. at 120-121.) The next day, Burnell Shedrick ("Shedrick"), the Director of Engineering who was black, allegedly informed the Plaintiff that if he made a mess, he had to clean it up. (Id. at 332.) This incident culminated in a meeting in which two of the housekeeping employees involved, Holland McLauren ("McLauren") and Ike Roberts ("Roberts"), allegedly called Plaintiff a racist. (Id. at 349-350.) McLauren denied saying this to Plaintiff. (McLauren Dep. at 51.)

In April, 1997, Plaintiff alleges that he had a second encounter with McLauren in the cafeteria. (Turgeon Dep. at 334-338.) When Plaintiff accidentally broke a bottle of steak sauce on the floor, McLauren allegedly used profanity to Plaintiff, telling him to clean up the spill. (Id. at 334-335.) Plaintiff told Brian Mazuk ("Mazuk"), one of Plaintiff's supervisors who was white, about this incident, and he allegedly told Plaintiff that he would look into it. (Id. at 340-41.) David Stinson ("Stinson"), Marriott's Director of Personnel Resources who was black, met with Plaintiff and took notes concerning Plaintiff's complaint. (Stinson Dep. at 39-46.) McLauren denied using profanity but admitted that Plaintiff cleaned up the steak sauce. (McLauren Dep. at 25-26, 38.) McLauren told four other black

employees, three of whom were managers, about this incident because he claimed that Plaintiff gave him a "hard time". (Id. at 32-38.) However, McLauren stated that he did not remember if Plaintiff used profanity and could not remember any specifics about the "hard time" that Plaintiff gave him. (Id. at 38-39.) Shedrick compiled a summary of events regarding this incident involving Plaintiff and McLauren. (Def.'s App. Ex. 9.) Shedrick allegedly told Plaintiff that he was surprised that Plaintiff hadn't gotten his "a-- kicked" yet. (Turgeon Dep. at 117.) Shedrick denied saying this. (Shedrick Dep. at 41.)

On May 21, 1997, Plaintiff received his first verbal warning for allegedly being rude and abrasive to a co-worker. (Def.'s App. Ex. 8.) Plaintiff disputed this verbal warning and disagreed with the characterization of events in the incident report prepared by the co-worker, a fellow M-2 who was black, Kenneth Bivens ("Bivens"). (Turgeon Dep. at 329.) According to Plaintiff, he was not asked to explain his version of the facts surrounding this incident prior to being issued the verbal warning. (Id.) On July 2, 1997, Plaintiff received a written performance evaluation rating his overall performance as "Meets Standards." (Def.'s App. Ex. 7.)

On July 17, 1997, Plaintiff received his first written warning for alleged falsification of company records regarding whether he had greased an exhaust fan. (Def.'s App. Ex. 13.) The

lead engineer in charge of Plaintiff, Jack Savage ("Savage") who was white, advised Plaintiff on July 17, 1997 that he had checked a part on the outside of the exhaust fan and the part had dust on it, indicating to Savage that Plaintiff had not greased that part. (Turgeon Dep. at 203-204.) Plaintiff reports that he explained to Savage that he did grease the fan but the part had collected dust because of the constant traffic around that area. (Id.) Savage allegedly told Plaintiff not to worry about this warning. (Id. at 203.) Under Defendant's policy, Plaintiff could have been terminated over this incident, however, Plaintiff was not terminated at that time. (Mazuk Dep. at 37.)

Plaintiff alleges that he was subjected to a "constant barrage of harassment and discrimination" throughout the remainder of 1997. (Pl.'s Resp. at 9.) Specifically, Plaintiff contends that on several occasions throughout the summer of 1997, McLauren called him a skinhead, referring to his short haircut. (Turgeon Dep. at 343-345, 349.) He also allegedly reported these occasions to Mazuk and Stinson, whom Plaintiff claims said that they would look into it. (Id. at 345.) Plaintiff claims not to have heard anything back from either of these two supervisors. (Id. at 346.) On another occasion, Plaintiff alleges that McLauren stated that "Farrakhan is better than the Pope." (Id. at 342-343.) McLauren denied making this statement to Plaintiff. (McLauren Dep. at 54.) Plaintiff alleges that again he reported

this to the two supervisors, but nothing was done. (Turgeon Dep. at 343.) Plaintiff also alleges that black employees commented loudly in front of him that "Islam is going to rule." (Id. at 346-47.) Plaintiff further alleges that around July 4, 1997, Shedrick advised him to remove the small American flag he had put on his tool pouch because it would offend the guests and some of the employees. (Id. at 347-48.) Shedrick denied this. (Shedrick Dep. at 41.)

