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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAKEISHA MCCLAIN, LEONARD MCCLAIN, and L&M AGENCY, Plaintiffs, v. AVIS RENT A CAR SYSTEM, INC., Defendant.	**OPINION** Civ. No. 12-5151 (WHW)(CLW)

Walls, Senior District Judge

Plaintiff L&M Agency ("L&M," or "Plaintiff"), formerly an independent operator of a car rental agency, alleges that Defendant Avis Rent A Car System LLC ("Avis") unlawfully terminated the parties' operating agreement because of racial bias. L&M claims discrimination and retaliation in violation of 42 U.S.C. § 1981. The Court previously dismissed the claims of the individual plaintiffs, Lakeisha and Leonard McClain. Avis now moves for summary judgment against L&M. L&M has failed to raise a triable issue of fact as to either discrimination or retaliation, and Avis's motion, decided without oral argument under Fed. R. Civ. P. 78, is granted.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are uncontested unless otherwise indicated. Avis operates and licenses car rental locations throughout the United States. Def.'s SMF ¶ 1. The locations are operated either by independent operators, franchisees, or the corporation itself. *Id.* ¶ 2. Avis provides independent operators with a rental office, vehicles, business systems, training and

support. *Id.* ¶ 3. Avis pays its operators a commission based on the revenue earned at the operator's location. *Id.* ¶ 4.

Lakeisha McClain and Leonard McClain are a married African-American couple. *Id.* ¶ 5. Ms. McClain is the president and sole shareholder of Plaintiff L&M Agency. *Id.* ¶ 8. In 2003, L&M and Avis entered into an independent operator agreement ("IOA," or "the agreement"), under which L&M would operate the Avis car rental location on South Henderson Road in King of Prussia, Pennsylvania ("the location"). *Id.* ¶ 9. Both McClains began working at the location that year. *Id.* ¶ 31. In 2005, Ms. McClain ceased operating the location full-time, and Mr. McClain assumed primary responsibility. *Id.* ¶ 32-33.

The IOA states that the "Operator shall use the location and all company-supplied equipment . . . solely for operation of the business." *Id.* ¶ 10. The agreement requires that the operator's staff be uniformed, *id.* ¶ 12, that the location be maintained "in good condition and repair," *id.* ¶ 13, and that Avis be allowed to enter the location for any purpose, including audits and inspections. *Id.* ¶ 14. The agreement permitted either party to terminate the agreement without cause on ninety days' notice, *id.* ¶ 28, or for good cause on thirty days' notice. *Id.* ¶ 29. Among the grounds for termination with good cause is an operator's or employee's commission of "any act of dishonesty, violence, abusive or threatening behavior, or moral turpitude." *Id.* ¶ 30. Avis set goals for its operators' generation of incremental revenue or "counter sales," which come from sales of vehicle upgrades, supplemental insurance, GPS device rentals and satellite radio units. *Id.* ¶ 19. During Plaintiff's operatorship, Avis's metric for counter sales was known as "CSI," *id.* ¶ 20, and Avis assigned its operators a CSI goal of $6.00 per vehicle rental day. *Id.* ¶ 21. Avis collects revenue data through a point-of-sale computer system, *id.* ¶ 22, and employs Territory Performance Managers ("TPMs") to train and review operator performance. *Id.* ¶ 23.

TPMs report to a district manager. Pl.'s SMF ¶ 10. In 2007, Carol Mancini became district manager in the McClains' region. *Id.* ¶ 14. Barbara Long became the TPM for the McClains' location in 2011. *Id.* ¶ 21. Ms. Mancini and Ms. Long are white. *Id.* ¶¶ 15, 22.

The parties dispute the number of Avis operators in Ms. Mancini's district as of 2007, with Plaintiff alleging that there were 22. *Id.* ¶ 24. Avis admits that there were 29 operators when Ms. Mancini retired in 2012, Ex. 13 to Duttera Decl. 36. In 2011, in the district Ms. Mancini supervised, Plaintiff's exhibits show as many as 55 locations branded as Avis or Budget (the two share a corporate parent, *see* ECF No. 10, and some locations are branded as both Avis and Budget. *See* Mancini Dep. 173.). The figures do not indicate if a location was operated by Avis or an independent agency or franchisee, or if any locations shared an operator. Ex. 19. The parties also disagree as to the number of locations with African-American operators at the beginning of Ms. Mancini's tenure, but the number unquestionably declined. Pl.'s SMF ¶ 23. Plaintiff alleges that there were eight when she began; five years later, the parties agree that the number was two. *Id.* ¶ 23; Ex. 13 to Duttera Decl. 37. In contrast, the number of white operators increased, as did the total number of locations. *Id.* Including L&M's location, six locations had their agreements involuntarily terminated during Ms. Mancini's time as district manager. Pl.'s SMF ¶ 24. Of those, four African-American operators were replaced by white operators, one white operator was replaced by a white operator, and one white operator was replaced by an African-American operator before Avis closed the location. *Id.* ¶ 24.

Mr. McClain characterized Ms. Mancini's behavior toward the McClains at their first meeting as communicating that she "just [didn't] like" them. *Id.* ¶ 27. According to Mr. McClain, when Ms. Mancini asked him where he was from, and he responded that he was from Chester, Pennsylvania, Ms. Mancini said, "oh, oh, that explains it." *Id.* ¶ 28. Mr. McClain remembers Ms.

Mancini telling him that she had attended Chester High School and was chased home every day. *Id.* ¶ 29. At her deposition, Ms. Mancini described an incident she experienced in high school:

> Q. Did you hate going to Chester High School?
> A. I had a bad experience there, scared.
> Q. Why were you scared?
> A. Because of another high school student. I had just moved up from Virginia, and at that point in time, Virginia had segregated schools, and the person just came after me in the ladies' bathroom with a small knife, and that was the last time I went there.
> Q. That's why you left the high school?
> A. I left the high school and went back to live with my dad in Massachusetts.

Id. ¶ 31. The student who attacked her with a knife was African-American. *Id.* ¶ 32.

