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

SETH NEUSTEIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	2:15cv1045
	)	**Electronic Filing**
PNC BANK, NA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

July 25, 2017

I. INTRODUCTION

Plaintiff, Seth Neustein ("Neustein" or "Plaintiff") filed a five (5) count Complaint alleging: (1) religious discrimination and retaliation in violation of his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII)") (Counts I & II); (2) hostile work environment and retaliation in violation of his rights under the Americans With Disabilities Act of 1990, 42 U.S.C. §§12101, *et seq.* (the "ADA") (Counts III & IV); and (3 violation of his rights under the Pennsylvania Human Rights Act, 43 Pa. Cons. Stat. Ann. § 925 et seq. (the "PHRA"), against Defendant, PNC Bank NA ("PNC" or "Defendant"). PNC has filed a motion for summary judgment, Neustein has responded and the motion is now before the Court.

II. STATEMENT OF THE CASE

Neustein was hired by PNC on March 10, 2008, as a Network Services ("NWS") Analyst–Desktop Technologies in its Network Solutions–Technology Asset Management department. Defendant's Statement of Undisputed Material Facts ("Def. SUMF") ¶ 1. As an Analyst, Neustein was responsible for ensuring the proper operation of PNC's desktop

technology systems. *Id.* Upon his hire, Neustein acknowledged that he had reviewed PNC's Code of Business Conduct and Ethics and understood that he was required to comply with the rules, standards and values set forth therein. Def. SUMF ¶ 2. PNC also provided him with annual training on the Code of Business Conduct and Ethics. *Id.* Neustein also acknowledged that he would review, and comply with, the PNC Employee Manual. *Id.*

The PNC Employee Manual contains a separate Bias and Harassment Policy ("BHP") which provides that "PNC will not tolerate harassment, bias or other inappropriate conduct by a manager, supervisor, employee, customer, vendor or visitor." Def. SUMF ¶ 5. The purpose of the BHP is to "ensure that PNC employees are provided a work environment free of bias, harassment and other inappropriate conduct." *Id.*

The BHP obligates employees who believe that they or others have been subject to misconduct to report that misconduct. Def. SUMF ¶ 6. To ease the reporting of any misconduct, the BHP provides employees with five alternatives for making a report: (1) to a Supervisor; (2) to a Human Resources Business Partner; (3) to the Employee Relations Information Center ("ERIC"); (4) to the Corporate Ethics Office; and/or (5) the Business Conduct and Ethics Hotline. *Id.* Neustein was aware that PNC had a policy prohibiting discrimination, and knew that there were individuals who he could contact to voice any concerns about discrimination, including the ERIC. Def. SUMF ¶ 9.

Initially, Neustein reported to NWS Manager Arlene Cook ("Cook"). Def. SUMF ¶ 10. Beginning in 2009, Cook reported to Manager I Technology David Byers ("Byers"), who reported to Manager II Technology Sandra Barnhill ("Barnhill"). *Id.* In or around early 2010, Neustein began reporting directly to Byers, who continued to report to Barnhill. *Id.*

On October 6, 2009, Neustein called the ERIC to report that his managers were giving him a hard time about taking days off, including for the Jewish holiday of Yom Kippur and that he felt that he was being discriminated against based on his religion, Judaism. PNC Appendix ("PNC App") Ex. A, Neustein Depo. pp. 186-187. PNC assigned Senior Employee Relations Investigator Jodie Fine-Sheriff ("Fine-Sheriff") to investigate Neustein's concerns of religious discrimination. Def. SUMF ¶ 12; PNC App Ex. D, Fine-Sheriff Declaration ("F-S Decl.") ¶ 5. Based on her investigation, Fine-Sheriff determined that Cook did not discriminate against Neustein, that Neustein was granted all the time off that he requested, and that his claims of religious discrimination were unfounded. F-S Decl. ¶ 8.

