

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

LEONARD L. KIMBLE
Plaintiff,

v.

MORGAN PROPERTIES
Defendant.

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| **CIVIL ACTION NO. 02-CV-9359** |
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MEMORANDUM AND ORDER

Tucker, J.

November ____, 2004

Presently before this Court is Defendant Morgan Properties' Motion for Summary Judgment (Doc. 30). For the reasons set forth below, upon consideration of Defendant's Motion and Plaintiff's Response (Doc. 41), this Court will grant in part and deny in part the Defendant's Motion for Summary Judgment.

BACKGROUND

From the evidence of record, taken in a light most favorable to the Plaintiff, the pertinent facts are as follows. Plaintiff, Leonard Kimble, is a 53 year-old African-American male, born on July 18, 1951. Defendant, Morgan Properties Group, is a corporation doing business in Pennsylvania, and is Plaintiff's former employer.

Plaintiff began work for Defendant on March 4, 1996, as a maintenance mechanic. On or about January 26, 1998, Plaintiff accepted a position change from a "live off premises worker" to a "live on premises worker" with residency privileges. Amended Complaint ¶ 9. Between March 1996 and January of 2000, Plaintiff received two performance evaluations. One evaluation was dated March 4, 1998, and one dated February 2, 1999. Both evaluations rated him as "very good," with scores of 83 and 82 out of 100, respectively.

Some time after the second evaluation, Plaintiff applied for the position of assistant maintenance supervisor, but the promotion was given to Gregory Bailey, a white male. In January of 2000, Plaintiff complained that Bailey was given the promotion over Plaintiff, alleging that Bailey was less qualified and less experienced.¹

Plaintiff alleges that in March of 2000, he came under the supervision of James DeCray, a white male, who subjected him to different terms, privileges, benefits and conditions of employment because of his race, age and in retaliation for engaging in protected conduct. In that same month, plaintiff received another performance evaluation. This time, he was given a performance rating of 71.5 out of 100, which is designated as "good" under the Defendant's evaluation system.

In response to this evaluation, Plaintiff wrote a rebuttal letter challenging the validity of his lowered evaluation grades citing work related activities, which he believed merited a higher performance rating. In this rebuttal, Plaintiff claims that the reasons for his lowered performance evaluation ratings were (1) refusal to train another technician and (2) "interpersonal problems" between Plaintiff and his two supervisors, James DeCray and Amy Weisberg.²

¹Plaintiff states that he complained to Pam Thomas, the Human Resources Director for Morgan Properties, that he believed he was not considered for the supervisory positions due to his race. Defendant states that it has no record of Plaintiff's application for a supervisory position.

²It should be noted that there were at least two resident complaints made during the summer of 1999 concerning Plaintiff's unsolicited comments to residents concerning their air-conditioning (Defendant alleges that there were three complaints, however, only two are documented in Defendant's Statement of Material Facts (000014-000016)). It is clear that the parties have had some what of a tumultuous relationship. With each warning given, there is a response from Plaintiff, and in some instances, additional responses from Defendant, all in writing. In a few, Plaintiff alleges that he is being harassed, that defamatory comments are being made concerning him, and that despite his professionalism, his supervisors have a personal

Despite this, on May 30, 2000, Plaintiff was offered a promotion to Assistant Supervisor at Defendant's property, "Brookside," located in Lansdale, PA. One of the responsibilities of the Assistant Supervisor, Plaintiff's new position, was to be on-call for the location assigned and to be within 15 minutes of the property when on duty. Plaintiff, at the time of promotion, was a resident of one of Defendant's properties in King of Prussia, PA. This was located over 15 minutes away from his newly assigned property in Lansdale. Defendant gave Plaintiff information about three apartments located near Brookside that would be available by July 5, 2000, for move in. Plaintiff informed Defendant that he would not be moving into any of Defendant's properties and would attain his own accommodations. Defendant explained in a written memorandum:

"I do not expect you to be able to participate in the on-call rotation at Brookside [the Lansdale location] until you are relocated to that area. I will be speaking with Rick [the maintenance supervisor] Thursday regarding an official start date for you at the property. I do realize there will be a period of transition over the next several weeks, and will assist in any way I can to help this go as smoothly as possible."

