IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FRANCIS V. PULLELLA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 03-711-SLR
	)	
SUPER FRESH FOOD MARKETS, INC.	)	
	)	
Defendant.	)	

Francis V. Pullella, Wilmington, Delaware. Plaintiff, pro se.

Judith M. Kinney, Esquire and Thomas J. Francella, Esquire of Reed Smith LLP, Wilmington, Delaware. Counsel for Defendant. Of Counsel: Don A. Innamorato, Esquire and Sherri A. Affrunti, Esquire of Reed Smith LLP, Princeton, New Jersey.

MEMORANDUM OPINION

Dated: July 28, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On July 14, 2003, plaintiff pro se Francis Pullella filed a complaint alleging claims of sexual harassment, sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, against his former employer, defendant Super Fresh Food Markets, Inc. (D.I. 1) In a subsequent filing, plaintiff also alleged discrimination on the basis of disability in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. (D.I. 86) The court has jurisdiction pursuant to 28 U.S.C. § 1331. Presently before the court are the parties' cross motions for summary judgment. (D.I. 129, 134) For the reasons stated below, the court will grant defendant's motion.

II. BACKGROUND

Plaintiff was hired by defendant on September 17, 2000, as a floating Journeyman Meat Cutter. (D.I. 131, ex. F at 15, 74, 103) As part of his employment orientation, plaintiff was informed of defendant's policies pertaining to workplace threats, violence and sexual harassment. (Id. at 116-17, 145; ex. F; ex. G)

Plaintiff's first assignment was at defendant's Newark, Delaware location ("Newark Store"), where he remained through October 2000. (Id., ex. F at 181) Subsequently, plaintiff was transferred to defendant's Wilmington, Delaware location

("Wilmington Store"), where he was employed through December 23, 2000. (Id. at 181)

A. Alleged Same-Sex Sexual Harassment

Plaintiff alleges that he was the target of same-sex sexual harassment by a non-management, co-employee who worked as a clerk in the Wilmington Store's deli department and whom plaintiff perceived to be gay. (Id. at 62-63, 172-73; ex. I at 400) The conduct plaintiff complains of included sexual statements and suggestive looks.[1] (D.I. 131, ex. F at 61, 178-79, 257; ex. I at 404) Plaintiff contends that he repeatedly complained about this alleged harassment during November 2000. (Id. at 29, 61-62, 182) Plaintiff asserts that, although his manager intervened and spoke with the alleged harasser, the conduct did not stop. (Id. at 29, 61-62, 182; D.I. 7 at 7; D.I. 86 at ¶ 4-5)

On at least one occasion, plaintiff engaged in a profanity-laden altercation with the alleged harasser. (D.I. 131, ex. F at 256-58; ex. I at 390-91, 403) In that altercation, plaintiff used offensive, profane and homophobic epithets toward that employee.[2] (Id., ex. F at 255-56; ex. I at 405-06) Following

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[1]In plaintiff's words, the alleged harasser looked at him "[t]he way you would look at a girl if you hadn't seen one in maybe ten years." (D.I. 131, ex. I at 404) These statements included: "I like your new meat helper;" "I can see why he's in the meat department;" and "I would like to wake up with my head on his chest." (Id, ex. F at 61, 178-79, 257)

[2]Plaintiff admits a disdain for persons that he perceives to be homosexual because of their alleged "unclean, unhealthy

this altercation, plaintiff took a sick leave for the remainder of that work day. (Id. at 255-56)

Defendant's deli manager confronted plaintiff regarding the altercation and requested that plaintiff apologize for his behavior. (Id. at 246-437, 254; ex. I at 330; D.I. 7 at ¶ 7) In response, plaintiff told the deli manager that she should not "stick her nose in someone else's business." (Id., ex. F at 246-47, 253-54; D.I. 7 at ¶ 7)

Plaintiff alleges that prior to the altercation, he attempted to contact defendant's toll-free number to lodge a complaint regarding the alleged work place harassment but "was never able to get an answer on that toll free line."[3] (D.I. 135 at 3) Plaintiff also asserts that he complained to the deli manager at the Wilmington Store but was allegedly told that "Management was not interested in correcting the situation."

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lifestyle" which he finds "offensive." (Id., ex. I. at 390-91; D.I. 135 at 3) Plaintiff states that his co-employee was "lucky [he] didn't punch his face in ... or break his neck" which, plaintiff says, he would have done but for concern about "what kind of diseases" the employee might have. (Id. at 390-92) Plaintiff asserts that same-sex sexual harassment is a "common problem for men who are good looking." (Id.)

