

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

CHRISTOPHER J. BURKE : CIVIL ACTION
 :
 v. :
 :
 SEARS-ROEBUCK-CO., PAUL :
 EISEMAN, KATHLEEN KIENIE and :
 COLEEN WITMER : NO. 98-4364

MEMORANDUM ORDER

Plaintiff was a part-time store detective for Sears. He was terminated in June 1996 after an investigation overseen by the individual defendants into charges that plaintiff had assaulted a suspected shoplifter, stole company property, made racist and anti-Semitic remarks and engaged in sexual harassment. Plaintiff is a white male.

Plaintiff has asserted claims under Title VII for "[w]rongful [t]ermination (discriminatory in nature)," "reverse discrimination" and "[c]ondoning a hostile work environment," and a state law claim for defamation. Presently before the court is defendant's motion to dismiss for failure to state a claim.

Plaintiff alleges that "members of management" obtained slanderous statements about him, hired "a black female minority undercover officer ('plant') for purposes of gathering evidence" against him, failed to act on plaintiff's complaint about a "racially hostile black-employee," wrongfully terminated

plaintiff "as a defense vs. black-employee who filed Human Relations Complaint in February 1996" because of alleged conduct of plaintiff and others, subjected plaintiff to interviews regarding racist remarks, led him to believe he could be charged with sexual harassment and refused to let him make written notes at his interview "though other employees, including minorities, were allowed to write full lengthy statements." He alleges that he was the only employee "terminated for 'insubordination' as a result of interview" and that defendants wrongfully credited false statements made against him. He alleges defendants defamed his character by sustaining claims that he was racist, anti-Semitic, a sexual harasser, had stolen company property and had assaulted a shop-lifter while on duty.

The essence of plaintiff's claim of reverse discrimination and wrongful termination is that he was discharged on false evidence after a faulty investigation and that defendants were motivated by a desire to create a defense against charges of discrimination brought by a black employee.

To state a claim under Title VII, a plaintiff must allege facts to show he was discriminated against because of race, sex, religion or national origin. See 42 U.S.C. § 2000e-2. Plaintiff relies upon Jones v. Ohio Dept. of Mental Health, 687 F. Supp. 1169 (S.D. Ohio 1987) for the proposition that an employer may not fire a white employee as a defense to a

discrimination claim brought by a minority employee. Jones, however, does not support the broad proposition that plaintiff asserts. The white plaintiff in Jones was fired not because he was accused of racist conduct, but to make it more difficult for a similarly situated former black employee to establish a prima facie case of discriminatory discharge. Id. at 1171.

Plaintiff's allegations, taken as true, do not show that he was terminated for the same reason as the employee in Jones. An employer may, without running afoul of Title VII, discharge an employee who has been charged by another employee with racist or sexist conduct. See Albert v. DeBartolo, 1993 WL 272477, at *8 (6th Cir. July 20, 1993) (claim that plaintiff was wrongfully discharged because of false accusations of sexual harassment is not cognizable under Title VII); Anthony v. County of Sacramento, 898 F. Supp. 1435, 1450 (E.D. Cal. 1995) (employer has an affirmative duty to remediate hostile conditions).*

That plaintiff may have been the only employee terminated for insubordination during an interview or that defendants' investigation may have been faulty simply does not support an inference that plaintiff was terminated because he is white or male. Insubordination is a legitimate, non-discriminatory cause for termination. See Johnson v. Resources

* The unpublished opinion in Albert was cited consistent with CTA6 Rules 10(f) and 24(c).

for Human Development, 878 F. Supp. 35, 38 (E.D. Pa. 1995). An employer is not subject to liability under Title VII for terminating an employee based on a belief that the employee was insubordinate or otherwise acted improperly even if that belief was incorrect or the result of a flawed investigation. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (the issue is "whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"). See also Pollis v. The New School for Social Research, 132 F.3d 115, 124 (2d Cir. 1997) (absent showing it was motivated by discriminatory intent, bad treatment does not establish a violation of Title VII). One could not reasonably conclude from plaintiff's factual allegations, accepting their veracity, that he was terminated because of his race or gender.

A hostile work environment claim arises when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1002 (1998). To sustain a racially or sexually hostile work environment claim, a plaintiff must show he or she suffered intentional discrimination because of race or gender; the discrimination was pervasive and regular; the discrimination detrimentally affected the plaintiff; the

discrimination would detrimentally affect a reasonable person of the same race or gender in that position; and, the existence of respondeat superior liability. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996).

That defendants failed to act with regard to a "racially hostile" black employee, subjected plaintiff to interviews regarding his alleged "racist remarks" or led him "to believe he could be charged with sexual harassment" is insufficient to sustain a hostile work environment claim under Title VII. An employer has a duty to investigate a charge that one its employees has engaged in discriminatory conduct. See Scott v. Western State Hospital, 658 F. Supp. 593, 598 (W.D. Va. 1987). An employer's warning to an employee that he has engaged in inappropriate conduct that could constitute sexual harassment does not create Title VII liability and is consistent with the employer's duty to make reasonable efforts to ameliorate hostile work conditions. Plaintiff does not allege any actual instances of discriminatory conduct by the "racially hostile" black co-worker to whom he refers, let alone the sort of severe conduct necessary to sustain a hostile environment claim. See Ortega v. New York City Off-Track Betting Corp., 1998 WL 355416, at *4 (S.D.N.Y. July 1, 1998) (dismissing hostile environment claim supported only by conclusory statements and failing to set forth severe or pervasive conduct).

As to plaintiff's claims against defendants Eiseman, Kienie and Witmer, it should also be noted that individual employees cannot be held liable under Title VII. See Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996); Cohen v. Temple Physicians, Inc., 11 F. Supp. 2d 733, 737 (E.D. Pa. 1998).

Plaintiff's state law defamation claim will be dismissed pursuant to 28 U.S.C. § 1367(c)(3). Because the court cannot conclusively determine that plaintiff will be unable to show that defendants credited and republished false defamatory statements about him, his state law claim will be dismissed without prejudice to reassert it in an appropriate state court consistent with 28 U.S.C. § 1367(d). The court takes no position on whether or not the limitations period for such a claim was tolled by application of the Pennsylvania discovery rule.

ACCORDINGLY, this day of June, 1999, upon consideration of defendants' Motion to Dismiss (Doc. #6) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and this action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.