Mr. McClain testified that Ms. Mancini made several comments which he considered to be racially motivated. At various points, she allegedly said that Mr. McClain "ain't done shit," *id.* ¶ 34, was lazy, *id.* ¶ 41, was "doing a song and dance," *id.* ¶ 35, was engaged in "shady business," *id.* ¶ 43, and would only rent to his "family and friends." *Id.* ¶ 42. When Mr. McClain complained that the lights in the parking lot had not been replaced, Ms. Mancini allegedly said, "[o]h, you're from Chester. You're scared of the dark?" *Id.* ¶ 36. Mr. McClain asserted that she frequently yelled at him. *Id.* ¶ 37.

Avis was responsible for maintaining the physical condition of the facility. Pl.'s SMF ¶ 48. Mr. McClain testified that the facility was in need of repair while he operated the location, and that Avis did not sufficiently maintain the property, failing to replace moldy carpet or provide new computers. *Id.* ¶ 46. Avis made improvements to the facility soon after it terminated Plaintiffs' agreement. *Id.* ¶ 49. The McClains reported that the computers were not properly registering their counter sales, but Avis did not resolve the issue. *Id.* ¶¶ 50-51. Mr. McClain attributed this neglect by Avis to racial bias. *Id.* ¶ 47.

In August of 2007, the McClains complained through an attorney to Avis that Ms. Mancini was discriminating against them based on their race. *Id.* ¶ 53. Mr. McClain alleged that

Avis limited Ms. Mancini's contact with the McClains for two years after that, but that Ms. Mancini increased her contact with them after her supervisor was promoted in 2009. *Id.* ¶¶ 57-59. Ms. McClain set Ms. Mancini's emails to automatically go to her spam folder, stating that she "probably spammed [Ms. Mancini] because [Ms. McClain] didn't want anything to do with her at that time." Def.'s SMF ¶ 47. The forwarding caused Ms. McClain to miss at least one email from Ms. Mancini regarding the location's revenue performance, the "argumentative" nature of her interaction with Mr. McClain, and concerns about insufficient training. *Id.* ¶ 48; Ex. I to Halasz Cert.

TPM Barbara Long sent Mr. McClain a letter in August of 2011, advising that Avis considered his counter sales to be insufficient, and warning that a lack of improvement would put the contract in jeopardy. Def.'s SMF ¶ 51. Although the location's overall revenue was one of the highest in the district, *id.* ¶ 53, Mark Osbourne, Avis's Northeast Region President, attributed this to the location's proximity to commercial centers. Dep. of Mark Osbourne 34. He estimated that the location was "down double digits in revenue" compared to 2010, while other locations in the territory "were right around break even or even with the previous year." *Id.* at 35.

Mr. Osbourne visited the location on November 3, 2011, Def.'s SMF ¶ 60, along with other Avis personnel, including Ms. Mancini and Northeast Area Development Manager Anne Lomonaco. Dep. of Leonard McClain 384; Cert. of Anne Lomonaco ¶ 1. Mr. Osbourne testified that the location was "the dirtiest location I'd ever been to, from bags of clothes to lost-and-found scattered everywhere, to contracts not organized, not in filing cabinets, to filth and dust, to weights, to weight-room-type bikes." Osbourne Dep. 29. Mr. McClain admittedly kept certain personal items at the location, including exercise equipment. Def.'s SMF ¶ 42. The McClains did not believe that the agreement prohibited keeping or using this equipment. *Id.* ¶¶ 43-43. Avis

personnel testified that the location was dirty and cluttered on multiple visits, Def.'s SMF ¶¶ 34, 49-50; Mr. McClain denied this characterization ("[e]verything was clean."). Leonard McClain Dep., 159:12-20. Though he disputes the extent of the criticism, Mr. McClain acknowledges that Mr. Osbourne expressed dissatisfaction over the presence of some of Mr. McClain's personal items in the office, the loose paperwork, the fake camera on top of the Avis sign, as well as the location's counter sales. *Id.* 385-88. Mr. McClain suggests that Mr. Osbourne was referring to the need for structural maintenance to the building (e.g. repairing the bullet hole in the window), for which Avis was responsible, when Mr. Osbourne said that it "shouldn't be looking like this." *Id.* 395-96.

Matters came to a head on November 10, 2011. That day, Ms. Mancini returned to the location with Ms. Long, finding it in much the same physical condition as the week before. Def.'s SMF ¶¶ 68-69. At the time of the inspection, Ms. McClain and the McClains' children were in an inner office with the door closed, waiting to meet someone for unspecified non-work-related purposes. Leonard McClain Dep. 400. Ms. Mancini approached the office and asked Mr. McClain to open the door. *Id.* 398-400; Def.'s SMF ¶ 70. The door to the office opened, and Ms. Mancini saw Ms. McClain, the children, and some of the McClains' personal items. *Id.* ¶ 72. Mr. McClain testified that Ms. Mancini was "pointing at [his] kids, they ain't supposed to be here. And didn't Mark Osbourne tell you to get this stuff out of here." Leonard McClain Dep. 401. The parties agree to this description of what happened next: "voices were raised." *See* Def.'s SMF ¶ 71; Pl.'s Resp. to ¶ 71. Ms. McClain remembered that Ms. Mancini "put [her] hands and fingers up in [her] child's face," and that she "could've snapped out and started . . . beating the shit out of" Ms. Mancini. Def.'s SMF ¶ 73; Pl.'s Resp. to ¶ 73. Mr. McClain raised his voice at Ms. Mancini in the office, Leonard McClain Dep. 405, and Ms. Long confronted him about it.

