

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

BERNARD CURETON : CIVIL ACTION
 :
 v. :
 :
 SUN COMPANY, INC. (R&M) : NO. 96-4804

MEMORANDUM AND ORDER

BECHTLE, J.

OCTOBER , 1997

Presently before the court in this race discrimination action is defendant Sun Company, Inc. (R&M)'s ("Defendant") motion for summary judgment and plaintiff Bernard Cureton's ("Plaintiff") response thereto. For the following reasons, the motion will be granted.

I. BACKGROUND

Plaintiff brought this action pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5; the Civil Rights Act of 1991, 42 U.S.C. § 1981; and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Con. Stat. Ann. § 955, alleging that Defendant terminated his employment because of his race, and that Defendant violated its policy of equal treatment. (Am. Compl. ¶¶ 7-9; 20.)¹ The facts construed in the light most favorable to Plaintiff are as follows.

1. The court has jurisdiction over Plaintiff's civil rights claims because they arise under the laws of the United States. 28 U.S.C. § 1331. It exercises supplemental jurisdiction over his state law claims under 28 U.S.C. § 1367.

Plaintiff is a black male who began working for one of Defendant's predecessor corporations, the Atlantic Refining Company, in 1966. (Cureton Dep. at 7-8.) Plaintiff worked his way up through the company to the position of shift foreman and was given the same position with Defendant when it acquired the Atlantic Refining Company in 1989. Id. at Ex. 1. Plaintiff was promoted to a supervisory position which he held when his employment was terminated.

On October 16, 1993, Plaintiff was involved in an altercation with a white employee who had directed a racist remark at Plaintiff. Plaintiff threw a chair at the wall, the chair bounced back and then hit the employee. The employee was treated at the hospital for his injuries. (Mem. Opp. Summ. J. at 4.) Both Defendant and the employee were given written warnings. Plaintiff's warning included the following language: "Please be advised that any other violations of the Rules of Conduct will result in further disciplinary action, up to and including termination." (Ex. 4 Pl.'s Mem. Supp. Summ. J.) In addition to the warning, Plaintiff was also transferred. Id.

In February 1994, a white employee posted around Defendant's premises copies of a newspaper article detailing Plaintiff's recent arrest for drug and weapon charges. (Kohn Dep. at 35-36; Cureton Dep. at 67-69 & Exs. 5, 6.) On February 26, 1994, Defendant, through Plaintiff's immediate supervisor, asked Plaintiff to submit to a drug test pursuant to Defendant's Substance Abuse Policy. (Kohn Dep. at 38-39.) Plaintiff

submitted to the test and Defendant informed him that the test results were positive for marijuana. (Ex. E Def.'s Mem. Supp. Summ. J.) On March 11, 1994, Defendant terminated Plaintiff's employment, citing the drug test results as the reason for the termination of his employment. (Def's Mem. Supp. Summ. J. at 4.) On February 8, 1995, Plaintiff filed a charge of race discrimination with the Equal Employment Opportunity Commission ("EEOC"). On April 17, 1996, he received a Notice of Right to Sue letter from the EEOC.

On July 3, 1996, Plaintiff commenced this civil action. On September 17, 1996, Defendant filed an answer. On March 31, 1997, Plaintiff filed an Amended Complaint. Defendant filed this motion for summary judgment on April 22, 1997. On May 15, 1997, Plaintiff filed a response.

II. LEGAL STANDARD

Summary judgment is proper "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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court must draw all justifiable inferences in the light most favorable to the non-moving party.

Id. If the record thus construed could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In response to a motion for summary judgment, the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings, but must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322. If the non-moving party does not so respond, summary judgment shall be entered in the moving party's favor because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 322-23.

III. DISCUSSION

A. Title VII

Under Count One of the Complaint, Plaintiff alleges that Defendant discriminated against him based on his race, in violation of Title VII. He claims Defendant did not afford him the Employee Assistance Program offered to white employees, and that if he had been white, his employment would not have been terminated.

In McDonnell Douglas Corp. v. Green, The United States Supreme Court set forth a three-step framework for the presentation of proof in Title VII discriminatory treatment

cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

First, a plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).

Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the action. Id. at 253 (quotation omitted). Third, if the defendant satisfies this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but a pretext for discrimination. Id. A plaintiff proves that the explanation is a pretext if he or she shows "both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). The plaintiff has the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. Burdine, 450 U.S. at 253.

The United States Court of Appeals for the Third Circuit has applied the McDonnell Douglas framework to motions for summary judgment. It has held that a plaintiff who has made a prima facie case may defeat a summary judgment motion either by pointing to some evidence "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v.