On April 2, 2010, Neustein again called the ERIC to report that Byers and Barnhill would not allow him to enter time off for Passover as time off for religious observation, but wanted him to enter it as vacation time. Def. SUMF ¶ 14. Byers and Barnhill reached out to the ERIC for guidance, and were told that Neustein should record the time off as vacation time. *Id.*

On June 23, 2010, Neustein called off sick and visited his primary care physician, Dr. Joseph Trompeter ("Dr. Trompeter"), complaining of congestion and a cough. Def. SUMF ¶¶ 24 & 25. Though Neustein discussed with Dr. Trompeter the fact that mold had been found in his home, which Dr. Trompeter thought might have contributed to his condition, Dr. Trompeter diagnosed Neustein with whooping cough. Def. SUMF ¶ 25. When Neustein returned to work the next day, he told Byers that he had a potential fungal infection in his lungs. Def. SUMF ¶ 26.

In or around July 2010, PNC informed Neustein that he was being moved from his office in downtown Pittsburgh, to Allegheny Center, located on the North side of Pittsburgh. Def. SUMF ¶ 34. Neustein alleges that when Barnhill informed of the move, she accused him of faking his medical condition, called him an anti-Semitic name, and told him that she was going

to isolate him and move him "somewhere away from everybody else." Def. SUMF ¶ 35. Though Barnhill and Byers contend they made the decision to reassign Neustein to Allegheny Center due to work volume, and because his supervisor worked in Allegheny Center, Neustein contends that he was never told the reasons he was being moved. Def. SUMF ¶ 36; Plaintiff's Response to Concise Statement of Material Fact ("Pl. Resp.") ¶ 36. On July 13, 2010, Neustein called the ERIC to report that Byers and Barnhill were violating his medical restrictions by requiring him to move to a different PNC building[1]. Def. SUMF ¶ 41. PNC assigned Senior Employee Relations Investigator Jean Olenak ("Olenak") to investigate Neustein's concerns. *Id.*

Neustein indicated that his concern regarding his move to Allegheny Center was that he would be required to regularly walk back and forth between Allegheny Center and PNC's locations in downtown Pittsburgh. Def. SUMF ¶ 38. Such requirement would violate his medical restrictions. *Id.* In that regard, Neustein submitted documentation to PNC on July 20, 2010, that indicated that he should not be in dusty areas, crawling, lifting more than 6 to 8 pounds or walking more than 150 yards. *Id.* Barnhill discussed Neustein's medical restrictions with Employee Relations, and it was determined that they could accommodate those restrictions by having him work at Allegheny Center. Def. SUMF ¶ 39.

As part of her investigation, Olenak spoke with Neustein, who alleged that Barnhill had made anti-Semitic comments to him. Def. SUMF ¶ 42. Specifically, Neustein alleged that Barnhill said: "You dirty Jew I know you're faking this and you'll pay for this." Def. SUMF ¶ 43. Neustein further alleged that after he requested time off for Passover, Barnhill said, "Look

[1] Neustein also complained that his medical restrictions were being violated because he was being required to pack up his office for the move. Pl. Resp. ¶ 41.

here you uppity Jew, I can discipline you for whatever I want. You do not get days for Passover." *Id.* Barnhill denied making such statements. Def. SUMF ¶ 44.

As part of her investigation, Olenak spoke to Byers, as well as other employees who may have heard comments by Barnhill, however, no one corroborated Neustein's allegations. Def. SUMF ¶ 49; Pl. Resp. ¶ 49. Olenak found that the allegations made by Neustein were unfounded. Olenak, however, specifically stated, "I was having trouble that this is something Seth would make up. I told Seth I believe the truth is in the middle," and that she could defend a termination of neither Barnhill nor Neustein. Pl. Resp. ¶ 50.

On or about July 26, 2010, Neustein became a Technical Project Manager, managing technology related projects for PNC. Def. SUMF ¶ 51. During the last quarter of 2010, PNC allowed Neustein to begin working from home because of his medical condition. Def. SUMF ¶ 52.

In or around May 2013, Neustein began reporting to Manager I Technology Cheryl Klippa ("Klippa"). Def. SUMF ¶ 54. Klippa oversaw a team that included Neustein, Senior Software Engineer, Nathaniel Snyder ("Snyder"), Business Systems Analyst, Erika Trageser ("Trageser"), and Quality Analyst, Karen Scansaroli ("Scansaroli"). Def. SUMF ¶ 55. Neustein and Snyder were college friends, and Neustein helped Snyder get his job with PNC. Def. SUMF ¶ 56. Moreover, Neustein was dating Snyder's sister at that time. *Id.*

In or around the summer of 2013, Neustein contends that Klippa ordered him to stop attending physical therapy because she needed him to work "basically nonstop." Def. SUMF ¶ 60. Neustein agreed to stop attending physical therapy, but advised Klippa that it had to be temporary because it would take a toll on his health. Def. SUMF ¶ 61; Pl. Resp. ¶ 61. Once Neustein began attending physical therapy again, he alleges that Klippa continuously tried to

prevent him from attending physical therapy or doctors' appointments. Def. SUMF ¶ 63. Neustein complained to PNC Senior Employee Relations Investigator, Lenette Seibel ("Seibel"), about Klippa's actions. Pl. Resp. ¶ 64.

