

District Office from August 15, 1997 until November 1998 when the INS terminated him. The off-duty discharge incident which eventually led to Plaintiff's termination occurred in the early hours of August 23, 1998.

Around 9:30 p.m. on Saturday, August 22, 1998, Plaintiff went to visit with friends and family at his cousin's house near Chester, Pennsylvania. He and his friends then drove to a liquor store in Delaware where Plaintiff purchased a bottle (fifth) of gin and a 22 ounce bottle of beer. Back at his cousin's house, Plaintiff and his friends drank the gin and beer and ate some food². At around 12:30 a.m., Plaintiff, with three friends, left his cousin's house and headed to Chester in a friend's car. Plaintiff took with him his duty bag and service weapon.³

At about 1:30 a.m., after the Plaintiff and the three friends stopped at the Second City Lounge in Chester, they parked their car and walked towards 3rd Street. During this time, Plaintiff wore his service weapon under his tank top and shorts. He stated he took his weapon with him because he did not want someone to break into the car and steal it. As they were walking, Plaintiff stepped into an alley between 3rd and 4th Streets to relieve himself. While in the alley, Plaintiff heard

²There is evidence that Plaintiff had consumed additional amounts of alcohol prior to his arrival at his cousin's house.

³Robertson stated he took his weapon with him in case he had to respond to a duty call.

a sound "like firecrackers." When the sounds became more distinctive, he quickly determined it was the sound of gunfire.

Plaintiff then moved away from the sound of the gunfire to take cover in a nearby Chinese restaurant. According to the Plaintiff, an individual who had barricaded himself against the corner wall of the Chinese restaurant, had a gun and was firing shots.⁴ Plaintiff drew his weapon and while Plaintiff was getting out of the way, the man who had barricaded himself against the corner wall came towards him and fired multiple shots at someone or something behind the Plaintiff. Plaintiff turned around and saw a man on the opposite side of the street who was in a car or leaning over the roof of the car, shoot in the direction of the Chinese restaurant. Plaintiff then fired two shots at the man near the car with his service weapon.

Plaintiff then went into the Chinese restaurant where he identified himself as an agent. He told the occupants to stay inside, and instructed the owner to call the police. According to Chester Police Sergeant Joseph M. Bail, who filed the department investigative report on the incident⁵, the Plaintiff

⁴ There were at least three individuals involved in the gun fight. Apparently, when the Plaintiff first came upon the man who had barricaded himself against the corner wall, this man was exchanging gunfire with a person across the street.

⁵ The Chester police department prepared the investigative report on the incident on the night of the incident but apparently did not do so until the INS made inquiries.

smelled of alcohol when the police arrived on the scene. They did not, however, test for his alcohol level. Plaintiff told them there was a gunfight. After the Chester police found a spent .40 cal. round near the restaurant, Plaintiff told the police he had fired. A check of the area revealed that no one was injured and there was no property damage.

According to the police, there were approximately 100 to 150 people in the area when the police arrived. Various other witnesses reported that there were 30 to 100 people in the area at the time of the shooting. According to the Plaintiff, there were, at most, only 5 people walking around near the Chinese restaurant where the shooting occurred.

Back at his cousin's house, sometime between 2:00 a.m. and 3:30 a.m., Plaintiff called his supervisor, Supervisory Special Agent ("SSA") Kevin F. O'Neil, and told him what happened. SSA O'Neil immediately sent another SSA to the Chester police department to find out what happened. About an hour later, he met with the Plaintiff in the District Office. The Plaintiff gave him a verbal report of the incident. SSA O'Neil stated that Plaintiff was upset by the incident but did not appear intoxicated. Although Plaintiff admitted he had consumed alcohol before the shooting incident, SSA O'Neil did not test the Plaintiff's alcohol level. At this time, SSA O'Neil retrieved the Plaintiff's service weapon, which was standard practice.

