

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

LACY R. WHEELER, III	:	CIVIL ACTION
	:	
v.	:	
	:	No. 10-2022
COMMONWEALTH OF	:	
PENNSYLVANIA DEPARTMENT OF	:	
LABOR AND INDUSTRY	:	
 NORMA L. SHAPIRO, J.		MARCH ____, 2012

MEMORANDUM

Plaintiff Lacy R. Wheeler, III (“Wheeler”) brings claims against his former employer, defendant Commonwealth of Pennsylvania Department of Labor and Industry (the “Commonwealth”), for race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Before the court is the Commonwealth motion for summary judgment. Wheeler, an attorney, has proceeded *pro se*. The court is patient with *pro se* litigants, but Wheeler has pursued his claims in a dilatory manner.¹

The court has federal question jurisdiction under 28 U.S.C. § 1331. Venue is proper under 28 U.S.C. § 1391.

¹Wheeler failed to appear for the final pretrial conference and oral argument on the motion for summary judgment, so the court will decide the motion on the papers. He submitted his pretrial memorandum six weeks late and the memorandum did not comply with the court’s pretrial order and the requirements of Local Rule 16.1(c). He did not seek leave of the court to file his pretrial memorandum late until a week later. Finally, he failed to include a copy of his amended complaint with his motion to amend his complaint, which the court subsequently denied.

Wheeler, an African-American, filed a complaint alleging the Commonwealth: (1) failed to promote Wheeler because of his race; and (2) terminated Wheeler and engaged in other post-termination retaliatory acts when he filed complaints alleging race and age discrimination with the Commonwealth Office of Equal Opportunity (“OEO”) and U.S. Equal Employment Opportunity Commission (“EEOC”). Wheeler brought claims under Title VII, 42 U.S.C. § 1981, and the Pennsylvania Humans Relations Act (“PHRA”) against the Commonwealth and three Commonwealth employees: Edward Rawlings (“Rawlings”), James Wilderman (“Wilderman”), and Stephen Schmerin.

By Order of November 15, 2010, the court dismissed the § 1981 and PHRA claims against all defendants, and the Title VII claims against the individual defendants. The Title VII claims against the Commonwealth are the only remaining claims. Wheeler seeks: (1) compensatory damages for pain and suffering, physical and emotional distress, and past and future economic losses; (2) declaratory relief that the Commonwealth’s discriminatory practices are unlawful; (3) an injunction prohibiting the Commonwealth from engaging in discriminatory practices; (4) lost wages and benefits; (5) pre- and post-judgment interest, costs, and attorney’s fees; and (6) any other relief deemed just and proper.²

The court will grant the Commonwealth motion for summary judgment because there is not sufficient evidence for a jury to return a verdict in Wheeler’s favor.

²By Order of November 15, 2010, the court denied the request for punitive damages under Title VII. “A complaining party may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1) (emphasis added).

I. Background

Wheeler was employed as an Unemployment Compensation Appeals Referee (“Appeals Referee”) with the Commonwealth Unemployment Compensation Appeals Board of Review from September 15, 2003 until he was terminated on January 30, 2008. On May 24, 2007, Wheeler submitted an application for promotion to the position of Eastern Appeals Referee Program Manager (“Program Manager”). Seven candidates applied for the position; four, including Janice Cohen (“Cohen”), were Caucasian and three, including Wheeler, were African-American.

The candidates were interviewed for the position of Program Manager by three Commonwealth employees: Autro Heath (“Heath”) and former defendants Rawlings and Wilderman. Cohen received an overall rating of “Strong” by all three reviewers, each of whom identified Cohen as the best candidate for the position. Mot. Summ. J., Ex. B. Wheeler received an overall rating of “Strong” by Wilderman and “Acceptable” by Rawlings and Heath. Mot. Summ. J., Ex. C. At least one of the reviewers, Wilderman, expressed concern in his review about Wheeler’s proposal to implement a workplace policy allowing Appeals Referees to leave the office early upon completion of over seven hearings in one day. Mot. Summ. J., Exs. C, D. Rawlings also attests the reviewers were concerned about the proposal. Mot. Summ. J., Ex. A, ¶ 18.

After the interviews, Cohen was promoted to the position of Program Manager. Wheeler alleges he was more qualified than Cohen but was not promoted to Program Manager because of his race. Wheeler also alleges the Commonwealth has never promoted an African-American to Program Manager. Wheeler claims the Commonwealth settled two prior federal

actions brought by African-American employees who claimed they were not promoted to Program Manager because of their race.