[3]Plaintiff alleges in his answer to defendant's summary judgment motion that he contacted defendant through its toll-free number with respect to the sexual harassment. (D.I. 135 at 3) In his deposition, however, plaintiff alleges that he called the toll-free number in April 2002 in regards to being transferred from defendant's News Castle location ("New Castle Store"), not with respect to any sexual harassment that had occurred. (D.I. 132, ex. J at 421)

(Id.) Plaintiff also claims that he spoke on several occasions with the assistant store manager but that nothing was done. The events of November and December 2000 conduct are the sole basis of plaintiff's sexual harassment claims.[4] (Id., ex. F at 210-11)

B. Intrigue in the Meat Department

Between November and December 2000, while at the Wilmington Store, plaintiff was supervised by Meat Manager Allan Dubolino. (Id. at 63) Plaintiff contends that prior to December 2000, defendant's regional area manager asked him to fabricate derogatory reports about Dubolino's work performance to assist the regional area manager in his effort to terminate Dubolino. (Id. at 66-67; D.I. 7 at ¶ 7) Plaintiff alleges that when he refused to comply with this demand, he was told that he could be "jeopardizing [his] career." (D.I. 131, ex. F at 66-67; D.I. 7 at ¶ 7) Plaintiff refused to participate in this ruse. In December 2000, Dubolino was discharged by defendant.

Plaintiff does not know why the regional area manager or defendant allegedly wanted Dubolino fired nor the reason why Dubolino was discharged in December 2000. (D.I. 131, ex. F at 65, 67) Plaintiff does not believe that this incident was

[4]The male deli clerk was not the only employee of defendant's to express interest in plaintiff. Plaintiff alleges that a female employee also made sexual advances, including rubbing her body up against his. (D.I. 131, ex. F at 287) Apparently this behavior was not objectionable, as plaintiff did not file a complaint.

related to plaintiff's complaint's of alleged sexual harassment, although it occurred during the same time period. (Id. at 64-65)

C. December 2000 Layoff

Following Dubolino's termination, a new supervisor was assigned to the meat department at the Wilmington Store. (Id. at 63-64) Plaintiff believed that the new supervisor felt threatened by plaintiff because the supervisor himself was not a meat cutter. (D.I. 7 at ¶ 7) Plaintiff alleges that his new supervisor told him on December 23, 2000, that he would find a reason to terminate plaintiff because the supervisor believed that plaintiff had been involved in a plot to discharge Dubolino. (Id. at 29, 63-65)

Plaintiff contends he complained of the supervisor's alleged threat to the Wilmington Store manager. Immediately after reporting this threat to the store manager, a meeting was held with the store manager, the regional area manager and another employee. At that meeting, plaintiff was told that he would be laid off because he was not a union member and was escorted from the store.[5] (Id. at 60-61, 63-64, 65, 183-84)

[5]Apparently both parties were mistaken in December 2000 regarding plaintiff's union status. Plaintiff states that when asked in December 2000 whether he was "in the Union," he indicated to management that he did not know. (D.I. 135 at 4) Plaintiff also asserts that it was "the responsibility of Management to know whether or not Plaintiff was a Union member." (Id.) Plaintiff asserts that, as a union member, he could not be laid off during midweek and should have received a week's notice. (D.I. 135, ex. F at 154)

According to plaintiff, he was laid off as of December 23, 2000. Plaintiff alleges that his lay off was retaliatory because he had: (1) complained about Malone's threat; (2) refused to lie about Dubolino; and (3) previously complained of workplace sexual harassment. (Id. at 27-29, 60-61, 74-75) Defendant contends that the lay off was consistent with normal practices following the holiday season slowdown.