(Defendant's Exhibit, 000031).³

vendetta against him.

³An attached exhibit numbered 000035 purports to be typewritten notes that were allegedly handwritten by Karen McAlonen immediately following conversations that Karen McAlonen had with Plaintiff between May 30, 2000, and June 8, 2000, concerning his promotion. An entry dated June 1, 2000, states that Plaintiff was told that if he chose not to reside in one of the apartments owned by Defendant, that he would still have to be in Lansdale by July. It is alleged that Plaintiff agreed to be on-call while the maintenance supervisor was away in June and then would have to begin participating regularly in the on-call rotation in July. Although this document was allegedly handwritten by McAlonen immediately following the May 30, 2000, to June 8, 2000, conversations, it is important to note that this document is actually signed and dated November 22, 2000, and appears to have been prepared for the litigation, as it was faxed to the attorney assigned to this case on the same day that it was signed and dated.

On July 1, 2000, DeCray alleges that Plaintiff refused to accept an on-call assignment. Plaintiff was given a verbal warning that if he again refused an on-call responsibility, he would be terminated. On July 11, 2000, Plaintiff was given another on-call assignment which Plaintiff refused to accept.⁴ Subsequently, Plaintiff was terminated for refusing the responsibility.

Plaintiff alleges that he was not discharged for his insubordination, but terminated due to his race and age and in retaliation for his complaints of discrimination.

LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L. Ed.2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L. Ed.2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be

⁴From the record provided, this fact is somewhat unclear. Plaintiff does not specifically say whether he was again asked to perform an on-call assignment, but merely states that he was discharged on July 11, 2000. Defendant, on the other hand, claims that he was given a second on-call assignment and that when he refused to accept the assignment the second time, he was then terminated.

met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual 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, 477 U.S. at 322, 106 S. Ct. at 2552-53. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against opponent, even if the quality of the movant’s evidence far outweighs that of its opponent.” Big Apple BMW, Inc. V. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513-14.

DISCUSSION

Plaintiff brings the following claims pursuant to the Civil Rights Act of 1866 §1981 (“§1981”), Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §2000, the Age Discrimination in Employment Act, 29 U.S.C. §621, and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. C.S.A. §951.

Defendant claims an entitlement to summary judgment on each count of the Plaintiff’s complaint. Specifically, Defendant contends that Plaintiff cannot succeed on his claims for discrimination because Defendant had a legitimate, non-discriminatory reason for giving lowered

performance evaluations and for firing him.

The Court will review each claim in turn.

A. Racial Discrimination Claims

In order to sustain a Title VII, §1981 or PHRA claim, Plaintiff must establish a prima facie case of racial discrimination. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973). To prove a prima facie case of race discrimination, Plaintiff must show the following elements: (1) he is in a protected class, (2) he is qualified for the position, (3) he suffered adverse employment action, (4) and that non-members of the protected class were treated more favorably than Plaintiff. Gaspar v. Merck and Co., Inc., 118 F. Supp. 2d 552, 555 (E.D. Pa. 2000); McDonnell, 411 U.S. at 802.

If Plaintiff successfully proves a prima facie case of race discrimination, then the burden shifts to the Defendant, who may rebut the claim with a legitimate, nondiscriminatory reason for the adverse employment action. Gaspar, 118 F. Supp. at 555. If Defendant provides such a reason, the burden shifts back to the Plaintiff to prove that the reason is merely a pretext for discrimination. McDonnell, 411 U.S. at 802; Gaspar, 118 F. Supp. at 556. To fulfill this burden, the Plaintiff must produce evidence from which the factfinder could reasonably infer that the discriminatory reason was likely the motivating factor of the employer's actions, or from which the factfinder could reasonably disbelieve the defendant's articulated reasons. Gaspar, 118 F. Supp. at 556; See also Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1993) (noting that a Plaintiff must produce evidence from which the factfinder could infer that the Defendant's articulated reasons are "unworthy of credence"). This evidence may be direct or

circumstantial. Gaspar, 118 F. Supp. at 556; Ezold, 983 F.2d at 531.