Sometime in late 1997, Plaintiff had a physical altercation with Bivens. Bivens, who was looking for a set of truck keys that Plaintiff had in his possession, allegedly grabbed Plaintiff by the elbow and slammed him against the wall. (Turgeon Dep. at 286-87.) An Asian employee allegedly witnessed this incident. (Id. at 286, 289.) Bivens denied that the incident occurred. (Bivens Dep. at 37.) Plaintiff reported the incident to Mazuk, but no one was disciplined. (Turgeon Dep. at 287-288.)

On January 22, 1998, Plaintiff received his second written warning for being rude and unprofessional because of a second physical altercation with Bivens. (Def.'s App. Ex. 10.) In Plaintiff's written statement describing the incident, he claims that Bivens, in front of Savage, ordered Plaintiff to move and then pushed him out of the way. (Def.'s App. Ex. 17.) Bivens also allegedly threatened to physically harm Plaintiff.

(Turgeon Dep. at 291.)

Savage denied witnessing this alleged assault. (Savage Dep. at 50-53.) Savage also testified that he walked away from the confrontation between Plaintiff and Bivens because "I don't want to know nothing. I don't want to see nothing. I don't want to be dragged into court like I am now." (Id. at 51.) Plaintiff went to Mazuk's office to report this incident, and found Bivens already in the supervisor's office. (Turgeon Dep. at 292.) Bivens received a verbal warning for this incident. (Def.'s App. Ex. 19.) Bivens also provided a written statement of his version of the events and denied ever assaulting or threatening Plaintiff.² (Bivens Dep. at 30-34.) On March 3, 1998, Plaintiff received his second verbal warning for alleged tardiness. (Def.'s App. Ex. 12.)

Plaintiff alleges that he complained on an almost daily basis to Savage about his work load and about the discipline he had been receiving. Plaintiff further alleges that Savage told him that "there's no sense in doing any b----ing because you're white." (Turgeon Dep. at 360-62.) Plaintiff also contends that the lead mechanic in charge of Bivens would complain about Bivens not doing his job and stated to Plaintiff that it did no good to

² Defendant's policies state that an employee may be immediately terminated for "hitting, pushing or otherwise striking another person or any other disorderly conduct." (Def.'s App. Ex. 16 at 22.)

complain because he, like Savage and Plaintiff, was white. (Turgeon Dep. at 362.) Plaintiff also alleges that he complained to management about discriminatory preferential treatment of black employees. However, both Mazuk and Stinson denied that Plaintiff ever complained to them about racial harassment or discrimination.³ (Mazuk Dep. at 73-83; Stinson Dep. at 38-41.)

On March 7, 1998, Plaintiff received his third and final written warning for alleged falsification of company records arising from Plaintiff allegedly claiming work had been completed when it had not been. (Def.'s App. Ex. 20.) This, in turn, led to the Plaintiff being suspended pending termination. (Def.'s App. Ex. 25.) Plaintiff believed that he had been set up for this termination because Defendant chose to discipline him for following the procedure that he had allegedly been instructed to follow. (Turgeon Dep. at 112-113.) Plaintiff also alleges that he did not falsify the documents. (Id. at 113.)

According to Plaintiff, when work orders, known as Preventive Maintenance ("PM") sheets, were finished, he and his co-workers would hang the sheets horizontally on their clipboards. (Id. at 110-111.) However, Plaintiff alleges that when the job was completely finished he and his co-workers would

³ Stinson stated that when Plaintiff first reported the steak sauce bottle incident to him, Plaintiff used the word "harassment" but that later Plaintiff stated that it was "not harassment". (Stinson Dep. 38-41.)

hand in the PM sheet to Savage.⁴ (Id. at 229.) Furthermore, Plaintiff alleges that he often did not receive a PM sheet on the printed start date because Savage did not always assign the sheets on that date. (Id. at 227-228.) Plaintiff alleges that Savage had instructed him to enter the actual start date of the project next to the heading marked "finish date." (Id. at 228, 235-236.) Plaintiff's co-workers and supervisors disagree that this was the practice. (Doe Dep. at 53; Fetlow Dep. at 37-38; Bivens Dep. at 53; Mazuk Dep. at 62-63; Savage Dep. at 60-61.)