On September 4, 2007, Wheeler submitted an internal complaint to the OEO alleging race discrimination in the failure to promote him to Program Manager.³ After conducting an internal investigation, the OEO dismissed the complaint. Wheeler then filed a complaint with the EEOC in December 2007. Wheeler states the EEOC “issued Notices of Right to Sue on February 4, 2010.” Compl. ¶ 3.

On January 16, 2008, the Commonwealth held a “fact-finding conference” with Wheeler to discuss information discovered during the OEO internal investigation. The OEO had discovered Wheeler listed his attorney identification number in his employment application when he applied for the position of Appeals Referee, even though his law license was suspended at the time. The OEO had also discovered Wheeler claimed to have no criminal history in his applications for both Appeals Referee and Program Manager, despite having been arrested, held in direct criminal contempt, and incarcerated on at least two occasions.

The Commonwealth terminated Wheeler on January 30, 2008.⁴ Wheeler alleges his termination was in retaliation for filing the OEO and EEOC complaints.

³Wheeler amended his OEO complaint to include a charge of age discrimination. He did not bring a claim for age discrimination in this action.

⁴In his response to the motion for summary judgment, Wheeler claims the Commonwealth violated his due process rights when it terminated his employment without providing a hearing as required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). On December 1, 2010, Wheeler moved to amend his complaint to include due process claims under the Fifth and Fourteenth Amendments. The court denied the motion without prejudice because the due process claims were barred by state sovereign immunity under the Eleventh Amendment. The court will not consider the due process claims.

II. Legal Standard

Summary judgment must be granted when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The court must view the facts in the light most favorable to the nonmoving party and make all reasonable inferences in that party’s favor. *See Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005).

The movant must identify those portions of the record showing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the movant does not bear the burden of persuasion, it may show the nonmovant’s evidence is insufficient to carry the burden of persuasion. *Id.* at 323. To withstand summary judgment, the nonmovant must show a genuine dispute of material fact by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c)(1)(A); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A dispute is “genuine” only if there is “sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

III. Discussion

Title VII makes it unlawful for an employer to:

[F]ail 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 nation origin; or 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. §§ 2000e-2(a)(1), (2). Title VII also prohibits employees from discriminating against an employee or applicant who has opposed an unlawful employment practice or “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a).

Wheeler asserts four theories of liability under Title VII: (1) individual disparate treatment (42 U.S.C. § 2000e-2(a)(1)); (2) systemic disparate treatment (42 U.S.C. § 2000e-2(a)(1)); (3) disparate impact (42 U.S.C. § 2000e-2(a)(2)); and (4) retaliation (42 U.S.C. § 2000e-3(a)).⁵

A. Individual Disparate Treatment

Wheeler alleges the Commonwealth committed an affirmative act of racial discrimination when it promoted Cohen to Program Manager, even though Wheeler was more qualified for the position. Compl. ¶ 16. Wheeler alleges the Commonwealth promoted Cohen because of racial bias against Wheeler. Compl. ¶ 85.

An action for individual disparate treatment under Title VII arises when an employer has “treated [a] particular person less favorably than others because of the plaintiff’s race, color,

⁵Wheeler failed to assert clearly specific claims or counts in his complaint. A liberal reading of the complaint could find Title VII claims based on theories of individual disparate treatment, retaliation, systemic disparate treatment, and disparate impact. The motion for summary judgment does not address the theory of systemic disparate treatment, but Wheeler’s response addresses all four theories. In the OEO complaint, filed prior to termination, Wheeler included allegations that could be based on all theories save retaliation. Mot. Summ. J. Ex. E. The record does not show which theories of liability were included in the EEOC complaint, but the Commonwealth has not raised failure to exhaust administrative remedies as a defense. The court will consider all four theories of potential liability under Title VII.

religion, sex, or national origin.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-86 (1988). “The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000). Wheeler may sustain his individual disparate treatment claim by proffering: (a) direct evidence of discrimination; or (b) circumstantial evidence of discrimination under the three-step burden-shifting procedure set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Direct evidence of racial discrimination must demonstrate the “decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989), *superseded on other grounds by statute as recognized in Robinson v. Se. Pa. Transp. Auth., Red Arrow Div.*, 982 F.2d 892, 899 n.8 (3d Cir. 1993). Wheeler does not proffer direct evidence that the decision to promote Cohen instead of Wheeler was motivated by racial bias. Nothing in the record shows race was a factor in the decision to promote Cohen.

