

Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Courts will generally only reconsider an issue "when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice." NL Indus., Inc. v. Commercial Union Ins., 65 F.3d 314, 324 n.8 (3d Cir. 1995).

The plaintiff argues that the Court made factual and legal errors in granting summary judgment to the defendants, that there has been an intervening change in the controlling law, that there is new evidence that should be considered, and that there would **be** manifest injustice by not allowing the plaintiff to pursue his Title **VII** and First Amendment retaliation claims. The Court will address each of these contentions in turn.

The plaintiff claims that the Court erred in making the following factual statements: (1) the plaintiff was late to work on February 23, 1998 and April **1**, 1998; (2) the discipline given **to** African American employees Henry Watkins and Howrhu Self by the Pennsylvania Board **of** Probation and Parole ("the Board") differed only marginally from the discipline recommended by the plaintiff; (3) Mr. Jones was unaware of any prior settlement between the African American employees and the Board; (4) the plaintiff informed Mr. Jones that Mr. Watkins and Mr. Self were guilty **of** insubordination; and (5) the plaintiff's employee

performance review was in April 1998. In the plaintiff's reply on his motion for reconsideration, he concedes that the employee performance review was in April 1998.

1. With respect to the plaintiff's being late to work, the Court stated that: (1) on February 23, 1998, Mr. Jones told the plaintiff that he should not be late to work; (2) the plaintiff was late to work on March 12, 1998; and (3) the plaintiff was late to work on April 1, 1998. The plaintiff testified to the first two facts at his deposition. The plaintiff testified before the State Civil Service Commission that he was late to work on April 1, 1998. The plaintiff offered no evidence disputing being late to work on April 1, 1998.

2. In terms **of** the discipline for Mr. Watkins and Mr. Self, the plaintiff recommended a verbal reprimand for Mr. Watkins and a two day suspension for Mr. Self. The Board gave Mr. Watkins a written reprimand and Mr. **Self** a three day suspension. Although the plaintiff argues that a written reprimand creates a more permanent adverse record than a verbal reprimand, he did not offer evidence that the Board did not or could not keep track **of** verbal reprimands. On the range of discipline that could have been imposed by the Board there is not much difference between a verbal and written reprimand or between a two day and three day suspension.

3. When the plaintiff told Mr. Jones of the settlement between the Board and the African American employees, Mr. Jones responded that "I don't give a damn what they got, if they're not doing their job, I'm going to have them terminated." This statement does not show that Mr. Jones was aware of the settlement. Mr. Jones stated at his deposition that he was unaware of any settlement before it was mentioned to him by the plaintiff. The plaintiff did not offer any evidence that Mr. Jones knew **of** a settlement.

4. The plaintiff told Mr. Jones that Mr. Watkins's behavior bordered on insubordination and that Mr. Self's behavior was direct insubordination. In the facts section of the Court's decision, these facts were correctly stated. It was an overstatement for the Court to state in the analysis section that the plaintiff told Mr. Jones that Mr. Watkins was guilty of insubordination.

The overstatement that the plaintiff told Mr. Jones that **Mr. Watkins was** guilty of insubordination does not affect the Court's decision. Whether Mr. Watkins was guilty *of* insubordination or whether his behavior bordered on insubordination is not a material fact. **The** material facts relied on by the Court were that the plaintiff believed Mr. Watkins was in need of discipline, and he told this to Mr. Jones.

The plaintiff argues that the Court committed legal error by shifting the burden to the plaintiff to establish his prima facie case of retaliation before the defendants established that there were no genuine issues of material fact. The plaintiff, however, identified only one factual error in the Court's decision. This error did not concern a material fact. The defendants, therefore, met their burden of establishing that there were no genuine issues of material fact.

Once the defendant met its initial burden, the decision whether to grant or deny summary judgment on the plaintiff's Title VII claim was governed by the Supreme Court's burden shifting analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), clarified in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Under this analysis, the plaintiff must first make out a prima facie case of discrimination. Reeves, 530 U.S. at 142. The defendants moved for summary judgment arguing that the plaintiff could not, on the record in the case, make out the elements of a prima facie case.

As one element of the prima facie case of illegal retaliation, a plaintiff must show that he engaged in a protected activity. Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir.

2001). Under McDonnell Douglas, the burden was on the plaintiff to establish that he engaged in protected activity.

The plaintiff claims that his protected activity was complaining to **Mr.** Jones, Mr. Scicchitano, Mr. Robinson, and Ms. Thomas about "discriminatory" conduct by Mr. Jones. Before deciding whether the plaintiff engaged in **protected** activity, **the** Court relied on Clark County School District v. Breeden, 523 U.S. 268, 271 (2001) (per curiam), to explain that opposing the actions of the defendants could not be protected activity if no reasonable person could have believed the actions taken by the defendants violated Title VII.

The Court concluded that the plaintiff had not met his burden under McDonnell Douglas of showing that he engaged in protected activity. No reasonable person could have believed the actions taken by the defendants violated Title VII because: (1) the demand made by Mr. Jones was general and not based on race; (2) the plaintiff admitted Mr. Watkins and **Mr.** Self were in need of discipline; (3) Mr. Jones did not demand discipline for other employees that were discussed; (4) **Mr.** Jones did not know of the settlement between the Board and the African American employees preventing him from discriminating on the basis of it; and (5) the plaintiff was really complaining about the settlement being breached and **not** any alleged discrimination.

The plaintiff argues in his reply brief on the motion for reconsideration that Shellenberger v. Summit Bancorp, Inc., No. 01-1215, 2003 WL 187197 (3d Cir. Jan. 23, 2003), is new case law supporting his motion. In Shellenberger, the Third Circuit found that the causation element of a prima facie case could be established by the temporal proximity between the plaintiff's protected activity and her firing. The plaintiff also raised a genuine issue with respect to whether the employer's reasons for acting were a pretext and whether the employer's actions were based on mixed motives. The **Court** held that the jury should resolve the dispute over why the employer acted. Id. at *5-*6.