Perskie, 32 F.3d 759, 764 (3d Cir. 1994). Id. More specifically,

To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the nonmoving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for [the asserted] nondiscriminatory reasons."

Id. at 764-65 (citations and footnote omitted).

(1) Prima Facie Case

To establish a prima facie case, a plaintiff must show that (1) he is a member of a protected class, (2) he is qualified for the position, (3) adverse action was taken against him, and (4) there is evidence that would allow the inference of improper motivation. McDonnell, 411 U.S. at 792. Plaintiff has shown that he is black, he was qualified for the position, Defendant terminated his employment, and he has presented evidence that would allow the inference of racism and, therefore, improper motivation. The court is satisfied that Plaintiff has presented a prima facie case.

(2) Articulated Non-Discriminatory Reason

Defendant contends that it terminated Plaintiff's employment because of "his positive test for marijuana following a recent discipline for a work rule violation." (Mem. Supp. Summ. J. at 7.) Defendant warned Plaintiff after his altercation that any

further violations might result in the termination of his employment. Following the warning, Defendant became aware of Plaintiff's arrest on drug charges, and asked him submit to a drug test.² He tested positive for marijuana. Defendant's policy manual states that this is an offense for which it may terminate his employment. Defendant has articulated legitimate, nondiscriminatory reasons for terminating Plaintiff's employment.

(3) Pretext

The burden now shifts back to Plaintiff to show that Defendant's proffered reason is a pretext for racial discrimination. He must point to some evidence, either direct or circumstantial, from which a factfinder could (1) reasonably disbelieve the employer's articulated legitimate reason; or (2) reasonably believe that an invidiously discriminatory reason was more likely than not a motivating or determinative cause of Defendant's action. Fuentes, 32 F.3d at 763-64. Showing that the decision was unwise or imprudent is not sufficient. Id. at 765.

Plaintiff contends that white employees who failed the drug test were sent to a drug rehabilitation facility, and that because of his race, his employment was terminated instead.³

2. Defendant "may require all employees to submit to a substance test at such time as reasonable cause warrants such testing." This is the so-called "for cause" testing. (See Sun Policy, Procedures & Guidelines, Ex. 9 Def.'s Mem. Supp. Summ. J.)

3. Plaintiff also argues that because there was only one other incident in his past, he should have been given the opportunity
(continued...)

(Cureton Dep. at 90-99.) He presents no evidence to support his contention that similarly situated white employees--supervisors with previous disciplines who were given "for cause" tests and had positive results--were given the opportunity to rehabilitate. Defendant's evidence refutes Plaintiff's bald contention.⁴

Plaintiff, in support of his position, relies on the testimony of David Rineer, one of Defendant's managers who testified that "generally line management and the Human Resources Department would be involved in a decision to terminate employment or offer rehabilitation."⁵ (Rineer Dep. at 23-24.) That statement alone is of no assistance to Plaintiff. First,

3. (...continued)
for rehabilitation. (Pl.'s Mem. Opp. Summ. J. at 9.) That is a business judgment decision not appropriate for consideration by this court.

4. In discovery, Defendant provided Plaintiff with a list of other employees given "for cause" drug tests and the results. They included (1) a black male hourly employee without previous disciplines, who entered a rehabilitation program; (2) a white male salaried supervisor without prior disciplines who entered rehabilitation, tested positive again and was terminated; (3) a black male hourly employee with prior disciplines who refused to take the test and was terminated; (4) a white male with prior disciplines who was permitted to resign under threat of termination.

All union employees were permitted to enter rehabilitation pursuant to the terms of the collective bargaining agreement. However, those that committed additional violations were dismissed.

Defendant argues that Plaintiff's testimony is inconsistent because he also states that at least one black hourly employee, who is identified, was sent to rehabilitation. (Cureton Dep. at 89.)

5. Rineer also stated that a "huge" factor to be taken into account is previous disciplinary events. (Rineer Dep. at 23.) Plaintiff had one such event.

there is no evidence that line management and Human Resources were not involved. Second, from the small number of persons who have been tested by the company, it is likely that a second violation, such as this, is not a "general" case. A reasonable jury could not believe that this statement has the import Plaintiff attributes to it.

Plaintiff also points to Defendant's treatment of a white former employee, Blaise Mahalik ("Mahalik"). Defendant's actions regarding Mahalik do not support Plaintiff's claim. After failing a drug test, Mahalik's employment was terminated by Defendant. He was permitted to return to work and participate in rehabilitation after an arbitrator mandated that Defendant provide him with the opportunity for rehabilitation. (Kohn Dep. at 42; Ex. G Pl.'s Mem. Supp. Summ. J.)

