

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GEORGE E. KINCADE,	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 3:00cv1801(PCD)
	:	
PAUL O'NEILL,	:	
SECRETARY OF THE TREASURY	:	
Defendant.	:	

RULING ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment on all counts for the reasons stated herein.

Defendant's motion is **granted** in part and **denied** in part.

I. BACKGROUND

A. Procedural Background:

In September 2000, George E. Kincade filed the original complaint herein. The Amended Complaint alleges that during his employment as a Revenue Officer with the Department of the Treasury (IRS), he was racially discriminated retaliated against in violation of Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., (Counts One and Two), retaliation in violation of the Civil Service Reform Act, 5 U.S.C. § 2303(b)(9) (Count Three), and that such discrimination and retaliation resulted in severe emotional distress (Count Four).

Defendants' motion for summary judgment was granted with regard to Counts One, Two, and Three of the Amended Complaint for lack of jurisdiction based on Plaintiff's failure to exhaust administrative remedies. With respect to Counts One and Two (Title VII claims), Plaintiff was given leave to produce records of proceedings before the EEOC. Plaintiff withdrew

Count Four of the Amended Complaint. Plaintiff has now produced the EEOC records. Summary judgment will here be reconsidered as to the Title VII claims.

B. Factual Background¹:

In June of 1988, Plaintiff began his employment with the IRS. He became an IRS accounting technician in Cincinnati, Ohio until 1994. In June of 1994, Plaintiff became an IRS GS-7 Revenue Officer in Norwalk, Connecticut where his immediate supervisor was Sam DiGiovanni. Prior to moving to Norwalk, his job evaluations were always satisfactory or excellent. After passing a qualification test on the second attempt, Plaintiff was promoted to GS-9 Revenue Officer. Plaintiff's duties included field visits to individual tax payers and businesses to collect delinquent taxes and to secure delinquent returns, as well as to ensure that the taxpayer was in full compliance with federal tax laws.

On June 20, 1994, Plaintiff was suspended for one-day for failing to timely pay his income taxes for 1991 and 1992. He did not dispute the claim made against him.

On November 18, 1996 Plaintiff was suspended for seven days for failure to timely pay his federal income taxes for 1993 and 1995. He did not dispute the claim made against him.

On March 17, 1997 Christopher R. Quill became a Group Manager of IRS Group 17 in Norwalk, Connecticut, replacing Sam DiGiovanni as Plaintiff's immediate supervisor. Quill managed a group of approximately ten revenue officers and reviewing their work in order to insure that their cases were properly handled. In the Norwalk group, of these revenue officers, two were at Grade 9, six were at Grade 11, and two or three were at Grade 12. The two GS-9

¹All facts are taken from the parties Local Rule 56(a)2 Statements of Material Facts Not in Dispute.

officers, including Plaintiff, were African American males. The remaining revenue officers in the group were white.

Group 17 was assigned to a specific geographic area, within the Connecticut-New York border on the west, the Connecticut-Massachusetts border on the north, on the south, the towns of Weston, Easton, Monroe, and Ridgefield, and on the east, the towns of Winstead, Torrington, Seymour, and Derby. Quill assigned cases to revenue officers based on ZIP codes and the grade of the case. He assigned one GS-11 and one GS-12 revenue officer to a ZIP code. The territory was divided in half by north and south for the two GS-9 revenue officers. Plaintiff was assigned to the southern half of the territory.

After Quill arrived, Plaintiff contends that he suffered numerous incidents of discrimination and/or retaliation. He asserts that the one other African American revenue officer was subjected to similar discriminatory treatment. The more specific incidents Plaintiff alleges are summarized as follows, to be discussed in detail below:

- Over the course of his employment, Plaintiff was required to carry heavier caseload than white employees and required to drive more, despite having a documented back injury.
- In July of 1996, he was falsely accused of causing other employees to not receive their phone calls.
- In 1997 was evaluated below what he deserved in the area of customer relations.
- Plaintiff was passed over for a promotion on the basis of this evaluation.
- Plaintiff's first EEO Complaint filed in May 21, 1997. It was dismissed as untimely.
- In 1997, Quill denied him participation in the "hours-flexiplace" program.
- On November 14, 1997, Plaintiff was required to use a credit hour for being late for work.
- In 1998, Quill stopped assigning Plaintiff higher graded cases.
- In April, 1998, Quill re-validated Plaintiff's prior employment evaluation.
- In May, 1998, he was initially denied the opportunity to earn and use a credit hour on the same day.
- In July, 1998, Plaintiff received four case performance reviews.

- In July, 1998, Plaintiff was asked to stop talking to a co-worker, also African-American, who was asked to leave his desk.
- In 1998 Plaintiff was reprimanded for losing a security ID badge. The reprimand was later rescinded.
- Thereafter, Plaintiff was reprimanded for allowing a statute of limitations to expire on one of his cases. The reprimand was later rescinded.
- On January 28, 1998, Plaintiff was again passed over for a promotion.
- On January 30, 1998 Plaintiff contacted an EEO counselor and filed a second complaint of discrimination and retaliation. The complaint was dismissed as untimely, except with respect to a failure to promote claim.
- In September of 1998, Plaintiff was yelled at over a lost tax return.
- On September 25, 1998 Plaintiff contends that he was falsely accused of not placing his name on the office out board when he was out of the office.
- On October 10, 1998 Plaintiff filed a third EEO complaint. It was timely in all respects.
- In October of 1998, Quill rated Plaintiff's performance as unacceptable in Case Decisions and Workload Management.
- On December 7, 1998 Quill issued Plaintiff an Opportunity to Improve Performance Letter.
- On July 23, 1999, a Notice of Proposed Adverse Action was issued to Plaintiff.
- On March 29, 1999 Plaintiff was instructed that he would no longer be allowed to go into the field.
- On September 2, 1999, another Notice of Proposed Adverse Action was issued to Plaintiff.