The plaintiff's reliance on Shellenberger is misplaced. The Shellenberger Court noted that when a plaintiff relies on temporal proximity to establish causation, "the timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred." Id. at *5, *8 n.9 (quoting Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)).

The Court is aware of only two cases in which the Third Circuit found temporal proximity alone to be enough to establish causation. One case is Shellenberger where there was ten days between the plaintiff's protected activity and her firing. The other case is Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir.

1989), where the adverse employment action occurred two days after the protected activity. The time difference in the present case between the plaintiff's protected activity and the first adverse employment action is two months. This timing is not unusually suggestive enough to demonstrate causation without more evidence.

Additionally, the plaintiff in Shellenberger presented evidence that brought the defendant's proffered reasons for acting into dispute. The Third Circuit held that resolution of the dispute between the parties was best left to the jury. In the present case, the defendants' legitimate, non-discriminatory reason for disciplining the plaintiff was that the plaintiff had performance problems at work. The plaintiff offered excuses for his problems at work, but he presented no evidence that the defendants acted for reasons that were not legitimate and non-discriminatory.

The motion for reconsideration and the motion for leave to supplement the motion for reconsideration seek to bring new evidence before the Court.

The **plaintiff** relies on Federal Rule of Civil Procedure 15 to supplement his motion for reconsideration. Even assuming that Rule 15 applies to motions, it does not allow the plaintiff to supplement his motion.

Rule 15(d) allows supplemental pleadings if the pleadings set forth transactions, occurrences, or events that have happened since the date of the pleading sought to be supplemented. Exhibit E to the motion for leave to supplement is a June 1994 Report and Recommendation from United States Magistrate Judge M. Faith Angell. Exhibit F is an October 1994 decision from United States District Judge Thomas O'Neill adopting Magistrate Judge Angell's Report and Recommendation. Exhibits A-D of the motion to supplement are affidavits or testimony about events that happened either before or at a similar time as the events in the plaintiff's case. The information contained in the exhibits does not concern transaction, occurrences, or events that happened after the filing of the motion for reconsideration.²

Even if the supplemental filings were considered, these filings, like the affidavits attached to the motion for reconsideration and the documents attached to the plaintiff's reply on the motion for reconsideration, do not affect the Court's decision. These materials discuss: (1) the plaintiff's

² The plaintiff also relies on Rule 15(a) to support his motion to supplement his motion for reconsideration. This rule **allows** pleadings to be amended, but the plaintiff asks to supplement his motion for reconsideration and not to amend it. Rule 15(a), therefore, does not apply to the plaintiff's supplemental filings.

beliefs about whether Mr. Jones discriminated against the African American employees; (2) the African American employees' perspectives on whether they were discriminated against by the Board; and (3) whether the African American employees complained about discrimination by the Board.

The documents offered by the plaintiff about the plaintiff's beliefs are not relevant. The relevant inquiry under Clark County is whether a reasonable person could believe that the defendants' actions violated Title VII.

The materials submitted by the plaintiff regarding the African American employees' perspectives and whether these employees complained about discrimination is irrelevant. The plaintiff claimed his protected activity was opposing the defendants' allegedly discriminatory discipline demands. The plaintiff did not claim that he was opposing general discrimination against the African American employees.

Finally, the plaintiff argues that there would be manifest injustice if the motion for reconsideration is not granted because the plaintiff would be unable to pursue his Title VII and First Amendment retaliation claims. There is no manifest injustice in this situation because the defendants established an absence of genuine issues of material fact, and the plaintiff failed to meet his burden of showing that he engaged in protected

activity. After the plaintiff failed to meet his burden, the Court was **required** to grant summary judgment.

Appropriate orders follow.

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

RONALD ZAPPAN,
Plaintiff

CIVIL ACTION

v.

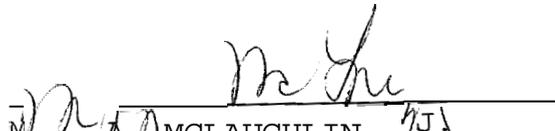
PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
WILLIAM WARD, JAMES ROBINSON :
GARY SCICCHITANO, EDWARD :
JONES, and VERONICA THOMAS, :
Defendants

NO. 00⁻¹⁴⁰⁹

ORDER

AND NOW, this 7 day of February, 2003, upon
consideration of the plaintiff's Motion for Reconsideration
(Docket No. 70), the defendants' opposition thereto, and the
plaintiff's reply, IT IS HEREBY ORDERED that the motion is DENIED
for the reasons set forth in a memorandum of today's date.

BY THE COURT:


M. A. MCLAUGHLIN, J.

filed 2/7/03

B. Demps
J. Lamb
D. Benedict
R. Sugarman

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

RONALD ZAPPAN,

Plaintiff

CIVIL ACTION

v,

:
:

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
WILLIAM WARD, JAMES ROBINSON :
GARY SCICCHITANO, EDWARD
JONES, and VERONICA THOMAS,

Defendants

NO. 00⁻¹⁴⁰⁹

ORDER

AND NOW, this 6th day of February, 2003, upon

consideration of the plaintiff's Motion for Leave to Supplement
His Motion for Reconsideration (Docket No. 71), the defendants'
opposition thereto, and the plaintiff's reply, IT IS HEREBY
ORDERED that the motion is DENIED for the reasons set forth in a
memorandum of today's date.

BY THE COURT:



MARY A. MCLAUGHLIN, J.