Wheeler may also prove his individual disparate treatment claim with circumstantial evidence under the three-step burden-shifting procedure set forth in *McDonnell Douglas*:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (quoting *McDonnell*

Douglas, 411 U.S. at 802, 804).

To prove a prima facie case, Wheeler must show: (1) he belongs to a protected class; (2) he was qualified for the position in question; (3) he was subjected to an adverse employment action; and (4) under circumstances giving rise to an inference of discrimination, the employer favored an individual not of the protected class to fill the position. *See Sarullo v. United States Postal Serv.*, 352 F.3d 789, 797-98 (3d Cir. 2003). The focus of the prima facie test is “whether the employer is treating ‘some people less favorably than others because of their race.’” *Id.* at 798 (citation omitted). “The burden of establishing a prima facie case of disparate treatment is not onerous.” *Burdine*, 450 U.S. at 253.

Wheeler, an African-American, is a member of a protected class. *See McDonnell Douglas*, 411 U.S. at 802. The reviews from Wheeler’s interview for Program Manager show he was qualified for the position. The reviewers rated Wheeler as “Acceptable” or “Strong” across a broad range of categories. Mot. Summ. J., Ex. C. The materials that Wheeler submitted in his application further show his qualifications. Wheeler received favorable annual reviews for at least two of his years as an Appeals Referee. Mot. Summ. J., Ex. D. Wheeler also received high scores on at least two quality review evaluations. *Id.*

The parties agree the Commonwealth promoted Cohen, a Caucasian, instead of Wheeler. The issue is whether the decision to promote Cohen occurred under circumstances giving rise to an inference of discrimination. Wheeler contends racial discrimination influenced the promotion of Cohen because Wheeler was more qualified for the position. Compl. ¶ 16. It is permissible for the court to infer discrimination from a comparison between Wheeler and a single person outside his protected class. *See Simpson v. Kay Jewelers, Div. of Sterling, Inc.*,

142 F.3d 639, 646 (3d Cir. 1998).

Wheeler contends multiple factors demonstrate his superior qualification for Program Manager: (1) experience in management; (2) experience as a practicing attorney and academic; (3) history of accepting extra assignments beyond his regularly scheduled caseload, including assignments requiring travel to other Commonwealth offices; (4) union and committee involvement; (5) interpersonal skills; and (6) superior application package. Compl. ¶¶ 23-30, 36-38, 41-42, 45, 75-76. Wheeler contends Cohen, by comparison: (1) has limited or no managerial and legal experience; (2) rarely if ever accepted extra assignments; (3) did not engage in committee work; and (4) lacks interpersonal skills. Compl. ¶¶ 31-34, 39-40, 43-44. Wheeler also claims Cohen accepted a demotion from the position of Deputy Counsel at the Civil Service Commission to Appeals Referee. Compl. ¶ 46. The court, viewing the evidence in the light most favorable to Wheeler, assumes Wheeler has established a prima facie case.

The prima facie case gives rise to a presumption of discrimination. The Commonwealth can rebut the presumption by proffering evidence that it had a legitimate, non-discriminatory reason for promoting Cohen instead of Wheeler. *See McDonnell Douglas*, 411 U.S. at 802. The Commonwealth contends it promoted Cohen instead of Wheeler because: (1) she was the highest rated candidate by the reviewers; (2) her answers were better organized; (3) she showed a better understanding of the subject matter; and (4) the reviewers were concerned about Wheeler's proposal that Appeals Referees be permitted to leave the office early upon completion of over seven hearings in one day.

The Commonwealth supports its proffered legitimate, non-discriminatory reason with record evidence. *See Mot. Summ. J., Exs. B and C.* The Commonwealth produced interview

reviews showing that Cohen received an overall rating of “Strong” by all three reviewers, each of whom identified Cohen as the best candidate for the position. Mot. Summ. J., Ex. B. Rawlings attests “Cohen’s answers were better organized and showed a better understanding of the subject matter than the answers provided by Mr. Wheeler.” Mot. Summ. J., Ex. A., ¶ 17. Wheeler, by comparison, received an overall rating of “Strong” by only one reviewer and “Acceptable” by two reviewers. Mot. Summ. J., Ex. C. At least one of the reviewers, Wilderman, expressed concern about Wheeler’s proposal to implement a workplace policy allowing Appeals Referees to leave the office early upon completion of over seven hearings in one day. Mot. Summ. J., Exs. C, D. Rawlings also attests the reviewers were concerned about Wheeler’s proposal. Mot. Summ. J., Ex. A, ¶ 18. Rawlings further attests he “did not make any decision on the basis of Mr. Wheeler’s race.” *Id.* at ¶ 56. The Commonwealth has satisfied its burden of proffering evidence of a legitimate, non-discriminatory reason for promoting Cohen instead of Wheeler.