Plaintiff was terminated in March, 2001, but effectively stopped working on May 27, 1998.

II. STANDARD OF REVIEW

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "A party opposing a properly brought motion for summary judgment bears the burden of going beyond the pleadings, and 'designating specific facts showing that there is a genuine issue for trial.'" Amnesty Am. v. Town of W. Hartford, 288 F.3d 467, 470 (2d Cir. 2002) (quoting Celotex Corp. v. Catrett, 477 U.S.

317, 324 (1986)). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). “Conclusory allegations will not suffice to create a genuine issue.” Delaware & H. R. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990). Determinations of the weight to accord evidence or credibility of witnesses are improper on a motion for summary judgment as such are within the sole province of the jury. Hayes v. N.Y. City Dep’t of Corr., 84 F.3d 614, 619 (2d Cir. 1996).

III. DISCUSSION²

A. Continuing Violation and Hostile Work Environment Claims:

Defendant argues that many of the claims of discrimination and retaliation are barred either for failure to comply with administrative time deadlines or for failure to exhaust administrative remedies by failing to raise the claims at the EEO level. Defendants Memorandum in Support of Motion for Summary Judgment at 5-8 and 31-33. Defendant argues first, that allegations not contained in any of Plaintiff’s EEO complaints are improper for failure to exhaust, and second that among those complaints, only the third EEO complaint (October 10, 1998) and the failure to promote claimed in the second EEO complaint are not time-barred. Plaintiff does

²Any claims not addressed below are deemed sufficiently unclear as to preclude discussion. For example, in his Statement of Material Facts Not in Dispute, Plaintiff alleges that on March 29, 1999 Plaintiff was inexplicably barred from the field. Pl. Local R. 56(a)2 Statement, Pt. I ¶1. However, shortly thereafter Plaintiff maintains that he stopped working at the IRS on May 17, 1998. Id. at ¶ 10. These apparently contradictory claims are unresolved and cannot be reconciled here.

not confront directly Defendant's arguments as to exhaustion or timeliness, although Plaintiff does note them. Plaintiff's Brief in Opposition to Summary Judgment at 4.³ Instead, Plaintiff relies on the continuing violation doctrine to escape the time-bar and exhaustion requirements. Pl. Br. Opp. Summ. J. 10-12. Thus, if the continuing violation doctrine fails as to Plaintiff's discrimination, retaliation, and hostile work environment claims, only those facts alleged in the EEO complaint dated October 10, 1998, Def. Ex. 6, and the January 1998 failure to promote claim are to be considered.

I. Hostile Work Environment Claim:

In his Brief in Opposition to Summary Judgment Plaintiff, for the first time, asserts a hostile work environment claim. Defendant argues that it should not therefore be considered. Def. Reply Mem. Supp. Summ. J. at 3-4. As Defendant has had the opportunity to argue the issue in its Reply, there is no prejudice and the claim will be considered. Cruz v. Coach Stores, Inc., 202 F.3d 560, 569 (2d Cir. 2000).

Though both parties seem to conflate the continuing violation theory and a hostile work environment claim, they are different. The former allows plaintiffs to recover for discriminatory or retaliatory acts otherwise time-barred if the acts are reasonably related to an ongoing policy of discrimination. Quinn v. Green Tree Credit Corp., 159 F.3d 759, 765 (2d Cir. 1998) (internal citations omitted). A Title VII hostile work environment claim involves specific claims about the work environment, namely, that it is "permeated with 'discriminatory intimidation, ridicule, and insult,' ...'sufficiently severe or pervasive to alter conditions of the victims employment or

³The Court notes that there is no pagination on the Plaintiffs Brief in Opposition to Motion for Summary Judgment and thus all page references are based on the Court's count.

create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (internal citations omitted). The continuing violation doctrine may save otherwise time-barred acts in hostile work environment claims as well. Despite the recent clarification of the issue, see National Railroad Passenger Corp. v. Morgan, 526 U.S. 101, 115 (2002), it need not be reached here, as the hostile work environment claim fails for other reasons.

A hostile work environment claim must allege that the workplace is "permeated" with discriminatory actions that create an "abusive" work environment. Harris, 510 U.S. at 21. This test has both objective and subjective components. The conduct must create an "objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive" and the victim must subjectively perceive the environment to be abusive, otherwise the "conduct has not actually altered the conditions of the victim's employment." Id. at 21-22. Plaintiff fails to meet the objective prong of this test.