Id. 411; *accord* Mancini Dep. 194-95 *and* Long Dep. 72. Ms. Mancini and Ms. Long began boxing up documents, and another Avis employee named Donald Swinney moved the boxes into a van. Leonard McClain Dep. 404, 408. That day, Mr. McClain told Mr. Swinney, "I know what I've got to do. I'm going to call my lawyer." Pl.'s SMF ¶ 72. (Mr. Swinney alternately remembers the comment as, "[M]y lawyer is on the way." Swinney Dep. 57:1.) Mr. Swinney sent an email that afternoon to Ms. Mancini that included telling her about Mr. McClain's statement that he was going to call his lawyer. *Id.*

At some point in November of 2011, after the visit on November 10th, Avis decided to terminate the agreement with L&M. Def.'s SMF ¶ 75; Pl.'s Resp. to ¶ 75. Mr. Osbourne described himself as "the decision maker." Osbourne Dep. 29. At his deposition, Mr. Osbourne gave this explanation for the termination:

> "After visiting the location, I determined that we gave him an opportunity or we gave of the Location, the company running that, an opportunity to clean up the location, and that we would come back to it a week later to see if it was cleaned up, and if it wasn't, I was going to look at replacing them.
>
> "They went back to the location. There was numerous things that come into play with it, but from my standpoint, the location, when I visited it, was the dirtiest location I'd ever been to, from bags of clothes to lost-and-found scattered everywhere, to contracts not organized, not in filing cabinets, to filth and dust, to weights, to weight-room-type bikes. At that point in time, when I went in there, I was going in there just for my normal visit, and there was things I would have been talking to him about, if the store would have been good, if the location would have been clean and everything. I would have talked to him about upsells that there was an issue with, but when I saw the location, that become [sic] one of the most important pieces to me. . . .
>
> "That along with, I think I mentioned earlier, you have to have a good business relationship with the team, and it had become a hostile environment that my people, and when say 'my people,' Carol and the territory performance manager, Barbara Long, were very nervous about even going to the location because everything from very high voices, yelling at each other, getting in Carol's face like when she went back, not wanting to unlock the doors in the back rooms, all of this came into play. . . . All of that joins together."

Id. 29-30. Ms. Mancini echoed these reasons. Mancini Dep. 11-12. On December 1, 2011, Avis notified L&M by letter that it was terminating the agreement, giving no further explanation.

Def.'s SMF ¶ 78. The termination became effective ninety days afterward. *Id.* ¶ 79. On two separate occasions involving locations in the district, Avis terminated an agreement for cause, and listed the reasons for the terminations. Pl.'s SMF ¶ 75. The McClains' former location is now operated by a white-owned agency. *Id.* ¶ 76.

After receiving a letter from Plaintiff's counsel alleging race discrimination, counsel for Defendant responded by listing two reasons for the termination: failure to "keep the location in a neat and business like manner" and "poor revenue performance." *Id.* ¶ 79. Defendant's response to an interrogatory about its reasoning was more detailed:

> "Avis states that Plaintiff's contractual relationship with Avis terminated because of Plaintiff's unsatisfactory performance, and because of Plaintiff's failure to abide by company standards and policies. Plaintiff failed to meet its goals for counter sales and demonstrated a lack of sufficient sales skills overall. Plaintiff failed to sufficiently maintain a visible and recognizable presence in the local marketplace. Plaintiff did not diligently promote the Avis brand in Plaintiff's area. Plaintiff did not demonstrate a proper use of telephone techniques. Plaintiff's employees behaved in a hostile and unprofessional manner toward Avis. Plaintiff's employees refused to wear Avis uniforms. Plaintiff was given every opportunity to correct these faults, but demonstrated an inability to do so. Avis additionally refers to the Local Market Car Contact Reports produced in response to Plaintiff's Request for Production of Documents – Set 1."

Ex. 11 to Duttera Decl. 4. Mr. Osbourne verified the response. *Id.* 24. Mr. Osbourne's deposition testimony differed from the interrogatory response; he denied that his decision involved improper telephone techniques, Osbourne Dep. 99:18-100:10, insufficient marketing and advertising, *id.* 102:13-18, or Mr. McClain's failure to wear an Avis uniform. *Id.* 102:19-103:3. Summarizing his reasoning at his deposition, Mr. Osbourne testified that "[t]he primary decision was the location filth, and I mean the worst I have ever seen at any location in all my years, the hostile business relationship with our people, and that revenue wasn't going up, CSI upsells not being right; all of those go towards my decision." *Id.* 100:17-22. He stated earlier that he examined other areas besides upsells after the termination, and "the numbers looked okay." *Id.*

97:4-11. Other locations in the district were not meeting their CSI goals at that time either, and Plaintiff's was the only agreement terminated that year. Pl.'s SMF ¶ 86.

L&M Agency, along with Lakeisha McClain and Leonard McClain, brought suit under the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the New Jersey Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-1, *et seq.*, alleging race discrimination and retaliation. Compl. ¶¶ 69-82. The Court dismissed Mr. and Ms. McClain's claims under 42 U.S.C. § 1981 because the individuals are not parties to L&M's contract with Avis. ECF Nos. 19-20. The McClains' New Jersey state law claims were also dismissed, as the case lacks necessary contacts with New Jersey. *Id.* Only L&M's section 1981 claim remained pending. Defendant moved for summary judgment on October 7, 2014. ECF No. 42.

STANDARD ON SUMMARY JUDGMENT

Summary judgment is appropriate where "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). A factual dispute between the parties must be both genuine and material to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A disputed fact is material where it would affect the outcome of the suit under the relevant substantive law. *Scott v. Harris*, 550 U.S. 372, 380 (2007). A dispute as to a material fact is genuine where a rational trier of fact could return a verdict for the non-movant. *Id*. The movant bears the initial burden to demonstrate the absence of a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529 (2006). Once the movant has carried this burden, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" in question. *Scott*, 550 U.S. at 380 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)). Each party must support its position by "citing to

particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). At this stage, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter." *Anderson*, 477 U.S. at 249. Where there is a genuine dispute as to a material fact, the court must view that fact in the light most favorable to the non-movant. *Scott*, 550 U.S. at 380.

DISCUSSION

Federal law protects the equal right of "[a]ll persons within the jurisdiction of the United States" to "make and enforce contracts" without respect to race. 42 U.S.C. § 1981; *see also Domino's Pizza, Inc. v. McDonald*, 564 U.S. 470, 474 (2006). An independent contractor may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009). Section 1981 prohibits not only racial discrimination but also retaliation against those who oppose it. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008).