D. Defendant Rehires Plaintiff

In January 2001, defendant rehired plaintiff and he was assigned as a floating meat cutter to defendant's stores in the Philadelphia area. (Id. at 176, 184) Although he had a longer commute, plaintiff was retained in January 2001 at the same wage rate, benefits and hours as prior to his layoff. (Id. at 184-85) By assigning plaintiff to a floating schedule, plaintiff alleges that this constituted a demotion.[6]

In May 2001, plaintiff was transferred to defendant's Pennsville, New Jersey location ("Pennsville Store"), where he worked until early August 2001. (Id. at 184; ex. I at 361) Plaintiff does not allege any adverse employment actions occurred during the period between his rehire in January 2001 and August

[6]In plaintiff's briefs it is unclear whether he contends that this was retaliatory for his complaining of sexual harassment or whether it was discriminatory in that defendant did not handle plaintiff's complaint of sexual harassment in a similar manner as it would have handled a complaint filed by a woman. (D.I. 135 at 4)

2001. (Id., ex. F at 208-11)

E. Harassment Charges Against Plaintiff

In August 2001, an employee in the produce department at the Pennsville Store filed a harassment complaint against plaintiff. (D.I. 132, ex. L; id., ex. K at 854-55; D.I. 131, ex. F at 187-88) The complaint alleged both unwanted sexual advances and inappropriate physical contact by plaintiff. (D.I. 132, ex. L) Plaintiff denied the claims of harassment and alleged that the complainant had made sexual advances toward him. (D.I. 131, ex. F at 286-88; D.I. 132, ex. K at 856-65)

A second employee of defendant's filed a written complaint regarding alleged sexually harassing conduct by plaintiff directed toward her while plaintiff worked at the Pennsville Store. (D.I. 132, ex. M; D.I. 131, ex. F at 188-89) This second complainant's allegations were supported by statements by another employee. (D.I. 132, ex. N) According to her statement, plaintiff made sexually derogatory statements toward her and her then boyfriend. Although plaintiff denies that he harassed this second complainant, he admits that they had a conversation about her boyfriend's age and hair color. (D.I. 131, ex. F. at 188-89, 196) Plaintiff apologized to this second complainant for his behavior, although he denies being contrite.[7] (Id. at 189-90;

[7]During his deposition, plaintiff first denied knowing that the second complaint was filed. (D.I. 135, ex. F at 188) He quickly changed his testimony and indicated that he learned about

D.I. 132, ex. K at 877-78) Plaintiff maintains that both charges of sexual harassment against him were either withdrawn or proven false.[8] (D.I. 135 at 5)

Following receipt of the two written complaints and supporting witness statement, defendant's regional area manager contacted plaintiff at home and suspended him for two days; later, plaintiff was demoted. (D.I. 131, ex. F at 197, 228; D.I. 132, ex. K at 854-56) Plaintiff contends that his suspension and demotion were either the result of retaliation for plaintiff's refusal to lie about Dubolino or due to the regional area manager's favoritism for one of the complainants.[9] (D.I. 131, ex. F at 197-98, 231, 233, 235; ex. I at 352) Plaintiff also contends that this demotion constitutes sex discrimination and retaliation. (D.I. 132, ex. O)

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the second complaint after he filed suit. (Id.) Plaintiff then indicated that he had, in fact, been aware of the complaint but that it was illegitimate. (Id. at 189)

[8]The basis for plaintiff's belief are statements allegedly made to him by a union representative. (D.I. 131, ex. F at 198-99, 201)

[9]The court notes that plaintiff argues that he "has not alleged nepotism." (D.I. 135 at 11) This is directly contrary to statements made in his deposition. (D.I. 131, ex. I at 352)

F. Plaintiff's First Charge of Discrimination

On August 30, 2001, plaintiff filed charges of discrimination, sexual harassment and retaliation with both the Delaware Department of Labor ("DDOL") and the Equal Opportunity Employment Commission ("EEOC")(the "First Charge"). (Id. at 163-66; D.I. 132, ex. O) In the First Charge, plaintiff describes the sexual harassment, the retaliatory layoff in December 2000, the rehire and transfer in January 2001, the demotion and suspension in August 2001, and the alleged threats he received from management in November and December 2000. (D.I. 132, ex. O) Plaintiff asserts that he detailed every form of discrimination, harassment and retaliation that he perceived he experienced between his hiring in September 17, 2000 and the date of the First Charge, August 30, 2001. (D.I. 131, ex. F at 203-04)

Nearly nine months later, on May 14, 2002, plaintiff requested in writing that DDOL transfer his case to the EEOC so that he could obtain a right to sue letter. (D.I. 132, ex. P; D.I. 131, ex. F at 213-15) On May 31, 2002, the DDOL administratively closed its file on the First Charge in accordance with plaintiff's request. (D.I. 132, ex. Q) On June 25, 2002, the EEOC also closed its file and issued plaintiff a right to sue letter. (Id., ex. R) Plaintiff received that letter on or about June 25, 2002. (D.I. 131, ex. F at 217-18) Plaintiff admits to knowing that he had ninety days to file suit

in federal or state court, which expired on September 24, 2002. (Id.) Plaintiff states that he "made a conscious choice not to exercise his 'right to sue.'" (D.I. 135 at 6)