Plaintiff claims that on his PM sheet, he had entered his start date in the "finish date" spot and that he had not placed the PM sheets in question horizontally on his clipboard because he had not finished the work. (Turgeon Dep. at 249, 255-256.) Savage claimed that the work was not completed, but the sheets had been placed horizontally and the finish date had been filled in. (Savage Dep. at 85-86.) Savage also claimed that Plaintiff later admitted that the work had not been completed. (Id. at 88.) When Mazuk confronted Plaintiff about the falsification of company records, he allegedly advised Plaintiff that he would be suspended. (Turgeon Dep. at 113.)

⁴ Plaintiff's co-workers admit to using the horizontal procedure. However, one co-worker claimed that Savage would remove the PM sheets from the clip board when they were hung horizontally and that he did not turn them in. (Doe Dep. at 47-48.) Another co-worker stated that occasionally, both methods were used. (Fetlow Dep. at 38.)

Shedrick, who had the power to rescind or reduce any discipline issued by Mazuk, discussed this incident with Mazuk and approved the decision to suspend Plaintiff pending termination. (Shedrick Dep. at 72-73.) Shedrick, on behalf of Human Resources, also conducted an investigation of the incident, which included talking to Savage and reviewing documentation. (Id. at 74.) Stinson conducted a further investigation into the events that led to Plaintiff's termination and concurred with Shedrick's recommendation to terminate Plaintiff. (Stinson Dep. at 58, 63.) Ultimately, Charlie Hines ("Hines"), the General Manager who was white, terminated Plaintiff. (Def.'s App. Ex. 29 at ¶ 2.) Hines met with Plaintiff for about six minutes and told him that he was following the management's recommendation to terminate him. (Turgeon Dep. at 85, 271-272.) Plaintiff appealed the decision with Hines, but the decision was affirmed. (Def.'s App. Ex. 30, 31.) Plaintiff assumed that he would be replaced by a black employee. (Turgeon Dep. at 163-164.) However, his position was actually filled by a white employee. (Mazuk Dep. at 96.)

II. STANDARD.

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and the moving party is entitled to judgment as a matter

of law.'" Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.⁵ Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the non-movant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION.

Plaintiff claims that he was discriminated against on

⁵ "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, 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.'" Compton v. Nat'l League of Prof'l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D.Pa. 1998) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

the basis of his race in violation of Title VII, § 1981 and PHRA. These claims are "addressed collectively as the same standards and analysis are applicable to each." Roberts v. GHS-Osteopathic Inc.-Parkview Hosp., No. CIV.A.96-5197, 1997 WL 338868, at *5 (E.D. Pa. June 19, 1997). A plaintiff may present either direct or indirect evidence to prove that he or she was subjected to unlawful discrimination. Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 352 n.4 (3d Cir. 1999). In an indirect evidence case such as this, the plaintiff must first set forth a prima facie case of discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, ___; 120 S. Ct. 2097, 2106 (2000). Thereafter, courts apply a system of shifting evidentiary burdens; however, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This same analysis is also appropriate in reverse-discrimination cases. See Iadimarco v. Runyon, 190 F.3d 151, 158 (3d Cir. 1999).

McDonnell Douglas established an allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases, which was clarified by subsequent cases. See St. Mary's Honor Ctr. v. Hicks, 509 U.S.

502, 506 (1993). Once a prima facie case has been established, the defendant must produce some evidence of a legitimate nondiscriminatory business reason for its action. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). If this evidence is produced, the plaintiff may survive a motion for summary judgment only if he or she "produce[s] sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action." Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir. 1996)(en banc); cert. denied, 521 U.S. 1129 (1997).

A. Employee's Prima Facie Case

The Plaintiff in a discrimination case must first produce sufficient evidence in order to convince a reasonable fact finder of all elements of a prima facie case. Long v. Thomson, No. CIV.A.99-CV-1693, 2000 WL 1586078, at *5 (E.D. Pa., Oct. 24, 2000)(citing Reeves, 350 U.S. at ___, 120 S.Ct. at 2106; Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000)). The plaintiff must show that (1) he or she is a member of a protected class; (2) that he or she was qualified for the position; and (3) that he or she was discharged under circumstances that give rise to an inference of unlawful discrimination. Jones v. School Dist. of Phila., 198 F.3d 403, 410-11 (3d Cir. 1999). Common circumstances giving rise to an inference of unlawful

discrimination include the hiring of someone not in the protected class as a replacement, or the more favorable treatment of similarly situated colleagues outside of the relevant class. See Sheridan, 100 F.3d at 1066 n.5 (stating that the plaintiff must show that the position was filled by someone not in the protected class); Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993)(stating that in order to succeed, plaintiff must show that other employees not in a protected class were treated more favorably).

