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

CLYDE A. HARRIS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 13-1663
	)	
ASTELLAS PHARMACEUTICALS a/k/a and d/b/a ASTELLAS PHARMA US, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

BLOCH, District J.

Presently before the Court is Defendant's Motion for Summary Judgment (Doc. No. 24). For the reasons set forth herein, Defendant's motion will be granted.

I. BACKGROUND

In this action, Plaintiff alleges discrimination based on race and sex, as well as retaliation, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, et seq.; disability discrimination in violation of the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. § 12101, et. seq.; age discrimination in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, et seq.; and racial discrimination in violation of 42 U.S.C. § 1981 ("Section 1981"). This Court has jurisdiction over this case as it presents federal questions, and jurisdiction over such actions is vested pursuant to 28 U.S.C. § 1331. As set forth in the Amended Complaint, Plaintiff asserts that, on various occasions and by eventually terminating his employment, Astellas discriminated against him based on his race, sex, age, and disability. Plaintiff further alleges that Astellas

subjected him to a hostile work environment and retaliated against him for engaging in protected employee activity.

II. FACTUAL BACKGROUND

The record as read in the light most favorable to Plaintiff establishes the following background.[1] Plaintiff Clyde A. Harris, Jr., an African American male, was formerly employed

[1] The Court sets forth herein only those facts relevant to the ultimate basis of its resolution of Defendant's Motion. Additionally, the Court notes that, in filing his Response to Defendant's Motion for Summary Judgment, Plaintiff has failed to comply with the Local Rules of Court for the Western District of Pennsylvania. Significantly, Plaintiff has failed to file a proper Responsive Concise Statement in accordance with Local Rule 56.C.1, which requires that the party opposing a motion for summary judgment file:

> A separately filed concise statement, which responds to each numbered paragraph in the moving party's Concise Statement of Material Facts by:
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> a. admitting or denying whether each fact contained in the moving party's Concise Statement of Material Facts is undisputed and/or material;
> b. setting forth the basis for the denial if any fact contained in the moving party's Concise Statement of Material Facts is not admitted in its entirety . . . **with appropriate reference to the record** . . .; and
> c. setting forth in separately numbered paragraphs any other material facts that are allegedly at issue, and/or that the opposing party asserts are necessary for the Court to determine the motion for summary judgment.

LCvR 56.C.1 (emphasis added).

The rule further specifies that, in any party's concise statement, "[a] party must cite to a particular pleading, deposition, answer to interrogatory, admission on file or other part of the record supporting the party's statement, acceptance, or denial of the material fact." LCvR 56.B.1.

Instead, Plaintiff has filed a three-part 107-page submission, the first 22 pages of which (entitled "Response" to Astellas' motion) appear to contain numbered responses to Astellas' statement of undisputed material facts. Many of those responses, however, offer only a general denial without citing to any part of the record, while certain other responses provide a denial along with additional allegations without citing to any evidence of record for support. Furthermore, the last section of Plaintiff's Response (entitled "Memorandum") contains numbered statements which include additional arguments which are, likewise, largely unsupported by citations to record evidence. The middle section of the Response (entitled "Memorandum of Law in Support of Response") is not a memorandum of law, but rather, contains portions of deposition transcripts without any accompanying explanation or context. Additionally, 80 exhibits were filed as attachments to Plaintiff's Response, but he makes no specific reference in his submission to most of those documents.

as a sales representative by Defendant Astellas Pharmaceuticals (hereinafter "Astellas"), which is engaged in the business of selling pharmaceutical products. Plaintiff was hired as a "Senior Executive Representative I, Hospital" by Astellas on March 2, 2010. Maria Katsafanas, a Regional Sales Manager for Astellas, interviewed and hired Plaintiff, and Plaintiff reported to Ms. Katsafanas during his employment with the company.

Plaintiff's job duties included promoting Astellas' products to target hospitals in the East Pittsburgh region, including the UPMC Health System, the largest health system in that region. After spending time in the field with Plaintiff during the summer and fall of 2010, Ms. Katsafanas told Plaintiff—at that time and frequently thereafter—that UPMC was a primary target on which he should focus.

Regarding business expenses, Plaintiff was given a company credit card to use for charging his expenditures. Plaintiff was then responsible for submitting his expense reports, and Astellas' policy required that those reports be submitted at least every two (2) weeks. On multiple occasions, Plaintiff did not submit his expense reports every two weeks, and Ms. Katsafanas counseled him on the need to do so. Additionally, on more than one occasion, Plaintiff's expenses were flagged in the system and rejected because he did not provide the appropriate level of detail for those expenses.

Plaintiff had his first mid-year review in fall, 2010, during which Ms. Katsafanas provided him with various manager comments, including that he should: 1) increase account penetration at UPMC hospitals, 2) submit expense reports on time, 3) respond to all e-mails by

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Therefore, in accordance with Local Rule 56, alleged material facts set forth in Astellas' statement of undisputed material facts will, for the purpose of deciding its motion for summary judgment, be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement, with appropriate reference to the record. See LCvR 56.E, 56.C, 56.B; Fed. R. Civ. P. 56(e). Additionally, averments of fact contained in Plaintiff's Response which cite no record evidence in support will, likewise, be disregarded.

the due date or within 24 hours, 4) increase calls, and 5) use 100% company resources to market products. Plaintiff admits that he did not believe that this review was an act of discrimination, harassment or retaliation. Plaintiff also acknowledges that he did not always submit expense reports on time, did not always respond to Ms. Katsafanas' emails, and did not utilize the books referenced by Ms. Katsafanas at the time of his review, even though he knew that he was expected to do so.

Plaintiff again received notice on December 20, 2010, that he had submitted late expense reports. Ms. Katsafanas advised Plaintiff not to turn them in late again, but to submit all expenses within two weeks—to which Plaintiff responded that he would not let it happen again. On January 26, 2011, Ms. Katsafanas again discussed with Plaintiff how he could improve his performance and requested that he respond to her e-mails. She specifically asked Plaintiff to: 1) focus on appropriate targets (including UPMC) and to prepare a written business plan for UPMC, and, 2) once again, to respond to e-mails in a timely manner. Between January 26, 2011, and March 4, 2011, Plaintiff submitted several draft business plans for UPMC, which Ms. Katsafanas returned to him for being unsatisfactory.