Pursuant to the INS Firearm Policy, the INS began an internal investigation into the matter. Based on the verbal report Plaintiff gave to SSA O'Neil, Deputy District Director M. Francis Holmes ("Deputy District Director") revoked the Plaintiff's authority to carry his service weapon. After further investigation, on October 15, 1998, the Deputy District Director proposed termination based upon a finding of INS Service Policy violation. Specifically, Plaintiff was found to have violated the following Service Firearm Policy (Administrative Manual 20.012):

Subsection 6. Guidelines for Carrying Firearms

- M. When acting under INS authority, Service officers shall not carry a firearm while under the influence of . . . intoxicating alcoholic beverages.
- N. Service officers are to act in a professional manner and therefore will not carelessly or unnecessarily display firearms. The authority to carry firearms carries with it an obligation and responsibility to exercise discipline, restraint, and good judgment in their use.

Subsection 7. Deadly Force Involving Firearms

- C. Firearms shall not be discharged under the following circumstances:
 - (3) In any situation where it appears likely that an innocent person will be injured.

Additionally, the INS relied on a document entitled "Notice to Service Officers of Personal Responsibility Under the INS Firearms Policy" which the Plaintiff signed on December 17, 1997.

On November 13, 1998, District Director J. Scott Blackmun terminated Plaintiff. The District Director stated the following:

In deciding to remove you from employment with the Service, I considered the nature and seriousness of your misconduct. By discharging your Service weapon toward an unknown target, you displayed not only a complete disregard for the Service's firearm policy, but even worse you placed a minimum of 30 innocent bystanders at risk for serious injury or death. Furthermore, by your own admission, you consumed at least six alcoholic beverages on the hours immediately proceeding you discharging your weapon.

All of your actions surrounding your misuse of your weapon have removed any confidence I have in your ability to perform as a Special Agent, or in any other position that would necessitate your carrying a firearm.

Plaintiff then contacted an Equal Employment Opportunity ("EEO") counselor on November 16, 1998. In June of 1999, he filed a formal complaint against the INS, alleging racial discrimination. The INS EEO office conducted an investigation and Plaintiff elected a final agency appeal which was denied on September 7, 2000. Plaintiff subsequently filed this civil action against the INS alleging racial discrimination.

Plaintiff's sole evidence of racial discrimination is his claim that three non-minority SAs who were also involved in weapon discharge incidents were not similarly terminated as he was. For privacy purposes, the Court will refer to these SAs as Agents A, B and C. All three incidents were investigated by the INS and described in INS's Report of Investigation of Accidental

Discharge.

Agent A was involved in an accidental discharge of his service weapon in 1997 while working with the Drug Enforcement Agency ("DEA"). Agent A was covering suspected felons while they were being removed from a car. After they were removed, the car, which was still in drive, started to roll towards a DEA agent who was standing between the felons' car and an unrelated car which was parked in front of the felons' car. The DEA agent was about to be pinned between the two cars, so Agent A, who was still holding his gun in his hand, jumped into the felons' car, attempting to change the gear. The gun went off by accident and three shots went off into the small area on the dashboard panel. The investigation revealed that Agent A saved the DEA agent from great bodily harm. As a result of the accidental discharge, the INS recommended Agent A receive additional training on the deadly force policy.

In 1996, Agent B and SSA O'Neil were attempting to arrest an aggravated felon. Agent B pulled his car next to the driver's side of the felon's car. SSA O'Neil pulled up behind the felon. While still inside the car, Agent B had his gun out to cover the felon. The felon attempted to pull away and twice struck Agent B's car. On impact, Agent B's gun went off accidentally. Agent B received training on the deadly force policy.

In 1994, Agent C injured himself when the gun he was

cleaning went off by accident. Agent C was at home drinking and handling his weapon in violation of INS policy. As a consequence, Agent C was proposed for a two day suspension but ultimately received an official reprimand instead.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith 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." Fed. R. Civ. P. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make

a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

To bring an action under Title VII, the Plaintiff must first establish a prima facie case of racial discrimination by a preponderance of the evidence as outlined under the McDonnell Douglas scheme. See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). A plaintiff may establish a prima facie case of discrimination by showing the following: (1) he is a member of a protected class; (2) he is qualified for the former position; (3) he suffered an adverse employment action; and (4) the circumstances of his termination gave rise to an inference of racial discrimination. Goosby v. Johnson & Johnson, 228 F.3d 313, 318-19 (3d. Cir. 2000).