Mahalik was an hourly union employee whose employment was governed by a collective bargaining agreement that mandated rehabilitation. Plaintiff was not a union employee and his employment was not governed by that agreement. Mahalik's position was not the same as Plaintiff's. Therefore, it does not provide support for Plaintiff's argument. Further, Defendant did not decide to permit Mahalik to participate in rehabilitation, that decision was mandated by an arbitrator.

Therefore, Plaintiff's allegation that other white employees were offered rehabilitation while he was not is wholly unsubstantiated. Plaintiff does not provide names of the employees, does not know if they were subject to the bargaining

agreement, and does not know whether these persons were tested "for cause" or randomly. Nor does he know if any went to rehabilitation as a result of a voluntarily request for help rather than as a result of testing. (Cureton Dep. at 89.) His beliefs alone will not defeat a summary judgment motion.

Plaintiff also quarrels with the application of the drug test, claiming that the positive result was from passive inhalation, rather than actual use.⁶ (Cureton Dep. at 79-80.) However, he provides no evidence to support the contention that passive inhalation could cause the test results achieved. He provides no evidence to contradict the test results. Even if he could show that passive inhalation caused the reading, it would be of no consequence, because Defendant's policy manual states that it may terminate the employment of any employee who comes to work "under the influence"⁷ of illegal drugs, including marijuana.

6. After Plaintiff responded to Defendant's motion for summary judgment, Defendant replied by submitting the laboratory results of the test, in addition to the results that were submitted as an exhibit to the motion for summary judgment. The test professes to be calibrated to avoid false positive results from passive inhalation of marijuana smoke. Based on the undisputed record before the court, upon reading Plaintiff's test level, no reasonable jury could determine that his results were from passive inhalation. However, even if the jury could believe that the results were caused by passive inhalation, it does not present an issue for trial, because he was still under the influence as defined in Defendant's policy manual.

7. "Under the influence" is defined in the manual as the results of a urinalysis test "show[ing] the presence of prohibited substances at or above the established detectable level as determined by the Company and the drug-testing laboratory." (Ex. 9 Def's Mem. Supp. Summ. J.)

Plaintiff has not pointed to evidence "from which a factfinder could reasonably disbelieve Defendant's articulated legitimate reasons." Nor has he shown any reason for a factfinder to believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of Defendant's action. Accordingly, the court will grant Defendant's motion as to the Title VII claim.

B. PHRA Claims

Under Count Two, Plaintiff alleges that the above conduct was in violation of the PHRA. Because the elements and standard of proof are the same under both statutes, West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1985), the court will grant the motion as to the PHRA claim.

C. Breach of Contract Claim

Under Count Three, Plaintiff alleges that Defendant violated its own policy to provide equal opportunity for people of all races. That claim is not cognizable. See Lofton v. Wyeth Labs., 643 F. Supp. 170 (E.D. Pa. 1986) (stating that policy statements concerning commitment to equal opportunity do not support cause of action, these legal obligations arise from state and federal law, not terms of an employment contract); see also Banas v. Matthews International Corp., 502 A.2d 637 (Pa. Super. Ct. 1985). The court will grant the motion as to the breach of contract claim.

IV. CONCLUSION

Plaintiff concedes that he received a final warning notice for the altercation with a fellow employee on October 16, 1993. He concedes that he was arrested for possession of marijuana. He also concedes that the drug test conducted at Defendant's request was positive for marijuana, and that under the definition in Defendant's policy manual, he was "under the influence" of marijuana. He does not contest the fact that his violations of Defendant's policies--an action resulting in injury to another, and reporting to work under the influence of illegal drugs--are legitimate causes for discharge. (See Ex. 15 Def.'s Mem. Supp. Summ. J.).⁸ He has provided the court with no evidence from which a reasonable jury could disbelieve Defendant's articulated reason for the termination of his employment or from which a reasonable jury could find that discrimination was more likely than not a motivating or determinative cause of Defendant's action.

Defendant has shown that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Accordingly, the court will grant Defendant's motion for summary judgment.

An appropriate Order follows.

8. See Ex. 9, Def.'s Mem. Supp. Summ. J. at 4.

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SUN COMPANY, INC. (R&M)	:	NO. 96-4804

ORDER

AND NOW, TO WIT, this day of October, 1997, upon consideration of Defendant Sun Company, Inc.'s motion for summary judgment, and Plaintiff Bernard Cureton's response thereto, IT IS ORDERED that said motion is GRANTED.

Judgment is entered in favor of Defendant Sun Company, Inc. and against Plaintiff Bernard Cureton.

LOUIS C. BECHTLE, J.