In August 2013, during a conference call with Klippa and Snyder, Neustein told Klippa that he needed to take two days off in September for the Jewish holiday of Rosh Hashanah. Def. SUMF ¶ 65. Klippa, however, was scheduling an installation to take place during those days, and insisted that Neustein work on Rosh Hashanah. Def. SUMF ¶ 66. Klippa told Neustein that even though he was scheduled for vacation during Rosh Hashanah, he had to be available if any work issue arose. Pl. Resp. ¶ 66. Neustein contends that during this conference call, Klippa referred to Rosh Hashanah as a "supposed" or "made-up" religious holiday, and threatened to terminate Neustein. Def. SUMF ¶ 66. Neustein took off two (2) days for Rosh Hashanah in September of 2013. Def. SUMF ¶ 67.

The August 2013 conference call was the first time that Klippa learned that Neustein was Jewish Plaintiff's Concise Statement of Material Facts ("Pl. CSMF") ¶ 123. Neustein alleges that after Klippa found out that he was Jewish, she began calling him anti-Semitic or derogatory names, harassed him about his religion, repeatedly threatened his job, and asked him to commit fraud by falsifying documents and changing data. Def. SUMF ¶¶ 72 & 74. Neustein further contends that Klippa made him work 16-20 hour days, 7 days a week, 365 days a year, and told Neustein that "Jews do not get work life balance." Def. SUMF ¶ 73; Pl. CSMF ¶ 124. Neustein did not call the ERIC or reach out to anyone in PNC Employee Relations or Human Resources to report Klippa's conduct. Def. SUMF ¶ 78.

On January 14, 2014, Neustein took an unscheduled day off from work because of a medical problem that required him to go to the hospital. Def. SUMF ¶ 79. That afternoon, Klippa

e-mailed Neustein, stating that she "did not see [him] online or attending any meetings" that day, and "did not receive any communication from [him] regarding an absence." Def. SUMF ¶ 80. Notably, Neustein's girlfriend also took a preapproved day off on January 14, 2014, and Snyder told Klippa that Neustein may be spending the day with his sister. Def. SUMF ¶ 81.

The next morning, on January 15, 2014, Neustein participated in a conference call with Klippa, Snyder, Trageser, Scansaroli and a third-party contractor. Def. SUMF ¶ 82. According to PNC's records, Neustein connected to the conference call at 8:31 a.m. and disconnected from the conference call at 8:42 a.m. *Id.* Neustein alleges that Klippa asked him to stay on the line after the other participants hung up, and then demanded a detailed accounting of his time. Def. SUMF ¶ 83. When Neustein refused, he alleges that Klippa stated to him, "Fuck you, you Jew. I am eliminating your position. You think you can just take time off for your made-up holidays whenever you want. You're going to get what is coming to you." *Id.*

At 8:45 a.m., Neustein and Klippa exchanged instant messages regarding Neustein's absence on the 14th. Specifically, Klippa sent a message asking, "Seth, Did you read my email about absence yesterday?" Def. SUMF ¶ 84. Neustein stated that he "was unexpectedly taken to the hospital and was there until late," and he did not have his cell phone with him. Def. SUMF ¶ 85. With regard to Neustein's absence, Snyder told Neustein that Klippa said that there might be some "unpleasant things" that she needed to do in reference to Neustein. Def. SUMF ¶ 86. That same day, on January 15, 2014, Neustein called the ERIC to complain that Klippa had discriminated against him based on his religion and disability. Def. SUMF ¶ 87.