On January 27, 2011, Plaintiff contacted Marianna Fuksman in Astellas' Human Resources Department because he felt that he and Ms. Katsafanas were not working well together in the field, he believed there was difficulty between them in the workplace, and he was seeking advice about how to handle that situation. Plaintiff did not complain at that time, however, of discrimination, harassment or retaliation. Ms. Fuksman subsequently advised Ms. Katsafanas that Plaintiff had contacted her about their situation.

On February 9, 2011, Ms. Katsafanas sent an e-mail to Plaintiff and another sales representative ("Melissa"), requesting that they submit their weekly reports which were due but

which she had not received. Ms. Katsafanas noted that this was at least the third week in a row that Plaintiff had not submitted his report when it was due. When both Plaintiff and Melissa responded that they had e-mailed their reports to her the previous day, Ms. Katsafanas contacted Astellas' Information Technology department to inquire why she had not received them. Melissa subsequently informed Ms. Katsafanas that she had found her missing e-mail in her outbox, at which point she realized that she had mistakenly never sent it. The IT department was ultimately unable to conclude whether or not Plaintiff had sent his e-mail, and Plaintiff was not disciplined for the incident.

On or about March 15, 2011, a conference call was held between Plaintiff, Ms. Katsafanas and Marty Golden, the Vice President of Hospital Division. On March 21, 2011, Ms. Katsafanas sent Plaintiff an e-mail, which she said contained a recap of that conference call, and which outlined her concerns, including that: 1) Plaintiff was not focusing on appropriate targets, 2) his call frequency continued to be low, and 3) he was still not responding to her e-mails (which Plaintiff admitted was not professional on his part). In that same e-mail, Ms. Katsafanas suggested that, in order to improve his performance, Plaintiff should: 1) submit a UPMC business plan by March 25, 2011, 2) increase his sales calls and call entry to meet national and regional averages and submit weekly reports of all calls to Ms. Katsafanas, and 3) respond to all e-mails within 24 hours.

On March 24, 2011, Plaintiff e-mailed Dana Fitzgerald in Astellas' Human Resources Department about concerns he had, and Ms. Fitzgerald sent Ms. Fuksman an e-mail asking her to follow up with Plaintiff. On that same date, Plaintiff also e-mailed Ms. Fuksman, telling her that he wanted to discuss his concerns because his situation had become more stressful and he

believed he was working in a hostile working environment. Plaintiff made no mention at that time, however, of race, age, gender, or disability.

Following up on an April 27, 2011, conference call between Ms. Katsafanas, Human Resources and Mr. Golden, Ms. Katsafanas sent Plaintiff an e-mail on May 6, 2011, advising him that she was still not receiving his weekly reports on time and providing him with specific guidance as to what those weekly reports should contain. On May 8, 2011, Plaintiff responded, "I understand and will comply with and meet your expectations. I hope this will be a fresh start and productive year!"

On May 12, 2011, Plaintiff sent Ms. Fuksman an e-mail stating that he had concerns regarding the "server anomaly" that had failed to send the February 8, 2011, e-mail to Ms. Katsafanas, and the fact that his UPMC account was listed on a report as a "tier 2" account rather than a "tier 1" account. Neither of these events led to any adverse employment action being taken against Plaintiff. He was concerned, however, that mislabeling the UPMC account might be affecting his call reporting, for which he was receiving counseling from Ms. Katsafanas. Ms. Katsafanas explained to Plaintiff that the tier system had nothing to do with her review of his calls (in which she saw days with zero, one or two calls), and that she was indeed aware of all the calls that Plaintiff was recording.

Plaintiff's 2010 annual review, which took place in approximately July, 2011, identified the same areas of concern that Ms. Katsafanas had been discussing for some time—which Plaintiff acknowledges—including that he: 1) was not submitting expense reports on time; 2) needed to increase UPMC calls and not spend as much time on smaller accounts; 3) had low call activity; 4) was not responding to e-mails; 5) needed to make more impactful product

presentations, with appropriate sales materials; 6) was not submitting weekly reports on time; and 7) struggled with focusing on the right targets.

Plaintiff continued to submit late expense reports after his 2010 annual review, which was again addressed with him on September 19, 2011. Plaintiff also admits that he had problems in several of the areas which Ms. Katsafanas continued to address with him, including: 1) not responding to her e-mails within 24 hours, 2) not submitting weekly reports on time, 3) not arriving on time to meetings, and 4) not submitting his business expenses on time. In fact, Plaintiff's company credit card was eventually canceled because of his late reports, some of which were filed more than 90 days after expenses were incurred.

Beginning on September 27, 2011, Plaintiff took a medical leave of absence for stress, which was approved by Astellas. On November 8, 2011, while on leave, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against Astellas based on race and retaliation.[2] Prior to filing that charge, he had never complained that he had been subject to racial harassment at Astellas. Plaintiff remained off work on leave until December 19, 2011, at which time his leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., was nearly exhausted and he was released to return to work without restriction.

On January 26, 2012, Plaintiff was involved in a car accident on his way to a lunch appointment. Plaintiff called Ms. Katsafanas immediately after the accident occurred, and he informed her that he had been rear-ended and was experiencing pain in his neck, shoulders and back, and that he was going to the Emergency Room to be checked. Plaintiff testified that Ms.

[2] On June 26, 2012, The EEOC issued a Dismissal and Notice of Rights as to Plaintiff's EEOC Charge.

Katsafanas told him that "if I'm not hurt that bad I don't need to go," but Plaintiff went to the Emergency Room nonetheless.

On February 2, 2012, pursuant to Astellas' performance improvement policy, Plaintiff received a Level I Warning, which addressed issues of territory management, sales results and communication, including his need to: 1) increase his call activity to meet or exceed 6-8 calls per day; 2) focus on targets that will help drive the business; 3) enter all calls into the system; 4) improve his low sales, which fell below expectations for a number of products; and 5) respond to e-mails in a timely manner. Plaintiff admits that Ms. Katsafanas had been discussing these items with him since the beginning of his employment.