Plaintiff does not allege any facts involving overtly racial discrimination. All Plaintiff's allegations of discrimination and a hostile environment hinge on the inference of discriminatory motive based on disparate treatment between black and white employees. Other courts have noted that in the Second Circuit, hostile work environment claims tend to survive summary judgment "where the record reflects either a continuous and repeated pattern of explicit racial slurs or a few particularly severe incidents of discrimination." Curtis v. Airborne Freight Corp., 87 F. Supp. 234, 247 (S.D.N.Y. 2000), citing Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426 (2d Cir. 1999) (Repeated use of racial epithets and slurs survive summary judgment, but claim involving only three incidents of use of racial slurs does not.) and Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (Single incident of sexual assault by

supervisors sufficient to defeat summary judgment.). Plaintiff alleges no explicit racial slurs. No alleged single incident of discriminatory conduct rises to the level necessary to be actionable on its own. Viewing the record as a whole, it is just not possible to find that the work environment was objectively abusive. See Fitzgerald v. Henderson, 251 F.3d 345 (2d Cir. 2001), cert denied 536 U.S. 922 (2000) (Courts "should not view the record in piecemeal fashion.").

Under similar factual circumstances involving the inference of racial discrimination and disparate treatment in promotions, raises, salaries, personal interaction, and termination, without overtly racial acts, Plaintiff would be unable to meet the objective requirement and legally sustain a claim for a hostile work environment. Ortega v. New York City Off-Track Betting Corp., 97 Civ. 7582 (KMW), 1999 U.S. Dist. LEXIS 7948, *11 (S.D.N.Y. May 27, 1999). That court reasoned that even if the inference of discrimination was actionable under Title VII it would not be actionable as a hostile work environment claim. Id. In cases requiring an inference of discrimination, discrimination and/or retaliation claims are more valid than hostile work environment claims. See Murray-Dahnir v. Loews Corp., No. 98 Civ. 9057 (LMM), 1999 U.S. Dist. LEXIS 12973, *12 (S.D.N.Y. August 23, 1999) (The "amended complaint fails to allege any acts or comments which are even racial in nature. While the above facts, if proven, might support plaintiff's discriminatory failure to promote claim, they do not support his claim of a racially hostile work environment.") and Oteri-Harkins v. City of New York, No. 97-CV-2309 (JG), 1998 U.S. Dist. LEXIS 21876, *20 (E.D.N.Y. February 5, 1998) ("Assuming plaintiff can demonstrate discriminatory motive, the alleged acts, if proven, may well support plaintiff's claim that Queens Hospital discriminates in its hiring and promotion, but they cannot support a claim of a racially hostile work environment.").

Plaintiff's hostile work environment claim fails absent allegations of an objectively abusive work environment. Summary judgment is granted for the Defendant on this Count.

ii. Continuing Violation Theory:

Plaintiff's continuing violation theory fails as to claims of non-promotion and negative employment evaluations, which are discrete acts and not amenable to continuing violation claims.

Defendant initially argues that Plaintiff failed to raise the theory at the administrative level or in the complaint and therefore cannot raise it now as it must be "clearly asserted both in the EEOC filing and in the complaint." Miller v. International Telephone and Telegraph Corp., 755 F.2d 20, 25 (2d Cir. 1985), cert denied, 474 U.S. 851 (1985). However, even the authority cited by Defendant found that, at the administrative level, the assertion that he has "and continues to feel aggrieved and humiliated by these circumstances" was sufficient to raise the theory. Peters v. City of Stamford, No. 3:99-CV-764, 2003 U.S. Dist. LEXIS 4189, at *12 (D. Conn. March 17, 2003). Plaintiff's October 10, 1998 EEO complaint contain similar language, claiming that "there is plenty more they are doing to me and they feel like no one can stop them...". Def. Ex. 6 at 10. This language sufficiently raises the issue at the EEOC.

The complaint alleges that "unlawful employment practices have and are being committed by the defendant...". Amen. Compl. ¶ 2. This does not meet the "clearly asserted" standard of the Second Circuit. However, as with the hostile work environment claim, Defendant was not prejudiced and even anticipated the theory before Plaintiff explicitly raised it in the opposition to summary judgment. See Def. Mem. Supp. Summ. J. at 33 (addressing anticipated continuing violation argument) and Def. Reply Mem. Supp. Summ. J. at 3-7 (arguing

continuing violation theory).

The continuing violation theory allows plaintiffs to assert claims otherwise time-barred. Quinn, 159 F.3d at 765. Until recently, it was held that "if a plaintiff 'files a timely EEOC charge about a particular discriminatory act committed in furtherance of an ongoing policy of discrimination,' the statute of limitations is extended 'for all claims of discriminatory acts committed under that policy.'" Weeks v. New York State, 273 F.3d 76, 82 (2d Cir. 2001) (internal citations omitted). A policy of discrimination may be found where "where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." Fitzgerald, 251 F.3d at 359. Plaintiff alleges a policy of discriminatory promotion and preference as evidenced by the continued and unremedied failure to promote Plaintiff and the poor treatment he allegedly receives.

The continuing violations doctrine does not preserve time-barred discrete discriminatory acts, even if part of a policy of discrimination. See Morgan, 526 U.S. at 115 (2002) ("All prior discrete discriminatory acts are untimely filed and no longer actionable."). Acts allegedly part of the discriminatory policy are examined as to whether they constitute discrete acts. Acts such as "termination, failure to promote, denial of transfer or refusal to hire are easy to identify" are discrete and constitute "separate actionable 'unlawful employment practice.'" Id. At 114.