PNC assigned Seibel to investigate Neustein's concerns. Def. SUMF ¶ 89. Seibel explained to Neustein that her investigation was confidential and that he needed to be honest during the investigation, as required under the Code of Ethics. Def. SUMF ¶ 91. Neustein told

Seibel that after a staff meeting on January 15, 2014, Klippa told Neustein to stay on the line while the others hung up, then proceeded to demand certain information from him, threatened his job, and made anti-Semitic remarks. Def. SUMF ¶ 92. Seibel also spoke with Klippa as part of her investigation, and she denied asking Neustein to stay on the line after the conference call on January 15, 2014, and vehemently denied Neustein's allegations that she had made anti-Semitic remarks. Def. SUMF ¶ 94. Snyder told Seibel that he never heard Klippa call Neustein names or mock Neustein because of his medical conditions. Def. SUMF ¶ 95.

As part of her investigation, Seibel also obtained records from PNC's audiobridge department regarding the conference call on January 15, 2014, in order to determine when the participants in the conference call had logged on and off of the conference line. Def. SUMF ¶ 97. These records showed that Neustein connected to the conference call at 8:31 a.m. and disconnected at 8:42 a.m., at the exact same time that Scansaroli, Trageser and Snyder disconnected. Def. SUMF ¶ 98. The records further showed that Klippa stayed on the conference call with the contractor, Andrew Spry ("Spry"), until 8:44 a.m. *Id.* Seibel determined that these telephone records directly contradicted Neustein's claim that he and Klippa had stayed on the conference call after all of the other participants had hung up. Def. SUMF ¶ 99. Seibel was unable to find any independent evidence that Klippa made anti-Semitic comments or mocked Neustein's disability. Def. SUMF ¶¶ 96, 100 & 101.

It is standard practice for PNC under its Fidelity Bonding Policy ("Bonding Policy") to place an employee on paid administrative leave if there are concerns that the employee has engaged in a dishonest act, including dishonesty during an internal investigation. Def. SUMF ¶ 102. On February 28, 2014, Siebel placed Neustein on paid administrative leave while she completed her investigation. *Id.* On or about January 30, 2014, while Seibel's investigation was

still pending, Neustein filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that he had been discriminated against based on his religion and disability. Def. SUMF ¶ 105.

Seibel determined at the conclusion of her investigation that Neustein was dishonest in his allegations against Klippa, and that his allegations were not made in good faith. Def. SUMF ¶ 108.

Under PNC's Bonding Policy, employees are expected to be truthful and honest at all times and, if PNC has a reasonable belief that an employee has engaged in a dishonest act, coverage under PNC's fidelity bond is suspended, and the employee cannot continue working at PNC until coverage is reinstated. Def. SUMF ¶ 106. PNC's Bonding Policy lists specific examples of dishonest acts that may lead to the suspension of an employee's bond coverage, including misrepresentation or lying during an investigation. Def. SUMF ¶ 107.

Seibel determined that Neustein had violated PNC's Code of Ethics, and was no longer eligible for employment under PNC's Bonding Policy. Def. SUMF ¶ 110. Based on her investigation, Seibel recommended to Klippa's supervisor, Director of Technology Janice Nissel ("Nissel") that Neustein's employment be terminated. Def. SUMF ¶¶ 111 & 112. Nissel agreed with Seibel's termination recommendation. . Def. SUMF ¶ 112. On April 23, 2014, PNC terminated Neustein's employment, effective April 24, 2014. Def. SUMF ¶ 113.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, *i.e.*, one upon which a reasonable fact finder could

base a verdict for the non-moving party and one which is essential to establishing the claim. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the court is not permitted to weigh the evidence or to make credibility determinations, but is limited to deciding whether there are any disputed issues and, if there are, whether they are both genuine and material. *Id*. The court's consideration of the facts must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. *Whiteland Woods, L.P. v. Township of West Whiteland,* 193 F.3d 177, 180 (3d Cir. 1999), *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P 56(e). Further, the nonmoving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. *Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir.1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The non-moving party must respond "by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial." *Simpson v. Kay Jewelers, Div. Of Sterling, Inc.*, 142 F. 3d 639, 643 n. 3 (3d Cir. 1998), *quoting Fuentes v. Perskie*, 32 F.3d 759, 762 n.1 (3d Cir. 1994).

IV. DISCUSSION

Neustein brings a claim of discrimination and retaliation under Title VII, the ADA and the PHRA[2]. Title VII prohibits an employer from discriminating against an individual based on race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)(1). The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a).