On March 29, 2012, Plaintiff met with Ms. Katsafanas and Area Director Chris Proctor to discuss continuing concerns and expectations and to review Plaintiff's performance since his Level I Warning. Plaintiff agreed to try to meet these expectations going forward. The next day, Ms. Katsafanas sent Plaintiff an e-mail identifying continuing issues regarding his communication, call reports, territory management, gave him specific examples of her concerns, and advised him that he was "not meeting the expectations specified in the Level I Warning or the expectations of your current position."

On April 9, 2012, Plaintiff submitted a request for a leave of absence related to his January, 2012, car accident. He had only three days of FMLA eligibility remaining at the time, but Astellas granted his request nonetheless. Plaintiff was then off work on leave from April 18, 2012, through June 18, 2012, due to a rotator cuff injury. Plaintiff does not recall telling Ms. Katsafanas the reason for his leave, nor did he disclose the specific medical reason for his leave on his leave of absence request form. Astellas held Plaintiff's position open through his return to work on June 18, 2012, even though he had exhausted his FMLA leave as of April 11, 2012.

Plaintiff continued to engage in the same conduct after his Level I Warning on February 2, 2012, which prompted the meeting on March 29, 2012 (and even between March 29, 2012, and Plaintiff going out on leave again in April, 2012, Plaintiff continued to fail to respond to Ms. Katsanas' e-mails). On June 25, 2012, Ms. Katsafanas met with Plaintiff to give him a Level II Performance Action Plan ("PAP"), which addressed continuing issues with communication, territory management, sales results, and expectations going forward.

On June 22, 2012, Plaintiff informed Ms. Fuksman that he needed to take leave for shoulder surgery, beginning June 28, 2012, by which point Plaintiff had exhausted his FMLA leave. He informed Astellas that he would be on leave for an "unknown" period of time, and would be reevaluated by a doctor in eight weeks. On June 28, 2012, Plaintiff began his leave of absence.

In a letter dated July 2, 2012, Ms. Fuksman informed Plaintiff that Astellas was unable to accommodate an indefinite leave and that it would need to fill his position if he was unable to return to work in the foreseeable future. Ms. Fuksman further asked Plaintiff to notify her if she had misunderstood his status or if he was able to perform the essential functions of his job, with or without reasonable accommodation. After his leave commenced, however, Plaintiff never returned to work.

Astellas received a doctor's note from Plaintiff dated August 24, 2012, which stated that he was not cleared to return to work, and that he had a follow-up appointment on September 6, 2012. Astellas also received a doctor's note from Plaintiff dated September 27, 2012, which stated that Plaintiff was still not cleared to return to work and that he would remain off of work until his next evaluation in four (4) months.

Six months later, on March 27, 2013, Plaintiff filed a second Charge of Discrimination with the EEOC against Astellas based on race, sex, age, disability, and retaliation.[3]

On October 8, 2013, and October 11, 2013, Ms. Fuksman called Plaintiff and left him voicemail messages, but he did not return her calls. In a letter dated October 16, 2013, Plaintiff was notified that his employment with Astellas was terminated effective October 18, 2013. As of that date, Plaintiff had been off work continuously for nearly sixteen (16) straight months.

Plaintiff alleges that, as a direct and proximate result of Astellas' violations of Title VII, Section 1981, the ADA and the ADEA, he has suffered in various ways, including loss of wages and earnings, an impairment of his earnings capacity, pain and suffering, mental anguish, and stress. Accordingly, he seeks "Back Pay, Front Pay, Retroactive Seniority, Compensatory Damages, Interest, Loss of Earnings, Loss of Wages, Promotion, Reinstatement, Loss of Future Earnings and Earnings Capacity, Injunctive Relief, Monetary Damages, Pain and Suffering, Treble Damages, Attorneys Fees and All Other Equitable Relief that the Court deems appropriate and Just, for an amount in excess of $150,000.00 (One-Hundred and Fifty Thousand Dollars)." (Doc. No. 4, at 31).

On October 31, 2014, Astellas filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that, because there are no genuine issues of material fact, Astellas is entitled to judgment as a matter of law.

III. APPLICABLE LEGAL STANDARD

Summary judgment is appropriate when "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); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The parties must support their

[3] The EEOC issued a Dismissal and Notice of Rights for Plaintiff's second charge on August 22, 2013.

position by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson, 477 U.S. at 247-48 (emphasis in original). A disputed fact is material if it might affect the outcome under the substantive law. See Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998) (citing Anderson, 477 U.S. at 247-48). Summary judgment is unwarranted where there is a genuine dispute about a material fact, that is, one where a reasonable jury, based on the evidence presented, could return a verdict for the non-moving party with regard to that issue. See Anderson, 477 U.S. at 248.

When deciding a motion for summary judgment, the Court must draw all inferences in a light most favorable to the non-moving party without weighing the evidence or questioning the witnesses' credibility. See Boyle, 139 F.3d at 393. The movant has the burden of demonstrating the absence of a genuine issue of material fact, while the non-movant must establish the existence of each element for which it bears the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant has pointed to sufficient evidence of record to demonstrate that no genuine issues of fact remain, the burden is on the non-movant to search the record and detail the material controverting the movant's position. See Schulz v. Celotex Corp., 942 F.2d 204, 210 (3d Cir. 1991). Rule 56 requires the non-moving party to go beyond the pleadings and show, through the evidence of record, that there is a genuine issue for trial. See Celotex, 477 U.S. at 324.

IV. DISCUSSION

A. Plaintiff's Discrimination Claims

Because Plaintiff has not shown direct evidence of discrimination, his claims must be evaluated using the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Under that analysis: 1) the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination; 2) if he establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its treatment; and 3) if the employer meets that burden, the plaintiff must prove by a preponderance of the evidence that the employer's proffered reason was actually a pretext for discrimination. See id.; Jones v. School Dist. of Phila., 198 F.3d 403, 410-11 (3d Cir. 1999); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997); Olson v. General Elec. Astrospace, 101 F.3d 947, 951-52 (3d Cir. 1996); Fasold v. Justice, 409 F.3d 178, 188 (3d Cir. 2005).