The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. Iadimarco, 190 F.3d at 161. Furthermore, the plaintiff cannot rely on unsupported assertions, speculation, or conclusory allegations to avoid a motion for summary judgment. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 252 (3d Cir. 1999).

B. Employer's Reason

If the plaintiff can establish a prima facie case, the employer bears the burden of production with respect to a "legitimate, nondiscriminatory reason" for its actions. Hicks, 509 U.S. at 510. Thereafter, the plaintiff has the burden of proof to establish that the employer's articulated reason for the adverse employment action is merely a pretext for discrimination. Reeves, 530 U.S. at ___, 120 S. Ct. at 2108-2109. Under Fuentes, the plaintiff may establish pretext by presenting evidence from

which a factfinder could "(1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer's action." Fuentes, 32 F.3d at 764.

In order to avoid summary judgment, "the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered nondiscriminatory reasons . . . was either a post hoc fabrication or otherwise did not actually motivate the employment action." Iadimarco, 190 F.3d at 166 (quoting Fuentes, 32 F.3d at 764). Further, the plaintiff cannot simply show that the employer's decision was unwise or wrong since the actual issue is whether the employer had a discriminatory motive. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3rd Cir. 1997)(en banc). The Plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons" that the factfinder could rationally find them unbelievable and could infer that the employer did not act for the non-discriminatory reasons proffered. Id. (quoting Fuentes, 32 F.3d at 765). In order to survive summary judgment, the plaintiff must show through admissible evidence that the employer's articulated reason was not merely wrong, but that it was "so

plainly wrong that it cannot have been the employer's real reason." Jones, 198 F.3d at 413 (quoting Keller, 130 F.3d at 1109).

C. Application

In its Reply, Defendant notes that Plaintiff ignores evidence that three black mechanics in the engineering department, including Bivens, were also terminated or resigned in lieu of termination for falsification of company records. (Def.'s App. Ex. 34 ¶ 4.) Because that evidence shows that similarly situated individuals outside of the protected class were treated similarly and were not treated more favorably than Plaintiff, Defendant states that Plaintiff cannot establish a prima facie case. Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999). In fact, Plaintiff has not shown any similarly situated non-white employees who were not terminated after falsifying company documents. In his Response, Plaintiff overlooks the fact that three black mechanics were also terminated or resigned in lieu of termination for committing the same offense as Plaintiff. Plaintiff does claim that, in general, he was subjected to less favorable treatment in comparison to black employees. For example, Plaintiff claims that he was made to clean the fountain by himself. However, as Defense points out, even if this tended to establish discrimination, Plaintiff ignores the fact that two of his black co-workers also had to clean the fountain by

themselves at various times. (Doe Dep. at 21-22; Fetlow Dep. at 22.) Plaintiff also claims that three black employees would not help him clean up after he installed the "smoke eater", and that his supervisor, Shedrick, later stated that Plaintiff had to personally clean up any debris that he left behind. Plaintiff does not explain how this, even if true, is unfavorable treatment based upon his race. As the Defendant correctly argues, simply because other employees were not required to aid Plaintiff in his work does not mean that he was discriminated against. Further, after Plaintiff reported the incident between Plaintiff and McLauren in the cafeteria to Stinson, Plaintiff claims that Stinson "admitted that plaintiff complained to him about this racially harassing incident, as documented in Stinson's own handwritten notes" (Pl.'s Reply at 6.) However, Stinson's notes do not mention race and in fact the notes state that Plaintiff "stated that this may not be harassment." (Pl.'s Ex. 6.)

To support his "less favorable treatment argument", Plaintiff also argues that Bivens was not given the same discipline for confrontations involving Bivens and Plaintiff. However, the record reveals that Bivens received a verbal instead of a written warning because he had no prior disciplinary record whereas Plaintiff received a written warning because he had a disciplinary history. (Mazuk Dep. at 78-79.) This evidence

presented by Defendant is un rebutted by Plaintiff.