A defendant may prevail on summary judgment where the defendant shows that the plaintiff can raise no genuine issue of fact as to one or more elements of his prima facie case. Levendos v. Stern Entm't, Inc., 860 F.2d 1227, 1229-30 (3d Cir. 1988). On the other hand, if the plaintiff shows that such genuine issues of fact do exist, summary judgment is inappropriate. For purposes of this Motion, the Court will

assume that the Plaintiff has met his burden on the first three elements of his claim. The only remaining issue is whether the circumstances of Plaintiff's termination rise to an inference of racial discrimination.

One of the ways in which a Plaintiff may show circumstances giving rise to an inference of racial discrimination is by presenting evidence that similarly situated individuals who are not members of the plaintiff's protected class received more favorable treatment. Mauli v. Division of State Police, 141 F. Supp. 2d 463, 478 (D. Del. 2001). Plaintiff here refers to three other non-minority INS SA's who were involved in improper discharge incidents but not terminated as he was. Defendant argues these incidents are not comparable to the incident which resulted in the Defendant's termination and therefore, Plaintiff has failed to meet his burden of establishing a prima facie case.

A review of the three cases and the incident which resulted in Plaintiff's termination reveals that the incidents involving Agents A, B and C are not comparable to the Plaintiff's situation. As such, Plaintiff has not provided evidence that similarly situated individuals were treated better than he. First, Plaintiff's discharge was an intentional shooting while the other three cases all involved accidental discharges. Furthermore, only Agent C was off duty. Agents A and B were on duty at the time of the accidental discharges. Agent A actually

saved a DEA agent from harm and Agent B was attempting an arrest. Furthermore, although Agent C had been drinking when his gun went off, he was at home and only endangered himself.

Plaintiff's improper conduct, on the other hand, was a severe and clear violation of INS Service Policy. Not only was Plaintiff's off-duty discharge intentional, but he had also been drinking prior to the shooting. It is not relevant whether Plaintiff was legally intoxicated at the time of the shooting. The policy clearly states that officers are not to carry firearms while under the influence of intoxicating alcoholic beverages. In addition, despite the varying testimonies regarding the number of people present at the scene of the shooting, there is no dispute that Plaintiff discharged his weapon in public. INS assumed there were at minimum thirty (30) people who were endangered as a consequence of Plaintiff's action. Even if the Court were to assume there were only five (5) other people near the Chinese restaurant at the time Plaintiff fired his weapon, as testified by the Plaintiff in his deposition, that is still five innocent persons that Plaintiff put at risk.

The undisputed facts reveal that the discharge incidents of Agents A, B and C are not comparable to the incident which led to the Plaintiff's termination. Defendant has shown that Plaintiff has failed to support his prima facie case of discrimination. Accordingly, Defendant's Motion For Summary Judgment is granted.

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

PAUL E. ROBERTSON, JR.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
JOHN ASHCROFT, U.S. ATTORNEY	:	
GENERAL,	:	
Defendant.	:	No. 00-5728

O R D E R

AND NOW, this day of January, 2002, in consideration of the Motion For Summary Judgment filed by the Defendant, John Ashcroft, U.S. Attorney General, (Doc. No. 5) and the Response of the Plaintiff, Paul E. Robertson, Jr., thereto, it is **ORDERED** that the Motion For Summary Judgment is **GRANTED**. Therefore, Judgment is **ENTERED** in favor of Defendant John Ashcroft, U.S. Attorney General, and against Plaintiff, Paul E. Robertson.

BY THE COURT:

JAMES MCGIRR KELLY, J.