The extent the continuing violations doctrine survives Morgan is unclear. See Borrowes v. Brookdale Hospital, No. 02-7473, 2003 U.S. App. LEXIS 4933, at **5 (2d Cir. March 18, 2003) (unpublished opinion) (noting only that the issue has not been reached by the Second Circuit). It is clear, however, that time-barred discrete acts cannot be considered as part of a continuing violation theory. Thus, all otherwise barred instances of failure to promote alleged by

Plaintiff cannot be considered. Id. at 114. Thus, only the failure to promote in Plaintiff's second EEO complaint may be considered in relation to Plaintiff's discrimination and retaliation claims.

Similarly, all employee evaluations are easily identified, separate, potentially actionable employment practices and time-barred. See Morgan 526 U.S. at 114. Negative, even multiple, performance evaluations are best characterized as "multiple incidents of discrimination" and not continuing violations. Wang v. N.Y.C. Dept. of Finance, No. 96-CV-5170, 1999 U.S. Dist. LEXIS 11256, at *36-7 (E.D.N.Y. July 21, 1999). The Second Circuit has noted, following Morgan, the focus is not on the continued effect experienced by the plaintiff, but on whether there is a "single completed action." Elmenayer v. ABF Freight, 318 F.3d 130, 135 (2d Cir. 2003). An evaluation is clearly a single completed act much like a failure to promote - regardless of its continuing effect on the employee.

Defendant argues the rest of Plaintiff's factual allegations involve discrete acts. This argument would render every conceivable act discrete. Plaintiff does raise a question as to whether the acts alleged are "sufficiently repetitious" and related to an overall alleged discriminatory policy to prevent Plaintiff's promotion as to merit consideration below. Fitzgerald, 251 F.3d at 362-63.

B. MERITS OF DISCRIMINATION AND RETALIATION CLAIM:

With respect to the allegations surviving, it is necessary to consider whether Plaintiff and Defendant have met their requisite burdens of production in relation to both the discrimination and retaliation claims. On balance Plaintiff has met his burden with respect to a prima facie case. Defendant has met its burden to produce evidence of a legitimate nondiscriminatory/non-retaliatory reason for virtually all of Plaintiff's allegations. Plaintiff, however, fails to meet his

burden of production on the issue of pretext on both discrimination and retaliation claims. Thus, summary judgment will enter on those claims.

In Title VII actions involving allegations of discrimination and retaliation, plaintiffs must first make out a prima facie case of both discrimination or retaliation. The two tests are similar. The prima facie case for discrimination involves: "membership in a protected class, qualification for the position, an adverse employment action, and preference for a person not of the protected class." James v. New York Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000) (internal citations omitted). The prima facie case for retaliation requires "[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action." Quinn, 159 F.3d at 769 (internal citations omitted).

Title VII claims impose upon the parties certain burdens of production. The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff", but the burden of production shifts from plaintiff to defendant and back. Texas Dep. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[If] the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the [negative employment action]. 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 pretext for discrimination.

Id. at 252-53. This burden shifting analysis applies to retaliation cases as well as discrimination or disparate treatment cases. Reed v. A.W. Lawrence, 95 F.3d 1170, 1178 (2d Cir. 1996). If Plaintiff fails to meet his burden, summary judgment is appropriate. See Celotex Corp. v.

Catrett, 477 U.S. 317, 322 (1986) (Summary judgment enters when "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."). Summary judgment in a Title VII claim depends the strength of the plaintiff's prima facie case, the "probative value of the proof that the employer's explanation is false", and "any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." Reese v. Sanderson Plumbing, 530 U.S. 133, 148-49 (2000).

1. Prima Facie Case of Discrimination and Retaliation:

The prima facie case for discrimination is a "minimal" burden not requiring direct evidence of discrimination. James v. New York Racing Assoc., 233 F.3d 149, 153-54 (2d Cir. 2000). Defendant argues that Plaintiff fails to make out a prima facie case of discrimination because Plaintiff fails to demonstrate that he was otherwise qualified for the position, that with respect to both discrimination and retaliation Plaintiff fails to demonstrate adverse employment action, and with respect to retaliation, he fails to demonstrate causation. Def. Mem. Supp. Summ. J. at 11-14, 10-11, and 29-31. Because of the minimal requirements for a prima facie case, only the adverse action requirement will be addressed. Otherwise, it is assumed that Plaintiff makes out a prima facie case for discrimination and retaliation.

Adverse employment action can be as wide ranging as "discharge, refusal to hire, refusal to promote, demotion, reduction in pay" and even reprimand. Morris v. Lindau, 196 F.3d 102, 110 (2d Cir.1999). There is of course a threshold - a "bruised ego is not enough." Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 761 (1998) (internal citations omitted). Plaintiff fails to meet this threshold with respect to four of his allegations: being accused of causing employees

not to receive their phone calls in July of 1996, being told to stop talking during a training session in July of 1998, being yelled at for a lost tax return in September of 1998, and being accused of not placing his name on the out of office board in September of 1998.

In all four instances, no formal disciplinary action was taken against Plaintiff. He was not issued any reprimand and did not lose any privilege or benefit, even temporarily, as a result. Although Plaintiff alleges conclusorily that other workers were not treated similarly, absent any repercussion from any of these events, no reasonable fact finder could find an adverse action.