Plaintiff further claims that he was subject to a "constant barrage of harassment and discrimination."⁶ (Pl.'s Reply at 9.) However, these uncorroborated statements were allegedly made by employees and not by management. Plaintiff also claims that both Savage and the engineer in charge of Bivens told him that it was no use for Plaintiff to complain because he was white. Neither of these men are management either, and although Savage reported Plaintiff's falsification of company records, there is no evidence that he was involved in the actual decision to discharge Plaintiff. Furthermore, the only proof of these statements is from Plaintiff's deposition. Regardless of their truth, the statements do not show that Defendant treated similarly situated individuals differently. In Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997), cert. denied, 523 U.S. 1074 (1998), the court stated that "[s]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its . . . decisions were based on legitimate criteria." Id. at 513 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989)). Plaintiff never once followed Defendant's written anti-harassment policy by stating in writing or

⁶ Plaintiff points to statements allegedly made by co-workers that Plaintiff was a "skinhead," that "Farrakhan is better than the Pope," and that "Islam is going to rule."

documenting any claims of racial discrimination or harassment.⁷

Lastly, Plaintiff attempts to show disparate treatment by comparing discipline imposed on various employees. For example, Plaintiff claims that he complained to management that a black co-worker failed to perform a task assigned to him and that he left company property without permission. (Turgeon Dep. at 365-366, 374-376.) Plaintiff claims that, to his knowledge, management did not investigate these alleged infractions. (Id.) Plaintiff compares this incident to a white co-worker's discharge for falsification of payroll records and for leaving company property without authorization. (Pl.'s Ex. 10.) Plaintiff again selectively ignores the similar discipline given to three black co-workers in his department who were discharged for falsification of company records. (Def.'s App. Ex. 34 ¶4.) Furthermore, Plaintiff admits that he lacks knowledge of whether the black co-worker had permission to leave company property. (Turgeon Dep. at 375-376.) Plaintiff also asserts that Bivens was not disciplined for failing to call out for work on three occasions while a white co-worker received a verbal warning for the same offence. (Turgeon Dep. at 371-372.) However, Plaintiff is not management and therefore lacks personal knowledge of the specific facts in those cases.

Furthermore, individuals, in order to be compared, must

⁷ See Def.'s Ex. 16 at 27.

be similarly situated. In order to be similarly situated, the individuals compared must "have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment for it." Bullock v. Children's Hosp. of Phila., 71 F. Supp.2d 482, 489 (E.D. Pa. 1999)(internal quotations omitted). To establish that he was treated less favorably because of his race, Plaintiff must show that non-whites accused of falsifying documents were not terminated. See Flagg v. Control Data, 806 F. Supp. 1218, 1223 (E.D. Pa. 1992), aff'd 998 F.2d 1002 (3d Cir. 1993), cert. denied, 510 U.S. 1052 (1994)(stating that plaintiff failed to establish a prima facie case because he failed to show "that a white male field technician had his driver's license suspended and was not terminated."); Riddick-Battle v. Dep't. of Navy, No. CIV.A.95-7488, 1996 WL 502241 at *4 (E.D. Pa. 1996)(finding that the plaintiff failed to show that other non-minority employees, similarly situated to the plaintiff, were treated differently for the same offense because "there was a complete lack of evidence to indicate that other employees who assaulted co-workers were not terminated). The majority of Plaintiff's claims of discrimination and disparate treatment are based upon his own undocumented assertions contained in his own deposition. Plaintiff cannot rely on speculation and conclusory allegations to avoid a motion for summary judgement. Ridgewood, 172 f.3d at

252.

Plaintiff fails to carry his burden of proof in establishing a prima facie case of employment discrimination because he does not prove that he was discharged under circumstances giving rise to an inference of discrimination. This is especially evident because Plaintiff was replaced by another white employee and because Bivens and two other mechanics were terminated or resigned in lieu of termination for their first offense of falsifying the PM sheets, while Plaintiff was terminated after his second offense of falsifying the PM sheets. In addition, of the five individuals involved in detecting Plaintiff's falsification of company records and disciplining Plaintiff, only two were black, and one of them originally hired Plaintiff. Lastly, Hines, who was white, made the final decision to terminate Plaintiff. Therefore, Plaintiff has failed to establish a prima facie case of discrimination.