The burden shifts to Wheeler to proffer evidence creating a triable issue of fact that the Commonwealth’s proffered reason for promoting Cohen instead of Wheeler was a pretext for racial discrimination. *See St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993). A sufficient showing of pretext must “allow the 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.” *Fuentes v. Perkasie*, 32 F.3d 759, 764 (3d Cir. 1994).

Wheeler makes several arguments in support of his claim that the Commonwealth promoted Cohen for pretextual reasons. Wheeler contends his failure to be promoted despite

being the most qualified candidate is evidence that the Commonwealth did not promote him for discriminatory reasons. Even if Wheeler was more qualified than Cohen, he may not establish pretext by simply showing the Commonwealth's decision was wrong or mistaken. *Id.* at 765. The main issue is whether the Commonwealth acted in a discriminatory manner. *Id.* Wheeler has failed to proffer evidence showing the Commonwealth acted with discriminatory intent.

Wheeler questions the authenticity of the interview reviews submitted by the Commonwealth. Wheeler may not rely upon mere allegations, general denials, or vague statements. *See Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991). Rawlings attests the interview reviews "are true and complete copies of the ratings that were completed by the three reviewers on the interview panel." Mot. Summ. J., Ex. A, ¶ 11. Each review is dated August 1, 2007, and Wheeler has not proffered any evidence, beyond his own allegation, calling into doubt the authenticity of the Commonwealth business records. *See* Mot. Summ. J., Ex. C. The interview reviews are authentic business records.

Wheeler alleges two former African-American Commonwealth employees were also denied promotions because of their race. Compl. ¶¶ 52, 57. Wheeler may show the Commonwealth discriminated against other persons within his protected class to show discrimination was more likely than not a motivating or determinative factor in the decision not to promote him. *See Simpson*, 142 F.3d at 645. Although the Commonwealth acknowledges having settled racial discrimination lawsuits filed by both former employees, Answer ¶¶ 56, 61, Wheeler does not support his allegations with evidence.

Wheeler does not proffer evidence creating a triable issue of whether the Commonwealth's proffered reasons for promoting Cohen instead of Wheeler are a pretext for

unlawful racial discrimination. Wheeler cannot prove his individual disparate treatment claim with direct evidence or by showing pretext; the individual disparate treatment claim cannot withstand summary judgment.

B. Systemic Disparate Treatment

Wheeler alleges the Commonwealth has a “long-standing pattern and business practice” of intentionally excluding African-American employees from the position of Program Manager. Compl. ¶¶ 18, 51. Wheeler also alleges the Commonwealth has a “policy to hire a less qualified white female as a member of a ‘protected class’ in an attempt to exclude members of the ‘protected class’ of African-American candidates and thus maintain the desired ‘all white’ managerial ranks.” Compl. ¶ 17.

To prove a claim of systemic disparate treatment, Wheeler must show the Commonwealth intentionally had a pattern or practice of discriminating against a protected group. *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Wheeler has not proffered direct evidence of a discriminatory pattern or practice by the Commonwealth.

Wheeler can meet his burden of proof with two kinds of circumstantial evidence to establish the existence of a pattern or practice of intentional discrimination: (1) statistical evidence establishing the Commonwealth’s past treatment of the protected group; and (2) testimony from protected class members detailing specific instances of discrimination. *See id.* at 337-39. Wheeler proffers neither statistical evidence nor testimony to establish a prima facie case of systemic disparate treatment. Wheeler alleges the Commonwealth employed an arbitrary and capricious “pre-textual point system” to eliminate qualified African-Americans from the position of Program Manager for the last twenty-five years. *See* Compl. ¶¶ 71-73;

Resp. Mot. Summ. J. pp. 16-18. Wheeler also alleges the litigation between the Commonwealth and two former employees in racial discrimination actions evidences the Commonwealth's systematic exclusion of African-Americans from management. *Id.* at 17-18.

