

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

ANDRE DAVIS, II : CIVIL ACTION
: :
v. : :
: No. 00-CV-5671
CITY OF PHILADELPHIA WATER :
DEPARTMENT :

MEMORANDUM

Padova, J.

November , 2001

Plaintiff, Andre Davis, II, brings this action for racial discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq. (1994). Plaintiff alleges that he was terminated from his position as a semi-skilled laborer with the City of Philadelphia Water Department ("Water Department") as a result of racial discrimination. Before the Court is Defendant's Motion for Summary Judgment. For the reasons that follow, the Motion is granted.

I. BACKGROUND

Davis is a 49-year-old African-American who was employed by the Water Department between September 1989 and January 12, 1999. Three months prior to his dismissal, he was transferred from the Water Department's Fox Street Yard to the West Philadelphia Yard after Richard Goode, the Superintendent of Sewer Maintenance for the Water Department (who is African-American), witnessed Davis in an altercation with a female storage worker at the Fox Street Yard. (Goode Dep. at 54.) Goode saw Davis lunge and grab the woman, who then hit Davis. (Goode Dep. at 54-55.) Goode then had

Davis transferred to the West Philadelphia Yard with the understanding that he not return to the Fox Street Yard. (Goode Dep. at 55.) Davis was later suspended without pay for three days for returning to the Fox Street Yard. (Meiers Dep. at 24, Meiers Ex. 1.) The Notice of Suspension instructed Davis as follows: "Please be advised that further infraction will result in more severe disciplinary action, possibly including dismissal." (Meiers Ex. 1.)

While employed at the West Philadelphia Yard, Davis made threats against two individuals: his immediate supervisor, Joseph Buttacavoli, a Caucasian; and his Crew Chief, Charles Cooper, an African-American. On October 26, 1998, while Davis, Buttacavoli and Christopher Nicholson were in their truck on the way to a job, Davis allegedly said the following to Buttacavoli: "I don't take no orders from no white motherf***er. And I don't care about you. . . . I don't take no orders from no white motherf***er. And if this gets back to the office, I got something to take care of you." (Buttacavoli Dep. at 52.) Davis had earlier boasted to co-workers that he had shot a previous supervisor. (Buttacavoli Dep. at 56, Lofton-El Dep. at 65-66.) This incident was reported by the Crew Chiefs, Cooper and Earl Truesdale, to Norman Lofton-El, the Sewer Maintenance Supervisor for the West Philadelphia Yard (an African-American), who was the chief supervisor for that yard. (Lofton-El Dep. at 63.) Davis admitted to Lofton-El that he made that statement to Buttacavoli. (Lofton-El Dep. at 64-

65.) Davis now denies having made this statement. (Davis Aff. ¶ 14.) Nicholson, who was sitting next to Buttacavoli in the truck, did not hear Davis make this comment. (Nicholson Dep. at 15.)

At some point after October 26, 1998, Davis went into Cooper's office and made a gesture as if he was shooting him with a gun. (Cooper Dep. at 14-15.) On another occasion Davis made a threatening statement about Cooper to one of his co-workers, John Brown, after having a disagreement with Cooper about chairs at a work site. (Cooper Dep. at 18.) Brown heard Davis say: "Who the hell is he to come out on a job and tell us to throw the chairs away. He treats us like a f***ing kid. . . . I know where he goes to church at. I can get that mother f***er anytime." (Brown Dep. at 23.) On December 4, 1998, Brown memorialized Davis' remark as follows: "I herd Andrew Davis - say to Larry Smith in Yard at 49th St I know were f***ing Cooper go's to church at. I can get that motherf***er any time at church. I have a 9 m.m. pistol." (Brown Ex. 1.) Brown also recorded the following additional remarks which he heard Davis say: "and them white motherf***ers need a cap in there ass to" and "I was in jail for killing a man already. Who the f*** cares." (Brown Ex. 1.) Brown reported Davis' threat against Cooper to Lofton-El, (Brown Dep. at 24, Lofton-El Dep. at 66-67), and to Cooper. (Brown Dep. at 24, Cooper Dep. at 18.) Although Davis now denies having threatened to harm Cooper (Davis Aff. ¶ 15), he earlier admitted to Francis Meiers, Assistant Personnel Officer for the Water Department, that he made the

statement in question, although he maintained that he did not mean anything by it. (Meiers Dep. at 65.)

