

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

DELIA E. RAMOS-ROSA,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
ANTHONY J. PRINCIPI,	:	No. 03-4955
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J.

July 20, 2004

Plaintiff Delia Ramos-Rosa, a native of Puerto Rico, brings this action against Anthony Principi, Secretary of the Department of Veterans' Affairs ("VA"), alleging employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964. Defendant now moves for summary judgment, arguing that Plaintiff failed to exhaust administrative remedies regarding her retaliation claim¹ and that Defendant had a non-discriminatory and non-pretextual basis for terminating Plaintiff's employment. For the reasons set out below, Defendant's motion is denied.

I. FACTUAL BACKGROUND

The following facts are undisputed, except where noted otherwise. In 1988, Plaintiff began working as a nurse at the VA hospital in Philadelphia. (Joint Pretrial Disclosure Mem. at 2-3.) As a condition of her employment, she was required to maintain a current nursing license. (*Id.*) She maintained her license from the Commonwealth of Puerto Rico from the time she graduated nursing school in 1971 until July 1998, renewing it every three years as required. (*Id.*)

¹ Plaintiff originally raised two retaliation claims. At oral argument, Plaintiff conceded that the second of these claims was not exhausted before the EEOC and is therefore not properly before this Court.

In 1998, Plaintiff's nursing license was due to expire on July 31. (*Id.*) In order to renew it, she was required to attend continuing education courses. (Compl. ¶ 20.) Plaintiff took her final course on July 16, but she could not obtain a certificate of completion because of a bureaucratic mistake at the college at which the course was given. (*Id.* ¶ 43.) After being informed of this mistake on July 28, Plaintiff immediately enrolled in another course, which she attended on July 30. (*Id.* ¶ 49.) On July 31, she submitted all of the necessary paperwork for license renewal but was not granted a renewal because of another mistake, this time on the part of the Puerto Rican processing agency. (Joint Pretrial Disclosure Memo. at 2-3.)

There is some disagreement regarding whether Plaintiff informed the VA of the aforementioned problems, but it is undisputed that on August 7, 1998, Medical Center Director Michael Sullivan terminated her for failing to maintain a current nursing license. (Def.'s Mot. for Summ. J. at 3.) According to Defendant, Sullivan based his decision to terminate Plaintiff on the advice of Labor Relations Specialist William Stewart, who stated to Sullivan that VA regulations required immediate termination of any nurse whose license lapsed. (*Id.* at 3-4.)

On August 11, 1998, the Puerto Rican processing organization reversed itself and accepted Plaintiff's renewal application. (Compl. ¶¶ 59-60.) She accordingly requested reinstatement, but, according to Plaintiff, this requested was not acted on by the VA. (See Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 6.) On October 7, 1998, Plaintiff filed an EEOC complaint alleging, inter alia, that she had been terminated on the basis of her national origin in that non-Hispanic nurses whose licenses had lapsed had not been terminated. (Def.'s Mot. for Summ. J. Ex. 4.) On November 3, 1998, Plaintiff filed a second EEOC complaint alleging that the VA was retaliating against her by refusing to reinstate her despite the fact that she had finally obtained her renewed nursing license,

and by withholding her last two paychecks. (Def.'s Mot. for Summ. J. Ex. 3.) On November 22, 1998, Plaintiff was re-hired by the VA, but she had lost ten years of accumulated seniority, sick leave, and other benefits. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 5.)

On July 19, 2000, the Administrative Judge ("AJ") presiding over Plaintiff's EEOC complaints held a telephone conference with the parties. (Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 11.) On July 20, 2000, the AJ issued a memorandum framing Plaintiff's discrimination claim as the only issue in dispute and omitting any mention of her retaliation claim. (*Id.*) Plaintiff has denied in an affidavit that either she or her lawyer ever withdrew the retaliation claim. (Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 12.) The AJ then, without holding a hearing, granted summary judgment in favor of the VA on the discrimination claim, but issued no opinion on the retaliation claim. (*Id.* Ex. 16.) This judgment was reversed on appeal by the EEOC, which held that the AJ had erred in failing to hold a hearing. (*Id.* Ex. 18.) On remand, a second AJ held a hearing and, on September 28, 2001, issued a judgment in favor of the VA making no mention of Plaintiff's retaliation claim. (Compl. ¶ 81.) This decision was affirmed by the EEOC on March 19, 2003, and Plaintiff filed the instant suit soon thereafter. (Compl. ¶ 83.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (1994); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its

burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Id.* at 248. In reviewing the record, “a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party’s favor.” *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm’n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

