

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

NICHOLAS J. BARONE,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JOHN DALTON, SECRETARY OF THE NAVY, DEPARTMENT OF THE NAVY,	:	
	:	
Defendant.	:	NO. 96-5658

MEMORANDUM

Reed, J.

May 26, 1998

Before the Court is the motion of defendant John Dalton, Secretary of the Navy, for summary judgment (Document No. 25) on the claims of plaintiff Nicholas Barone (“Barone”) under Title VII and the Rehabilitation Act of 1973. Because I find that Barone did not produce evidence sufficient to sustain his burden under Federal Rule of Civil Procedure 56(e) to demonstrate a genuine issue of material fact, the motion will be granted.

I. BACKGROUND

Barone worked at the Philadelphia Naval Shipyard (“the Shipyard”) as an insulator from December of 1980 until April 11, 1995, when he was separated. As an insulator, Barone was required to do a lot of bending, lifting, and carrying of materials on ladders and in and around pipes, turbines, refrigeration units and boilers of ships that were serviced at the Shipyard. (Def. Ex. 2 and Ex. 6, Barone dep. at 21). Barone was exposed to a lot of dust in the course of his

work. He suffered from a chronic mastoiditis or otitis media, which left an open mastoid cavity in his right ear that was prone to infection. (Def. Ex. 6, Barone dep. at 14; Ex. 7; Ex. 8).

Barone's exposure to dust and other particulate matter in his job aggravated his ear condition. When his ear was infected, Barone could not drive, climb flights of steps, or work in high places. (Def. Ex. 6, Barone dep. at 65-66). Barone had four ear operations between 1987 and 1994; after each operation he would switch to light duty work for thirty days before returning to his regular position. (Def. Ex. 9, Barone sworn statement at 11).

On January 31, 1994, Dr. Wolfson, Barone's doctor, submitted a letter to the Shipyard recommending that Barone be assigned to a light duty position or a position in an environment free of particulate matter due to his chronic mastoiditis. (Def. Ex. 17). In response to this letter, Dr. Trostle, a medical officer for the Shipyard, examined Barone on April 15, 1994 and issued a Medical Evaluation of Work Status. (Def. Ex. 18). Dr. Trostle found that Barone's condition was permanent and recommended that he be assigned to "office type work or at a minimum work in a dust free environment to prevent recurrence of his ear infection." Id. Barone was evaluated by another physician, Dr. Kean, in January, July, and November of 1995, who opined that the dust and particulate matter in Barone's work environment aggravated Barone's mastoid cavity. (Def. Exs. 19, 20, and 21). In a letter dated June 6, 1995, Dr. Wolfson noted that Barone was "unable to work in an environment where there is a fair amount of dirt and debris in the immediate work environment." (Def. Ex. 22).

In July of 1991, the Shipyard received official notification that it was to close in September of 1995. (Def. Mem. at 3). The Department of Defense Priority Placement Program ("P.P.P.") was implemented to assist the employees in finding future employment. Under the

P.P.P., employees at the Shipyard could voluntarily register for placement in different positions in various locations within the Department of Defense beginning on September 1, 1993, and if positions opened up in Department of Defense agencies, those agencies could fill the positions from the rolls of the P.P.P. (Def. Ex. 10). Shipyard employees could register for positions for which they were fully qualified in geographic areas where they would accept placement. Id. Barone registered in the P.P.P. on or around August 28, 1993. (Def. Ex. 11).

The regular policy of the Shipyard was to try to accommodate employees with injuries or work restrictions by modifying the employee's original position to accommodate his needs, or by placing the employee in another position in the Shipyard, if vacancies were available. However, due to the closing notification in July of 1991, the Shipyard ceased filling any positions that became vacant. (Def. Ex. 9 at 26-27, 28, 33-35).

In an effort to avoid interim reductions in force, the Shipyard began to separate employees who were permanently restricted from performing the duties of their regular positions and had not been placed in other positions. In July of 1994, Coradine Myers was assigned to process these separation cases. (Def. Ex. 26, Myers dep. at 9, 11-12). She was to review each file, determine job qualifications, and look for vacancies within the Shipyard. Of the eighty files she worked on, she was not able to place any of the employees in permanent positions, including Barone. (Def. Ex. 26 at 29-30; Ex. 27 at 10-16). In February of 1995, Myers met with Barone to explain that she was unable to place him. (Def. Ex. 27 at 13). On February 16, 1995, Barone received a Notice of Proposed Separation Disability on the grounds that he could not fulfill his duties and that the Shipyard had been unable to place him in another position. (Def. Ex. 28). In the notice, Barone was informed of his right to answer the proposed action in writing, but he did

not respond. Id. On March 27, 1995, Barone was informed in writing that he would be separated on April 11, 1995. (Def. Ex. 29).

In March of 1995, Barone filed a claim for continuation of pay and compensation for contusions to both heels that Barone claims he suffered jumping out of a van on the Shipyard on March 7, 1995. (Def. Ex. 30). The claim was accepted, and Barone received a continuation of pay from March 8, 1995 through mid-April of 1995, and since that time he has received workers' compensation benefits for wage loss through the Department of Labor for this injury. (Def. Ex. 31).