G. Work-Related Injury and Suspension

Plaintiff alleges that in or about August or September 2001, he sustained a work-related injury and left work at the Pennsville Store. (D.I. 131, ex. I at 355, 358; D.I. 7 at ¶ 11; D.I. 86 at ¶ 10) Plaintiff contends that he received a telephone call from defendant's regional area manager suspending plaintiff based upon defendant's position that plaintiff had left work without proper notice and the regional area manager's belief that a workers' compensation claim should not have been filed. (D.I. 132, ex. I at 355-56; D.I. 7 at ¶ 12) Plaintiff also contends that the manager's decision was influenced by plaintiff's December 2000 refusal to lie about Dubolino. (D.I. 131, ex. F at 236-37) Plaintiff subsequently filed a union grievance; the company agreed, without admitting liability, to pay plaintiff for one of the three days of his suspension. (D.I. 131, ex. I at 356-58)

In April 2002, following the conclusion of a workers' compensation leave and a period of light duty, plaintiff resumed full work and was assigned to defendant's New Castle Store. (Id. at 406-07) While working at the New Castle Store, plaintiff encountered the employee who he had previously accused of

harassment; the two men exchanged brief and polite salutations. Following this exchange, plaintiff states he was transferred from the New Castle Store based upon an alleged complaint made by that employee. (Id. at 407-08) Plaintiff does not know the substance of this alleged complaint nor who made the decision to transfer him. (Id. at 408-10; D.I. 132, ex. J at 419) There is no evidence that a formal complaint was actually ever filed against plaintiff. Plaintiff also does not allege he experienced any sexual harassment on that day. (D.I. 131, ex. F at 177; D.I. 132, ex. J at 417, 421)

Plaintiff was transferred to the Newark Store in early May 2002. (D.I. 131, ex. I at 320-21; D.I. 132, ex. J at 419) Plaintiff's wages, benefits and hours remained unchanged following his transfer, and his commuting distance was substantially the same. (D.I. 132, ex. J at 417-20)

H. Plaintiff's Wage Claim

In early May 2002, following his arrival at the Newark Store, plaintiff discovered that his paychecks had been misdirected to one of defendant's Philadelphia stores. Plaintiff became aware that his paycheck was missing on the Thursday prior to payday. He approached the bookkeepers regarding the location of his paycheck and they offered to assist him in locating it. Plaintiff, agitated by the absence of his paycheck, refused their offer and threatened to call the DDOL. (D.I. 131, ex. F at 93-

93; ex. I at 364, 376-66; D.I. 132, ex. K at 663-65, 673-75, 668-72)

Later that same day, plaintiff telephoned the Newark Store in hopes that someone would be there who could authorize a pay advance that night. (D.I. 132, ex. K at 676) Plaintiff reached a manager at that store and allegedly screamed at her regarding his missing paycheck.[10] (Id., ex. S)

The following day plaintiff approached the store manager at the Newark Store and requested a pay advance. Plaintiff asserts that he was denied a pay advance until his union, acting on his behalf, contacted the store manager. (D.I. 131, ex. I at 364; D.I. 132, ex. K at 678-79) Plaintiff received an advance of two-thirds his normal net pay later that day. (D.I. 131, ex. I at 378; D.I. 132, ex. K at 677) Although plaintiff asserts that his paycheck was misdirected to "harass" him, but admits that an administrative problem was also a likely cause.[11] (D.I. 131, ex. I at 369, 373)

On May 30, 2002, plaintiff filed a complaint alleging that

[10]Plaintiff contends that it was, in fact, defendant's employees who were yelling and using foul language. (D.I. 135 at 8)

[11]Over the course of his employment with defendant, plaintiff alleges that his paycheck was misdirected on approximately five occasions. (D.I. 131, ex. F at 97)

he was underpaid by $150 (the "Wage Claim").[12] (Id. at 362-66, 368-69; D.I. 132, ex. W; D.I. 86, ex. 12) The Wage Claim asserted that for the week of May 12, 2002 through May 18, 2002, he received $150 less than he had actually earned. (D.I. 132, ex. W) Plaintiff stated that his reason for filing the Wage Claim was to "fix [the store manager's] little red wagon." (D.I. 131, ex. I at 365-66) Following the filing of his Wage Claim, plaintiff was instructed by the Newark Store manager to bring all future paycheck related problems to him directly. (Id. at 37-78; D.I. 132, ex. J at 498-99) Plaintiff received the missing $150 a week after it should have been paid. (Id., ex. I at 369)