If the plaintiff has put forth direct evidence of discrimination, the court must apply the theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), also referred to as the "mixed motive" theory. Under *Price Waterhouse*, if a plaintiff "offers 'direct evidence' of unlawful discrimination . . . the plaintiff need only show that the unlawful motive was a substantial motivating factor in [the employer's] decision" to take an adverse employment action against the plaintiff. *Miller v. CIGNA Corp.*, 47 F.3d 586, 594 (3d Cir. 1995) (discussing *Price Waterhouse* concurrence by Justice O'Connor); *see also Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003) (citation omitted). If the plaintiff satisfies this burden, "[b]oth the burden of production and the risk of non-persuasion are shifted to the defendant who . . . must persuade the factfinder that even if the discrimination was a motivating factor in the adverse employment decision, it would have made the same employment decision regardless of its discriminatory animus." *Connelly v. Lane Constr. Corp*., 809 F.3d 780, 787 n.5 (3d Cir. 2016)

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[2] There is no need to differentiate between Neustein's Federal discrimination claims and PHRA claims because, for our purposes, the same analysis is used for each. *See, e.g., Simpson v. Kay Jewelers*, 142 F.3d at 643-644 & n.4*; Jones v. School District of Philadelphia*, 198 F.3d 303, 410-411 (3d Cir. 1999); *Fairfield Township Volunteer Fire Co. No. 1 v. Commonwealth*, 609 A.2d 804, 805 (Pa. 1992).

(quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994)). *See also Watson v. Se. Penn. Trans. Auth.*, 207 F.3d 207, 215 (3d Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. at 244-245).

If, however, the plaintiff has put forth circumstantial evidence of discrimination, the court uses a pretext theory, which incorporates the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973) (the "McDonnell Douglas analysis"). Under the McDonnell Douglas analysis, once the employee establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's adverse employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802. If the employer makes that showing, the burden of production shifts once again to the employee to establish that the employer's proffered justification for the adverse action is pretextual. *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). Throughout this burden-shifting exercise, the burden of persuasion remains on the employee. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 n.4 (3d Cir. 1995) (citing *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. at 253).

Neustein contends that he has offered "direct evidence" of discrimination. Direct evidence is overt or explicit evidence that is so revealing of a discriminatory animus that no presumptions or inferences are needed. *See Bullock v. Children's Hosp. of Phila.*, 71 F. Supp. 2d 482, 485 (E.D. Pa. 1999) ; (citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778-779, 782 (3d Cir. 1994) for the proposition that direct evidence is analogous to the "proverbial 'smoking gun'"); *see also Hankins v. City of Phila.*, 189 F.3d 353, 365 (3d Cir. 1999) (finding comment to African American candidate that position was "reserved for the gay, white community" a "quintessential example of direct evidence"), *aff'd en banc*, 216 F.3d 1076 (2000).

A plaintiff attempting to prove discrimination with direct evidence faces a "high hurdle." *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3d Cir. 1999). The direct evidence "must demonstrate that decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *See Price Waterhouse v. Hopkins*, 490 U.S. at 277 (O'Connor, J., concurring); *see also Jakimas v. Hoffmann-LaRoche, Inc*., 485 F.3d 770, 786 (3d Cir. 2007). Moreover, derogatory comments or stray remarks in the workplace that are unrelated to employment decisions, even when uttered by decision makers, do not constitute direct evidence of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. at 277; *see also Fuentes v. Perskie*, 32 F.3d 759, 767 (3d Cir.1994) ("Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision") (internal quotation and citation omitted)).

Neustein alleges that after Klippa found out that he was Jewish, she began calling him anti-Semitic or derogatory names, harassed him about his religion, repeatedly threatened his job, and asked him to commit fraud by falsifying documents and changing data. Def. SUMF ¶¶ 72 & 74. With regard to the anti-Semitic comments, Neustein specifically alleges that Klippa told him that "Jews do not get work life balance," and, after Klippa asked him to stay on the line a conference call, allegedly demanded a detailed accounting of his time and when Neustein refused, she said, "Fuck you, you Jew. I am eliminating your position. You think you can just take time off for your made-up holidays whenever you want. You're going to get what is coming to you." Def. SUMF ¶ 83.