I. Plaintiff's Discrimination Claim Fails as a Matter of Law

A. *Standard for Discrimination under Section 1981*

The standard applied in a claim for race discrimination under section 1981 varies depending on whether the suit is characterized as a "pretext" suit or a "mixed motives" suit. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997). Plaintiff's theory is that Defendant's stated reasons for terminating the contract were a pretext for race discrimination. Pl.'s Br. 9. As such, Plaintiff's section 1981 discrimination claim is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1983). *See Trent v. Test Am., Inc.*, 559 F. App'x 180, 182 (3d Cir. 2014) (observing that the elements of a

race discrimination claim under section 1981 are identical to the elements of an employment discrimination claim under Title VII of the Civil Rights Act of 1964); *see also Woodson*, 109 F.3d at 920 (identifying the *McDonnell Douglas* test as proper when the plaintiff argues that a defendant's actions were pretextual).

Under *McDonnell Douglas*, a plaintiff is first required to establish a prima facie case of discrimination. 411 U.S. at 802. To do so, an independent contractor must show that (1) he or she is a member of a protected class; (2) he or she was qualified for the position; (3) he or she suffered an adverse employment action; and (4) and the action occurred under circumstances that could give rise to an inference of intentional discrimination. *See Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008). Such an inference arises when an employer's "acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995) (citations omitted). A Court may consider that a plaintiff is replaced by someone outside the protected class. *See Vernon v. A & L Motors*, 381 F. App'x 164, 167 (3d Cir. 2010); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 355 (3d Cir. 1999).

Next, if the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802; *see also Jones v. Sch. Dist. of Philadelphia*, 198 F.3d 403, 410 (3d Cir. 1999). Finally, 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. *Jones*, 198 F.3d at 410 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981)).

At this third step, to defeat summary judgment, a plaintiff must follow one of two prongs, pointing to "some evidence, direct or circumstantial, from which a factfinder would reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Jones*, 198 F.3d at 413. A plaintiff can meet the first prong by showing that a defendant's proffered reasons are weak, incoherent, implausible, or so inconsistent that "a reasonable factfinder could rationally find them unworthy of credence." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108–09 (3d Cir. 1997). In other words, a plaintiff must introduce admissible evidence showing "not merely that the employer's proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." *Jones,* 198 F.3d at 413. Success on the second prong comes from proving critical facts "based solely on the natural probative force of the evidence." *Keller*, 130 F.3d at 1111. For example, the plaintiff may show that the employer has previously discriminated against him or her, that the employer has discriminated against other persons within the plaintiff's protected class or within another protected class, or that the employer has given more favorable treatment to similarly situated persons not within the protected class. *See Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 644-45 (3d Cir. 1998) (citations omitted).

B. *Analysis of Plaintiff's Race Discrimination Claim*

1. Plaintiff Presents a Prima Facie Case of Race Discrimination

The existence of a prima facie case of employment discrimination is a question of law that must be decided by the Court. *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003). Plaintiff easily establishes the first three elements of a prima facie case. Plaintiff is owned entirely by an African-American woman and staffed by her and her African-American husband.

Def.'s SMF ¶ 5. The agreement between L&M and Avis was in force for over eight years, with Mr. McClain staffing the agency throughout. *Id.* ¶ 31. Plaintiff's "satisfactory performance of duties over a long period of time . . . clearly established his qualifications for the job." *Sempier*, 45 F.3d at 729. Defendant terminated the contract. *Id.* ¶ 78.

To demonstrate intentional discrimination, Plaintiff has submitted statistical evidence, meant to show that Defendant terminated African-American operators more often than white operators, and hired new white operators at a greater pace than African-American operators. Under Ms. Mancini's supervision, the number of African-American-owned agencies in the district fell to two, while the number of white-owned agencies rose, and is indisputably in the double-digits. Pl.'s SMF ¶ 23; Ex. 13 to Duttera Decl. 37.

In contrast to a class-action or pattern and practice case, statistical evidence in an individual pretext case "may be helpful, though ordinarily [is] not dispositive." *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1217 (3d Cir. 1995) (citations omitted). Courts are not "obliged to assume that plaintiffs' statistical evidence is reliable . . ." *Blunt v. Lower Merion School District*, 767 F.3d 247, 276 (3d. Cir. 2014), *citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 (1988). Courts' "formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 995. "Considerations such as small sample size may, of course, detract from the value of such evidence, *see, e.g.*, *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) and evidence showing that the figures for the general population might not accurately reflect the pool of qualified applicants would also be relevant." *Int'l Brotherhood of Teamsters v. United States et al.*, 431 U.S. 324, 340 n.20 (1977). Statistical evidence is weak when "raw numerical

comparisons . . . are not accompanied by any analysis of either the qualified applicant pool or the flow of qualified candidates over a relevant time period." *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 543 (3d Cir. 1992), *cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989) (in disparate impact case, proper comparison is between racial composition of at-issue jobs and racial composition of qualified population in relevant job market).

Plaintiff's sample here is small: the 29 locations in Ms. Mancini's district. *Compare, e.g., Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254 (D.N.J. 1994) (finding the data insufficient to show disparate impact, when 10 out of 16 terminated employees belonged to a protected class, and the total number of employees was 221); *and Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1076 (9th Cir. 1986) (statistical evidence disregarded in discharge case, when, in a department with 28 total employees, four out of five discharged employees were dark-skinned). The statistics here are unaccompanied by an expert's analysis. *Compare, e.g., Croker v. Boeing Co. (Vertol Div.),* 437 F. Supp. 1138 (E.D.Pa. 1977) (statistics introduced by expert). As in *Ezold*, Plaintiff presented no analysis of the qualified applicant pool or the flow of qualified candidates over a relevant time period. The district covers a large geographic area across New Jersey, Pennsylvania and Delaware. *See* Ex. 19 to Duttera Decl. Plaintiff does not present data describing the demographic composition of the areas where the operators changed. Apart from the McClains, there were no other "individuals who testified about their personal experiences with the company [to bring] the cold numbers convincingly to life." *Int'l Brotherhood of Teamsters v. United States et al.*, 431 U.S. 324, 339 (1977).