A. Plaintiff’s Exhaustion of Administrative Remedies Regarding Her Retaliation Claim

A Title VII plaintiff is required to exhaust her administrative remedies before bringing suit in federal court. 42 U.S.C. § 2000e-5 (2003). In the instant case, it is undisputed that Plaintiff properly filed an EEOC complaint alleging retaliation. It is also undisputed that this complaint was not addressed in any of the four relevant administrative opinions. Thus, the relevant question is whether Plaintiff exhausted her retaliation claim despite the AJs’ and EEOC’s failure to address it.

As the Third Circuit has stated, “[o]nce a charge of some sort is filed with the EEOC, . . . the scope of a resulting private civil action in the district court is defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. If the EEOC’s investigation is unreasonably narrow or improperly conducted, the plaintiff should not be barred from his statutory right to a civil action.” *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 966 (3d

Cir. 1978) (internal quotations and citations omitted); *see also Sedlacek v. Hach*, 752 F.2d 333, 335 (8th Cir. 1985) (“The Commission’s . . . failure to check into [complainant’s] statement . . . [was] beyond her control. The action or inaction of the EEOC . . . cannot affect a complainant’s substantive rights under Title VII.”). In the instant case, Plaintiff properly raised her retaliation claim at every stage of the proceedings, and Defendant has produced no evidence to the contrary. (*See, e.g.*, Friedman Letter of July 20, 2004 Ex. B at 8 (raising retaliation issues on second EEOC appeal).) Thus, the EEOC’s failure to consider the claim was unreasonable and does not bar Plaintiff from bringing suit thereon. *See Robinson v. Dalton*, 107 F.3d 1018, 1026 (3d Cir. 1997) (remanding to district court for determination of whether plaintiff exhausted administrative remedies despite EEOC’s unreasonable failure to investigate portion of claim) (*citing Hicks*).

B. Plaintiff’s Claim of National Original Discrimination

Under Title VII, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 798 n.7 (3d Cir. 2003) (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792-804 (1973)). She may meet this burden by showing, inter alia, that she belongs to a protected class and was subject to an adverse employment action under circumstances that raise an inference of discrimination, such as being treated less favorably than similarly-situated non-minority employees. *Id.* at 797-98 & n.7 (noting that plaintiffs are not required to show that similarly-situated employees were treated more favorably). When a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee’s rejection. *Id.* at 797. If the defendant meets this burden, the plaintiff then must establish that the employer’s proffered reasons were merely a pretext for discrimination, and not the real motivation for the unfavorable job action. *Id.*

1. *Plaintiff's Prima Facie Case of Discrimination*

It is undisputed that Plaintiff suffered an adverse employment action when she was terminated. Thus, the relevant question is whether she was treated differently than non-Hispanic nurses in the same situation. In its motion for summary judgment before the first AJ, the VA stated that “two . . . nurses [other than Plaintiff] had expired licenses[,] one in 1996 and the other in 1997[,] and were not terminated. Accordingly, the agency will concede that complainant has established a prima facie showing of discrimination.” (Pl.’s Resp. Ex. 13 Part C.) Accordingly, although the VA now argues that Plaintiff has not made out her prima facie case, this argument is belied by the VA’s own prior submissions, and the Court finds that Plaintiff has set forth a prima facie case under Title VII.