Klippa vehemently denied Neustein's allegations that she had made anti-Semitic remarks. Def. SUMF ¶ 94. Moreover, PNC'S telephone records from the January 15, 2014, conference call contradicted Neustein's claim that Klippa asked him to stay on the conference call after the

other participants hung up and made anti-Semitic comments. These records showed that Neustein connected to the conference call at 8:31 a.m. and disconnected at 8:42 a.m., at the exact same time that Scansaroli, Trageser and Snyder disconnected. Def. SUMF ¶ 98. The records further showed that Klippa stayed on the conference call with a contractor until 8:44 a.m. *Id.* Neustein also identified Snyder as a witness to Klippa's alleged discriminatory conduct, but Snyder denied ever hearing Klippa call Neustein any anti-Semitic names, refer to Jewish holidays as made up holidays, or mock Neustein because of his disability. Snyder Depo. pp. 39-40. Finally, not one of the thirteen employees who Neustein identified as witnesses to Klippa's alleged conduct substantiated his claims.

Notwithstanding the lack of objective evidence supporting Neustein's claim that Klippa manifested a discriminatory animus toward him, Neustein fails to show that, if such remarks were in fact made by Klippa, her alleged remarks were related to PNC's decision to terminate him. The evidence clearly establishes that after a comprehensive investigation[3], initiated upon Neustein's complaint, Seibel determined that Neustein was dishonest in his allegations against Klippa, and that his allegations were not made in good faith. Seibel determined that Neustein had violated PNC's Code of Ethics, and was no longer eligible for employment under PNC's Bonding Policy. Based on her investigation, Seibel recommended to Klippa's supervisor, Janice Nissel that Neustein's employment be terminated. There is no evidence that Neustein was terminated based upon his religion.

Neustein also fails in his attempt to establish the "cat's paw" theory to impute Klippa's alleged discriminatory animus to her employer, PNC. Under the "cat's paw" theory, an employer

[3] This Court is unable to find any evidence of Neustein's contention that Seibel was predisposed to believe Klippa and ignore evidence substantiating his claims.

is deemed at fault if one of its agents "committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011); *see also Jones v. S.E. Pa. Transp. Auth*., 796 F.3d 323, 330 (3d Cir. 2015) ("[P]roximate cause is required in cat's paw cases . . . "). Proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged' and excludes links that are 'remote, purely contingent, or indirect.'" *Jones v. S.E. Pa. Transp. Auth*, 796 F.3d at 330 (quoting *Staub v. Proctor Hospital*, 562 U.S. at 419). The Court in *Jones* further stated, "proximate cause will not exist when the employer does not rely on the 'supervisor's biased report' in taking the ultimate adverse action." *Id.* at 331 (quoting *Staub v. Proctor Hospital*, 562 U.S. at 421).

As set forth above, Neustein lacks any evidence that the alleged discriminatory animus by Klippa was the proximate cause of his termination. Seibel found Neustein was dishonest based upon objective evidence after a comprehensive investigation. Accordingly, Neustein has failed to show direct evidence of discrimination based upon either religion or disability.

Under the McDonnell Douglas analysis, Neustein bears the burden of establishing a *prima facie* case of religious discrimination. *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 539 (3d Cir. 2006); *Atkinson v. LaFayette College*, 460 F.3d 447, 454 (3d Cir. 2006). In order to state a *prima facie* case of Title VII discrimination based on his religion, Neustein must establish that (1) he is a member of a protected class; (2) that he suffered some form of adverse employment action; and (3) "this action occurred under circumstances giving rise to an inference of unlawful discrimination that might occur when nonmembers of the protected class are treated differently." *Miller v. Keystone Blind Ass'n/Tpm*, 547 F. App'x 100,

102 (3d Cir. 2013). *See also See Goosby v. Johnson & Johnson Med.*, 228 F.3d 313, 318 (3d Cir. 2000); *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 410 (3d Cir. 1999).

To establish *a prima facie* case of disability discrimination under the ADA, Neustein must show "(1) that he is disabled within the meaning of the ADA, (2) that he is otherwise qualified for the job, with or without reasonable accommodations, and (3) that he was subjected to an adverse employment decision as a result of discrimination." *Tirk v. Dubrook, Inc.*, 673 Fed. Appx. 238, 241 (3d Cir. Pa. Dec. 27, 2016) (quoting *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 185 (3d Cir. 2010)). The third element requires a plaintiff to show causation. *See, e.g., New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 301 (3d Cir. 2007) ("[T]o make out a claim under the ADA, the plaintiff need only show that intentional discrimination was the but for cause of the allegedly discriminatory action.").

