

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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**FRANK H. LEA,**

**Plaintiff,**

**94 CV 1276 (NG)**

**v.**

**MEMORANDUM  
AND ORDER**

**AMTRAK/THE NATIONAL RAILROAD  
PASSENGER CORPORATION,  
Defendant.**

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**GERSHON, United States District Judge:**

This is an employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964, §§ 701 *et seq.*, 42 U.S.C. §§ 2000e *et seq.*, in which the plaintiff, Frank H. Lea, challenges his termination from employment with the defendant, Amtrak, on the grounds that Amtrak's decision to terminate him was motivated by racial and gender animus. Amtrak now moves for summary judgment. For the reasons set forth below, its motion will be granted.

**FACTS**

**A. Undisputed Facts.**

Lea, an African American male, was hired by Amtrak in 1976 as a Service Attendant. On an unspecified date prior to his 1986 termination, he was promoted to Lead Service Attendant, which position he held at the time of his termination. At all times relevant to this action, Lea was a member of a union, the Amtrak Service Workers Council ("ASWC").

As a Lead Service Attendant, Lea, with the help of an assistant, was charged with the operation of the food service car on the Amtrak train to which he was assigned. His primary responsibility was the provision of food and beverages to Amtrak passengers.

Lea compiled an extensive record of disciplinary violations during the course of his employment. The record before the court includes various reprimands and brief suspensions from employment for, *inter alia*, misappropriation of company supplies, lateness and discourtesy to passengers. In November 1984, at which time he was forty-two years old, Lea filed a complaint with the New York State Division of Human Rights and the Equal Employment Opportunity Commission (“EEOC”). In this complaint, Lea asserted that various disciplinary actions taken against him in the preceding thirteen months were motivated by discriminatory animus based on age and gender. In May 1986 Lea filed a second complaint with the Division of Human Rights and the EEOC, specifically challenging a thirty-day suspension imposed on him the preceding month. Amtrak stated that it had imposed the suspension because of Lea’s refusal to perform an assignment, but Lea charged that the suspension was in retaliation for his having filed his initial discrimination complaint.

By letter dated August 14, 1986, Amtrak, acting pursuant to its collective bargaining agreement with ASWC, directed Lea to appear for a formal investigation of charges that he had committed three serious disciplinary violations within a single week. Specifically, Amtrak charged that, on August 5 and 8, 1986, Lea failed to provide appropriate food service to passengers and that, on August 11, 1986, he became “loud and boisterous” in the presence of passengers while engaged in an argument with a fellow employee.

The investigation, at which Lea was represented by an ASCW official, consisted of an evidentiary hearing conducted before a hearing officer. After considering both the evidence presented at the hearing and Lea’s prior record of disciplinary problems, the hearing officer informed Lea, by letter dated September 12, 1986, that he would be “assessed discipline of

dismissal,” effective immediately.

Amtrak’s collective bargaining agreement with ASCW afforded Lea the opportunity to challenge his termination through two levels of appeal within the company. First, Lea appealed to the Division Manager of Amtrak’s Labor Relations Department, who denied his appeal in a letter dated February 6, 1987. Next, Lea appealed to Amtrak’s Director of Labor Relations, who likewise upheld his termination in a letter dated April 8, 1987. In addition, Section 3 of the Railway Labor Act, 45 U.S.C. § 153, establishes the Public Law Board, an independent tribunal established for the arbitration of labor disputes in the railway industry. Lea appealed his termination to the Public Law Board, which conducted a review of the record in Lea’s case, including the transcript of the September 8, 1986 investigatory hearing. In a written decision, the Public Law Board concluded that Lea’s termination was appropriate in the light of evidence that “painted a picture of an employee who was unconcerned about meeting his basic responsibilities and who was argumentative with colleagues.” At all stages of appellate review, Lea was represented by ASCW officials.

On November 18, 1992 the EEOC issued Lea a right to sue letter, which informed him that the Commission had determined that there was no probable cause to conclude that his termination was the result of discriminatory animus and which gave Lea ninety days to file a lawsuit in his own right. Lea did not file this action until March 17, 1994, more than fifteen months later.<sup>1</sup> In his complaint, Lea contends that he never received the original November 18, 1992 right to sue letter and was made aware of its existence only in February 1994, when he

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<sup>1</sup> Lea filed the complaint *pro se*, but he has been represented by counsel since at least May 1996.

made inquiries to the EEOC as to the status of his case. The complaint challenges only Lea's termination, on the grounds of race and sex discrimination, and makes no mention of alleged acts of discrimination and retaliation taking place prior to termination.

