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

LARRY TWENTIER,	)	
	)	
Plaintiff,	)	
	)	2:15cv913
v.	)	**Electronic Filing**
	)	
DAVID J. SHULKIN,[1] Secretary of the Department of Veterans Affairs,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

July 18, 2017

I. INTRODUCTION

Larry Twentier brings this employment discrimination action against the Secretary of the Department of Veterans Affairs, alleging that his non-selection for two positions at the Butler Veterans Administration Medical Center ("Butler VA") constituted retaliation under the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* Now pending before the Court is Defendant's motion for summary judgment, with a brief, concise statement of material facts ("CSMF"), and appendix in support. (ECF No. 30-33). Plaintiff filed a response in opposition, along with a response to Defendant's CSMF, and a statement of additional facts. (ECF Nos. 37-39). Defendant filed a reply and a response to Plaintiff's statement of additional facts. For the reasons set forth below, Defendant's motion will be granted.

II. BACKGROUND

Plaintiff initiated this action on July 15, 2015, alleging claims for disability

[1] David J. Shulkin was confirmed as Secretary of Veterans Affairs, to succeed Robert McDonald Secretary of Veterans Affairs, on February 13, 2017. Pursuant to Fed. R. Civ. P. 25(d)(1), Shulkin is automatically substituted as the defendant in this action.

discrimination and retaliation under the Rehabilitation Act. He has since withdrawn his disability discrimination claims. (Pl.'s Pretrial Stmt. at 5).

The following facts are undisputed except where otherwise noted. All reasonable inferences have been drawn in favor of Plaintiff, the non-moving party.

By way of background, Plaintiff has a bachelor's degree in science and psychology and a master's degree in justice administration. He was on active duty in the Air Force from 1985 until 1997, when he went on disability retirement. He fully retired from the Air Force in 2001.

Plaintiff was hired as a Domiciliary Assistant at the Butler VA on December 6, 2009. On January 25, 2011, the Office of Personnel Management instructed the Butler VA to terminate Plaintiff after determining that he had been untruthful in his Declaration for Federal Employment. As a result, Plaintiff was placed a three-year period of debarment, during which he was ineligible for competitive service federal jobs. After his termination, Plaintiff filed an EEO complaint and a federal lawsuit, alleging disability discrimination, which settled in in 2012. *See* Civ. A. No. 11-1337 (W.D. Pa.).

After the end of the debarment period on January 24, 2014, Plaintiff applied for and was not selected for the positions of Telephone Operator and Program Support Assistant at the Butler VA.[2] The Telephone Operator position was posted from March 13, 2014, through March 26, 2014. The Program Support Assistant position was announced and cancelled twice near the end of the 2013-2014 fiscal year. Once funding was secured, however, the hold on filling the position was lifted and recruiting continued.

Applicants for these positions were initially screened by the Human Resources ("HR")

[2] Plaintiff was also not selected for the Medical Records Technician and Medical Supply Technician positions. Initially, he claimed that his non-selection for these positions was also retaliatory, as well, but he has withdrawn such claims. (Pl.'s Br. at 1).

department at the Butler VA, and the applicants who were deemed qualified were then interviewed by a three-person panel. Plaintiff was not referred for an interview for either position. There is no evidence in the record about how candidates were referred for interviews, such as who conducted the initial screening or how applicants were rated. The successful applicant for each position was the highest-ranking applicant after interviews were conducted.

