

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

JOHN A. THOMPSON	:	CIVIL ACTION
	:	
v.	:	
	:	
SEARS, ROEBUCK AND CO.	:	NO. 04-5342

**MEMORANDUM**

**Baylson, J.**

**October 30, 2006**

**I. Introduction**

On April 22, 2005, Plaintiff John A. Thompson (“Plaintiff” or “Thompson”), filed an Amended Complaint in this Court against his former employer, Sears, Robuck and Co. (“Defendant” or “Sears”), alleging that Defendant discriminated against him on the basis of his race and age during his employment at Sears. He brought these claims pursuant to the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43 § 951-963 (“PHRA”), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621-634. Now pending before this Court are cross-motions for Summary Judgment.

**II. Factual and Procedural Background**

In early September 2001, Sears hired John Thompson, an African American male over the age of forty, to work in its Trevoese, Pennsylvania office as a Programmer Analyst in the Strategy Group of its Credit Division.<sup>1</sup> As a Programmer Analyst, Thompson was responsible

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<sup>1</sup> Plaintiff’s Motion for Summary Judgment does not contain a Statement of Uncontested Facts as required by the undersigned’s pretrial and trial procedures. In lieu of such a statement, the Court has compared the facts alleged in Plaintiff’s Amended Complaint, his brief in support of his Motion for Summary Judgment, and his Response to Defendant’s Motion for Summary Judgment with Defendant’s Statement of Undisputed Facts.

for designing and improving computer programs used by collections associates in their work with the account holders of Sears's credit cards. The specifications for what these programs should do was provided to Thompson and all other Programmer Analysts by Business Analysts in the Credit Division. Thompson had two primary job assignments during his employment at Sears. He was assigned to work on the existing "Atlanta Dailies" program, a program that supplied up-to-date account information for account holders, and to create and run a Late Fee Rebate program, which would assist Sears in rebating late fees back to account holders.

Thompson received his first and only performance review on March 12, 2002. Fred Bilotta, Plaintiff's immediate supervisor, rated Plaintiff's performance a 3 on a 5-point scale, which corresponds to an evaluation of "consistently meeting expectations; Solid, value-added performance." The review also stated that feedback from colleagues and clients suggested that Thompson "greatly needed to improve his interpersonal skills." Although Bilotta's initial review indicated Thompson's performance was satisfactory, Bilotta subsequently issued Thompson four Performance Plans for Improvement ("PPIs"), a type of disciplinary write-up, on April 18, May 10, May 24, and July 13, 2002. These PPIs described Thompson's limited interpersonal and communication skills, his failure to follow directions and instructions, and his inability to explain the cause of technical issues that had occurred in the Late Fee Rebate program or how to fix them. Citing continuing issues with Thompson's job performance and his failure to correct those issues, Sears terminated him on August 19, 2002.

Thompson filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on June 6, 2003. After the EEOC issued him a right to sue letter, Thompson, who is acting pro se, initiated this suit against Sears on November 15, 2004. Various

motions were filed in this case, including a Motion to Dismiss by the Defendant based on Plaintiff's improper service of the Complaint, which the Court denied in a Memorandum Opinion entered on March 9, 2006. Plaintiff delayed in serving discovery on Defendant. It does not appear that Plaintiff took any depositions. On August 4, 2006, Sears filed a Motion for Summary Judgment and, three days later, Thompson filed his own Motion for Summary Judgment. Currently before this Court are these cross-motions.

This Court has subject matter jurisdiction over Thompson's federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Venue is appropriate under 28 U.S.C. § 1391(b).

### **III. Legal Standard**

The burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the appropriate analysis for summary judgment motions in cases alleging employment discrimination.<sup>2</sup> In order to establish a prima facie case of discrimination, the plaintiff must demonstrate the existence of four elements: (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) under circumstances that raise an inference of discriminatory action, the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position. See Sarullo v. U.S. Postal Service, 352 F.3d 789, 797 (3d Cir. 2003); Fuentes v. Perskie, 32 F.3d 759,

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<sup>2</sup> In addition to claims brought under Title VII, employment discrimination claims under the PHRA, ADEA, and § 1981 are analyzed under the McDonnell Douglas framework. See Tomasso v. Boeing Co., 445 F.3d 702, 704 (3d Cir. 2006); Pamintuan v. Nanticoke Memorial Hosp., 192 F.3d 378, 385 (3d Cir. 1999).

763 (3d Cir. 1994). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the adverse employment action. See Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). The defendant satisfies its burden of production by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Fuentes, 32 F.3d at 763. The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff. Id.