In order to establish a *prima facie* case of race, sex or age discrimination, Plaintiff must show that: 1) he belongs to a protected class; 2) he was qualified for his position; 3) he suffered an adverse employment action; and 4) that adverse employment action occurred under circumstances that give rise to an inference of unlawful discrimination. See Jones v. School Dist. of Phila., 198 F.3d at 410-11; Keller v. Orix Credit Alliance, Inc., 130 F.3d at 1108. An adverse employment action can be defined as an employer's action that is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004) (internal citations omitted). Examples of adverse employment actions include termination, failure to promote, failure to hire, and discrimination as to compensation, terms, conditions and privileges of employment, but not

actions which are merely frustrating or unpleasant. See 42 U.S.C. § 2000e-2(a)(1); Walker v. Centocor Ortho Biotech, Inc., No. 13-1855, (3d Cir. Feb. 19, 2014).

1. Race

In Counts I and VI of the Amended Complaint, Plaintiff alleges discrimination based on race, stemming from various actions taken by Ms. Katsafanas and Ms. Fuksman.[4] None of the actions cited by Plaintiff establish a *prima facie* case of race discrimination, however, either because no adverse employment action actually occurred, or because any adverse action which did take place did not occur under circumstances that give rise to any inference of unlawful discrimination.

First, Plaintiff alleges that Ms. Fuksman discriminated against him by sharing information with Ms. Katsafanas about his call to her on January 27, 2011. Plaintiff admits, however, that the sharing of this information about his concerns with the working relationship with Ms. Katsafanas, in and of itself, does not constitute an adverse employment action. Further, Plaintiff concedes that Ms. Fuksman took no employment action against him, other than making "aggressive requests for information" regarding his June, 2012, surgery. (Doc. No. 27-2, at 335). Although Plaintiff may not have appreciated being questioned about his surgery, the fact that he later complained of discrimination does not immunize him "from those petty slights or minor annoyances that often take place at work and that all employees experience." Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (U.S. 2006); Fairclough v. Wawa, Inc., 412 Fed Appx. 465, 469 (3d Cir. 2010) (stating that "personality conflicts resulting in a less than ideal work environment is simply not actionable under Title VII"); Diaz v. Donahoe, No. 10-6510, 2013 WL 85262, at *10 (D.N.J. Jan. 4, 2013) (noting that the law "does not protect

[4] Count I is brought pursuant to Title VII, and Count VI is brought pursuant to Section 1981.

employees from '. . . simple lack of good manners,' . . . nor from common personality conflicts that 'generate antipathy and snubbing by supervisors and co-workers'") (internal citation omitted). Accordingly, Ms. Fuksman's questioning alone, although Plaintiff may have found it annoying, does not constitute an adverse employment action and cannot support his race discrimination claim.

Plaintiff also contends that Astellas' identifying his principal account with UPMC as a "tier 2" account instead of a "tier 1" account, which led to his supervisors counseling him concerning his low call volume, constitutes evidence of race discrimination. Plaintiff admits, however, that he was not disciplined for UPMC being identified as a tier 2 account, nor does he suggest that Astellas improperly identified UPMC's account status with the intent of disadvantaging Plaintiff based on his race. In fact, the evidence shows that the status of the UPMC account had no impact on the call reporting for which he received counseling. Rather, Plaintiff's supervisors reviewed his complete call history, regardless of tier ranking, and counseled him because they noted many instances where he had two or fewer calls each day. Thus, Plaintiff's contention in this regard does not support a *prima facie* case of race discrimination.

Next, Plaintiff alleges that he felt targeted by the handling of the missing e-mail incident of February 8-9, 2011. Here again, Plaintiff admits that he was not disciplined because of this event. Nevertheless, he argues that the incident supports his race discrimination claim because he was "the only man of color in the region . . . and you can't tell me someone didn't send a late report to any manager . . . [and] were subjected to the same type of scrutiny and character assassination" over the issue. (Doc. No. 27-2, at 362). Plaintiff contends that he was singled out for scrutiny over this occurrence in a way that other sales representatives were not.

Once again, the incident cited does not support a claim of race discrimination merely because Plaintiff found it to be annoying. See Burlington, 548 U.S. at 68. Ms. Katsafanas' questions about Plaintiff's missing e-mail, and the complaint that he was offended by those questions, simply do not constitute an adverse employment action. Moreover, the event does not give rise to an inference of discrimination to support a *prima facie* case since Plaintiff was not treated differently than a similarly situated employee. An inference of discrimination can be established by a plaintiff "showing that he or she was treated differently than similarly situated employees outside of the protected class." Burton v. Pa. State Police, 990 F. Supp. 2d 478, 501 (M.D. Pa. 2014) (internal citation omitted). "To be valid comparators, employees need not be 'identically situated,' but they must be similar in 'all relevant respects.'" Mitchell v. City of Pittsburgh, 995 F. Supp. 2d 420, 431 (W.D. Pa. 2014) (internal citation omitted).

As noted supra, Ms. Katsafanas inquired of both Plaintiff and a female Caucasian sales representative, Melissa, about their failure to send her their reports on time. When they both assured her that the reports had been sent, she followed up with the IT department to find out whether there was a computer problem which was causing her not to receive e-mail. Later, Melissa advised Ms. Katsafanas that she had discovered that she had never actually sent her e-mail, but Plaintiff maintained that his had been sent. Thus, the question of what had happened to Melissa's missing e-mail was resolved, but the reason for Plaintiff's e-mail never having been received remained unknown. Thus, Ms. Katsafanas held Plaintiff and a Caucasion woman to the same standards in asking about their missing reports and in investigating with IT why the e-mails in question did not reach her. The IT investigation only continued as to Plaintiff's missing e-mail because the "anomaly" with it remained unresolved. Plaintiff and Melissa were treated differently only after Melissa's e-mail was located and she told Ms. Katsafanas that it had never

been sent. Therefore, since both employees were held to the same standard until they became dissimilarly situated, no inference of unlawful animus has been shown with regard to this incident.