I. Plaintiff's Suspension

On June 13, 2002, plaintiff received his paycheck for the week including June 2, 2002. (D.I. 132, ex. J at 547) Upon review of the check, plaintiff incorrectly believed that the paycheck was for less than the appropriate amount, as it did not include pay for June 2.[13] (Id. at 547-49)

On June 14, 2002, plaintiff arrived for work at the Newark Store and approached the Newark Store bookkeeper. She was working at the customer service area in the front portion of the

[12]Plaintiff alleges that he did not received the correct amount in his paycheck on approximately five to seven occasions over the course of his employment. (D.I. 131, ex. F at 96; D.I. 132, ex. J at 491)

[13]Plaintiff latter admitted that his belief was in error as he did not actually work on June 2. (Id. at 547-49)

store, along with another employee. (D.I. 132, ex. J at 511-13; 552-554; ex. X at ¶ 3; ex. Y at ¶ 3) Plaintiff, agitated about his paycheck, demanded to know who was responsible for his missing pay. (Id., ex. X at ¶ 3; ex. Y at ¶ 3) The bookkeeper retrieved the time sheets and reported that the time sheets indicated that he had not worked on June 2, 2002. (Id., ex. X at ¶ 4; ex. Y at ¶ 4; ex. K at 658-59) Plaintiff became irate and, with a foul tongue, accused the bookkeeper of falsifying the time sheets. (Id., ex. X at ¶ 5; ex. Y at ¶ 6; ex. Z at ¶ 3) Plaintiff's yelling continued and he threatened various legal actions against defendant and its employees.[14] (D.I. 132, ex. X at ¶ 6; ex. Y at ¶ 6; ex. J at 556, 564-66; D.I. 131, ex. F at 35-37; Id., ex. J at 503, 564-65) Plaintiff's outburst and profane language were observed by more than one employee and in the presence and view of defendant's customers. (D.I. 132, ex. X at ¶ 6; ex. Y at ¶ 6; ex. BB at ¶ 5)

Shortly thereafter, the store manager arrived and was advised by two employees of plaintiff's behavior. (D.I. 132, ex. T at ¶ 8-11) The store manager confronted plaintiff regarding this conduct, the fact that the records indicated that he had not been scheduled for work on June 2, and that plaintiff has been

[14]Plaintiff asserts that he spoke in a loud voice because the bookkeeper was an "old lady," his hearing loss from his guitar playing, and that she was behind plexiglass during the conversation. (D.I. 132, ex. J at 564-566)

directed to bring any paycheck concerns directly to him, the store manager. (D.I. 132, ex. T at ¶ 12; ex. AA at 8-10) Plaintiff began yelling at the store manager and screamed that he was "messing with the wrong cowboy." (Id., ex. T at ¶ 12; ex. AA at ¶ 10) The store manager then informed plaintiff that he was suspended pending further notice. (Id., ex. T at ¶ 13; ex. J at 584-85; D.I. 131, ex. F at 35-36) As plaintiff left the store, he continued to yell profanities and indicated that he was fighting off the urge to strike the store manager. (D.I. 132, ex. J at 586, 590; ex. K at 620-21; ex. T at ¶ 15; ex. AA at ¶ 11; ex. Y at ¶ 9; ex. BB at ¶ 6)

Following plaintiff's departure, the store manager immediately telephoned defendant's human resources manager. (D.I. 132, ex. T at ¶ 16; ex. CC at ¶ 3) The human resources manager directed the store manager to have each employee write down their recollections of the events that day that transpired between plaintiff and defendant's employees at the Newark Store. (Id., ex. T at 17-18; ex. CC at 4; ex. X at ¶ 11; ex. Y ¶¶ 10-11; ex. Z at ¶ 5; ex. BB at ¶ 7; ex. AA at ¶ 12) After collecting the employee statements, the store manager forwarded them to the human resources manager for review. (Id., ex. T at ¶ 18-19; ex. CC at ¶ 4)

J. Union Grievance Meeting

Plaintiff's union filed a grievance over his suspension.