Plaintiff has met his prima facie case burden on both his discrimination and retaliation claims. Thus, at least with respect to those claims that survive the preceding analysis, Defendant must produce some nondiscriminatory and/or non-retaliatory reason for its conduct.

2. Employer's Production of Legitimate Nondiscriminatory Reasons and Plaintiff's Proof of Pretext:

Defendant produced nondiscriminatory reasons for all but one of the allegedly discriminatory and retaliatory acts. Plaintiff has failed to offer evidence of pretext. Plaintiff offered no evidence that he was situated similarly to those employees allegedly treated differently.

Once Plaintiff meets the standard for a prima facie case, the burden shifts to Defendant to produce a legitimate nondiscriminatory reason for the allegedly discriminatory or retaliatory conduct. Burdine, 450 U.S. at 252. This burden is one of production, *not persuasion*. Reeves, 530 U.S. at 142. The Court makes no credibility assessment.

Once an employer produces a nondiscriminatory/non-retaliatory reason for its conduct, any presumption of discrimination is rebutted and the burden shifts back to Plaintiff to produce

evidence that the employer's reason is merely pretext for a discriminatory retaliatory motivation. Reeves 530 U.S. at 143. The evidence must suggest that the offered explanation is "unworthy of credence." Id. Conclusory statements "do not raise a genuine issue of material fact." Shumway v. United Parcel Service, Inc., 118 F.3d 60, 65 (2d Cir. 1997)

Plaintiff offers no direct evidence of racial discrimination or retaliation. His entire case rests on the assertion that other white employees were not treated as he was. To successfully rebut an employer's production of nondiscriminatory, non-retaliatory reasons for its conduct through this argument, a plaintiff must demonstrate that he was "similarly situated" to those individuals to whom he compares himself. Shumway, 118 F.3d at 64.

To be considered "similarly situated" Plaintiff must be able to demonstrate that he was "similarly situated in all material respects" to those whom he alleges were treated differently. Id. While the burden of making out a prima facie case is slight, "the issue of whether fellow employees are similarly situated is somewhat strict." Wang, 1999 U.S. Dist. LEXIS 11256, *45. Thus, merely analogizing is inappropriate and employees must be shown to have "reported to the same supervisor as the plaintiff, ...been subject to the same standards governing performance evaluation and discipline, and must have engaged in similar conduct ...without differentiating or mitigating circumstances...." Id.

a. Plaintiff's Second EEO Complaint (Dated May 29, 1998):

Plaintiff's second EEO complaint alleges racial discrimination with in several occurrences. Those that have survived the preceding analysis are: IRS failure to assign him higher graded cases in 1997, IRS' failure to allow him to work "flexiplace", his having to use a

credit hour in November of 1997, and IRS' failure to promote him in January 1998.⁴ Defendant offers nondiscriminatory reasons for all of those listed. See Def. Mem. Supp. Summ. J. at 16-19.

I. IRS' failure to assign Plaintiff higher graded cases:

Plaintiff alleges discrimination in his not being assigned higher graded cases. In 1997 Quill occasionally assigned Plaintiff higher graded cases, not to exceed 25% of Plaintiff's caseload, which would have required a temporary promotion. Def. Mem. Supp. Summ. J. at 16. Defendant concedes that Quill later stopped assigning Plaintiff higher grade cases, Id., for the nondiscriminatory, non-retaliatory reason of perceived performance deficiencies with respect to those cases. Id. Defendant thereby meets its burden to produce a legitimate nondiscriminatory reason for the allegedly discriminatory or retaliatory conduct.

Plaintiff produces no evidence, except his assertions, that Quill's proffered reason of poor performance is pretext. See Pl. Br. Opp. Summ. J. at 7, citing Pl. Ex. 9 at 84-88. In his deposition, Plaintiff suggests that there were "seven white employees which was no more [*sic*] qualified than I was who got their temporary Grade 11." Pl. Ex. 9 at 86. But, Plaintiff provides no specific information that would allow the conclusion that these other employees were indeed similarly situated in *all material aspects* and thereby rebut Defendant's explanation. Plaintiff relies only on his conclusory statements and has not met his burden.

ii. IRS's failure to permit Plaintiff to work "flexiplace":

Plaintiff alleges that he was denied "certain employment related benefits." Amended

⁴ Defendant also addresses allegations of Defendant's refusal to allow Plaintiff access to his Employee Performance Folder (EPF), Def. Mem. Supp. Summ. J. at 18-19, an allegation no longer at issue as Plaintiff has agreed that Quill never denied anyone the opportunity to view their EPF folder. Plaintiff's Local Rule 56(a)2 Statement ¶¶ 25-27.

Complaint ¶ 21. One such denial complained of in his second EEO complaint was the refusal to allow him to use "flexiplace," a program in which officers can perform some duties at home. Defendant asserts in response that Plaintiff was having difficulty with the computer skills required and that Quill did not feel comfortable allowing Plaintiff to use the program. Def. Mem. Supp. Summ. J. at 17. This decision was based on two memoranda dated October 30, 1997. Id., and Def. Ex. 2, Quill Ex. 2. Defendant meets its burden.