If the defendant is able to come forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from which a fact finder 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. Id. at 764. To discredit the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken, since the factual dispute is whether discriminatory animus motivated the defendant's actions. Id. at 765. A plaintiff's disagreement with an employer's evaluation of his performance does not show pretext. See Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) *overruled in part on other grounds*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); see also Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), cert. denied, 510 U.S. 826 (1993) (pretext turns on the qualifications and criteria identified by the employer, not the categories the plaintiff considers important).

#### **IV. Parties' Contentions**

The Plaintiff argues that Defendant's employment actions against him were discriminatory and therefore unlawful. In his Amended Complaint,<sup>3</sup> Plaintiff alleges that Defendant denied his repeated requests to telecommute to work even though another employee, Tom Nelson, a white male over fifty years old, who worked in the same position as Plaintiff, was allowed to do so. Compl. ¶¶ 26-33, 72, 77. Plaintiff further argues that he did not receive the mandatory in-house training given to all incoming recruits in credit collections, which he claims would have enhanced his job performance, even though such training was provided to two women and one man, all white and under the age of forty, who joined the Strategy group after him. Compl. ¶¶ 57-58, 73, 76. Plaintiff also alleges that, in May 2002, Defendant reassigned one of his primary job responsibilities to one of the new female recruits and assigned all new programming requests to the other two new employees. Compl. ¶¶ 60-62. Plaintiff finally argues that, although Defendant opened a series of PPIs to address Plaintiff's performance issues with respect to the Late Fee Rebate program, it did not institute similar action against Harry Smith, a white male under the age of forty, and the Business Analyst who provided Plaintiff with the functional specifications and requirements needed to design Late Fee Rebate program. Compl. ¶¶ 37, 63, 78-79.

In his Motion for Summary Judgment and his Response to Defendant's Motion, Plaintiff raises two different and somewhat contradictory arguments with respect to Sear's decision to issue him PPIs and, ultimately, to terminate his employment. He first argues that Defendant's articulated reasons for terminating him were pretextual (although he does not use this precise

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<sup>3</sup> Plaintiff's Amended Complaint offers his most comprehensive discussion of the factual basis for his claims.

term). Plaintiff notes that Defendant gave him a positive job evaluation one month prior to issuing his first PPI. (Pl.'s Resp. 2-3.) He then argues that Defendant's management failed to assist him in improving his performance after issuing him several PPIs, an omission that Plaintiff claims was intentional and discriminatory. While implicitly conceding that Defendant's concerns with Plaintiff's performance as outlined in his PPIs were legitimate, Plaintiff contends that these issues could have been remedied if Defendant had allowed him to telecommute to work and to complete collections associate training. (Pl.'s Resp. 5-6.)<sup>4</sup>

In Defendant's Motion for Summary Judgment, Defendant first argues that Plaintiff's claims related to collections associate training, telecommuting, and the PPIs are time-barred under Title VII, the PHRA, and the ADEA because they fell outside of the 300 day limitations period required for filing an EEOC charge and were not part of a continuing violation. (Def.'s Br. 22.) According to Defendant, because Plaintiff filed his EEOC charge on June 6, 2003, only his claim related to his termination from Sears on August 19, 2002 falls within the proscribed

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<sup>4</sup> Plaintiff raises two further legal arguments that merit little discussion.

First, Plaintiff contends in his response that collections associate training and telecommuting were reasonable accommodations that Defendant was required by law to provide if they did not pose an undue hardship to Defendant. (Pl.'s Resp. 10.) Although he does not offer a citation, Plaintiff is apparently drawing this language from the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Plaintiff has never claimed he suffers from a disability and the legal standard under the ADA is accordingly inapplicable to his case.

Second, Plaintiff argues that Sears's PPIs created an implied contract with Defendant, which Defendant violated when it failed to take any affirmative steps to assist Plaintiff in improving his performance. (Pl.'s Resp. 5-6.) Plaintiff produces no evidence to suggest that his employment was anything but at-will and, as such, he faces an "uphill battle" to establish that Defendant entered into an implied contract with him that it would not terminate him without undertaking the steps outlined in the PPIs. *See Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 661 (3d Cir. 1990). In light of the absence of evidence to show that Defendant intended to enter into such a contractual relationship with Plaintiff, the Court finds that this argument lacks merit.

period. Therefore, Plaintiff should only be able to recover through his § 1981 claim, if at all, for the events preceding August 10, 2002, when the limitations period expired. (Def.'s Br. 23.)

With respect to Plaintiff's specific complaint that Defendant did not allow him to telecommute, denied him collections associate training, issued unfair PPIs against him and ultimately terminated him, Defendant argues that Plaintiff has not met his burden of persuasion of showing that Defendant intentionally discriminated against him under McDonnell Douglas. Defendant contends that it had legitimate, non-discriminatory reasons for committing all these actions, and that Plaintiff has produced no evidence to show that Defendant's stated reasons for taking adverse employment action against him were a pretext for discrimination. (Def.'s Br. 25.) Defendant argues that it issued PPIs to the Plaintiff and terminated his employment because of his poor performance on the job, including his lack of interpersonal skills and his failure to follow directions. (Def.'s Br. 27-28.)