Small sample size is not necessarily fatal to statistical proof, especially when no larger sample is possible. "By necessity, courts sometimes must rely on statistics derived from small sample groups. Not to do so would deny employees in small companies some of the protections

that [federal law] provides." *Sengupta*, 804 F.2d at 1076. Statistics' "usefulness depends on all of the surrounding facts and circumstances." *Int'l Brotherhood of Teamsters*, 431 U.S. at 340. "[I]n cases involving small or marginal samples, other indicia raising an inference of discrimination must be examined." *Waisome v. Port Authority of N.Y. and N.J.*, 948 F.2d 1370, 1379 (2d Cir. 1991).

Here, only six operators were terminated during Ms. Mancini's tenure, and four were African-American. Pl.'s SMF ¶ 24. Avis replaced Plaintiff with a white operator. *Id.* ¶ 76. Avis ignored maintenance issues with the building despite Mr. McClain's requests, but made improvements soon after it terminated the agreement. *Id.* ¶¶ 49-52. The termination was not made in conjunction with a wider reduction of the workforce; in fact, the number of Avis locations had been growing, expanding the percentage of white operators. Duttera Decl. ¶ 23; Ex. 13 to Duttera Decl. 37. Total revenue at the location was one of the highest in the district, Def.'s SMF ¶ 53, and other locations had similar problems meeting goals for counter sales, Pl.'s SMF ¶ 86, yet Plaintiff's was the only agreement terminated during 2011. *Id.* When Avis terminated other agreements, Ms. Mancini sent a letter informing the operator of the provisions of the agreement that Avis believed had been violated. Ex. 20 to Duttera Decl. Here, the termination letter contained no explanation. *Id.* Ex. 6. Avis offered no explanation until Plaintiff's counsel announced this litigation. *Id.* Exs. 8-9.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. Though the statistical evidence is only marginally probative, in light of a combination of circumstances that could give rise to an inference of intentional discrimination, the Court finds that Plaintiff presents a prima facie case of race discrimination.

2. Defendant Carries its Burden under Step Two of *McDonnell Douglas*

In response, Avis must articulate a legitimate, nondiscriminatory reason for terminating the agreement. It has offered several:

- Failure to "keep the location in a neat and business like manner." Pl.'s SMF ¶ 79; *compare* Osbourne Dep. 100:17-22 ("location filth").
- "[P]oor revenue performance." *Id.*; *compare* Osbourne Dep. 100:17-22 ("revenue wasn't going up").
- Failure to "abide by company standards and policies." Def.'s Interrogatory Resp., Ex. 11 to Duttera Decl. 4.
- Failure to meet goals for counter sales. *Id.*; *compare* Osbourne Dep. 100:17-22 ("CSI upsells not being right").
- Lack of "sufficient sales skills." *Id.*
- Failure to "sufficiently maintain a visible and recognizable presence in the local marketplace." *Id.*
- Failure to "diligently promote the Avis brand in Plaintiff's area." *Id.*
- Improper "use of telephone techniques." *Id.*
- Refusal to wear Avis uniforms. *Id.*
- Inability to correct faults. *Id.*
- Plaintiff's employees behaved in a hostile and unprofessional manner toward Avis. *Id.*; *compare* Osbourne Dep. 100:17-22 ("hostile business relationship with our people").

The record shows the three reasons Mr. Osbourne stressed at his deposition, namely uncleanliness, poor counter sales performance and personal acrimony, to be legitimate. There is no doubt that Mr. McClain and Ms. Mancini had a hostile relationship, dating back to 2007. *See,*

e.g., Leonard McClain Dep. 288: 18-24 ("A: Always hollering at me . . . . Q. Were you hollering back? A. I probably did.") As to the cleanliness of the location, Mr. McClain acknowledges that Mr. Osbourne expressed dissatisfaction during his visit. *Id.* 385-88. In August of 2011, Ms. Long warned Mr. McClain about his counter sales performance in writing. Def.'s SMF ¶ 51. Despite Mr. Osbourne's disavowal of the additional reasons, they are included in contemporaneous documents, and referenced in the testimony of Avis personnel. Ms. Long testified that Mr. McClain did not wear his uniform, left the location dirty, and did not make sales calls. Long Dep. 22:13-21. Each of these complaints is reflected in the reports Ms. Long completed in the months prior to the termination of the agreement. Ex. E to Halasz Cert. For instance, the report for August 24, 2011 lists deficiencies in the categories marked "Building lot clean and orderly," "Wearing authorized uniforms," "Counter sales," and "Competitive landscape/rate shop/local pricing," among others. *Id.* The November 10, 2011 report lists a deficiency in "Use of proper telephone technique." *Id.* The reports also mention problems with counter sales. *Id.*

3. Plaintiff Fails to Carry its Burden under *McDonnell Douglas*'s Third Step

The final question is whether Plaintiff can point to some evidence, direct or circumstantial, from which a factfinder would reasonably either (1) disbelieve Defendant's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of Defendant's action.

a. No Reasonable Factfinder Would Disbelieve Defendant's Articulated Legitimate Reasons

Are Defendant's proffered reasons weak, incoherent, implausible, or so inconsistent that a reasonable factfinder could rationally find them unworthy of credence? *Keller*, 130 F.3d at 1108–09. Under the burden-shifting framework, a plaintiff cannot avoid summary judgment

simply by raising a genuine dispute of material fact about *any* proffered reason. Instead, a plaintiff's evidence "must allow a factfinder reasonably to infer that *each* of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action." *Marione v. Metro. Life Ins. Co.*, 188 Fed. App'x. 141, 144 (3d Cir. 2006) (emphasis in original). "To discredit the employer's proffered reason . . . 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." *Fuentes v. Perskie,* 32 F.3d 759, 765 (3d Cir. 1994). The employee must challenge the "core facts" behind an employer's proffered reason for termination, not the decision itself. *See Ahmed v. Lowe's Home Centers, Inc.*, 346 F. App'x 816, 820-21 (3d Cir. 2009).