(Id., ex. CC at ¶ 5) Consistent with the collective bargaining agreement, a grievance meeting was held on July 3, 2002, to discuss plaintiff's suspension. (Id. at ¶ 6; ex. T at ¶ 19; ex. J at 595-96) Defendant's store manager, human resources manager, plaintiff and a union representative attended the meeting. Plaintiff denied yelling or engaging in the conduct described by multiple witnesses. (Id., ex. CC at ¶ 8; ex. T at ¶¶ 20-22; ex. J at 596-98) Plaintiff accused the store manager of smelling of whiskey, yelling at him and holding a grudge against plaintiff because plaintiff had worked with the store manager's wife at the Wilmington Store. (D.I. 132, ex. EE) At the conclusion of the meeting, the human resources manager stated that, consistent with defendant's policies, he would be conducting an investigation into the June 14, 2002 incident.

Following the completion of his investigation, the human resources manager determined that plaintiff had violated defendant's policies against threats in the workplace and had engaged in blatant insubordination. (D.I. CC at ¶ 11) For those stated reasons, the human resources manager, on defendant's behalf, terminated plaintiff's employment. (Id. at ¶ 12-15) Plaintiff was advised by letter on July 26, 2002 of the decision and that his suspension had been converted to a discharge effective that date. (D.I. 132, ex. CC)

K. Plaintiff's Second Charge of Discrimination

Following his termination, plaintiff filed a second charge of discrimination with the DDOL and EEOC on August 26, 2002 ("Second Charge"). (D.I. 131, ex. F at 242-44; D.I. 132, ex. HH) Plaintiff agrees that the Second Charge raises claims only pertaining to his 2002 suspension and termination and that the Title VII basis for his claims were sex and retaliation. (D.I. 131, ex. F at 244-45; D.I. 132, ex. HH) Specifically, plaintiff alleges that his suspension was the result of having "gotten smart" with the store manager's wife, retaliation for filing the Wage Claim, refusing to lie about Dubolino, and in retaliation for his previously filing the First Charge. (D.I. 131, ex. F at 244-45, 247-49; ex. I at 324-25; D.I. 132, ex. HH)

The DDOL dismissed plaintiff's Second Charge on February 28, 2003, based upon a finding of no reasonable cause to believe that Delaware law had been violated. (D.I. 132, ex. II; ex. J at 447-48) On April 17, 2003, the EEOC adopted the DDOL's findings and issued plaintiff a right to sue letter that same day. (D.I. 132, ex. JJ) Plaintiff filed the present complaint on July 14, 2003. (D.I. 1)

L. Plaintiff's Claim of Disability

Several months after filing the complaint in the present action, plaintiff filed a pleading titled "Opening Statement." (D.I. 86) In this self-styled "Opening Statement," plaintiff

alleged for the first time that he is disabled and that defendant's actions constituted discrimination and harassment within the meaning of the Americans With Disabilities Act, 42 U.S.C. 12101 et seq ("ADA"). Plaintiff alleges that he suffers from post traumatic stress disorder which, he claims, was "caused by a previous employer."[15] (D.I. 86 at 2, 5)

The event which plaintiff alleges resulted in this disorder are disclosed in a Social Security Disability report dated March 3, 2003. (D.I. 132, ex. GG) Plaintiff states that while working at another grocery store, he was harassed by a "homosexual, substance abusing meat cutter." (Id. at A-447) Plaintiff also stated that this employee would call plaintiff's name in a "sexual manner" and tried to "get [plaintiff] alone." (Id.) Further states that this co-employee threatened him with knives, after which plaintiff sought legal and medical assistance. (Id.)

Plaintiff alleges that defendant was made aware of plaintiff's purported disability in November 2000 when he first complained of sexual harassment. (D.I. 86 at 2) Plaintiff contends that he told the Wilmington Store assistant manager that he had post traumatic stress disorder and that he had sued his previous employer in regards to his alleged disorder. (Id.)

[15]The court notes that the record does not reflect whether plaintiff has ever actually been diagnosed with any mental health disorder, although plaintiff offered to stipulate to this condition. It would, of course, be plaintiff's burden to prove that he is a covered individual under the ADA.