The Plaintiff is able to establish the first three elements of the prima facie case for discrimination, but is unsuccessful in his attempt to fulfill the last element. The fourth element of the analysis requires Plaintiff to show people in other classes were treated more favorably than Plaintiff under the same circumstances, giving rise to the inference of discrimination. “To be deemed ‘similarly situated,’ the individuals with whom a plaintiff seeks to be compared must ‘have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” Dill v. Runyon, 1997 WL 164275, *4 (E.D. Pa. Apr. 3, 1997) (quoting Anderson v. Haverford College, 868 F. Supp. 741, 745 (E.D. Pa. 1994)). Plaintiff alleges that a white male employee of the Defendant, Bernard White, refused to perform numerous on-call assignments, but unlike Plaintiff, was not discharged for his insubordination. Amended Complaint ¶¶47-48. However, Plaintiff has failed to bring forth any credible evidence other than accusations and bald assertions to support this allegation.⁵ Therefore, there is no issue of material fact in dispute for a jury to decide. Thus, this Court finds that the Plaintiff has failed to make out a prima facie case of racial discrimination and will grant Defendant’s motion for summary judgment on Plaintiff’s racial discrimination claims.

⁵The Amended Complaint in this case was filed on June 6, 2003. This Court granted Plaintiff’s Motion for Extension of Time to Complete Discovery on November 25, 2003. This Court then granted Plaintiff’s former counsel’s Motion for Leave to Withdraw Appearance on February 18, 2004, in part due to Plaintiff’s decision not to take any depositions of decision makers, witnesses or alleged discriminating officials of Defendant. The Court’s order afforded Plaintiff sixty days to retain new counsel. To date, Plaintiff has not retained new counsel, nor has he submitted any deposition transcripts.

B. Age Discrimination Claims

To establish a prima facie case of age discrimination under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §621 and PHRA, the Plaintiff must show: (1) that he is a member of the protected class, that is, that he was over forty years of age, (2) is qualified for the employment position, (3) suffered an adverse employment decision, and (4) in the case of demotion or discharge, was replaced by a sufficiently younger person to create an inference of age discrimination. 29 U.S.C. §631(a)(2); Simpson v. Kay Jewelers, 142 F.3d 639, 644 n.5 (3d Cir. 1998). The burden shifting approach previously noted in the discussion of racial discrimination⁶ is then applied in age discrimination cases once the Plaintiff is able to establish a prima facie case.

Again, Plaintiff fulfills the first three elements necessary to make a prima facie showing of age discrimination, but fails to fulfill the last. Plaintiff alleges that age was a factor in his termination because he was replaced by a younger person. Amended Complaint ¶83. However, Plaintiff is again unable to produce any credible evidence to support his claim. Plaintiff also fails to submit any evidence indicating the age of the “younger person.” Thus, the Plaintiff fails to make out a prima facie case of age discrimination. Consequently, this Court will grant the Defendant’s motion for summary judgment on Plaintiff’s age discrimination claims.

C. Retaliation

To show retaliation under Title VII, §1981 and the PHRA, Plaintiff must demonstrate that: (1) he engaged in a protected activity; (2) Defendant took an adverse employment action

⁶Racial Discrimination, *infra* p. 6-7.

after or contemporaneous with his protected activity; and (3) a causal link exists between his protected activity and the Defendant's adverse action. Weston v. Commonwealth of Pa., 251 F.3d 420 (3d Cir. 2001); Delli v. CNA Ins. Co., 88 F.3d 192, 198 (3d Cir. 1996). Making an informal complaint to management about discriminatory employment practices is a protected activity. Barber v. CSX Distrib. Serv., 68 F.3d 694, 702 (3d Cir. 1995). See also EEOC v. L. B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997) (holding that plaintiff engaged in protected activity when she informed management that she intended to file a sex discrimination charge). This Court finds that the Plaintiff engaged in a protected activity when he brought his complaint of discrimination to management in January of 2000.