The Court finds Avis's alleged concerns about "visibility" in the "local marketplace" and promotion of "the Avis brand in Plaintiff's area" to be sufficiently vague and unsupported that a rational factfinder could question whether they were legitimate reasons for termination. At his deposition, Mr. Osbourne did not claim to have been swayed by those factors, nor by Mr. McClain's improper use of telephone techniques, refusal to wear the Avis uniform, or inability to correct faults when given the opportunity—a factfinder could also find these reasons unworthy of credence.

A dispute also exists as to the cleanliness of the facility. While Avis management testified that the location was dirty, Def.'s SMF ¶¶ 34, 49-50, Mr. McClain testified that it was not. Leonard McClain Dep., 159:12-20. Mr. McClain also disputes that Ms. Mancini or Ms.

Long ever mentioned cleanliness. *Id.* 345. On such a subjective issue, with no photographic evidence,[1] conflicting testimony alone is sufficient to challenge this rationale.

Plaintiff does not successfully challenge the core facts behind Avis's financial explanation, which focuses on the location's counter sales performance. Mr. McClain alleges that the computer system was not properly registering his upsells. *Id.* 247:13-21. In September 2011, for instance, despite his efforts, the system was "still showing a goose egg." *Id.* 376:18-377:4-6. Although Mr. McClain finds fault with the software, he does not dispute that the system displayed, and Avis's management consistently saw, counter sales numbers that were below the company's stated goal. Mr. McClain agreed that the counter sales issue "came up constantly" with both Ms. Mancini and the TPMs, Leonard McClain Dep. 392, that Mr. Osbourne expressed concern about it during his visit, *id.* 385-88, and that he received a letter from Ms. Long stating that the agreement would be in jeopardy if counter sales did not rise. Def.'s SMF ¶ 51. This accords with Ms. Mancini's testimony that "CSI was a very, very big factor. . . . [the goal of $6.00 per rental day] was, in the company's thought process, definitely achievable . . . and we needed to achieve that for profitability." Mancini Dep. 177:9-16; 180:11-15. Avis sent a letter warning about insufficient CSI to multiple locations. *Id.* 180:21-22. Comparative counter sales figures in Ms. Mancini's district show that over the course of 2011, CSI at L&M's Avis location fell in both relative and absolute terms. Ex. 19 to Duttera Decl. In January, counter sales were at $4.61 per rental day, putting the location in 10th place out of 45. *Id.* They fell to $2.89 in March (34th place out of 41), and $2.49 in October (42nd place out of 52). *Id.* In November, the month in

[1] Defendant submits a single photograph of documents in boxes in front of a closed door, Ex. L to Halasz Cert., identified as "documents removed from L&M's Location on November 10, 2011." *Id.* ¶ 15. The photo merely shows boxes full of paper, with no accompanying witness affidavit identifying who took the photo and when. It is not convincing as to the uncleanliness of the location.

which Avis announced the agreement's termination and three months after it warned L&M to raise its CSI, L&M's location was in 47th place out of 55, with counter sales of $2.24 per vehicle rental day. *Id.* Avis's goal was $6.00 per vehicle rental day. Def.'s SMF ¶ 21. "[A]n adequate employee who is under-performing relative to his peers may still be chosen for termination." *Marione v. Metro. Life. Ins. Co.*, 188 Fed. App'x. 141, 144 (3d Cir. 2006).

Plaintiff objects to the emphasis Defendant places on counter sales, offering that upsells were only a small part of a location's total revenue. Pl.'s Resp. to Def.'s SMF ¶ 52. Mr. Osbourne did not represent that counter sales performance was the main factor in the termination decision, testifying that the revenue issue took on greater significance because of the cleanliness of the location and the personal conflict between the McClains and Ms. Mancini. Osbourne Dep. 100:17-22, 101:22-102:8. Plaintiff readily acknowledges this conflict, and that an altercation took place shortly before Avis terminated the agreement. *See, generally,* Leonard McClain Dep. 398-403.

Section 1981 does not prohibit terminating a contract because of personal animosity; it prohibits terminating a contract because of racial bias. Although "acts of harassment need not be accompanied by racially discriminatory statements," a plaintiff must make a "showing that race is a substantial factor in the harassment, and that if the plaintiff had been white he would not have been treated in the same manner." *Brooks v. CBS Radio, Inc.*, 342 F. App'x 771, 776 n.4 (3d Cir. 2009) (citations omitted). When a plaintiff argues that racial animus underlies facially neutral conduct, courts have looked to proof of discrimination in surrounding circumstances. *Compare Brooks*, 342 F. App'x 771 (finding no racially discriminatory motivation when an employer used ethnic slurs in relation to himself, repeatedly put his hand on the head of an African-American receptionist, and distributed a book he had not read that contained racially

offensive passages), *with Cardenas v. Massey*, 269 F.3d 251, 262 (3d Cir. 2001) (finding the possibility of discriminatory intent when supervisors wrote a racially offensive message on an employee's cubicle, gave him knowingly contradictory instructions, rounded down his performance scores but rounded up scores of non-minority employees, and segregated minority employees into a unit with a minority manager), *and Caver v. City of Trenton*, 420 F.3d 243, 264 (3d Cir. 2005) (questioning the validity of a supervisor's negative evaluations when the supervisors used ethnic slurs against others, permitted racist graffiti, and there was no genuine basis for the negative evaluation).