III. STANDARD FOR SUMMARY JUDGMENT

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there

must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

With respect to summary judgment in discrimination cases, the court's role is "to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

IV. DISCUSSION

A. Plaintiff's ADA Claims

In his motion for summary judgment, plaintiff alleges discrimination on the basis of sex and disability, sexual harassment, and retaliation in violation of Title VII. It is undisputed that plaintiff did not raise any claims arising under the ADA until January 8, 2004. (D.I. 86) Plaintiff did not allege in either of his charges with the EEOC or DDOL that he

suspected that any of the alleged wrongful conduct by defendant arose from an actual or perceived disability. Although the court exercised its discretion to construe plaintiff's pleading as a supplement to his original complaint, in doing so, the court did not address the merits of whether plaintiff's ADA claims satisfied the statutory prerequisites for bringing suit; as the record plainly shows, plaintiff cannot meet this burden. (D.I. 92)

Title VII requires that, before bringing suit in federal or state court, a plaintiff must exhaust his administrative remedies. 42 U.S.C. § 2000e-5(e)(1). In the present case, the record is unequivocal that plaintiff never raised his claims of discrimination on the basis of disability with the EEOC or DDOL. Neither the First Charge nor the Second Charge make even a scant reference to disability, actual or perceived, as a factor in any of defendant's alleged misconduct. Consequently, to the extent plaintiff's claims are brought under the ADA, they are barred and defendant is entitled to summary judgment.

B. Statute of Limitations

42 U.S.C. § 2000e-5(f)(1) requires that a plaintiff bring suit under Title VII within ninety days of receiving a right to sue letter from the EEOC. The ninety day limit operates as a statute of limitations and is strictly construed. Irwin v. Department of Veteran Affairs, 498 U.S. 89, 94-95 (1990). In the

present case, there is no dispute that plaintiff's First Charge is well outside the time limit imposed by law. Moreover, plaintiff admits that he made the "conscious decision" to not bring suit with respect to those claims described in his First Charge because "it was more important that [he] retain his employment with Defendant."[16] (D.I. 135 at 6) He contends, however, that he should be permitted to pursue claims stemming from those facts based upon a continuing violation theory.

The continuing violation theory permits a plaintiff to "pursue a Title VII claim for discriminatory conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant." West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). This theory requires proof of two things: (1) that at least one prohibited act occurred during the filing period; and (2) the harassment is not an isolated or sporadic occurrence but part of a persistent, on-going pattern. See id. at 754 -755.

[16]The court notes that the timing of plaintiff's decision is irreconcilable with his own explanation. He received the EEOC right to sue letter on or about June 25, 2002, two weeks after having been suspended, ultimately his last. A little more than a week after receiving the EEOC letter, plaintiff attended the union grievance meeting on July 3, 2002. A month after receiving the EEOC letter, on July 26, 2002, plaintiff was notified by defendant that he was being permanently discharged for the events that occurred on June 14, 2002. Having just been fired by defendant, plaintiff's contention that he decided to not pursue his right to sue on the First Charge is not only unlikely, it is implausible.

The continuing violation theory does not apply to discrete acts of discrimination, such as adverse employment acts. See National Railroad Passenger Corp. V. Morgan, 536 U.S. 101, 114 (2002). A plaintiff can only rely upon the continuing violation theory for claims predicated upon a hostile work environment. Id. at 122.

To the extent plaintiff alleges a hostile work environment based upon his sex, his claim is nonetheless time barred. All of the events pertaining to plaintiff's hostile work environment, namely, that he was subjected to sexual harassment, occurred in November and December 2000. Plaintiff has alleged the occurrence of no conduct after December 2000 upon which a hostile work environment claim might rest. Consequently, to the extent plaintiff seeks to recover based upon conduct complained of in his First Charge, his claims are barred by the statute of limitations.

C. Title VII Sex Discrimination Claims

Discrimination claims under Title VII are analyzed under the framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff at bar must first establish a prima facie case of discrimination by proving that: (1) he is a member of a protected class; (2) he is qualified for his position; (3) he suffered an adverse employment action; and (4) either that (a) non-members of the protected class were treated more favorably than the plaintiff,

or (b) the circumstances of the plaintiff's termination give rise to an inference of discrimination. Id. at 802.

Once a prima facie case is established, the burden of production shifts to the defendant (the former employer) to produce a legitimate nondiscriminatory reason for the adverse employment action taken against the plaintiff. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). Because the burden of persuasion does not shift at this stage, the defendant's legitimate nondiscriminatory reason is not evaluated insofar as its credibility is concerned. Id.