Neustein is unable to establish a *prima facie* case of either religious or disability discrimination. With respect to his religious discrimination claim, Neustein cannot show that he was terminated under circumstances giving rise to an inference of religious discrimination because there is no evidence that nonmembers of his protected class were treated any differently. He was terminated because Seibel determined that he violated PNC's Code of Ethics, and was no longer eligible for employment under PNC's Bonding Policy. *See* Def. SUMF ¶¶ 110 & 111. Moreover, Neustein fails to direct this Court to evidence that similarly situated employees outside of his protected class engaged in similar conduct, but received more favorable treatment.

With respect to his disability discrimination claim, Neustein cannot establish the third element, a causal connection between his termination and his alleged disability. Proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged' and excludes links that are 'remote, purely contingent, or indirect.'" *Jones v. S.E. Pa. Transp. Auth*,

796 F.3d at 330 (quoting *Staub v. Proctor Hospital*, 562 U.S. at 419). Clearly, Neustein's termination was not related to his disability. After an investigation, initiated by Neustein, Seibel determined that Neustein had violated PNC's Code of Ethics, and he was terminated. Moreover, PNC accommodated Neustein's disability. During the last quarter of 2010, PNC allowed Neustein to begin working from home because of his medical condition, and he continued to work from home until his termination in April of 2014. Def. SUMF ¶ 52.

Neustein, therefore, has failed to establish *prima facie* claim with respect to his allegations of discrimination. Neustein also alleges claims of retaliation. To establish a *prima facie* case of retaliation, Neustein must demonstrate that: (1) he engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action. *See Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001); *Kachmar v. Sungard Data Sys., Inc*., 109 F.3d 173, 177 (3d Cir. 1999). A causal link between protected activity and adverse action may be inferred from an unusually suggestive temporal proximity between the two, an intervening pattern of antagonism following the protected conduct, or the proffered evidence examined as a whole. *Id*.

Neustein's retaliation claims are unavailing because he cannot establish a causal connection between his internal complaints on January 15, 2014, or the filing of his Charge of Discrimination on January 30, 2014, and his termination in April 2014. After his complaint to the ERIC in January of 2014, PNC conducted a comprehensive investigation of his allegations. Those allegations were found to be false[4]. Temporal proximity provides an evidentiary basis

[4] Similar allegations were made against a supervisor in 2011. PNC investigated the allegations were determined to be "unfounded." Def. SUMF ¶¶ 42, 43 & 50.

from which an inference of causation can be drawn. *See Carvalho-Grevious v. Del. State Univ*., 851 F.3d 249, 260 (3d Cir. Del. Mar. 21, 2017). The Third Circuit has held that, on its own, an intervening temporal period of two days may raise the inference of causation but that a period of two months cannot. *See Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989); *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 759-60 (3d Cir. 2004). Here, Neustein's complaints were made three (3) months prior to his termination, thus failing to raise an inference of causation. Further, Neustein fails to establish an intervening pattern of antagonism following the alleged protected conduct. Accordingly Neustein's retaliation claim fails.

Notwithstanding, Neustein's failure to establish a *prima facie* case of religious or disability discrimination and/or retaliation, this Court will proceed with the McDonnell Douglas analysis, and shift the burden of production to PNC to articulate a legitimate, nondiscriminatory reason for terminating him. *Keller v. Orix Credit Alliance, Inc*., 130 F.3d 1101, 1108 (3d Cir. 1997); *Simpson v. Kay Jewelers*, 142 F.3d at 644 n.5. This burden is "relatively light" and is satisfied if the employer provides evidence, which, if true, would permit a conclusion that it took the adverse employment action for a non-discriminatory reason. *Tomasso v. Boeing Co.*, 445 F.3d 702, 706 (3d Cir. 2006) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994)); *see also Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 302 (3d Cir. 2012) (describing this step as a "minimal burden").