After the incident, Lofton-El tried to work things out between Buttacavoli and Davis by having Davis apologize to Buttacavoli, but Davis would not apologize. (Buttacavoli Dep. at 59, Lofton-El Dep. at 65, 75.) If Davis had apologized to Buttacavoli, Lofton-El would not have recommended that he be dismissed. (Lofton-El Dep. at 75.) Since Davis did not apologize, Lofton-El sent a memo to Goode dated October 28, 1998, informing him of the October 26, 1998 incident and recommending that Davis be given 30 days suspension pending dismissal. (Goode Dep. at 52, Lofton-El Ex. 2.) Goode agreed with the recommendation and, in accordance with Water Department policy, the matter was sent to Meiers. (Goode Dep. at 52, Meiers Dep. at 18, City Exhs. 5 and 6.)

Meiers then held a departmental pre-disciplinary hearing to determine whether Davis should be terminated. (Meiers Dep. at 18.) Davis, Buttacavoli, Lofton-El and Andrew Bond, Davis' union business agent, attended the pre-disciplinary hearing and told Meiers what had happened. (Meiers Dep. at 18.) A couple of days later Meiers heard more testimony from Cooper and other witnesses about Davis' threats against Cooper and his altercation with the woman at the Fox Street Yard. (Meiers Dep. at 18 and 24.) Meiers concluded, as a result of the pre-disciplinary hearing, that there was enough to warrant Davis' dismissal and he was terminated. (Meiers Dep. at 18, City Ex. 7.) Davis appealed his dismissal to

the Civil Service Commission, which held a hearing on March 30, 1999 and denied his appeal. (City of Philadelphia Civil Service Commission, Appeal of Andrew Davis II, Case NO. 3856, April 29, 1999, Opinion at 2.)

Davis contends that he is a victim of disparate treatment, and that Caucasian employees have threatened and physically assaulted co-workers and supervisors without being terminated. In support of his contention, he has submitted the Notice of Suspension given to Domenico Mirarchi, a Caucasian Water Department employee, who was suspended for thirty days for attempting to strike a co-worker. (Davis Ex. D.) This Notice states that further infractions could result in dismissal. (Davis Ex. D.) He has also submitted the Notice of Suspension given to William Shields, a Caucasian Water Department employee, who was suspended for five days for punching a co-worker during an argument. (Davis Ex. E.) That Notice also states that further infractions could result in dismissal. (Davis Ex. E.) In addition, Nicholson testified in support of Davis that a Caucasian coworker named LaCroce assaulted him and, after Nicholson filed a grievance about the incident, LaCroce only received a written warning. (Nicholson Dep. at 31-32.) Meiers testified that LaCroce had been suspended and would have been dismissed if he had another incident. (Meiers Dep. at 37.)

In rebuttal, the Water Department has submitted the deposition testimony of Cooper, Brown, Lofton-El and Meiers.

Cooper testified that he had never heard that Caucasian employees were given preferential treatment over African-American employees with regard to discipline. (Cooper Dep. at 48.) John Brown also testified that he had never seen any discrimination against African American employees regarding discipline. (Brown Dep. at 17-18.) Lofton-El and Meiers both testified similarly. (Lofton-El Dep. at 112-13, Meiers Dep. at 34.)

II. 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, 248 (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 for 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 (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 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. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)).

III. DISCUSSION

Defendant moves for summary judgment on the grounds that Davis cannot establish a prima facie case of discrimination and that he was dismissed for legitimate, non-discriminatory reasons. Since Davis has not alleged direct evidence of discrimination, the burden shifting paradigm of McDonnell Douglas Corp. v. Green, 411

U.S. 792 (1973), applies to this case. Plaintiff has the initial burden under Title VII to establish a prima facie case of unlawful discrimination. Fuentes v. Perksie, 32 F.3d 759, 763 (3d Cir. 1993). He must show: "(1) [he] is a member of a protected class, (2) [he] was qualified for the position, (3) [he] was ultimately discharged, and (4) the position was ultimately filled by a person not of the protected class." Sheridan v. E.I. DuPuont de Nemours and Co., 100 F.3d 1061, 1066 no. 5 (3d Cir. 1996). However, he need not prove that his position was filled by someone not of the protected class if he can point to some other evidence that the Water Department terminated his employment based upon his race. Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 351-356 (3d Cir. 1999). He cannot establish this element by suggesting "the mere possibility of discrimination." Bullock v. Children's Hospital of Philadelphia, 71 F. Supp. 2d 482, 490 (E.D. Pa. 1999). Davis argues that he satisfies the fourth prong of a prima facie case for discrimination because he was treated differently from Caucasian co-workers who committed similar disciplinary infractions.