Wheeler does not proffer any evidence in the record to support his allegations. Wheeler cannot prove a prima facie Title VII claim under a systemic disparate treatment theory by relying upon mere allegations and vague statements. *See Quiroga*, 934 F.2d at 500. Wheeler has failed to create a genuine dispute of material fact that the Commonwealth has a pattern or practice of discriminating against African-Americans; the systemic disparate treatment claim cannot withstand summary judgment.

C. Disparate Impact

Wheeler's claim that the Commonwealth employed an arbitrary and capricious "pre-textual point system" to eliminate qualified African-Americans from the position of Program Manager could also assert a disparate impact theory of liability.⁶

A prima facie case of disparate impact discrimination has two components. First, Wheeler must identify "the specific employment practice that is challenged." *Watson*, 487 U.S. at 994. Second, Wheeler must show the Commonwealth practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(I). Unlike a Title VII claim alleging systemic disparate treatment, which requires a plaintiff to show an employer's discriminatory intent behind a practice or policy, a Title VII claim alleging disparate impact discrimination must show "a facially neutral standard has caused a

⁶Wheeler does not clarify whether he alleges Title VII liability under a systemic disparate treatment theory, disparate impact theory, or both. Although the motion for summary judgment does not address systemic disparate treatment, Wheeler responds to the motion for summary judgment on both grounds, so the court will address each theory.

‘significantly discriminatory hiring pattern.’” *N.A.A.C.P. v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 476 (3d Cir. 2011) (citation omitted); *see also Stagi v. Nat’l R.R. Passenger Corp.*, 391 Fed. Appx. 133, 136 (3d Cir. 2010) (unpublished). “To show causation, the plaintiff must present ‘statistical evidence of a kind and degree sufficient to show that the practice in question has caused exclusion of applicants for jobs or promotions because of their membership in a protected group.’” *Id.* at 136 (citation omitted). The “statistical disparities must be sufficiently substantial that they raise such an inference of causation.” *Watson*, 487 U.S. at 994-95.

Wheeler has failed to proffer evidence, statistical or otherwise, showing the Commonwealth has a specific neutral employment practice excluding African-Americans from promotion. Wheeler contends the two prior racial discrimination lawsuits against the Commonwealth and the Commonwealth’s failure to ever promote an African-American to Program Manager should have put the Commonwealth on notice of the discriminatory impact of its promotion practices. Compl. ¶¶ 48-50, 62. Wheeler fails to cite material in the record concerning the prior lawsuits. Wheeler also fails to proffer statistical evidence concerning the number of prior Program Manager applicants, their ethnicities, or the results of their applications aside from the six other candidates considered for Program Manager together with Wheeler. The promotion of one Caucasian (Cohen) over three other Caucasians and three African-Americans does not, by itself, support an inference that the Commonwealth has a practice excluding African-Americans from promotion. *See, e.g., Verney v. Dodaro*, 872 F. Supp. 188, 194-95 (M.D. Pa. 1995) (a single report concluding defendant had a low percentage of female employees was insufficient to establish a prima facie disparate impact claim).

Wheeler does not proffer evidence creating a genuine dispute of material fact that the

Commonwealth has a neutral employment practice with discriminatory impact. Wheeler cannot prove a prima facie Title VII claim under a disparate impact theory; the disparate impact claim cannot withstand summary judgment.

D. Retaliation

Wheeler alleges the Commonwealth retaliated against him for filing racial discrimination complaints with the OEO and EEOC by: (1) terminating him; (2) filing a complaint against him with the Disciplinary Board of the Supreme Court of Pennsylvania (“PA Disciplinary Board”) after he was terminated; and (3) filing a complaint against him with the Pennsylvania State Civil Service Commission (“PA Commission”) after he was terminated. Compl. ¶¶ 101, 129, 131.⁷

Although Wheeler’s claim that the Commonwealth did not promote him because of racial discrimination fails to withstand summary judgment, he may still bring an action for retaliation under Title VII. *See Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69-70 (2006). Wheeler can establish a retaliation claim without proving the underlying discrimination claim that gave rise to the retaliation. *Id.* Wheeler may also recover if the Commonwealth engaged in post-termination retaliation when it filed the PA Disciplinary Board and PA Commission complaints. *See Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994). “[A]n ex-employee may file a retaliation action against a previous employer for retaliatory conduct occurring after the end of the employment relationship when the retaliatory act is in reprisal for a protected act within the meaning of section 704 [of Title VII] and arises out of or is related to the employment relationship.” *Id.*

⁷The PA Disciplinary Board and PA Commission complaints were dismissed without any action taken against Wheeler. Resp. Mot. Summ. J., Exs. 5, 7.