During the relevant time, Christine Bruns was the HR Officer and Seth Coyle was an HR Specialist at the Butler VA. Both were aware of Plaintiff's prior discrimination complaint. Plaintiff believes that Bruns and Coyle, along with unidentified "managers" and "administrators" at the Butler VA, did not want to hire him for the positions at issue because of his prior complaint. When asked what made him believe that Coyle wanted to retaliate against him, Plaintiff testified that Coyle "was told by his bosses in HR, Christine Bruns and the managers above him," to retaliate against Plaintiff "[b]ecause the EEO suits make everybody look bad." (Pl.'s Dep. at 49: 7-15). When asked whether he had any other basis for thinking that Coyle "wanted to retaliate against [him] for having filed EEO complaints," Plaintiff testified, "At this time I don't remember." (*Id.* at 50:5-8). With respect to Bruns, Plaintiff testified that he believes she retaliated against him because after the Program Support Assistant position was posted, "Attorney Sanders received a letter from [her] from 11/14 stating that the position was no longer being offered, that it was in fact closed. However, in March of '15, a few months later, Stella Heupel got the job." (*Id.* at 51:25-52:1-4). Other than that, Plaintiff agreed that he had no other basis to believe that Bruns wanted to retaliate against him. (*Id.* at 52:20 ("I don't. That's all I have.")). While Plaintiff testified that he believes that Bruns and Coyle were working with others ("HR, their manager and also the people they report to, administrators of the VA Medical Center") to ensure that he was not selected for the Telephone Operator and Program Support

Assistant positions, he could not identify those other individuals by name or otherwise or explain their role in the hiring process. (*Id.* at 53:7-11).

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are those that will affect the outcome of the trial under governing law. *Anderson*, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court's role is "not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." *American Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009). "In making this determination, 'a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor.'" *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000) (quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994)).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the party opposing summary judgment "may not rest upon the mere allegation or denials," but "must set forth specific facts showing that there is a genuine issue for trial." *Saldana v. Kmart Corp.*, 260 F.3d 288, 232 (3d Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 n.11 (1986)). An issue is "genuine" if there is "more

than a scintilla of evidence" the non-movant's position – "there must be sufficient evidence (not mere allegations) for a reasonable jury to find for the nonmovant." *Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co.*, 10 F.3d 144, 148 (3d Cir. 1993).

IV. DISCUSSION

Section 504 of the Rehabilitation Act incorporates the substantive standards of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12201–04, 12210, including the restriction on retaliation. Section 503(a) of the ADA provides that: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). "To establish a prima facie case of retaliation under the [Rehabilitation Act], a plaintiff must show: (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 498 (3d Cir. 1997). In this case, the only question is whether Plaintiff brought forward enough evidence to show a causal connection between his protected activity and his non-selection for the Telephone Operator and Program Support Assistant positions?

The answer is no. "[A] plaintiff may rely on a 'broad array of evidence' to demonstrate a causal link between [the] protected activity and the adverse action taken." *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 300 (3d Cir. 2007) (quoting *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 284 (3d Cir. 2000). One way to do so is by showing that there is "close temporal proximity" between the protected activity and the adverse action. *Young v. City of Philadelphia Police*

Dep't, 651 F. App'x 90, 96 (3d Cir. 2016). That is not the only way, though. "A plaintiff can also rely on evidence such as 'intervening antagonism or retaliatory animus, inconsistencies in the employer's articulated reasons for [not hiring] the employee, or any other evidence in the record sufficient to support the inference of retaliatory animus.'" *Id.* (quoting *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, at 232–332 (3d Cir. 2007)).

Plaintiff concedes that he cannot establish an inference of retaliation based on timing alone. Instead, he argues that "HR, the relevant employees of which were aware of [his] protected activity, did not refer [him] for an interview even though he far exceeded the required qualifications for the position, had a greater veteran's preference than the successful candidates, and had more experience with the Butler VA's phone and computer systems and people than the successful candidates." (Pl.'s Br. at 7). According to Plaintiff, "This is inconsistent with the Defendant's explanation that Plaintiff was not highly enough qualified to be referred by HR to the interview panel." (*Id.*).