Plaintiff has not rebutted Defendant's computer proficiency explanation. Plaintiff simply asserts that "white employees were given this opportunity." Pl. Br. Opp. Summ. J. At 6. This is insufficient to meet his burden of production.

iii. Plaintiff being required to use a credit hour in November of 1997:

Plaintiff alleges that he was subjected to racial discrimination and/or retaliatory treatment when he was forced to use a credit hour as a result of being 40 minutes late. A credit hour is time earned prior or after the normal tour of duty that can be taken instead of annual leave. There is no dispute as to whether Plaintiff was late. Requiring Plaintiff to use a credit hour was shown to be standard practice when an employee arrives late for work. Def. Mem. Supp. Summ. J. at 17, see also Pl. Local 56(a)2 Statement, Part I, ¶ 23 (disagreeing only with statements as to whether Defendant actually applied the policy uniformly). As credibility is not at issue here, Defendant has met its burden to produce a nondiscriminatory, non-retaliatory reason for its action.

Plaintiff argues that Defendant's explanation that Plaintiff was disciplined because he was late is pretext because another worker came in later than he did and was not forced to use a credit hour. Pl. Br. Opp. Summ. J. at 6. Assuming the other individual was late, there is not enough

evidence that the individual was similarly situated to Plaintiff. It is not apparent that the individual held the same position, responsibilities, or was even required to be in at the same time. Plaintiff has failed to meet his burden to produce at least some evidence of material similarity.

iv. IRS's failure to promote Plaintiff in January 1998:

Plaintiff contends that IRS' failure to promote him to GS-11 Revenue Officer on January 28, 1998 was racial discrimination and/or retaliation for his prior EEO involvement. Defendant counters, with affidavits from relevant supervisors, that the non-promotion was based entirely on Plaintiff's numerical score generated through the Alternative Ranking procedure.

Joseph M. Wynne was the Chief of the Field Branch from 1994 to October of 2000. In that capacity, Wynne was asked by Elisabeth McQueeney, Chief, Collection and Compliance Research Division, to be the Ranking Official for this promotion package. Wynne's duties included establishing a cut-off score for "highly qualified" candidates prior to the ranking of candidates. Wynne set the cut-off score at 32. Because all the applicants were in the same job series, the Alternative Ranking Procedures were used. Only an applicant's Form 6850, Job Element Appraisal and any performance related awards for the past three years were utilized in the ranking process. Plaintiff received a score of 30 and thus was ineligible for the promotion. Defendant argues that the ranking procedure is a race neutral procedure and Plaintiff's prior EEO involvement was not considered. Def. Mem. Supp. Summ. J. at 18. Defendant has therefore produced evidence of a nondiscriminatory, non-retaliatory reason for the non-promotion.

Plaintiff argues that the evaluation system is biased and that his non-promotion is a result of that bias or in retaliation for his prior-EEO involvement. Plaintiff generically argues that the scoring system is not "rationally related" to job skills or job performance. Pl. Br. Opp. Summ. J.

at 6. Plaintiff alleges that no new black employees were hired or promoted and that all new hires and promotions were white. Pl. Loc. R. 56(a)2 Statement at ¶34. Plaintiff also argues that people with "obviously less ability and poorer work performance," including an unnamed white female employee, scored higher on the evaluations and were promoted over Plaintiff. Pl. Br. Opp. Summ. J. At 6 and 8.

While there are difficulties in proving such assertions, Plaintiff has not produced evidence to rebut Defendant's legitimate reasons for Plaintiff's non-promotion. Plaintiff's allegations hinge on similarly situated individuals receiving different treatment and Plaintiff has not produced evidence that those to whom he compares himself to were indeed similarly situated. There is no supporting affidavit or deposition. Plaintiff only produces his conclusory statements. As a matter of law, this is simply insufficient to meet his burden.

c. Plaintiff's EEO Complaint Dated October 10, 1998:

In his third complaint, Plaintiff alleges racial discrimination and retaliatory conduct based on his prior EEO involvement. Plaintiff cites five specific incidents of discrimination and/or retaliation. Those that survive are: 1) The re-validation of Plaintiff's performance evaluations; 2) An initial denial of the right to earn and use a credit hour on the same day in May of 1998; and 3) Receiving three reviews on day in July of 1998.

I. April 1998 re-validation of Plaintiff's performance appraisal:

Plaintiff contends that in April 1998, Quill re-validated his 1997 performance evaluation and that this re-validation was racially discriminatory and in retaliation for his EEO involvement.

Re-validation of an evaluation, Defendant asserts, is common practice when an immediate

manager finds no positive substantive change in an employee's work performance since the last evaluation. Def. Mem. Supp. Summ. J. at 20. Defendant contends that this was the case with Plaintiff's evaluation. The re-validation was performed because there was no positive substantive change in Plaintiff's performance and that the decision to do so had nothing to do with race or prior EEO involvement. Id. Defendant therefore meets its burden to produce a nondiscriminatory, non-retaliatory reason for its actions.