The Shipyard closed on September 15, 1995. The defendant argues that if Barone had not been separated in April, he would have been separated in September. (Def. Ex. 32, 33). If Barone could have remained in his regular position from April 12, 1995 through September 15, 1995, his total after tax compensation would have been \$10, 625.78. (Def. Ex. 34). During this same period, Barone received \$11,330.15 in untaxed compensation for his heel injury. (Def. Ex. 34).

Barone filed a complaint in this Court in August of 1996 seeking relief under the Americans with Disabilities Act,¹ Title VII, and the Rehabilitation Act of 1973. The defendant filed this motion for summary judgment in October of 1997 on the grounds that Barone has no evidence to support his Title VII claim and that Barone has failed to prove that he is entitled to relief for any violation of the Rehabilitation Act of 1973. This case was transferred to this Judge from the Honorable Norma L. Shapiro on November 4, 1997.

¹ This claim was dismissed by consent of the parties in an Order by Judge Shapiro entered on May 8, 1997 (Document No. 8).

The defendant argues that summary judgment should be granted to him on the Title VII claim of Barone because he did not allege that he was discriminated against on the basis of race color, religion, sex, or national origin, but rather that he suffered discrimination on the basis of disability. The defendant claims that summary judgment should be granted to him on the Rehabilitation Act claim because workers' compensation benefits are Barone's exclusive remedy, barring him from receiving other relief from the Shipyard as a matter of law. The defendant also argues that Barone is barred as a matter of law from receiving any damages because he has received benefits in excess of his salary for the period from April of 1995, when he went out on disability, until September of 1995, when the Shipyard closed.

Barone contends that he was separated while others in similar disabled, light-duty status were accommodated and continued in employment. Barone argues that he was passed over for participation in the P.P.P., and he points to the deposition testimony of Coradine Myers as evidence that Rubin Gomez, Yvette Wolf, John Olejarski, and others² were given P.P.P. placement above Barone. (Pl. Ex. 1, Myers dep. at 59- 60). Barone contends that Myers' deposition reveals that Myers, at the direction of Pat D'Amico, placed certain employees as "special cases" into the P.P.P. who otherwise did not qualify for the program because of their medical restrictions. Id. Barone also argues that because a person in the P.P.P. could have been placed anywhere in the Department of Defense, the fact that the Philadelphia Naval Shipyard was closing did not foreclose the possibility that Barone could have been placed in a job. In defense of his Title VII claim, Barone argues that he is a white male of Italian origin, and thus a member

² These "others" were never identified by Barone and their existence and identities are not evidenced in the record.

of a protected class and that none of the three individuals allegedly placed in the P.P.P. above Barone were members of a similarly situated class. Barone contends that Myers' testimony is sufficient to establish a genuine issue of material fact to survive this motion for summary judgment on both of his claims.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that "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" then a motion for summary judgment may be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). The movant can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case;" the movant is not required to produce affidavits or other evidence to establish that there are no genuine issues of material fact. Celotex, 477 U.S. at 323-25.

Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50.

III. ANALYSIS

A. The Title VII Claim

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. §§ 2000e et seq. A plaintiff has the burden to establish a prima facie case of unlawful discrimination. Thus, for this claim, Barone must show that: (1) he belonged to a protected class; (2) he applied and was qualified for the available position; (3) he was laid off or passed over, and (4) other workers not belonging to the protected class were retained. See Armbruster v. Unisys Corporation, 32 F.3d 768, 777 (3d Cir. 1994).

Although Barone did not clearly articulate in his complaint a basis for his Title VII claim other than discrimination based on disability,³ he asserts in his response to the motion for summary judgment that as a white male of Italian origin he is a member of a protected class and that none of the three who were placed ahead of him in the P.P.P. were of the same class.

Assuming that Barone is attempting to make a claim for discrimination on the basis of race, sex,

³ Barone has not provided this Court with any legal support for his argument that discrimination based on disability is actionable under Title VII, which prohibits discrimination on the basis of “race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-16.

or national origin, Barone does not provide evidence of the race, sex, or national origin of any of the three employees that he contends were placed ahead of him in the P.P.P. program. Barone has come forth with no evidence that these employees were not in the same class as Barone, other than his bare allegation in his memorandum in response to the motion for summary judgment. None of Barone's allegations or arguments address any type of discrimination other than discrimination based on his disability; Barone produced no evidence of conduct, or even alleged that such conduct occurred, which could be characterized as discrimination on the basis of race, sex, or national origin.