Plaintiff also argues that, because he was the only African-American sales representative in the region, he was held to a different standard than other sales representatives when it came to submitting his reports on time. However, Plaintiff admitted that (or admitted that he does not know whether) Ms. Katsafanas expected all sales representatives to meet the same standards regarding: 1) responding to her e-mails within 24 hours, 2) submitting weekly reports on time, 3) arriving to meetings on time, 4) submitting business expenses on time, 5) having between six and eight calls each day, and 6) calling her once each week. Furthermore, Plaintiff admitted that he does not know whether Ms. Katsafanas counseled other sales representatives as to their call activity, nor does he know how other sales representatives' performances have been evaluated. Thus, Plaintiff has shown no evidence as to how Ms. Katsafanas dealt with other similarly situated individuals, *i.e.*, employees with low call activity who failed to submit weekly call reports on time. Therefore, because Plaintiff has not shown any evidence to establish that he was treated differently than other similarly situated employees outside of his protected class, he cannot establish an inference of discrimination.[5]

Additionally, to support his race discrimination claim, Plaintiff cites his own "perception of disparate treatment," based on his being "the only man of color" in the region. (Doc. No. 27-2, at 320). Here, Plaintiff cites as a comparator Joe Chivinsky, a Caucasian sales representative who, Plaintiff alleges, was treated more favorably than he was. Specifically, Plaintiff contends

[5] In another attempt to show disparate treatment, Plaintiff cites an occasion where a Caucasian sales representative purportedly failed to report a drug incident. However, since Plaintiff was not disciplined for such an issue, that employee is not a similarly situated individual, and the corresponding event does not give rise to an inference of discrimination.

that Ms. Katsafanas accepted a business plan submitted by Mr. Chivinsky, but she did not accept that same plan when it was submitted by Plaintiff. The evidence of record shows, however, that Ms. Katsafanas requested something different from Plaintiff than she had requested from Mr. Chivinsky. Mr. Chivinsky was responsible for selling only one particular drug to UPMC, while Plaintiff was responsible for the UPMC account as a whole and for growing the sales of all other drugs to UPMC. Since UPMC was the largest health system in Plaintiff's region, and since Plaintiff was asked to focus on UPMC as his primary target, Plaintiff was asked to submit an overall UPMC plan, rather than the more limited plan submitted by Mr. Chivinsky. Since the evidence shows a rejection of Plaintiff's plan for a legitimate nondiscriminatory reason, Plaintiff's conclusory statements in no way demonstrate disparate treatment or create an inference of discrimination as to this issue. See Jones v. School Dist. of Phila., 198 F.3d 403, 414 (3d Cir. 1999) (wherein the court rejected the plaintiff's attempt to rely at summary judgment on numerous allegations predicated on nothing more than his beliefs); Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460 (3d Cir. 1989) (noting that a party cannot rely on unsupported allegations at summary judgment).

Further, to the extent Plaintiff alleges that the termination of his employment constitutes an adverse employment action that occurred under circumstances giving rise to an inference of unlawful discrimination, the Court notes that his termination claim is vaguely based on the same allegations made to support his other claims.[6] As Plaintiff has otherwise failed to establish a

[6] Astellas argues that, since Plaintiff was terminated after the filing of his second EEOC complaint, he failed to exhaust his administrative remedies as to his termination-related claims because they were not included in his EEOC charges. Astellas therefore urges the Court not to consider Plaintiff's claims to the extent that they include the termination of his employment. The Court of Appeals for the Third Circuit has held that "[t]he relevant test in determining whether [plaintiff] was required to exhaust [his or] her administrative remedies, therefore, is whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Waiters v. Parsons, 729 F.2d 233, 237 (3d

prima facie case of discrimination on the basis of the incidents cited, he has likewise failed to show that the events discussed, supra, establish that his eventual termination was an act of discrimination as well.[7]

Cir. 1984) (finding that the plaintiff's suit, alleging retaliatory discharge for filing previous EEOC complaints, was fairly within an earlier EEOC complaint charging retaliation). In Waiters, the Third Circuit held that the plaintiff had not failed to exhaust her administrative remedies because the core grievances in the suit filed and the earlier EEOC complaint were the same. See id. at 238. The Third Circuit noted that requiring a new EEOC complaint to be filed every time a new discriminatory act occurs would not further the statutory scheme where allegedly discriminatory actions continue after the filing of an EEOC complaint which are fairly within the scope of the investigation growing out of that complaint.

In the case at bar, the Court finds, similarly, that Plaintiff's termination-related claims fall fairly within the scope of his prior EEOC charges and the resulting investigations since his termination claims are based on, and are merely an extension of, the same allegedly discriminatory conduct included in his prior charges.

[7] Even if Plaintiff could satisfy a *prima facie* case of discrimination (or retaliation, as discussed, infra), he has failed to overcome the myriad legitimate, non-discriminatory reasons offered by Astellas for its employment decisions. To create a factual dispute sufficient to survive summary judgment in this regard, Plaintiff must introduce evidence from which a finder of fact could reasonably either: 1) disbelieve Astellas' articulated legitimate reasons for its treatment of him, or 2) "believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause" of the employment actions. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

Initially, Astellas points out that the fact that Ms. Katsafanas both interviewed and hired Plaintiff, and the fact that she is the primary individual who Plaintiff alleges discriminated against him, provides evidence of non-discrimination. See Kotakis v. Wesco Distrib., Inc., 650 F. Supp. 2d 435, 442 (W.D. Pa. 2009). Moreover, Plaintiff has failed to show that the counseling and disciplinary actions Ms. Katsafanas took were discriminatory because he has not shown that her actions were mere pretext for unlawful discrimination or retaliation. Most notably, Plaintiff does not allege that there was no legitimate basis for the items in his performance evaluations and discussions or his disciplinary actions. In fact, he admits that he submitted late expense reports, did not respond to Ms. Katsafanas' e-mails, and did not use Astellas' resource materials as requested. Furthermore, he concedes that he did not believe that these were acts of discrimination, harassment or retaliation.