Wheeler does not proffer direct evidence that the Commonwealth terminated him and filed the PA Disciplinary Board and PA Commission complaints in retaliation for the OEO and EEOC complaints.

To prove a prima facie case of retaliation with circumstantial evidence, Wheeler must show: (1) he engaged in a protected employee activity; (2) he was subject to adverse action by the Commonwealth, either subsequent to or contemporaneous with the protected activity; and (3) there was a causal connection between the protected activity and adverse action. *See Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567-68 (3d Cir. 2002). “An employer’s actions are considered retaliatory when, in response to an employee’s charge of discrimination, the employer takes actions that would ‘[dissuade] a reasonable worker from making or supporting a charge of discrimination.’” *Lee v. City of Phila.*, 2008 WL 2697320, at *3 (E.D. Pa. July 3, 2008) (quoting *Burlington*, 548 U.S. at 68).

The OEO and EEOC complaints are protected activity under Title VII, 42 U.S.C. § 2000e-3(a). *See Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989). Wheeler’s termination and the PA Disciplinary Board and PA Commission complaints are adverse actions subsequent to his filing of the OEO and EEOC complaints.

The court can infer a causal connection between the OEO and EEOC complaints and the Commonwealth’s allegedly retaliatory actions because of their temporal proximity. “In certain narrow circumstances, an ‘unusually suggestive’ proximity in time between the protected activity and the adverse action may be sufficient, on its own, to establish the requisite causal connection.” *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 302 (3d Cir. 2007); *compare Jalil*, 873 F.2d at 708 (two days between protected activity and adverse action sufficient to prove prima

facie case), with *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) (nineteen months between protected activity and adverse action insufficient to prove prima facie case). “It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff’s prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn.” *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997).

Wheeler filed the OEO complaint on September 4, 2007 and was informed of the fact-finding conference that lead to his termination by notice dated December 13, 2007. Mot. Summ. J., Ex. E; Resp. Mot. Summ. J., Ex. 12. Wheeler claims he filed the EEOC complaint on December 27, 2007. Compl. ¶ 100. The fact-finding conference occurred on January 16, 2008 and the Commonwealth terminated Wheeler on January 30, 2008. Resp. Mot. Summ. J., Ex. 16. Wheeler was terminated less than five months after filing the OEO complaint and approximately one month after filing the EEOC complaint. The court, viewing the evidence in the light most favorable to Wheeler, assumes the Commonwealth terminated Wheeler in close temporal proximity to the filing of the OEO and EEOC complaints.

The record does not show the precise dates when the Commonwealth filed the PA Disciplinary Board and PA Commission complaints. The PA Disciplinary Board complaint was dismissed by March 27, 2008 and Wheeler claims the PA Disciplinary Board complaint was filed on or about March 1, 2008. Resp. Mot. Summ. J., Ex. 5; Compl. ¶ 129. The Commonwealth filed the PA Commission complaint after January 16, 2008, and before May 19, 2008. Resp. Mot. Summ. J., Ex. 6. The court assumes the Commonwealth filed complaints with the PA Disciplinary Board and PA Commission in close temporal proximity to the filing of

the OEO and EEOC complaints.

Wheeler proffers evidence of temporal proximity allowing an inference of a causal connection between the OEO and EEOC complaints and the Commonwealth's allegedly retaliatory actions. He has proven a prima facie case of retaliation.

The Commonwealth contends it terminated Wheeler and filed the PA Disciplinary Board and PA Commission complaints for non-discriminatory reasons, *i.e.*, because Wheeler made false and misleading statements on his applications for Appeals Referee in 2002 and Program Manager in 2007. After Wheeler filed the OEO complaint, the Commonwealth conducted an internal investigation to determine whether racial discrimination was a factor in evaluating his promotion application. The Commonwealth discovered he made false and misleading statements in his applications concerning his law license and criminal history.