Once a legitimate nondiscriminatory reason is proffered, the presumption of discrimination created by the prima facie case disappears. Id. At this point, the plaintiff must proffer sufficient evidence for the factfinder to conclude by a preponderance of the evidence that the legitimate nondiscriminatory reasons offered by the defendant were not true, but were a pretext for unlawful discrimination. "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" Id. In this regard, the prima facie case and the inferences drawn therefrom may be considered at the pretext stage, as the Supreme Court has explained that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the

employer's explanation." Id. at 147. Nevertheless, the ultimate question remains whether the employer intentionally discriminated. "[P]roof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.'" Id. at 147 (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 524 (1993)). "In other words, '[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.'" Id. (quoting St. Mary's Honor Center v. Hicks, 509 U.S. at 519).

Plaintiff has failed to establish a prima facie case of discrimination under Title VII. Plaintiff alleges discrimination on the basis of his sex. Plaintiff, however, is not a member of a protected class, nor has he shown that any similarly situated female employees received more favorable treatment with respect to any of the adverse employment actions. He, therefore, has not met his initial evidentiary burden of production. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)("The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue."). Plaintiff contends that a female employee was not disciplined for raising questions concerning her

paycheck; he has put forward no supporting affidavits, depositions or other competent evidence to support this claim. Ultimately, it is plaintiff's burden to show a prima facie case, including the production of admissible evidence to support his claims; he has not done so. Consequently, defendant is entitled to summary judgment as to plaintiff's claims of discrimination on the basis of sex.

B. Title VII Retaliation Claims

Plaintiff's final claim is that his suspension and termination were in retaliation for engaging in protected activity. To establish a prima facie case of retaliation under Title VII, a plaintiff must establish that: (1) he engaged in protected activity; (2) defendant took adverse employment action against him; and (3) a causal link exists between the adverse employment action taken by defendant and the protected activity engaged in by plaintiff. 42 U.S.C. § 2000e-3 (2004); Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997). Whether a particular action "constitutes retaliation depends on what a person in the plaintiff's position would reasonably understand." Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania, 162 F.3d 235, 236 (3d Cir. 1998).

Plaintiff alleges four basis for his retaliation claim: (1) filing the First Charge with the EEOC in August 2001; (2) filing the Wage Claim with the DDOL in May 2002; (3) being "smart" with

a store manager's spouse; and (4) refusing to lie about his former supervisor. With respect to the latter three bases, none of these are "protected activities" within the meaning of 42 U.S.C. § 2000e-2. Section 2000e-2 only prohibits discrimination for engaging in activities related to Title VII. Consequently, even if plaintiff were terminated for being rude to a store manager's spouse two years earlier, refusing to participate in an alleged scheme to fire another employee or filing a wage claim with the DDOL, such activities are not protected by Title VII.

Plaintiff's remaining theory is that his termination was the result of his having previously filed a claim with the EEOC. Defendant contends that the First Charge lacks temporal proximity to plaintiff's termination; the court disagrees. While it is true that plaintiff's filing of the First Charge in August 2001 and his discharge in July 2002 are nearly eleven months apart, during that period of time the First Charge was moving forward through the administrative process. Moreover, the EEOC issued a right to sue letter just a few weeks before defendant determined that it would terminate plaintiff. Although not an advisable legal strategy, it is possible that defendant terminated plaintiff in July 2002 as a result of receiving word that the EEOC had issued a right to sue letter. This undermines defendant's contention that there is a total absence of temporal proximity. If this were presented on a motion to dismiss, the

court would conclude that at least a claim had been stated.

Viewed under the summary judgment standard, however, taking into consideration the affidavits and depositions and drawing all reasonable inferences therefrom, the court finds the absence of any competent evidence to support a conclusion of retaliation. The overwhelming evidence before the court shows that defendant had legitimate non-discriminatory reasons for discharging plaintiff. Despite the generous latitude given to plaintiff in discovery, he has produced no evidence to suggest that defendant's motivations were anything other than that which it has stated. Consequently, the court finds that defendant is entitled to summary judgment on plaintiff's claims of retaliation.

VI. CONCLUSION

For the reasons discussed above, the court will grant defendant's motion for summary judgment and deny plaintiff. An order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FRANCIS V. PULLELLA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 03-711-SLR
	)	
SUPER FRESH FOOD MARKETS, INC.	)	
	)	
Defendant.	)	

O R D E R

At Wilmington this 28th day of July, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment is denied. (D.I. 134)

2. Defendant's motion for summary judgment is granted. (D.I. 129)

3. The Clerk of Court is directed to enter judgment in favor of defendant Super Fresh Food Markets, Inc. and against plaintiff Frances Pullella.

Sue L. Robinson
United States District Judge