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

RICARDO G. BAILEY	:	CIVIL ACTION
	:	
v.	:	NO. 04-2532
	:	
READING HOUSING AUTHORITY,	:	
DANIEL F. LUCKEY, and	:	
RICHARD MULUTZIE	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **April 29, 2005**

Ricardo G. Bailey filed a civil rights action[1] claiming he was fired from his job with the Reading Housing Authority (RHA) on account of his race. The RHA, Daniel F. Luckey, and Richard Mulutzie claim they fired Bailey for sleeping on the job twice and, therefore, are entitled to summary judgment. We agree.

FACTS[2]

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[1]42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[2]In deciding a Motion for Summary Judgment, we must construe the facts and inferences in a light most favorable to the non-moving party. However, we need not consider unsupported assertions, speculation or conclusory allegations. *Celotex Corp. v. Catrett*, 447 U.S. 317, 322 (1986).

Bailey, an African American, has worked for the RHA since 1981. Bailey is a maintenance mechanic and performs repairs to the RHA's public housing units. His work primarily entails refurbishing empty units to prepare them for new occupants. On June 6, 2002, Mulutzie, Bailey's maintenance supervisor, claims he saw Bailey sleeping on the floor inside a unit he was repairing. Mulutzie states he saw Bailey through a back window and knocked to get his attention. Bailey did not respond to the knocking and Mulutzie could not enter the unit because all the doors were locked. Bailey ultimately opened the door for Mulutzie and claimed he was working, not sleeping.

Mulutzie reported the incident to Luckey, the Executive Director of the RHA.[3] Luckey fired Bailey because he was also caught sleeping on the job in 1998. Bailey filed a grievance claiming his firing was racially motivated. His grievance was ultimately denied. Bailey's claim went to arbitration on September 23, 2003. The arbitrator found Bailey was sleeping on the job, however, he was reinstated based on his length of employment with the RHA. The arbitrator found the offense to be serious and did not award back pay for Bailey's unpaid suspension. Bailey was reinstated to his maintenance mechanic position on December 18, 2003. Bailey continues to hold this position today.

DISCUSSION

A Motion for Summary Judgment will only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an

[3]David Talarico is Mulutzie's immediate supervisor and the person Mulutzie reports to. Mulutzie reported the incident to Luckey because Talarico was absent.

element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

The moving party bears the burden of proving no genuine issue of material fact is in dispute and the court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348 (1986). Once the moving party has carried its initial burden, the nonmoving party must then "come forward with specific facts showing there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587 (citing Fed.R.Civ.P. 56(e)). A Motion for Summary Judgment will not be denied because of the mere existence of some evidence in support of the nonmoving party. The nonmoving party must present sufficient evidence for a jury to reasonably find for them on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Such evidence must be more than the nonmoving party's bald assertions. *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1252 (3d Cir. 1987); *see also Pawlak v. Seven Seventeen HB Philadelphia Corp.*, 2005 WL 696878, at *13 (E.D. Pa. March 24, 2005).

Bailey claims he was fired because of his race, not because he was sleeping on the job. *McDonnell Douglas* established the legal framework for evaluating such claims..*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under the burden shifting framework of *McDonnell Douglas*, Bailey has the initial burden of establishing a prima facie case of discrimination. *Marzano v. Computer Science Corp.*, 91 F.3d 497, 502-03 (3d Cir. 1996). To survive a Motion for Summary Judgment, Bailey must first prove by a preponderance of the

evidence that a prima facie case of discrimination exists.[4]

There are two theories of discrimination, disparate impact and disparate treatment. "A disparate impact violation is made out when an employer is shown to have used a specific employment practice, neutral on its face but causing a substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer." *Equal Employment Opportunity Comm'n v. Metal Serv. Co.,* 892 F.2d 341, 346 (3d Cir. 1990). A disparate treatment violation "is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion." *Id.* at 347. Bailey's claim is a disparate treatment violation.

In a racial discrimination case under a disparate treatment analysis, Bailey must show: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was discharged from or denied the position, or suffered adverse employment consequences; and (4) non-members of the protected class were treated more favorably. *Harris v. SmithKline Beecham,* 27 F.Supp.2d 569, 578 (E.D. Pa. 1998), *aff'd,* 203 F.3d 816 (3d Cir. 1999) (citing *McDonnell Douglas,* 411 U.S. at 802). In this case, Bailey does not meet the fourth requirement for a prima facie showing.

To satisfy the fourth requirement, Bailey must establish that similarly situated non-protected persons were treated more favorably. *Andrews v. City of Philadelphia,* 895 F.2d 1469,

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[4]If Bailey establishes a prima facie case, the burden then shifts to the Defendants to articulate a legitimate, nondiscriminatory reason for the employment action. *McDonnell Douglas,* 411 U.S. at 802. If the Defendants successfully carry this burden, then Bailey, in order to survive a Motion for Summary Judgment, must produce sufficient evidence to raise a genuine issue of fact as to whether the Defendants' proffered explanation is pretextual. *Bullock v. Children's Hospital of Philadelphia,* 71 F.Supp.2d 482, 487 (E.D. Pa. 1999) (citing *Sheridan v. E.I. DuPont de Nemours & Co.,* 100 F.3d 1061, 1066 (3d Cir. 1996) (en banc)). Bailey does not establish a prima facie case and, therefore, we do not reach the burden shifting phase.

1478 (3d Cir. 1990). To be characterized as "similarly situated," Bailey must show "the other employee's acts were of 'comparable seriousness' to his own infraction." *Anderson v. Haverford College*, 868 F.Supp. 741 (E.D. Pa. 1994) (quoting *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir. 1988)). The individual with whom Bailey seeks to be compared must have "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Anderson*, 868 F.Supp. at 735, (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992)).

Bailey claims other employees were caught sleeping and were not terminated. Bailey identifies David Rodriguez, Hispanic, and Wilfred Burden, African American, as such employees. Rodriguez was found with his feet up and his eyes closed, however, Mulutzie could not verify Rodriguez was sleeping. Mulutzie Aff. at ¶¶ 38-39. As a result, Rodriguez was not disciplined for sleeping on the job. Talarico Aff. at ¶¶ 9-11. Burden, an African American, is not outside Bailey's protected class and cannot be used for such a comparison. Unlike Bailey, Rodriguez and Burden did not receive any prior discipline for sleeping on the job.

In a final attempt to salvage his claim, Bailey alleges Mulutzie, a Caucasian, was promoted in 1995 despite being well-known for sleeping on the job. Pl.'s Mem. Opposing. Def's Motion, p. 2. Bailey provides no support for this allegation. Without any specific supportive facts in the record, Bailey's bald assertions cannot overcome the Defendants' Motion for Summary Judgment. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Accordingly, we enter the following:

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DANIEL F. LUCKEY, and	:	
RICHARD MULUTZIE	:	

ORDER

AND NOW, this 29th day of April, 2005, Defendants' Motion for Summary Judgment (docket # 9-10) is GRANTED and judgment is entered in Defendants' favor. Defendants' Motion In Limine (docket # 23) is DENIED as moot.

BY THE COURT:

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Juan R. Sánchez, J.