Even if Plaintiff had been able to establish a prima facie case of discrimination, Defendant proffers a non-pretextual reason for Plaintiff's termination, falsification of company documents.⁸ This was Plaintiff's second written warning for falsifying company documents and although Defendant could have previously terminated Plaintiff for his first violation, it chose

⁸ Falsification of company documents is a terminable offense under Defendant's rules. (Def.'s App. Ex. 16 at 22.)

not to do so. Also, under Defendant's progressive discipline policy, Defendant could have terminated Plaintiff because he received three written warnings within a twelve month period. (Def's App. Ex. 29 ¶ 4, Def's App. Ex. 34 ¶ 5, Def's App. Ex. 38 ¶ 5, Def's App. Ex. 39 ¶ 5.)

Plaintiff has not provided any evidence that Defendant's proffered reason for termination was pretextual. The only defense Plaintiff raises is that he did not falsify the documents. In an attempt to show that his termination was based on discriminatory animus and that he was the victim of a conspiracy, Plaintiff claims that he and his co-workers were to put the start date of a project under the heading "finish date" on the PM sheet and by doing this he was following orders and not falsifying documents. However, neither Plaintiff's coworkers nor his supervisors agree that this was the practice. Also, the record reveals that Plaintiff's supervisors conducted at least three investigations into the facts surrounding the falsification of company records charge leading to Plaintiff's termination. Thus, Plaintiff has failed to provide evidence from which this Court could reasonably disbelieve the employer's articulated legitimate reason. See Fuentes, 32 F.3d at 76.

D. Plaintiff's Retaliation Claim

Lastly, Marriott moves for summary judgment of Plaintiff's retaliation claim on the basis that Plaintiff failed

to exhaust his administrative remedies with respect to this claim. As Defendant notes, Plaintiff admits that he never asserted a retaliation claim when he filed his discrimination charges with the EEOC and PCHR or with this Court. (Def.'s Reply at 25, citing Pl.'s Resp. at 32). In response, Plaintiff argues that his failure to exhaust his administrative remedies is irrelevant because "the evidence adduced . . . is sufficient for a retaliation claim as plaintiff has shown that once he began complaining to management about racial discrimination and harassment, defendant began subjecting him to unfairly harsh criticism, discipline and ultimately termination." (Pl.'s Resp. at 32).

"It is a basic tenet of administrative law that a plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief." Fosburg v. Lehigh Univ., No. CIV.A.98-CV-864, 1999 WL 124458 at *5 (E.D. Pa. Mar. 4, 1999)(quoting Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997)). In a case such as this where a retaliation claim has not been specifically asserted in the administrative charge of discrimination, the relevant inquiry for determining whether a plaintiff can later present the claim to the 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." Holness v. Penn State Univ., No. CIV.A.98-2484, 1999 WL 270388 at

*3 (E.D. Pa. May 5, 1999)(citing Walters v. Parsons, 729 F.2d 233 (3d Cir. 1994)(per curiam); see also Douris v. Brobst, No. CIV.A.99-3357, 2000 WL 199358 at *3 (E.D. Pa. Feb. 14, 2000).

Defendant contends that because Plaintiff failed to raise the retaliation issue at the appropriate time, he is precluded from bringing such a claim now. Further, according to Defendant, Plaintiff has produced no evidence tending to show that the acts alleged in this litigation were within the scope of the charge filed with the PCHR or the investigation arising therefrom. (Def. Reply at 26.) As an example, Defendant points to the fact that on the PCHR Charge Form, Plaintiff checked only the boxes for race and color discrimination and did not check the retaliation box. (Def.'s Mem. at 32). Defendant also notes that Plaintiff only asserted that he was discriminated against on the basis of race, and not that he was subjected to retaliatory conduct on both the Statement of Particulars and the Amended Particulars. (Def's Ex. 41.) Plaintiff's current retaliation claim was never raised before, nor investigated by, the EEOC or PCHR. Therefore, Plaintiff's claim of retaliation does not fall within the scope of his prior EEOC or PCHR complaints or those agencies' investigations. Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996); Douris, 2000 WL 199358, at *3; Fieni v. Pocopson Home, No. CIV.A.96-5343, 1997 WL 220280 at **5-6 (E.D. Pa. April 30, 1997). Accordingly, Plaintiff is barred from asserting a retaliation

claim in this action.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted.

An appropriate Order follows.