With respect to Plaintiff's request to telecommute, Defendant argues that the nature of Plaintiff's job as a Programmer Analyst required him to work closely with the Business Analysts he served. For that reason, the Director of Collection Strategy had prohibited Strategy Group members from telecommuting. Defendant concedes that Tom Nelson, a Senior Programmer Analyst, was allowed to telecommute but this was because he had been grandfathered in before the ban on telecommuting went into place. (Def.'s Br. 25.)

Defendant further argues that it denied Plaintiff's request to attend collections associate training because this training was not required for programmers in the Strategy Group and was of limited utility to them. As Defendant notes, the bulk of the training materials, which it attaches to its Motion, instruct associates on how to contact delinquent account holders, not on how to

draft computer programs, which was Plaintiff's primary job responsibility. Defendant notes that the only reason another Programmer Analyst was sent to this training was because she was in between major assignments. (Def.'s Br. 36.)

Finally, Defendant argues that its denial of Plaintiff's requests to telecommute and to attend collections associate training were not adverse employment actions because neither decision altered the terms of his employment. With respect to telecommuting, Defendant points out that Plaintiff knew at the time that he applied for and accepted his position as a Programmer Analyst that the position was located in Sears's Trevoise, Pennsylvania office, ninety miles from his home in Teaneck, New Jersey. (Def.'s Br. 34.) With respect to collections associate training, Defendant notes that such training was not designed or required for individuals in Plaintiff's position. (Def. Br. 38.)

## **V. Discussion**

The Court finds that Plaintiff's Title VII, ADEA, and PHRA claims with respect to events occurring prior to August 10, 2002 are time-barred. Under the applicable federal statute, an employee has 300 days from the date of any alleged employment discrimination to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e); West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). Any allegations falling outside that time period are time-barred unless the court finds that they were part of a continuing violation. The applicable state statute contains an even shorter limitations period of 180 days. Pa. Stat. Ann. tit. 43 § 959(h); Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1997).

The continuing violation theory is an equitable exception that allows a plaintiff to "pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can

demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant.” West, 45 F.3d at 754. In order to successfully present a continuing violation claim, the plaintiff must demonstrate that: (1) at least one discriminatory act occurred within the actual filing period, and (2) the discrimination did not consist of “isolated, intermittent acts of discrimination,” but instead of a “persistent, on-going pattern.” Id. at 754-55. Once a plaintiff has demonstrated a continuing violation, he or she may recover for discriminatory conduct that occurred prior to the filing period and offer evidence of all events that constitute the violation. Id. at 755. If the plaintiff does not establish a continuing violation, he or she may recover only for the conduct within the applicable statutory period. The Court finds that the acts complained of by Plaintiff, the denial of telecommuting privileges, the denial of collections associate training, the PPIs, and Plaintiff’s termination do not constitute a continuing violation. Each of these actions were “discrete acts” falling outside the 180 or 300 day time periods. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); O’ Connor v. City of Newark, 440 F.3d 125, 127 (3d Cir. 2006) (termination, wrongful discipline, and denial of training are all discrete acts under Morgan). Nonetheless, the Court must still consider these acts with respect to Plaintiff’s § 1981 claim, which is subject to a four-year statute of limitations. See Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 383-84 (2004).

Even if the Court were to find that Plaintiff’s claims relating to these actions were timely, this would not change the outcome of this case. First, Plaintiff has failed to support his allegations or refute Defendant’s assertions with any affidavits, depositions, or other sworn materials, as required by Federal Rule of Civil Procedure 56(e). The Court finds that Plaintiff has failed to carry his burden of persuasion. But even if Plaintiff had established a prima facie

case, the Defendant has articulated legitimate, non-discriminatory reasons for all the actions it took with respect to Plaintiff and has offered sufficient evidence to support these reasons including a declaration from Plaintiff's immediate supervisor and Plaintiff's own deposition testimony.<sup>5</sup> Under McDonnell Douglas, the burden then shifts back onto the Plaintiff to show that the legitimate reasons offered by the Defendant for these actions were a pretext for discrimination

Plaintiff's Motion for Summary Judgment and his Response to Defendant's Motion for Summary Judgment offer no affirmative support for any of the allegations contained in his Amended Complaint. Instead, Plaintiff relies almost exclusively on Defendant's Answer to Plaintiff's Amended Complaint to support his allegations of discrimination. In its Answer, Defendant admits that Tom Nelson was allowed to telecommute and that Plaintiff's request to do so was denied. Defendant further admits that Plaintiff was not allowed to attend collections associate training. These admissions show that Defendant denied Plaintiff's requests, but they do not show that Defendant's articulated reasons for these decisions were fabricated or pretextual. To survive a motion for summary judgment, the Plaintiff must at least produce *some* evidence to support a conclusion that the Defendant's proffered reasons for these actions were pretextual. See Fuentes v. Perskie, 32 F.3d 758, 764 (3d Cir. 1994). Simply arguing that these decisions were motivated by racial animus and that an employer's stated reasons are not believable is insufficient. Id.