This argument fails on multiple levels. While Plaintiff postulates that the "relevant employees" in HR (presumably Bruns and Coyle) were responsible for reviewing applicants for the two positions and referring them for interviews, there is no actual evidence to support this. Indeed, there is a complete lack of evidence related to the process by which applicants were referred for interviews and why some applicants were referred and others were not. Plaintiff cannot survive summary judgment by speculating about what happened during this process. *See Kovalev v. City of Philadelphia*, 362 F. App'x 330, 331 (3d Cir. 2010) (noting that "speculation and conjecture is insufficient to [a] motion for summary judgment"). Moreover, since there is no evidence about who was actually responsible for performing the review of applicants, the Court cannot determine whether that individual (or those individuals) knew about Plaintiff's protected

activity. Absent such evidence, Plaintiff cannot establish that his non-selection for the positions was causally related to his protected activity. *See Daniels v. Sch. Dist. of Philadelphia*, 776 F.3d 181, 196 (3d Cir. 2015) (explaining that a plaintiff "cannot establish that there was a causal connection without some evidence that the individuals responsible for the adverse action knew of the plaintiff's protected conduct [when] they acted").

Even assuming, for the sake of argument, that Bruns and Coyle were ultimately responsible for deciding not to refer Plaintiff for an interview, the evidence of causation is still lacking. Plaintiff effectively conceded at this deposition that his claim that Bruns and Coyle retaliated against him is based on his own supposition. The only "evidence" that he has deduced to support his claim against Bruns is that his attorney received a letter from her stating that the Program Support Assistant position was "no longer being offered," but he later learned that someone was, in fact, hired for this position. However, it is undisputed that this position was announced and cancelled twice for budgetary reasons during the latter part of the 2013-2014 fiscal year and later re-opened after funding was secured. This sequence of events is not, in any way, suggestive of retaliation. The evidence is even more scant as it relates to Coyle, who Plaintiff claims was "told by his bosses in HR, Christine Bruns and the managers above him," to retaliate against Plaintiff "[b]ecause the EEO suits make everybody look bad." Other than his own belief about what happened, though, Plaintiff could not identify any reason why Coyle would have wanted to retaliate against him. This evidence, such as it is, is simply not sufficient to create a genuine issue of fact for trial.

Nor is Plaintiff's belief that he was more qualified than the two successful applicants enough to cast doubt on Defendant's explanation for why he was not selected for the positions. *See Knox v. Fifth Third Bancorp*, No. 2:12-CV-539, 2014 WL 359818, at *12 (W.D. Pa. Feb. 3,

2014) (holding that the plaintiff's opinions about whether she was more qualified than other employees who received promotions "are an insufficient means to overcome summary judgment on this claim"); *Sadowski v. Greater Nanticoke Area Sch. Dist.*, No. 3:10-CV-242, 2013 WL 1176254, at *6 (M.D. Pa. Mar. 20, 2013) (internal citation and quotation marks omitted) (explaining that "the plaintiff's subjective belief that she was more qualified for the job does not create an issue of fact for the jury"). A comparison between Plaintiff's qualifications and those of the successful applicants could only help him prove his claim of retaliation if the differences between them "were 'so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position[s] at issue.'" *Hobbs v. City of Chicago*, 573 F.3d 454, 462 (7th Cir. 2009) (citing *Mlynczak v. Bodman*, 442 F.3d 1050, 1059–60 (7th Cir. 2006)). Such a showing has not been made here. In fact, because there is a dearth of evidence about the initial stage in the hiring process, the Court cannot make a real comparison between Plaintiff's qualifications and the qualifications of the candidates who were granted interviews. There is no evidence about why Plaintiff was rated the way he was and not referred for an interview, let alone evidence of retaliatory intent on Defendant's part. Thus, Plaintiff has not established a *prima facie* case, and Defendant is entitled to summary judgment.

V. CONCLUSION

Based on the foregoing, the Court will grant the motion for summary judgment filed by Defendant. An appropriate order will follow.

s/ David Stewart Cercone
David Stewart Cercone
United States District Judge

cc: Dirk D. Beuth, Esq.
Neal A. Sanders, Esq.
Jennifer R. Andrade, Esq.

(*Via CM/ECF Electronic Mail*)