Likewise, since other sales representatives were, admittedly, subject to the same standards as Plaintiff, he has not shown that an invidious discriminatory reason was more likely than not a motivating or determinative cause for his counseling or disciplinary actions. Rather, Plaintiff has provided no evidence to compare other sales representatives' call activity to his, no evidence regarding other e-mail issues such as that which he had, nor has he provided an example of another sales representative who submitted late expense reports but was not subject to the same scrutiny as he was. Finally, to the extent Plaintiff argues that the termination of his employment was an act of discrimination, Plaintiff has not shown that Astellas' proffered

Therefore, Plaintiff has failed to show, to the extent that he suffered adverse employment actions, that those actions occurred under circumstances giving rise to an inference of unlawful discrimination. Because Plaintiff has failed to establish a *prima facie* case of race discrimination, summary judgment should be granted as to Counts I and VI of the Amended Complaint.

2. <u>Sex</u>

In Count II of the Amended Complaint, Plaintiff alleges discrimination based on his sex, male, in violation of Title VII. Plaintiff states in his deposition that this claim is based solely on his not wanting to ride in a car with Ms. Katsafanas because she was female:

> Q: On what do you claim – on what basis do you claim that you were discriminated against based on your sex?
>
> A: Because I would not ride with Maria on field visits.
>
> Q: Is that the sole basis for your sex discrimination claim?
>
> A: Well, I felt that because of the environment I was in I didn't want to leave myself open to a potential situation.
>
> Q: My question though is, is that the sole basis for your sex discrimination claim that you would not ride on field visits with Maria Katsafanas?
>
> A: I didn't feel comfortable riding with Maria. So, yes, I guess the answer would be yes.
>
> Q: And was it your decision not to ride with her?
>
> A: Yes.
>
> Q: And did she object to that decision by you not to ride with her?
>
> A: I believe she may have made an objection. I can't recall.
>
> Q: Okay. Were you forced to ride with her?

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explanation for his termination —that Plaintiff had been off of work for sixteen months and his former position with Astellas was an important one which needed to be filled—was pretext.

A: No.

Q: All right. That's the sole basis for your sex discrimination claim?

A: Yes.

(Doc. No. 27-2, at 49-50).

Moreover, Plaintiff concedes in his deposition that he has no evidence that his sex was used against him in any way:

Q: Do you have any evidence that your sex was being used against you?

A: No.

(Doc. No. 27-2, at 51).

Accordingly, because Plaintiff admittedly has provided no evidence to show that his sex played a role in any adverse employment action by Astellas, he has failed to establish his *prima facie* case, and summary judgment should be granted as to Count II of the Amended Complaint.

3. Age

Count V of Plaintiff's Amended Complaint alleges discrimination based on age in violation of the ADEA. In order to prevail under the ADEA, a plaintiff must show not only that age played a role in the adverse employment action, but was actually the "but for" cause of that action. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176-78 (2009). In his deposition, Plaintiff testifies that the basis for his age discrimination claim is that he thought that he was one of the older members in his region, and that he therefore assumed that he was higher paid:

Q: . . . . What's the basis for your age discrimination claim?

A: One of the older members, if not the oldest member, of the team.

….

Q: Okay. And how was the fact that you were one of the older members, if not the oldest member, how is that age discrimination?

A: Older, higher paid, and being having health issues I felt my age was being used against me.

(Doc. No. 27-2, at 50).

Plaintiff further admits in his deposition, however, that he has no other evidence that his age was being used against him:

Q: Do you have any evidence that your age was being used against you?

A: No.

(Doc. No. 27-2, at 50-51). Additionally, Plaintiff continues on to concede that he does not know if he made more money than other sales representatives in Ms. Katsafanas' region.

Thus, because Plaintiff has admittedly provided no evidence to show that his age played any role in—let alone that it was in fact the "but for" cause of—any adverse employment action by Astellas—summary judgment should be granted as to Count V of the Amended Complaint.[8]

4. Disability

Count IV of Plaintiff's Amended Complaint alleges disability discrimination under the ADA. In order to establish a *prima facie* case of disability discrimination, Plaintiff must show that he: 1) is disabled under the ADA; 2) is otherwise qualified to perform the essential functions of the job, with or without the employer's reasonable accommodations; and 3) has suffered an adverse employment action because of his disability. See Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998). Here, Plaintiff bases his claim, generally, on his ongoing health issues and alleged disabilities related to those issues, and his feeling that Ms. Katsafanas was targeting him because of those issues. (Doc. No. 27-2, at 52).

[8] Moreover, the Court notes that, judging from his Response, Plaintiff appears to have conceded his claims of discrimination based on sex and age (Counts II and V of the Amended Complaint), arguing only that he "clearly has put forth sufficient facts in the records to show genuine issues of material fact ind [sic] dispute to get to the Jury on claims for racial discrimination, retaliation and violation of the ADA." (Doc. No. 31, at 104).

Plaintiff concedes in his deposition, however, that the **sole basis for his disability discrimination claim** is that Ms. Katsafanas marginalized the severity of his car accident and his condition after the accident because she did not think that he was hurt:

> Q: . . . . That's the sole basis for your discrimination claim that Maria Katsafanas marginalized your accident and your condition after your accident?
>
> A: Well, she didn't think I was hurt.
>
> Q: Okay. That's the sole basis for your disability discrimination claim?
>
> A: Yes.

(Doc. 27-2, at 53).

Interestingly enough, Plaintiff's allegation—that Ms. Katsafanas did not believe that Plaintiff was injured—actually controverts his argument that she discriminated against him because of his alleged disability. Additionally, Plaintiff admits that he has no evidence to indicate that Ms. Katsafanas had any knowledge of his disability—only that she knew that he was taking leaves of absence. Plaintiff has thus failed to establish that he suffered any adverse employment action because of his disability.

Furthermore, to the extent that Plaintiff alleges generally that the termination of his employment supports his claim for disability discrimination, this claim also fails. As explained supra, Plaintiff took a number of leaves of absence. Astellas eventually decided to terminate Plaintiff's employment approximately **sixteen (16) months** into his third leave of absence. Plaintiff's final leave request, dated June 27, 2012, stated that he would be on leave for an unknown period of time, and that he would be reevaluated after eight weeks. In fact, Plaintiff went out on leave on June 28, 2012, and never returned to his job. Astellas received doctors' notes on August 24, 2012, and September 6, 2012, both stating that Plaintiff was not cleared to

return to work. The second note explained, further, that Plaintiff would remain off work at least until his next evaluation in four months' time. After he had been on leave continuously for approximately sixteen (16) months, Astellas finally terminated Plaintiff's employment in a letter dated October 16, 2013, but not before calling Plaintiff twice (and Plaintiff admits that he did not return either of those calls).