Davis has met the first three prongs of the prima facie test. He is an African-American who was qualified for the job as a semi-skilled laborer from which he was terminated by the Water Department. Davis has not, however, satisfied the fourth element because he has not set forth evidence to establish that he was

treated differently from his Caucasian co-workers for similar disciplinary infractions. Davis, like his co-workers, was suspended for a few days after his first infraction and warned that a further infraction could result in his dismissal. He was terminated after a second infraction. Davis has not supplied any evidence that his Caucasian co-workers, after a second infraction, were treated differently from how he was treated. Therefore, Davis has not met his initial burden of establishing a prima facie case of unlawful discrimination.

Moreover, even if Davis were able to establish the fourth element of a prima facie case of unlawful discrimination, the Water Department would still be entitled to judgment. Once a plaintiff establishes a prima facie case of unlawful discrimination, the burden of production shifts to the Defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Fuentes, 32 F.3d at 763 (citing McDonnell Douglas, 411 U.S. at 802). Defendant satisfies this burden by "introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason" for his termination. Id. "This burden is one of production, not persuasion; it can involve no credibility assessment." Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106 (2000) (citation omitted). If the Defendant is able to meet this "relatively light burden," the burden of production then returns to the Plaintiff "who must show by a preponderance of

the evidence that the employer's explanation is pretextual." Fuentes, 32 F.3d at 763. In order to survive the Motion for Summary Judgment by showing that Defendant's legitimate, non-discriminatory reason for his discharge was pretextual, Plaintiff must submit 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, 32 F.3d at 764. "[T]he plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reasons is a pretext)." Id. (emphasis in original) (citations omitted). Plaintiff cannot merely show that Defendant's decision was wrong, he 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 non-discriminatory reasons." Id. at 765 (emphasis in original) (citations omitted).

When examining whether the Water Department's proffered reasons for Davis' dismissal are legitimate and non-discriminatory,

the Court focuses on "the particular criteria or qualifications identified by the employer as the reason for the adverse action." Pivirotto, 191 F.3d at 359. The Water Department has submitted evidence that its decision to terminate Davis' employment was made at the recommendation of Assistant Personnel Officer Meiers following a pre-disciplinary hearing. At the hearing, Meiers heard testimony by Buttacavoli, Cooper, Lofton-El, Cooper and Davis about Davis' threats against Buttacavoli and Cooper and from other witnesses concerning Davis' previous altercation at the Fox Street Yard. Meiers also considered Davis' previous suspension. Based upon the evidence presented at the hearing, Meiers concluded that there was enough to warrant dismissal. The Water Department has met its burden of production of a legitimate, nondiscriminatory reason for its termination of Plaintiff.

Davis argues that Nicholson's testimony raises an issue of fact as to whether Davis ever made any threats against Buttacavoli. He does not, however, challenge the sufficiency of the evidence before Meiers or the manner in which the pre-disciplinary hearing was conducted. Nor does he provide any evidence showing that the Water Department did not terminate him because of the infractions and the testimony concerning his threats against his supervisors. The Court concludes, therefore, that Davis has not provided any evidence to meet his burden of demonstrating "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 non-discriminatory reasons." Fuentes, 32 F.3d at 765. Accordingly, the Water Department's Motion for Summary Judgment is granted and the Court will grant judgment in favor of the Water Department and against Davis.

An appropriate Order follows.

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O R D E R

AND NOW, this day of November, 2001, in consideration of Defendant's Motion for Summary Judgment (Docket No. 18), and Plaintiff's response thereto, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** pursuant to Federal Rule of Civil Procedure Rule 56 and **JUDGMENT** is entered in favor of Defendant and against Plaintiff.

BY THE COURT:

John R. Padova, J.