Here, PNC has established a legitimate, nondiscriminatory reason for Neustein's termination. The burden, therefore, shifts back to Neustein to show that PNC's articulated reasons for his termination are merely a pretext for discrimination. An employee may demonstrate that his employer's legitimate nondiscriminatory reason is pretextual by submitting evidence that allows a factfinder to either 1) disbelieve or discredit the employer's justification;

or 2) believe discrimination was more likely than not a "but for" cause of the adverse employment action. *Abels v. Dish Network Serv., LLC*, 507 F. App'x 179, 183 (3d Cir. 2012) (citing *Fuentes v. Perskie*, 32 F.3d at 764). *See also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177-178 (2009). Evidence undermining an employer's proffered legitimate reasons must be sufficient to "support an inference that the employer did not act for its stated reasons." *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3d Cir. 1995).

In order to discredit PNC's proffered justification under the first prong of *Fuentes*, Neustein must present evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies (sic), or contradictions" in the proffered reasons "that a reasonable factfinder could rationally find them unworthy of credence," and ultimately infer that PNC did not act for the asserted nondiscriminatory reasons. *Fuentes v. Perskie*, 32 F.3d at 765. If Neustein's evidence rebutting PNC's proffered reason permits a factfinder to conclude that such reason (or reasons) was either a "post hoc fabrication" or otherwise did not actually prompt the employment action, then summary judgment is inappropriate. *Fuentes v. Perskie*, 32 F.3d at 764.

Alternatively, Neustein must show that religious or disability discrimination was a "but-for" cause of PNC's decision to terminate him. To meet this burden, Neustein "cannot simply show that [PNC's] decision was wrong or mistaken." *Fuentes v. Perskie*, 32 F.3d at 765. The question is whether PNC was motivated by a discriminatory animus, not whether it was wise, shrewd, prudent, or competent. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531, 533 (3d Cir. 1992); *Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.), *cert. denied*, 502 U.S. 861 (1991). *See also Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 332 (3d Cir. 1995) ("[A]n employer may have any reason or no reason for discharging an employee so long as it is not a discriminatory reason.").

Again, Neustein is unable to direct this Court to any evidence that discredits PNC's proffered legitimate, nondiscriminatory reason for his termination. PNC thoroughly investigated Neustein's allegations against Klippa, and reasonably determined that he was dishonest in making those allegations. Moreover, Neustein cannot show that PNC subjected him to unlawful discrimination in the past, treated similarly-situated employees more favorably, or discriminated against other members of his protected class.

Neustein, therefore, fails to make a showing of pretext as he is unable point to evidence in the record which would allow a rationale factfinder to "believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause" of PNC's adverse employment action, *Burton v. Teleflex, Inc.*, 707 F.3d 417, 427 (3d Cir. 2013), or to "believe discrimination was more likely than not a 'but for' cause of the adverse employment action." *Abels v. DISH Network Serv., LLC*, 507 F. App'x at 183; *see also Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 644-45 (3d Cir. 1998) (the plaintiff must "point to evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that age was a motivating or determinative factor in the employment decision."). Accordingly, the Court finds that Neustein's religious and disability discrimination claims under Title VII, the ADA and PHRA fail as a matter of law.

Finally, Neustein alleges a hostile work environment. To prove a hostile work environment claim, Neustein must show, *inter alia*, that his workplace was "permeated with discriminatory intimidation, ridicule, and insult, sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). Factors which may indicate a hostile work environment include: "the frequency of the discriminatory conduct; its severity; whether it

is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 23 (1993). "[O]ffhanded comments and isolated incidents (unless extremely serious) are not sufficient to sustain a hostile work environment claim. Rather, the conduct must be extreme to amount to a change in the terms and conditions of employment." *Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005). In assessing the severity of alleged discriminatory treatment, "we consider the totality of the circumstances," and our analysis "must concentrate not on individual incidents, but on the overall scenario." *Id.* at 262-263.

The incidents described by Neustein, which have little, if any, objective support in the record, do not rise to the level necessary to sustain a hostile work environment claim. Neustein's hostile work environment claim, therefore, fails as a matter of law.

V. CONCLUSION

The Court finds that there are no material facts in dispute, Neustein is unable to show that that PNC violated his rights under Title VII, the ADA or the PHRA. Accordingly, PNC's motion for summary judgment shall be granted. An appropriate order will follow.

s/ DAVID STEWART CERCONE
David Stewart Cercone
United States District Judge

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(*Via CM/ECF Electronic Mail*)