Furthermore, this Court finds that Defendant took an adverse employment action against Plaintiff when he was terminated on July 11, 2000. A tangible, adverse employment action is a significant change in employment status, such as hiring, firing, failing to promote, or reassignment. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997); Tupper v. Haymond & Lundy, 2001 WL 936650, *3 (E.D. Pa. Aug. 16, 2001).

Lastly, this Court finds that there is an issue of material fact as to whether the third prong of the Plaintiff's prima facie case of retaliation has been fulfilled, that is, whether there is a causal link between the Plaintiff's complaints and his termination.⁷ In this case, timing alone

⁷Plaintiff also alleges that his lowered performance rating and non-promotion were adverse employment actions. Although these actions considered in a vacuum appear to rise to the level of an adverse employment action, resident complaints about Plaintiff, the lack of evidence that Plaintiff had applied for a promotion and the fact that Plaintiff was later given a promotion, challenge the notion that these were adverse employment actions with a causal link to his protected activity.

between the protected activity and the adverse action is not enough to establish a causal link.⁸

However, “timing plus other evidence may be an appropriate test where the temporal proximity is not so close as to be ‘unduly suggestive.’” Estate of Smith v. Marasco, 318 F.3d 497, 513 (3d Cir. 2003) (quoting Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000)).

Therefore, Plaintiff has succeeded in making a prima facie case for retaliation.

Once Plaintiff shows a prima facie case of discrimination, the Defendant may still make a viable claim for summary judgment by showing a legitimate reason for taking an adverse employment action against an employee. Fuentes v. Perksie, 32 F.3d 759, 764 (3d Cir. 1994). Here, Defendant claims that it had a legitimate reason for terminating Plaintiff. Defendant states that Plaintiff refused to perform certain duties that were part of his job description, namely, to take “on-call” shifts. Defendant avers that Plaintiff was warned and given two opportunities to accept the “on-call” shifts prior to being terminated. Defendant, therefore, has succeeded in articulating a legitimate, non-discriminatory reason for Plaintiff’s termination.

The burden then shifts back to the Plaintiff to show there is sufficient evidence from which a jury could conclude that the purported reasons for the adverse employment action were actually a pretext for retaliation. The Plaintiff must provide evidence from which a fact-finder could reasonably either: (1) disbelieve the employer’s legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of

⁸Approximately six months elapsed between the Plaintiff’s protected activity and the Defendant’s alleged adverse action. “Even if timing alone could ever be sufficient to establish a causal link, . . . the timing of the alleged retaliatory action must be ‘unusually suggestive’ of retaliatory motive before a causal link will be inferred.” Estate of Smith v. Marasco, 318 F.3d 497, 512 (3d Cir. 2003) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)).

the employer's action. Fuentes, 32 F.3d at 764.

Here, there is an issue of material fact as to whether Defendant discharged Plaintiff because he refused to accept the "on-call" shifts, or if this is merely cited as an excuse to discharge him for complaining about discrimination. Plaintiff has provided evidence that he was given permission not to participate in the on-call shifts until he relocated to the area. At the time that he declined the on-call shift and was terminated, he had not yet relocated. Therefore, it is for the jury to decide whether this was a valid reason to terminate Plaintiff, or if Plaintiff was in fact excused from the on-call shifts, and Defendant merely used this as an opportunity to fire him in retaliation for his complaints.

Moreover, this Court notes that the Third Circuit urges special caution in granting summary judgment to an employer when its intent is at issue, particularly in discrimination and retaliation cases. Dingle v. Centimark Corp., 2002 WL 1200944, *7 (E.D. Pa. June 3, 2002) (citing Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 321 (3d Cir. 2000)). Thus, the Defendant's motion for summary judgment on the retaliation count is denied.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted in part and denied in part. Judgment is entered in favor of the Defendant and against the Plaintiff for summary judgment on Count II for racial discrimination and Count III for age discrimination. Count I for retaliation remains.