The Commonwealth discovered Wheeler listed his Pennsylvania Bar identification number in his employment application for Appeals Referee, even though he was suspended from the Bar when he applied. Mot. Summ. J., Ex. G. On May 6, 1997, the Supreme Court of Pennsylvania suspended Wheeler from the Bar for a year and a day. Mot. Summ. J., Ex. K. On April 26, 2001, the Disciplinary Board for the Supreme Court of Pennsylvania denied Wheeler's petition for reinstatement because he had resisted arrest and been incarcerated for criminal contempt during his suspension. *Id.* The Appeals Referee application instructions state that one of the qualifications an applicant may show to obtain the position is "certification of admission to the Bar of the Supreme Court of Pennsylvania." Mot. Summ. J., Ex. F. In his application, dated July 30, 2002, Wheeler wrote "Attorney ID# 41015" in the section of the application requesting "LICENSES OR CERTIFICATES WHICH DIRECTLY RELATE TO THE QUALIFICATIONS OF

THE JOB TITLE(S) FOR WHICH YOU ARE APPLYING (Give numbers and expiration dates).” *Id.* The Disciplinary Board for the Supreme Court of Pennsylvania did not reinstate Wheeler’s law license until May 2, 2003, more than nine months after Wheeler applied to be an Appeals Referee. Mot. Summ. J., Ex. L. Wheeler admits his law license was suspended when he completed the Appeals Referee application. Resp. Mot. Summ. J., p. 2.

The Commonwealth also discovered Wheeler claimed to have no criminal history in his applications for both Appeals Referee and Program Manager, but had been arrested, held in direct criminal contempt, and incarcerated on at least two occasions. The Appeals Referee application asks whether the applicant has ever been convicted of a criminal offense, other than minor traffic violations and juvenile offenses. Mot. Summ. J., Ex. G. The Program Manager application asks whether the applicant has ever been convicted of a criminal offense, defined to include “summary offenses” and defined as “an adjudication of guilt and includes determinations before a court, a district judge or magistrate . . . that result in a fine, sentence or probation.” Wheeler checked the box marked “NO” in response to both questions. Mot. Summ. J., Exs. G, H.

On May 14, 1993, Judge Mazur had sentenced Wheeler to one year incarceration for three charges of direct criminal contempt in a child support action filed against Wheeler in the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division. Mot. Summ. J., Ex. I. On June 17, 1998, Judge Baer had sentenced Wheeler to one month incarceration for direct criminal contempt in the same action. Mot. Summ. J., Ex. J at 34:11-35:8. Judge Baer found Wheeler in direct criminal contempt after hearing testimony that Wheeler had been held in contempt on at least five other occasions, arrested three times, and resisted arrest. Mot.

Summ. J., Ex. J.

Wheeler misled the Commonwealth when he listed his Pennsylvania Bar identification number on his Appeals Referee application. He provided false information on his Appeals Referee and Program Manager applications when he claimed he did not have any criminal history. The Commonwealth has satisfied its burden of production with evidence of legitimate reasons for terminating Wheeler and filing the PA Disciplinary Board and PA Commission complaints based on his allegedly false and misleading statements in his applications.

The burden shifts to Wheeler to proffer evidence creating a triable issue of fact on whether the Commonwealth's proffered reasons for terminating Wheeler and filing the PA Disciplinary Board and PA Commission complaints were pretextual. *See Atkinson v. N. Jersey Developmental*, 2011 WL 6000713, at *4 (3d Cir. Dec. 1, 2011). Temporal proximity alone is not sufficient to show pretext. *See Carlson v. Twp. of Lower Alloways Creek*, 2011 WL 4493571, at *6 (3d Cir. Sept. 29, 2011). Wheeler contends he did not provide false and misleading information on his applications because the Appeals Referee application did not require him to be an active member of the Bar and he does not have a criminal background. Wheeler also questions the Commonwealth's motive in conducting an investigation into the OEO complaint that extended to a review of the Appeals Referee employment application.

Wheeler misled the Commonwealth by listing his PA Bar number when his license was suspended. There is no merit to his argument that he did not state his license was "suspended" because the application only asked for date of "expiration." Resp. Mot. Summ. J., p. 2. The onus was not on the Commonwealth to investigate whether the license number listed was active.