### **B. Prior Proceedings.**

Amtrak filed a motion to dismiss the complaint, which contended that Lea's action was 1) untimely because of his failure to sue within ninety days of the November 18, 1992 right to sue letter and 2) procedurally barred because Lea failed to amend his EEOC and Division of Human Rights complaints to include the charge that his termination was improperly motivated by discriminatory animus. In a memorandum and order, dated November 1, 1994, the Honorable David G. Trager, to whom this case was then assigned, denied the motion to dismiss. Judge Trager held that Amtrak had failed to provide convincing proof that Lea's declaration that he did not receive the original November 18, 1992 right to sue letter was untrue. Further, Judge Trager held that Lea could properly challenge his termination because that event was sufficiently related to the incidents Lea had raised in his EEOC and Human Rights Division complaints to conclude that these agencies considered the termination in the course of their investigation of these incidents.

On this motion, Amtrak does not ask the court to revisit the issue of whether Lea is procedurally barred from challenging his termination because of his failure to amend his complaints with the EEOC and the Human Rights Division. However, citing Lea's deposition testimony, which it contends is inconsistent with his claim of non-receipt of the original right to sue letter, Amtrak again raises the issue of the timeliness of Lea's complaint. Amtrak also

contends on this motion that Lea is procedurally barred from asserting race as a basis for his termination because he never raised this as a ground in his complaints filed with the EEOC and the Human Rights Division. Finally, Amtrak argues that it entitled to summary judgment on the merits. Assuming without deciding that the issue of timeliness should be decided in Lea's favor, the record amply demonstrates that a grant of summary judgment is warranted.

### DISCUSSION

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted “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 a judgment as a matter of law.” It is the movant's burden to demonstrate the absence of any genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), which are facts whose resolution would “affect the outcome of the suit under governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).<sup>2</sup> Demonstration of the absence of a material fact is defeated by the non-movant's presentation of evidence sufficient to establish “that a reasonable jury could return a verdict for the non-moving party.” *Id.* In making a determination as to whether a genuine dispute as to a material fact

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<sup>2</sup> In order to assist the court with the determination as to whether the moving party has met its burden in this regard, Local Civil Rule 56.1 provides that the movant shall submit a “short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried” and that the non-movant respond with “a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.” While Amtrak has complied with the rule, Lea has not. I have nevertheless considered the facts that Lea proffers in opposition to the motion.

exists, “all justifiable inferences” from the factual record before the court are to be drawn in favor of the non-movant. *Id.* at 255.

In a discrimination action such as this, it is important to note that

[a] victim of discrimination is . . . seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence . . . . Consequently, in a Title VII action, where a defendant’s intent and state of mind are placed in issue, summary judgment is ordinarily inappropriate.

*Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) (citations omitted). On the other hand, “[t]he summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion.” *Meiri v. Dacan*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985).

#### **A. Title VII Standards.**

In order to establish a *prima facie* case of discriminatory discharge under Title VII, a plaintiff must demonstrate

1) that he belongs to a protected class; 2) that he was performing his duties satisfactorily; 3) that he was discharged; and that his discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class.

*Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Once a *prima facie* case has been made, the employer must articulate a legitimate, non-discriminatory reason for having taken the action of which the plaintiff complains. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). Having done this, the burden shifts back to the plaintiff to prove that the allegedly legitimate reason is merely a pretext for discrimination. *Id.* at 804. However, as the

Supreme Court has more recently stated, “a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that the discrimination was the real reason.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (citation omitted).

Although the burden of proof that must be met to permit an employment discrimination plaintiff to survive a summary judgment motion at the *prima facie* stage is modest, *Chambers v. TRM Copy Centers Corp.*, 43 F.3d at 37, Lea cannot establish either that he was performing his job adequately or that his termination took place under circumstances that give rise to an inference of discrimination. Summary judgment in favor of Amtrak is therefore warranted.

#### **B. Insufficiency of Racial Discrimination Claim.**

Failure to exhaust administrative remedies is a ground for the dismissal of a Title VII claim. *See, e.g., Stewart v. I.N.S.*, 762 F.2d 193, 197-98 (2d Cir. 1985). Thus, a court may only hear Title VII claims “that either are included in an EEOC charge or are based on conduct subsequent to the EEOC charge that is reasonably related to that alleged in the EEOC charge.” *Butts v. New York City Dept. of Housing*, 990 F.2d 1397, 1401 (2d Cir. 1993). It is undisputed that neither of Lea’s two EEOC complaints charged that Amtrak had discriminated against him on the basis of race. The court cannot consider a claim that charges a type of discrimination wholly distinct from any type of discrimination that the plaintiff has raised in administrative charges. *See, e.g., Dennis v. Pan American Airways, Inc.*, 746 F. Supp. 288, 291 (E.D.N.Y. 1990) (court would not consider age discrimination claim where plaintiff had only asserted racial discrimination in EEOC charge). Lea’s claim of race discrimination must therefore fail. Therefore, the only ground of discrimination properly before the court is gender discrimination.