The pretext analysis as to Plaintiff's January, 1998, non-promotion applies here. There is no other evidence with respect to the re-validation. His burden is not met.

ii. Plaintiff having been initially denied the right to earn and use a credit hour on the same day in May of 1998:

Plaintiff alleges discrimination when his request to earn and use a credit hour in the same day was initially denied. While Quill was group manager at Norwalk, a white female was transferred from New Haven. At Norwalk, she continued her New Haven practice of earning a credit hour in the morning and using that credit hour in the afternoon. In May of 1998, Plaintiff requested the same privilege. Quill initially denied this request, but later granted it. Defendant maintains that Quill believed the practice to be prohibited and only allowed the female employee to continue to do so because it was her past practice at New Haven. After making some inquiries, Quill realized that it was not in fact prohibited and therefore reversed his initial denial. From then on Plaintiff was allowed to earn and use a credit hour on the same day. Def. Mem. Supp. Summ. J. at 20. Defendant's albeit erroneous belief that the practice was prohibited constitutes a nondiscriminatory, non-retaliatory reason for the denial.

Plaintiff argument for pretext to hinges on this allegedly "identically situated" white

female employee. Pl. Br. in Opp. Summ. J. at 8. Plaintiff does not, however, demonstrate any reason to disbelieve Defendant's explanation that Quill believed the practice to be prohibited. Impliedly she was not similarly situated. Plaintiff does not produce facts that would allow permit a finding to the contrary. Even if she was similarly situated there was no basis for a finding that Quill acted in a discriminatory manner. Plaintiff relies solely on conclusory statements. He has not met his burden.

iii. Plaintiff having received multiple reviews in one day in July of 1998:

Plaintiff argues that Quill considered his race and EEO activity when reviewed three cases in one day. Quill, as Group Manager, was required to review at a minimum one case per month per employee and record his comments on Form 6067. These comments can be positive, negative, or both. At his discretion he could review additional cases per month, especially if he found negative performance trends. Def. Mem. Supp. Summ. J. at 22., citing Def. Ex. 2, Quill Aff. ¶ 29. Quill reviewed more of Plaintiff's cases than those of other revenue officers. Plaintiff received four reviews on July 27, 1998. Defendant argues that these reviews were performed because Quill noticed a downward trend in Plaintiff's performance. Def. Mem. Supp. Summ. J. at 22. Additionally, Defendant contends that Plaintiff's performance should have been improving given that Plaintiff was the only GS-09 in the group, and thus had the least complex caseload, and because overall inventories were reduced due to the introduction of a new computer system. Id. Defendant's reliance on poor work performance constitutes a nondiscriminatory and non-retaliatory reason for its conduct and meets its burden of production.

Plaintiff does nothing to rebut Defendant's reasons for the review of Plaintiff's work.

Plaintiff alleges that this action was discriminatory and/or retaliatory as white employees were not reviewed in a similar fashion. However, Plaintiff points with no specificity to any white workers who were treated any differently. Nor is there any showing that any other revenue officer with a questionable performance record was treated differently. Plaintiff does not meet his burden of production.

D. Plaintiff's Claims Not Contained in any EEO Complaint:

I. Lost security badge:

Plaintiff claims that it was retaliation and/or discrimination when Quill recommended that he be reprimanded for losing his security badge. In 1998, during an annual IRS credentials check, Plaintiff was discovered not to have his security badge. Quill recommended that Plaintiff be reprimanded for losing his badge and he was issued a letter of reprimand. When challenged, the letter and it was rescinded. Plaintiff acknowledges loss of his security badge, but claims he never received one upon his arrival in Connecticut. IRS records show that he was issued one and Defendant maintains that this is the sole reason Plaintiff was reprimanded. Def. Mem. Supp. Summ. J. at 23-24. Defendant has met its burden.

Plaintiff alleges that Defendant's reason for reprimanding Plaintiff for losing his security badge is pretext because "75 white employees who lost their ID badges were not reprimanded." Pl. Br. Opp. Summ. J. At 8. No further information is provided with respect to these other employees. Plaintiff claims a union grievance turned up information that other employees were not reprimanded. Pl. Ex. 9 at 121 (Plaintiff's Deposition). Nowhere in Plaintiff's papers is the Court pointed to any evidence or exhibit pertaining to this claim. There is no basis to find that these employees were similarly situated. Conclusory statements that they were not reprimanded

are not enough. Therefore, Plaintiff has not met his burden.

ii. Plaintiff being reprimanded for allowing a statute of limitations to expire:

Plaintiff claims discrimination and retaliation when he was reprimanded for allowing a statute of limitations to expire. Plaintiff challenged the reprimand and it was rescinded. Plaintiff does not dispute that the statute expired. Pl. Local R. 56(a)2 Statement, Pt. I, ¶ 46 (agreeing that the statute did expire). Defendant asserts that the expiration was the reason for the reprimand. Def. Mem. Supp. Summ. J. at 24. Thus, Defendant's burden has been met.

Plaintiff's only response is that both he and Quill thought that the statute hadn't expired. Plaintiff, points to no evidence to suggest that Quill was responsible for monitoring the statute of limitations. While Quill may share responsibility, that does not exonerate Plaintiff nor excuse him for his dereliction. Therefore, Plaintiff fails to meet his burden of production.

iii. December 7, 1998 Opportunity Letter:

On December 7, 1998, Quill issued Plaintiff an Opportunity to Improve Performance Letter. Plaintiff claims this letter to be racist and retaliatory because only he and another African-American GS-9 Revenue Officer ever received such a letter. An Opportunity to Improve Letter is a letter given to an employee that provides them with a deadline to improve unsatisfactory performance. Defendant maintains that Quill issued the letter for performance reasons and cites the fact that the letter detailed 16 examples of Plaintiff's failure to meet performance standards as to the Critical Elements of Case Decisions and Time and Workload Management. Def. Mem. Supp. Summ. J. at 25.