Although Wheeler's Pennsylvania State Police and Federal Bureau of Investigation

background checks did not show a criminal history, Wheeler had a criminal history when he completed the Appeals Referee and Program Manager applications. Resp. Mot. Summ. J., Exs. 1, 2. “The trial court is empowered to punish as direct criminal contempt the misbehavior of any person that takes place in the presence of the court, thereby obstructing the administration of justice [under] 42 Pa. Stat. Ann. § 4132(3).” *Commonwealth v. Ashton*, 824 A.2d 1198, 1202 (Pa. Super. Ct. 2003). “Direct criminal contempt is a crime against the Commonwealth . . . a contempt sanction is criminal in nature when the trial court’s main purpose is to punish the contemnor for disobedience of the court’s order.” *Commonwealth v. Kolansky*, 800 A.2d 937, 939 n.2, 3 (Pa. Super. Ct. 2002). “Any criminal contempt is a crime in the ordinary sense: it is a violation of the law constituting a public wrong punishable by fine, imprisonment, or both.” *Ashton*, 824 A.2d at 1203. On at least two occasions, Wheeler was sentenced in the Court of Common Pleas to a period of incarceration for direct criminal contempt. Mot. Summ. J., Exs. I, J at 34:11-35:8. There is no merit to Wheeler’s argument that he did not have a criminal history because he was never convicted of a crime in a criminal court. The convictions for direct criminal contempt were convictions for criminal offenses.

Wheeler’s 1993 and 1998 criminal convictions were expunged by Order of March 4, 2008. Resp. Mot. Summ. J., Ex. 9. Although the expungement was retroactive to March 30, 1999, it did not occur until *after* Wheeler submitted his Appeals Referee and Program Manager applications, and *after* he was terminated. When Wheeler applied to be an Appeals Referee and Program Manager, and when he was terminated, Wheeler had a criminal record of at least two convictions of direct criminal contempt.⁸

⁸The record does not show whether the Commonwealth filed the PA Disciplinary Board and PA Commission complaints before or after the Wheeler convictions were expunged.

Even if Wheeler did not provide false and misleading information by listing his Bar identification number on his applications and claiming to have no criminal history, he still fails to show the Commonwealth's reasons for firing him were pretextual instead of simply incorrect. *See Fuentes*, 32 F.3d at 765. "To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.*

The Commonwealth investigated Wheeler's employment history to determine whether racial discrimination was a factor in the promotion process. The Commonwealth discovered information causing it to believe Wheeler had submitted false and misleading information concerning his law license and criminal history in his applications. Wheeler does not proffer evidence showing the Commonwealth terminated him and filed the PA Disciplinary Board and PA Commission complaints for any other reason. Wheeler does not proffer evidence showing the Commonwealth conducted an unusually thorough investigation of his employment history.

Wheeler has not proffered evidence creating a triable issue of whether the Commonwealth terminated him and filed the PA Disciplinary Board and PA Commission complaints for pretextual reasons; the Title VII retaliation claim cannot withstand summary judgment.

IV. Conclusion

The Court will grant the Commonwealth motion for summary judgment. An appropriate Order follows.

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

LACY R. WHEELER, III	:	CIVIL ACTION
	:	
v.	:	
	:	No. 10-2022
COMMONWEALTH OF	:	
PENNSYLVANIA DEPARTMENT OF	:	
LABOR AND INDUSTRY	:	

ORDER

AND NOW, this 29th day of March, 2012, upon consideration of the Commonwealth of Pennsylvania Department of Labor and Industry motion for summary judgment (paper no. 11) and the Lacy R. Wheeler, III response (paper no. 14), and for the reasons stated in the attached memorandum of today’s date, it is **ORDERED** that the “Motion of Defendant for Summary Judgment” (paper no. 11) is **GRANTED**.

/s/ Norma L. Shapiro

J.

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

LACY R. WHEELER, III	:	CIVIL ACTION
	:	
v.	:	
	:	No. 10-2022
COMMONWEALTH OF	:	
PENNSYLVANIA DEPARTMENT OF	:	
LABOR AND INDUSTRY	:	

Norma L. Shapiro, J.

March 29th, 2012

JUDGMENT

AND NOW, this 29th day of March, 2012, in accordance with today's Order granting the Commonwealth of Pennsylvania Department of Labor and Industry motion for summary judgment (paper no. 11), and in accordance with Federal Rule of Civil Procedure 58, it is

ORDERED that:

Judgment is hereby entered in favor of defendant Commonwealth of Pennsylvania Department of Labor and Industry, and against plaintiff Lacy R. Wheeler, III.

/s/ Norma L. Shapiro

J.