2. *Defendant's Legitimate, Non-Discriminatory Reason for the Adverse Employment Action*

Defendant argues that it was authorized to terminate Plaintiff by two VA regulations requiring nurses to maintain their licenses at all times. The first such regulation states that “an employee who fails to meet or who fails to present evidence of meeting the statutory . . . or regulatory requirements for appointment will be separated.” (Def.’s Mot. for Summ. J. Ex. 2 (Supplemental Regulation MP-5, Part II, Chapter 9.08 (Aug. 8, 1988)) (hereinafter “MP-5”).) The second provides that an employee who does not “maintain current licensure . . . must be reassigned to another position for which qualified, or separated under appropriate procedures.” (*Id.* Ex. 3 ¶ 2(f) (Philadelphia VA Medical Center Memorandum 05-06 (Feb. 1996)) (hereinafter “MCM 05-06”).) Although it is unclear, as discussed below, whether Plaintiff’s termination was mandatory under these regulations, it is clear that such termination was, at the very least, justified on the basis of the

lapse of her license.² Thus, Defendant has presented a legitimate reason for the adverse employment action.

3. *Pretext for Discrimination*

Plaintiff argues that under the regulations cited above, the VA was not required to terminate her, but instead could have reassigned her to a different position or placed her on restricted duty while her license renewal was pending. Thus, the decision to terminate Plaintiff was discretionary, and, as the VA has conceded, non-Hispanic nurses in her position were not similarly terminated. (*See* Pl.’s Resp. Ex. 13 Part C.) Accordingly, Plaintiff argues, Defendant’s proffered reason for her termination was pretextual, in that it was merely a cover for the fact that Defendant terminated her on the basis of her being Hispanic. Defendant counters that it had no discretion whatsoever in this matter, and that termination was the only option.

Defendant’s argument fails, for three reasons. First, MCM 05-06 clearly states that an employee whose license lapses must be “reassigned . . . or separated.” Although the VA argues that reassignment is only an option for civil service employees and not medical employees, Defendant provides no legal or evidentiary basis for this claim, which contradicts the plain face of the regulation.³ Second, the sole case cited by Defendant for the proposition that it had no discretion actually espouses the contrary proposition: The VA has *more* discretion in the discipline and termination of nurses and doctors than vis-a-vis other employees. *See Newmark v. Principi*, 262 F.

² The Court expresses no opinion as to whether this termination comported with due process requirements, nor whether it was required to be immediate under the regulations.

³ At oral argument, Defendant cited 38 U.S.C. §§ 7401-7402 for the proposition that termination of nurses with lapsed licenses is mandatory. These statutes, however, set out the requirements for hiring Title 38 employees, not for terminating them. *See* 38 U.S.C. § 7402(a) (“To be eligible for appointment . . . a person must have the applicable qualifications . . .”).

Supp. 2d 509, 514 (E.D. Pa. 2003) (noting that VA has greater discretion regarding medical employees under Title 38 than civil service employees under Title 5). Finally, as noted above, the VA admitted that not all nurses whose licenses lapsed were terminated. (Pl.'s Resp. Ex. 13 Part C.) In total, therefore, the evidence indicates that the VA had discretion regarding whether to terminate or reassign Plaintiff, and Plaintiff has demonstrated genuine disputes of material fact concerning whether this discretion was exercised in a discriminatory manner. It is within the sole province of the factfinder to weigh the facts and conduct of the parties and to determine whether Defendant's true motivation was in fact discriminatory. *See Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 321 (3d Cir. 2000) (admonishing that summary judgment should rarely be granted when the motivation of an employer is at issue in a discrimination or retaliation case).⁴ Accordingly, summary judgment is not appropriate.

IV. CONCLUSION

For the reasons state above, Defendant's motion for summary judgment is denied. An Appropriate Order follows.

⁴ The Court had intended to inquire into this issue further at oral argument and, to that effect, had issued an order requiring Messrs. Sullivan and Stewart to attend the argument. Due to miscommunication within the U.S. Attorney's Office, however, this Order was not conveyed to the VA until the day before oral argument, at which point Sullivan and Stewart were on out-of-state vacations.

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ORDER

AND NOW, this 20th day of **July, 2004**, upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's Response thereto, it is hereby **ORDERED** that:

Defendant's Motion for Summary Judgment (Document No. 10) is **GRANTED in part** and **DENIED in part**, as follows:

1. Summary judgment is **GRANTED** to Defendant on the retaliation claims raised in Plaintiff's third EEOC complaint.
2. In all other respects, Defendant's motion is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.