It should be noted that Plaintiff's former position was to act as the Astellas sales representative responsible for the largest account in Ms. Katsafanas' region, and Plaintiff had been hired because of his expertise at UPMC. Astellas stresses that it had no obligation to retain Plaintiff indefinitely when it had to continue its business. See Provenzano v. Thomas Jefferson Univ. Hosp., 2004 WL 1146653, at *3 (E.D. Pa. May 20, 2004) (an employer cannot be expected to keep a position open when "the duration of the inability to perform a job is unknown"); Watkins v. J & S Oil Co., Inc., 164 F.3d 55, 61-62 (1st Cir. 1998) (an employer is not required to hold an employee's position open indefinitely). Accordingly, Plaintiff has failed to show that his employment was terminated because of his disability.[9]

In sum, Plaintiff has failed to offer any factual support to establish the third element of his *prima facie* case of disability discrimination, that he suffered an adverse employment action "because of" his alleged disability. Summary judgment should therefore be granted as to Count IV of the Amended Complaint.

[9] As noted with regard to his other discrimination claims, even if Plaintiff could establish a *prima facie* case of disability discrimination, he has offered no evidence to show that his termination was, in fact, because of his alleged disability and not because of Astellas' proffered explanation for his termination—that he had been off of work for approximately sixteen months and his position was an important one which needed to be filled.

B. Harassment

To the extent that Plaintiff also alleges unlawful harassment, in order to prove such a claim, he must show that: 1) he suffered intentional harassment because of a protected trait; 2) the harassment was pervasive and regular; 3) the harassment detrimentally affected him; 4) the harassment would detrimentally affect a reasonable person with the same protected characteristic in that position; and 5) *respondeat superior* liability exists. See Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999).

Plaintiff has failed to establish the first element of his harassment claim, *i.e.*, that he was subject to harassment "because of" a protected trait. As already discussed at length, supra, Plaintiff has provided no evidence that any act of which he complains was taken because of a protected trait, either race, sex, age or disability. In fact, the only allegation Plaintiff makes to support his claim of harassment is that he was subject to a "hostile work environment" by Ms. Katsafanas after he made his January, 2011, report to Ms. Fuksman. Such contention, however, is more properly stated in his retaliation claim since it implies that acts were taken because of his report to Human Resources, not that such acts were taken "because of" a protected trait.[10] Thus, since Plaintiff has failed to establish his *prima facie* case of harassment—and since such claim is actually a restatement of his retaliation claim, discussed infra—summary judgment is appropriate on this issue.

[10] To the extent that Plaintiff may wish to argue that his performance counseling or disciplinary actions were "harassment," he has failed to support any such claim since reasonably exacting standards of job performance do not create a hostile work environment, and, as discussed supra, Plaintiff has not shown that he was subject to different standards than other sales representatives. Krizman v. AAA Mid-Atlantic, Inc., 2006 WL 2945230, at *7 (E.D. Pa. Oct. 12, 2006).

C. Retaliation

Count III of Plaintiff's Amended Complaint alleges retaliation in violation of Title VII. In order to establish a *prima facie* case of retaliation under that statute, Plaintiff must show: 1) he engaged in protected employee activity,[11] 2) Astellas took a materially adverse action against him after or contemporaneous with the protected activity, and 3) a causal link exists between the protected activity and the adverse action. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 56-57 (2006); Walker v. Centocor Ortho Biotech, Inc., 558 Fed. Appx. 216, 220 (3d Cir. 2014). To establish the existence of a causal link, Plaintiff must prove that his protected activity was the "but-for cause" of the alleged adverse action by Astellas. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

More specifically, a plaintiff may establish the required causal link by demonstrating either: 1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or 2) a pattern of antagonism or retaliatory animus coupled with timing. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997); Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007). In the absence of that proof, a plaintiff may also show that, from the evidence gleaned from the record as a whole, the trier of fact should infer causation. See Smith v. Central Dauphin Sch. Dist., 355 Fed. Appx. 658, 668 (3d Cir. 2009) (citing DeFlaminis, 480 F.3d at 267).

Plaintiff appears to be basing his claims of retaliation on: 1) Ms. Katsafanas' ongoing performance counseling;[12] 2) the February 8/9, 2011 e-mail incident; 3) his February 2, 2012

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[11] "Protected activity" in a retaliation case is considered to be opposition to employment practices that are unlawful under the anti-discrimination statutes. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995).

[12] As discussed, supra, to the extent that Plaintiff attempts to frame his performance counseling as retaliation and harassment, he has not shown that he was subject to different

Level I Warning; 4) his June 25, 2012 Level II PAP; and 5) the termination of his employment on October 18, 2013. For purposes of deciding this summary judgment motion, however, Plaintiff can only argue that he engaged in protected activity—at the soonest—on March 24, 2011, when he reported to Ms. Fuksman that he believed he was working in a "hostile working environment."[13] Therefore, any action taken before that time cannot, as a matter of law, have been retaliation for engaging in protected activity. See Barber, 68 F.3d at 701-02. Additionally, Plaintiff filed charges with the EEOC on November 9, 2011, and March 27, 2013.

It should be noted at the outset that allegedly adverse actions, such as the interconnected counseling, evaluations, and warnings at issue here, which take place both before and after protected activity, indicate the lack of a causal link. See Shaner v. Synthes, 204 F.3d 494, 504-05 (3d Cir. 2000). In Shaner, for instance, the Court of Appeals for the Third Circuit found no retaliation where the plaintiff's performance evaluations contained similar criticisms both before and after he made his employer aware that he suffered from a disability, and before and after he filed an EEOC charge. See id. The Court of Appeals reasoned that, under such circumstances, there was simply **no evidence that such evaluations were causally linked to the filing of a charge or that they were motivated by discriminatory or retaliatory intent**. See id. at 505. Likewise, in this case, Plaintiff admits that Ms. Katsafanas had been addressing the same performance issues in his counseling, and in his Level I Warning, since the beginning of his

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standards than other sales representatives, and he has otherwise failed to support this claim since reasonably exacting standards of job performance do not create a hostile work environment. See Krizman v. AAA Mid-Atlantic, Inc., 2006 WL 2945230, at *7 (E.D. Pa. Oct. 12, 2006).