Here, the surrounding circumstances do not suggest that Ms. Mancini was hostile toward the McClains because they are African-American.[2] The comments that the McClains allege she made are facially neutral. For instance, her comment, "[o]h, that explains it," after learning that Mr. McClain was from Chester, Pennsylvania, has no apparent connection to Mr. McClain's race. Ms. Mancini's deposition testimony about having attended a segregated school before moving to Chester is also insufficient to demonstrate racial animus. The testimony did not express an opinion as to the segregated nature of the school. Both the incident and the testimony were remote from the facts of the case. The incident occurred many years earlier, when the deponent was in high school. The statement was made at a deposition, not at a place of

[2] Plaintiff's argument that Avis terminated the agreement because of the racial animus of Ms. Mancini, *see* Pl.'s Br. 19, depends on the subordinate bias, or "cat's paw," theory. The theory states that an employer is liable for race discrimination when a nonbiased decision-maker is influenced by a biased managerial employee. *Tucker v. Thomas Jefferson Univ.*, 484 F. App'x 710, 713 (3d Cir. 2012) (citing *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011)). "[T]he supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." *Staub*, 131 S.Ct. at 1193. If, on the other hand, "the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be liable." *Id.*

employment, after she had retired from her position with Avis, and had nothing to do with the McClains or any Avis operator.

Plaintiff provides no admissible evidence that Ms. Mancini treated white operators more favorably. Mr. McClain "makes numerous allegations . . . which he predicates on nothing more than his beliefs without having actual knowledge of them." *See Jones*, 198 F.3d at 414. Mr. McClain makes the conclusory allegation that Ms. Mancini spoke "differently" to African-American operators than to white ones, Leonard McClain Dep. 268-69, but the record contains no testimony or evidence from other operators that might allow the Court to compare how Ms. Mancini behaved toward them with how she behaved toward the McClains.

Mr. McClain's other accusations of discriminatory treatment are speculative as well. Mr. McClain testified that Ms. Mancini gave other operators "more attention on bringing up their CSI numbers than what we received." Leonard McClain Dep. 256:14-25. Defense counsel asked for clarification, and Mr. McClain responded that Ms. Mancini "would let the TPMs spend more time at their locations per day to help them to bring up their numbers on everything, rentals, CSI, everything." *Id.* 258:14-20. Defendant's counsel pressed him as to whether this conclusion was based on personal knowledge, asking if he was "aware of any statements, or facts, or other evidence where Ms. Mancini dictated to the TPMs to spend more time with the white agencies than with you?" *Id.* 262: 7-10. Mr. McClain responded, "No, I can't just say that she, actually, told them that. But I have heard her say on conference calls that TPMs would be at other locations." *Id.* 262:11-14. That TPMs would simply be at unspecified other locations, which could have been operated by either white or African-American personnel, does not indicate discrimination. No other proof is before the Court as to the time the TPMs spent at each location, comparing it with the time TPM Barbara Long spent at Plaintiff's location. Later in the

deposition, Mr. McClain was asked, "[t]here's an allegation [in the complaint] that Ms. Mancini placed unfair goals upon Plaintiff L&M Agency, and therefore, upon Plaintiff McClains, particularly compared to other non-black agencies. So why don't you explain what's meant here, if you know, about goals being placed on black agencies that were not placed on white agencies?" *Id.* 302:17-25. He responded, "[y]ou would probably have to talk to my lawyer about that because I can't recall offhand right now." *Id.* 303:4-7. The record contains no proof that white operators were held to different standards than L&M.

As weak as Plaintiff's statistical evidence is when applied to the entire Avis organization, the numbers are even less suggestive of individual bias on the part of Ms. Mancini. Plaintiff does not establish Ms. Mancini's role in any of the other five involuntary terminations during her time as district manager.[3] Addressing the termination of the Roosevelt Boulevard operator's agreement, for instance, she testified to her limited influence in the process: "Q. Who was it that made the decision to terminate [the Roosevelt Boulevard operator]? A. The company. . . . I didn't have the right to terminate anyone myself, just so we're clear on that. Q. You could only advise or recommend up to your manager? A. I could tell them a situation happened." *Id*. 20:8-20. (It was "one of [Ms. Mancini's] managers who first came across" the alleged embezzlement that ended the location's agreement. *Id.* 23:4-7.) In addition, she acknowledges involvement in the closing of the African-American-operated location in Havertown ("[w]e just made a

[3] Although Ms. Mancini signed a letter informing the African-American operator of the Burlington, New Jersey location of his agreement's termination, Ex. 20 to Duttera Decl., she testified that Mr. Knaust and Ms. Lomonaco made the decision without her. Mancini Dep. 27:4-10. Ms. Mancini also signed a letter notifying an operator in West Chester (whose race is unspecified) that Avis was terminating its agreement for cause, Ex. 20 to Duttera Decl., but Plaintiff does not include that location in its list of involuntarily terminated agreements, Pl.'s SMF ¶ 24, and the record does not otherwise mention it.

decision"), but the record does not clarify why it was closed. *Id.* 25:8-14. Plaintiff does not demonstrate that any decision was made based on race.

Ms. Mancini's participation in the hiring process was also limited. Although she interviewed and helped select at least one applicant (who was already an Avis employee) to replace an operator, Mancini Dep. 21, this is the only instance on record of her involvement in hiring. When asked how one successful applicant was located, Ms. Mancini responded that "[the applicant] filled out an application, the same as the other gentleman did. They do background checks and go through a training period." Mancini Dep. 25:24-26:2. Ms. Mancini also mentioned the involvement of her supervisor, Mr. Knaust. *Id.* 25:15-20.

Plaintiff does not demonstrate that Ms. Mancini was accountable for the other circumstances that established Plaintiff's prima facie case. There is no indication that it was Ms. Mancini's responsibility to replace a broken window or arrange for other repairs to the location ("Q. It would be Avis['s] facilities [department] or the landlord's responsibility to replace windows or doors? A. I don't really know, because I don't know that lease frontwards and backwards. I didn't put that location together." *Id.* 150:1-6). Nor is there any evidence that she caused other facilities to be repaired but not L&M's.