Plaintiff contends that Opportunity Letters were "used by Quill as a means of harassment

and creating the false impression of incompetence." Pl. Br. Opp. Summ. J. at 9. Plaintiff contends that only black employees got these letters and that whites "never did," a conclusion for which he demonstrates no foundation. Id. While Plaintiff points to another black employee who did receive an Opportunity Letter, he does not point to any similarly delinquent white employees who did not. Without *some* evidence that suggests that similarly situated non-African-American employees were treated differently, all Plaintiff has produced are conclusory statements. Plaintiff has not met his burden of production.

iv. July 23, 1999 Notice of Proposed Adverse Action:

On July 23, 1999, Plaintiff received a Notice of Proposed Adverse Action. Quill recommended the Notice be issued. Plaintiff contends that Quill so recommended for discriminatory and retaliatory reasons. Defendant argues that the letter was issued due to numerous conduct issues, including Plaintiff's failure to timely pay his federal income taxes for 1996, his failure to pay Connecticut State Income Taxes for 1996, presenting false statements concerning his travel vouchers from June to October of 1998 and false statements concerning his background investigation. Def. Mem. Supp. Summ. J. at 25-26. Defendant thus meets its burden of production.

Plaintiff disputes the veracity of one of the conduct issues cited in the letter (falsifying travel vouchers), but acknowledges that the balance of the incidents mentioned in the letter did occur. See Pl. Local R. 56(a)(2) Statement, Pt. I ¶¶ 53-54 (agreeing concerning taxes and erroneous statement). He argues nonetheless that white employees would not be subjected to such treatment, without identification of white employees guilty of similar conduct. On this basis he claims the action is discriminatory and/or retaliatory. Pl. Loc. R. 56(a)2 Statement, Pt. II

¶ 45. Nothing in the record supports this assertion. Conclusory allegations will not defeat summary judgment and Plaintiff fails to meet his burden of production.

v. September 2, 1999 Notice of Proposed Adverse Action:

On September 2, 1999 Plaintiff was issued a Notice of Proposed Adverse Action, recommended by Quill. As a result of the letter, Plaintiff was suspended for 30 days. Plaintiff again asserts that the Notice was issued as a result of his race and/or prior EEO involvement. Defendant contends that it was issued for Plaintiff's failure to timely pay his taxes. Def. Mem. Supp. Summ. J. at 11. At the time, acting Assistant District Director William Cane, also made note of the expired statute of limitations, Plaintiff's suspension in 1996, and his suspension in 1994. Id. Defendant meets its burden of production.

Plaintiff again asserts that, while it is true that he did fail to pay his taxes, "disciplinary action would not have been taken against him were he white," Pl. Br. Opp. Summ. J. at 9, a conclusion for which no substantiation is offered nor is a white employee similarly delinquent shown to have been exempt from any disciplinary action. This is again an allegation that similarly situated unidentified white employees were treated differently. Nothing in the record substantiates this conclusion. Plaintiff does not point to any incidents where similarly delinquent white employees were treated differently nor suggest the availability of such evidence. Plaintiff therefore fails to meet his burden.

vi. Heavier caseload and driving responsibilities:

Plaintiff maintains that over the course of his employment he was given a heavier caseload than white employees and that he was required to drive more, despite having a documented back injury. Plaintiff has, however, offered no evidentiary substantiation for his

conclusion. Defendant offers no nondiscriminatory/non-retaliatory reason for this treatment.

E. Evidence of Pretext Considered in the Aggregate:

As in the hostile work environment claim, courts must be careful not to view the record in an artificially piecemeal fashion such that the forest is lost for the trees. Fitzgerald 251 F.3d at 360. However, even looking at Plaintiff's evidence in the aggregate, he has failed to meet his burden. As stated at the outset, Plaintiff's claims hinge on the inference of discrimination and/or pretext based on the allegedly disparate treatment of similarly situated workers. Plaintiff has failed to produce sufficient evidence in even a single circumstance to raise a question of fact as to whether the other workers Plaintiff refers to were indeed similarly situated. As noted above, the burden for producing evidence that one is similarly situated is higher than the standard for proving a prima facie case. Wang, 1999 U.S. Dist. LEXIS 11256, *45. Thus, it is impossible to conclude that he has done so on an individual basis or in the aggregate. Accordingly, on all claims for which Defendant has produced a nondiscriminatory, non-retaliatory reason for its conduct, Plaintiff fails to meet his burden of production on the question of pretext and summary judgment is appropriate as to those claims.

3. Surviving Claims:

Based on the preceding analysis, the only allegations that survive are Plaintiff's claims concerning overly burdensome caseloads and driving requirements. Summary judgment is therefore denied with respect to Plaintiff's Title VII claims based on these factual allegations. Plaintiff is permitted to go to trial only on the question of whether Defendant's actions as to his caseload and driving is discrimination or retaliation in violation Title VII.

IV CONCLUSION:

For the reasons stated above, Defendant's motion for summary judgment (Doc. 32) is **granted** in part and **denied** in part.

SO ORDERED.

Dated at New Haven, Connecticut, September ____, 2003.

Peter C. Dorsey
United States District Judge