In addition, Barone's claim that he suffered discrimination through the P.P.P. is unfounded. Taken in the light most favorable to Barone, Myers' deposition testimony reveals only that she placed three individuals into the P.P.P. who did not qualify for the program, not that these individuals were placed into positions within the Shipyard or Department of Defense. Myers' testimony does not establish that Barone was "passed over" in favor of these three employees; Barone qualified for and registered for the P.P.P. in August of 1993. In addition, when Barone registered for P.P.P., he signed a certification that he understood that, if he applied for disability retirement or became temporarily physically incapacitated, he would "be removed from the program until such time that [he was] available to perform duties at the full performance level." (Def. Ex. 10 at 10 ¶g). Barone was removed from the P.P.P. on April 9, 1995 after his claim for continuation of pay and disability compensation for the heel injuries he suffered in March of 1995 was accepted. (Def. Ex. 30). Thus, Barone has not satisfied his burden under Federal Rule of Civil Procedure 56(e) and the defendants are entitled to judgment as a matter of law on his Title VII claim.

B. The Rehabilitation Act of 1973 claim

The Rehabilitation Act of 1973 prohibits federal employers and employers who receive federal funding from discriminating against persons with disabilities in matters of hiring, placement, or advancement. 29 U.S.C. § 701 et seq. However, employers “cannot be obligated to employ persons who are incapable of performing the necessary duties of the job.” Shiring v. Punyun, 90 F.3d 827, 831 (3d Cir. 1996). To succeed on a claim under the Rehabilitation Act, a plaintiff has the burden to show (1) that he has a disability, (2) that he is otherwise qualified to perform the essential function of the job, with or without reasonable accommodations by the employer, and (3) that he was nonetheless terminated or otherwise prevented from performing the job. Id. Plaintiff also has the burden to show that reasonable accommodation is possible and that he is “otherwise qualified,” that is, that the plaintiff is “able to meet all of a program’s requirements in spite of his handicap.” School Board of Nassau County v. Arline, 480 U.S. 273, 288 n. 17 (1987) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979)). Thus, if a plaintiff cannot perform one of the essential function of his job, even with reasonable accommodations by his employer, he cannot succeed on his Rehabilitation Act claim.

There is no disagreement that Barone has a disability or that he was terminated from his job, satisfying the first and third requirements of a Rehabilitation Act claim. The defendants argue that Barone was not otherwise qualified for the position of insulator at the Shipyard because his doctors have maintained since 1994 that he cannot work in that job environment. Thus, the defendants argue, no amount of accommodation would have allowed Barone to do his job. Barone conceded that he cannot work as an insulator at the Shipyard any more. (Transcript of Hearing before Judge Norma L. Shapiro on October 27, 1997 at 7 line 7-8).

While the Shipyard is required to make reasonable accommodations for an employee by reassigning him to another funded, vacant position, Barone failed to make the required facial showing that such an accommodation was possible. See Shiring, 90 F.3d at 832. Barone made no showing that he is otherwise qualified to perform his job, that he could have been accommodated in another position, or that any such positions even existed given the impending closing of the Shipyard.⁴

I find that Barone has failed to produce evidence sufficient to satisfy his burden to show that he was otherwise qualified to perform his job or that he could have continued to work with reasonable accommodations or through reassignment by the Shipyard.

IV. CONCLUSION

Based on the foregoing, the motion for summary judgment will be granted.⁵ An appropriate Order follows.

⁴ In order to receive workers' compensation benefits, Barone must maintain the position that he is unable to work; it would be difficult if not impossible for him to take the contradictory position that he is otherwise qualified to work in spite of his disability to succeed in his Rehabilitation Act claim.

⁵ The defendant also argued in his memorandum in support of his motion for summary judgment that the Federal Employees' Compensation Act ("FECA"), governing workers' compensation benefits, provides Barone's exclusive remedy, preempting Barone from recovering any other damages from the United States.

Barone was asked by Judge Shapiro to supplement his response to the motion for summary judgment by responding to the defendant's argument that he was statutorily barred from receiving damages under either of his claims because he had received workers' compensation benefits that exceeded the amount of his income had he continued working during the time in question. Barone did not supplement his response to address this issue.

The Court of Appeals for the Third Circuit held in Miller v. Bolger, 802 F.2d 660, 661 (3d Cir. 1986), that a plaintiff's receipt of FECA benefits does not preclude his claim for at least some Title VII remedies for discrimination. Assuming that this rationale would also apply to Barone's claim for discrimination under the Rehabilitation Act of 1973, Barone's receipt of workers' compensation benefits under FECA does not completely bar his claims here and Dalton is not entitled to summary judgment on this ground.

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v.	:	
	:	
JOHN DALTON, SECRETARY OF THE NAVY, DEPARTMENT OF THE NAVY,	:	
	:	
Defendant.	:	NO. 96-5658

ORDER

AND NOW, this 26th day of May, 1998, upon consideration of the motion of defendant John Dalton, Secretary of the Navy, for summary judgment (Document No. 25), the response of plaintiff Nicholas J. Barone thereto (Document No. 27), and the reply of the defendant (Document No. 28), having found that the pleadings, admissions, depositions, and discovery of record 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, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that **JUDGMENT IS HEREBY ENTERED** in favor of the defendant and against the plaintiff on the plaintiff's claims under Title VII and the Rehabilitation Act of 1973.

This is a final Order. The clerk is directed to close this file.

LOWELL A. REED, JR., J.