Mr. Osbourne's rationale—that a combination of uncleanliness at the location, missed financial goals and personality conflict warranted termination of Plaintiff's agreement—is not so weak, incoherent, implausible or inconsistent an explanation that a reasonable factfinder could find it unworthy of credence.

b. No Reasonable Factfinder Would Believe that Defendant Was More Likely than Not to Have Been Motivated by Invidious Discriminatory Animus

Has Defendant previously subjected Plaintiff to unlawful discriminatory treatment, treated similarly situated persons not of his protected class more favorably, or discriminated against other members of his protected class or other protected categories of persons? *See Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 277 (3d Cir. 2010).

The answer is no. The McClains had complained to Avis about alleged race discrimination by Ms. Mancini in 2007, but provided no evidence to substantiate the allegations. As described above, there is no proof that Avis treated similarly situated white operators more favorably, or discriminated against other African-Americans.

In contrast to a plaintiff's non-onerous burden of production at the first stage of the *McDonnell Douglas* inquiry, at the third stage "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. L&M has failed to produce evidence from which a factfinder would reasonably either (1) disbelieve Avis's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of Avis's action. L&M does not carry its burden of production on the question of pretext at *McDonnell Douglas*'s third step, and its discrimination claim under 42 U.S.C. § 1981 is dismissed.

II. Plaintiff's Retaliation Claim Fails as a Matter of Law

A. *Standard for Retaliation under Section 1981*

In order to state a claim for retaliation under section 1981, a plaintiff must show that (1) he or she engaged in protected activity; (2) the employer took an adverse employment action against him or her; and (3) there was a causal connection between the protected activity and the adverse employment action. *See Motto v. Wal-Mart Stores E., LP*, 563 F. App'x 160, 163 (3d Cir. 2014) (citations omitted). If the plaintiff establishes a prima facie case, then the burden shifts

to the employer to articulate a legitimate, non-discriminatory, reason for the adverse employment action. *Id*. If the employer can articulate such a reason, the burden shifts back to the plaintiff to present evidence to show that the employer's stated reason is pretextual. *Id.*

Analysis of Plaintiff's Retaliation Claim

Activity short of a formal letter of complaint to the EEOC, such as "making complaints to management," can constitute protected conduct. *Motto,* 563 F. App'x at 164. A complaint must register opposition to a protected activity under Title VII. *See Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 288 (3d Cir. 2001). In other words, a plaintiff must complain not simply about unfair treatment, but about illegal discrimination based on membership in a protected class. *See Barber v. CSX Distribution Servs.*, 68 F.3d 694, 702 (3d Cir. 1995).

Plaintiff would label two of Mr. McClain's comments on November 10, 2011 as protected activity: (1) his announcement that his lawyer was "on the way" after the altercation with Ms. Mancini, Pl.'s SMF ¶ 72, and (2) his statement to Ms. Mancini's former supervisor, Ron Knaust, that "here we go again with Carol. It's crazy, the way how she just acted." Leonard McClain Dep. at 409:4-6. *See* Pl.'s Br. 25.

Neither statement constitutes protected activity because Mr. McClain did not complain of illegal discriminatory treatment. The first correspondence to Avis from Plaintiff's counsel mentioning the incident of November 10, 2011, and suggesting race discrimination, came almost a month after Avis had terminated the contract. Ex. 9 to Duttera Decl. Mr. McClain's complaints to management on November 10th made neither explicit nor implicit reference to race discrimination. Plaintiff argues that "[a] jury could very easily infer that Ms. Mancini, who knew Plaintiff's lawyer had previously accused her of discrimination on that front, would know [the lawyer comment] meant that Plaintiff was about to accuse her of discrimination again . . . ." Pl.'s

Opp. 25. This is speculation. The only record of an Avis employee's reaction to Mr. McClain's statement comes from Mr. Swinney: "A. I took it at face value. He was going to contact his lawyer. He didn't like how things were going. . . . Q. At the time when you heard 'my lawyer is on the way,' did you believe he could be believing his race was playing any part in it? A. No." Swinney Dep. 57:1-21.

Plaintiff also suggests that the McClains' 2007 complaint of racial discrimination serves as a basis for the retaliation claim. Pl.'s Br. 24; Ex. 8 to Duttera Decl. In order for this argument to be successful, Plaintiff would have to demonstrate a causal connection between the 2007 complaint and the 2011 termination. "The mere fact that adverse employer action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events. . . . [T]emporal proximity greater than ten days requires supplementary evidence of retaliatory motive." *Blakney v. City of Philadelphia*, 559 F. App'x 183, 186 (3d Cir. 2014) (citations omitted). Supplemental evidence may include, but is not limited to, a "pattern of antagonism" subjecting plaintiff to a "constant barrage of written and verbal warnings and disciplinary actions, all of which occurred soon after plaintiff's initial complaints." *Id.* (citations omitted). "Absent direct evidence of antagonism, circumstantial evidence may be used to support an inference of antagonism. For example, a plaintiff may establish the connection by showing that the employer gave inconsistent reasons for terminating the employee." *Id.*

That Plaintiff's agreement was terminated four years after the letter complaint makes causation implausible without supplemental evidence. The record does not reflect a "constant barrage of written and verbal warnings" soon after 2007. In fact, by Plaintiff's account, Avis made an effort to limit Ms. Mancini's contact with the McClains after the complaint. Pl.'s SMF

¶¶ 57-58. Plaintiff alleges that Ms. Mancini was hostile toward Mr. McClain from the moment she met him, and does not allege that her conduct toward Mr. McClain was different after the letter than before. There is no suggestion that this complaint affected Mr. Osbourne's rationale, which, as explained above, is grounded in uncontested facts. It is impossible to make any reasonable inference of causation between the letter and the termination.

Since no reasonable factfinder would view Mr. McClain's comments in November of 2011 as protected activity, or would find a causal relationship between his complaints and the agreement's termination, Plaintiff does not make a prima facie case for retaliation under 42 U.S.C. § 1981.

CONCLUSION

Defendant's motion is granted. The case is dismissed.

IT IS SO ORDERED:

DATE: 03/23/2015

William H. Walls, U.S.D.J.

Senior United States District Judge