In any event, as will be seen, Lea cannot defeat summary judgment on the merits as to either type of discrimination.

**C. Inadequacy of Job Performance.**

Lea does not dispute that his record of employment with Amtrak was marked with numerous acts of indiscipline. Nor does he dispute that those acts for which he was ultimately terminated—the three acts of misconduct taking place within a single week of August 1986—occurred as Amtrak alleges. However, he contends that he was nevertheless adequately performing his job duties because, prior to his termination, he had neither been demoted nor had he yet been terminated. Not surprisingly, however, this stance is insufficient to support a Title VII claim. A record of poor job performance, particularly when unrebutted by affidavit or otherwise, demonstrates that a plaintiff has failed to satisfy the second prong of a Title VII *prima facie* case. *See, e.g., Sciarrino v. Municipal Credit Union*, 894 F. Supp. 102, 106-07 (E.D.N.Y. 1995).

**D. Absence of Inference of Discrimination.**

Lea attempts to cast the circumstances of his termination in a discriminatory light. First, he analyzes each of the three incidents of misconduct occurring in August 1986 that triggered Amtrak's termination of Lea. In each case, he argues, white and/or female Amtrak employees who were also involved in the incidents were not terminated. However, Lea is not similarly situated with respect to these employees because he has not shown that any of them were, like him, found to have been involved in three incidents of misconduct within a single week on top of

having accumulated a years-long record of misconduct. No inference of discrimination can therefore be drawn by contrasting their treatment to Lea's. *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) ("To be 'similarly situated,' the individuals with whom [the Title VII plaintiff] attempts to compare herself must be similarly situated in all respects.").

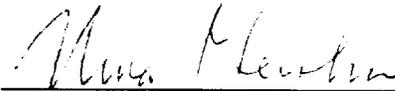
Next, Lea contends that an inference of discrimination arises from the fact that his termination followed his filing of two complaints of employment discrimination. However, this argument confuses a retaliation claim pursuant to 42 U.S.C. § 2000e-3(a) — which Lea has not raised in his complaint— with a discrimination claim. Even assuming that Lea had properly raised a retaliation claim, in order to make out a *prima facie* case as to such claim, he would have to show not only that he made discrimination complaints, of which Amtrak officials were aware, and that an adverse employment action was taken by Amtrak, but also that a causal connection exists between the making of the complaints and the adverse employment action. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995). There is no dispute that Lea can satisfy the first two elements, and the fact that his September 1986 termination took place less than four months after his filing of a second discrimination complaint with the EEOC is sufficient to meet the *de minimis* burden of demonstrating a causal connection at the *prima facie* stage. *Id.* But Lea cannot meet the rest of his burden. Amtrak has put forth considerable evidence in support of its claim that Lea was fired for a purely non-discriminatory reason, *i.e.*, his commission of three acts of indiscipline within a single week, in addition to numerous prior incidents of misconduct. Lea sets forth nothing to demonstrate pretext and thus, even if properly made, his retaliation claim must fail. *See Duffy v. State Farm Mutual Auto. Ins. Co.*, 927 F. Supp. 587, 597 (E.D.N.Y. 1996).

Finally, Lea relies upon *Baker v. National Railroad Passenger Corp.*, 1997 WL 53237 (S.D.N.Y. Feb. 7, 1997), where the court denied Amtrak's motion to dismiss a class action Title VII complaint brought by African-American Lead Service Attendants who work Amtrak's Eastern corridor routes. To begin with, Lea has not properly brought a claim of racial discrimination. Even if he had, Lea must establish that the circumstances specific to *his* termination raise an inference of discriminatory animus. He has not been able to do this and, accordingly, his complaint cannot survive Amtrak's motion for summary judgment.

#### CONCLUSION

Amtrak's motion for summary judgment is GRANTED and the complaint is dismissed.

**SO ORDERED.**



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**Nina Gershon**  
**United States District Judge**

**Dated: June 12, 1998**  
**Brooklyn, New York**