[13] Although it is not clear that the March 24, 2011, report to Ms. Fuksman qualifies as "protected activity" since it was an internal complaint that did not actually mention discrimination, harassment or retaliation, interpreting the facts in a light most favorable to Plaintiff for purposes of this motion, the Court will consider this date to be the first time Plaintiff engaged in protected activity.

employment—and his Level II PAP covered the same topics as the Level I Warning.[14] Thus, as in Shaner, the timing of the various employment actions in this case is anything but suggestive, since similar performance issues were addressed **prior to** Plaintiff's first general complaint of a hostile work environment, and the later filing of his first EEOC charge, and those same issues continued to be addressed **after** the filing of the charge.

Moreover, as in Shaner, the timing in this case of the alleged adverse employment actions, including Plaintiff's ultimate termination, and Plaintiff's protected activity is likewise not suggestive of a causal connection between the two types of events. In fact, even after Plaintiff filed his second EEOC charge on March 27, 2013, his last instance of protected activity, his employment was not terminated until **over six months later**, in October, 2013—after he had, in actuality, been out on leave for nearly **sixteen (16) straight months**. Even considering the timing of Plaintiff's first EEOC charge (filed on November 8, 2011) and his receipt of a Level I Warning (on February 2, 2012), nearly three months passed between these two events. In this case, the temporal proximity of several months between Plaintiff's protected activities and any later allegedly adverse employment actions, taken alone, is not "unusually suggestive" so as to support the inference of a causal connection between the two. See e.g., Flory v. Pinnacle Health Hospitals, 346 Fed. Appx. 872, 877 (3d Cir. 2009) (noting that a span of mere months, let alone years, between protected activity and an adverse employment action is insufficient to raise an inference of causation and defeat summary judgment); Theriault v. Dollar General, 336 Fed. Appx. 172, 175 (3d Cir. 2009) (finding that the plaintiff did not establish causation where she was terminated several months after her alleged protected activity); LeBoon v. Lancaster Jewish

[14] All of the issues listed in Plaintiff's Level I Warning were addressed in 2010 and early 2011. Additionally, those same issues were addressed in Plaintiff's Level II PAP. Notably, the concerns regarding call activity and proper targets had already been raised four times before Plaintiff made his March 24, 2011, report to Human Resources, and his communication issues had been addressed twice before he ever made his report.

Cmty. Ctr. Ass'n, 503 F.3d 217, 233 (3d Cir. 2007) (holding that a three-month gap between protected activity and an adverse action, without more, does not create an inference of causation and defeat summary judgment); Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751, 760 (3d Cir. 2004) (two months between protected activity and alleged retaliation does not necessarily give rise to an inference of causation).

Although Plaintiff has not shown that any temporal proximity alone is sufficient to support the inference of a causal connection between his protected activity and Astellas' allegedly adverse actions, the intervening period between the events can be examined for evidence of retaliatory animus. However, to support his case generally, Plaintiff has only cited the ongoing performance counseling and warnings which, as discussed supra, do not establish antagonism since they were consistent throughout his employment. Additionally, Plaintiff admitted in his deposition that between the time he went out on his last period of leave on June 28, 2012, and the time he received his termination letter on October 16, 2013, Astellas took no action whatsoever against him:

> Q: What action, if any, did they take between June 28, 2012 and October 16, 2013?
>
> A: No action.

(Doc. No. 27-2, at 62). Thus, Plaintiff has failed to establish a causal link by showing a pattern of antagonism or retaliatory animus coupled with timing.

Lastly, Plaintiff has failed to show that the Court should otherwise infer causation "from the evidence gleaned from the record as a whole." See Smith, 355 Fed. Appx. at 668. As noted, Plaintiff has failed to point to any other evidence to support the inference of retaliatory animus

on the part of Astellas. See Tarr v. FedEx Ground Package System, Inc., No. 08-1454, 2010 WL 331846, at *9 (W.D. Pa. Jan. 28, 2010).[15]

Accordingly, because Plaintiff has failed to show a causal link between his protected activity and the alleged adverse employment actions, including the termination of his employment, he has failed to establish his *prima facie* case of retaliation, and Count III of the Amended Complaint should be dismissed.[16]

V. CONCLUSION

Based on the foregoing, Defendant's Motion for Summary Judgment is granted.

s/Alan N. Bloch
Alan N. Bloch
United States District Judge

Date: September 24, 2015

cc: Counsel of Record

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[15] Even if the Court found that Plaintiff had satisfied his *prima facie* case of retaliation, the burden of production would shift to Astellas to articulate a legitimate non-discriminatory reason for its adverse employment actions. See Schellenberger v. Summit Bancorp., Inc., 318 F.3d 183, 187 (3d Cir. 2003). As Astellas has produced enough evidence to meet its relatively light burden (namely that Plaintiff was held to the same standards as his fellow employees, and he was eventually terminated because business had to continue at the company and retaining Plaintiff indefinitely would have created an undue burden to the company), the burden would shift back to Plaintiff to show by a preponderance of the evidence that the proffered reason is actually a pretext and that a retaliatory animus played a motivating factor. See id. Because Plaintiff has not produced any such evidence to rebut the proffered reasons (as discussed above with regard to his other claims), he has also failed to show pretext as to his retaliation claim.

[16] Plaintiff also adds a confused allegation in connection with the termination of his employment by asserting that the retaliation by Ms. Katsafanas and Ms. Fuksman was "akin to a constructive discharge." (Doc. No. 31, at 104). A constructive discharge exists where an employee has left his position because of conditions of discrimination in employment that a reasonable person would find intolerable. See Goss v. Exxon Office Systems Co., 747 F.2d 885, 887 (3d Cir. 1984). Because Plaintiff never resigned his employment with Astellas, this argument cannot be supported and therefore does not establish his claim of retaliation.