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<sup>5</sup> Defendant's argument that its denial of Plaintiff's requests to telecommute and to attend collections associate training were not adverse employment actions need not be addressed. Even if the Court were to find that the Plaintiff correctly characterized these actions as adverse to his employment, the Plaintiff's failure to produce any evidence to support a finding that these decisions were pretextual would still defeat his claim.

The exhibits attached to Plaintiff's Motion and Response are equally deficient in showing that Defendant's decisions were discriminatory. In support of his argument that Defendant discriminated against him by denying him telecommuting privileges, Plaintiff attaches two newspaper articles discussing the experience of one Sears employee, identified as a systems consultant, who telecommutes to work. Plaintiff also attaches several documents describing settlements Sears has reached in entirely unrelated cases, including a securities class action and two disability discrimination cases brought under the ADA. Defendant, and not Plaintiff, has attached the Credit Collections Initial Training Manual used in the training Plaintiff suggests would have significantly enhanced his job performance. While this training might have assisted Plaintiff in understanding how the programs he was asked to design were used by collections associates, Plaintiff offers no evidence to suggest that Defendant's stated reasons for denying his request were pretextual.

Plaintiff's contentions with respect to Defendant's decision to issue him PPIs without attributing any responsibility for the failure of the Late Fee Rebate program to Henry Smith and Defendant's ultimate decision to terminate him are equally unavailing. Plaintiff's fundamental issue with these decisions seems to be that Defendant incorrectly assessed his job performance, not that discriminatory animus was the actual motivation for these decisions. Plaintiff's original EEOC claim, his own responses to the performance issues raised on his PPIs, and his deposition testimony reveal that Plaintiff engaged in many of the actions of which Defendant complained. Whether Plaintiff agrees with how Defendant evaluated his behavior is irrelevant for the purposes of his claim of employment discrimination. As the Third Circuit has held, an employee's "view of his performance is not at issue; what matters is the perception of the

decision maker. . . . [t]he fact that an employee disagrees with an employer's evaluation of him does not prove pretext.” Billet v. CIGNA Corp., 940 F.2d 812, 826 (3d Cir. 1991) (internal citation omitted).

Plaintiff offers no depositions, answers to interrogatories, admissions on file or affidavits to support his contention that Defendant’s stated reasons for its decisions were not believable or had a discriminatory motive. The only evidence that Plaintiff offers that supports his allegation of discrimination is a copy of his six-month performance review. That evaluation rated Plaintiff’s performance a 3 on a 5-point scale, which corresponds to an evaluation of “consistently meeting expectations; Solid, value-added performance.” (Pl.’s Br. 2.) While this positive evaluation could serve as a starting point to demonstrate that Defendant’s PPIs were pretextual, such an evaluation, standing alone, does not demonstrate pretext. See Billet, 940 F.2d at 826 (“good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual”).

“[T]o 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 non-discriminatory reasons, was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).” Fuentes, 32 F.3d at 764 (internal citations omitted). Plaintiff’s positive performance review, combined with Defendant’ admissions and the newspaper articles he has attached relating to telecommuting and settlements Sears has reached in unrelated cases, fall far short of the evidence required for Plaintiff to sustain his burden on his Motion for Summary Judgment or to effectively oppose Defendant’s Motion.

Plaintiff has presented no evidence of specific facts showing a genuine issue for trial that would permit a jury to either disbelieve Defendant's articulated legitimate reasons or to believe that it is more likely than not that Defendant acted with an invidious discriminatory intent. Consequently, the Court must grant Defendant's Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
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JOHN A. THOMPSON	:	CIVIL ACTION
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	:	
SEARS, ROEBUCK AND CO.	:	NO. 04-5342

**ORDER**

AND NOW, this 30th day of October, 2006, it is hereby ORDERED that Plaintiff's Motion for Summary Judgment (Doc. No. 48) is DENIED, and Defendant's Motion for Summary Judgment (Doc. No. 46) is GRANTED. Judgment shall be entered in favor of Defendant and against Plaintiff. In light of this Order, Defendant's Motion to Dismiss for Failure to Timely Answer Discovery (Doc. No. 42) is DENIED AS MOOT, and the Clerk shall mark this case as closed for statistical purposes.

BY THE COURT:

/s/ Michael M. Baylson  
Michael M. Baylson, U.S.D.J.