

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

JOHNNIE BATES, OVERSTONE	:	CIVIL ACTION
CUMMINGS, and TODD PAYNE on their	:	
own behalf and all others similarly situated,	:	No. 03-5519
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
TANDY CORPORATION, d/b/a and a/k/a	:	
RADIOSHACK CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, S.J.

AUGUST 1, 2005

Presently before the Court in this employment discrimination action is Defendant RadioShack Corporation’s (“RadioShack”) Motion for Summary Judgment. For the reasons that follow, the Motion will be granted.

I. RIPENESS AND PROCEDURAL HISTORY

Due to the unique procedural history of this case, a discussion of ripeness is required at the outset. The present case was filed on October 2, 2003. At the time that it was filed, Plaintiffs designated this case for the special case management track, taking it out of the standard management practices used by the Court. During a telephone conference held on December 19, 2003, the Court instructed the parties to come to an agreement regarding a schedule for discovery and motion for class certification and submit the proposal to the Court for entry of a scheduling order. However, through oversight by both the Court and the parties no such proposal was submitted and a scheduling order was not entered. The parties reached a

vague agreement regarding a schedule and proceeded according to their own devices. However, the filing of the instant motion has sparked a dispute regarding the completeness of discovery.

Plaintiffs contend that the parties agreed to a bifurcated discovery schedule under which the parties would take discovery limited to the issues of class certification and once a motion for certification had been submitted to the Court discovery would then proceed on the merits. RadioShack disputes this contention, claiming that while it understood Plaintiffs may have wished to conduct some discovery on certification first, it felt in no way limited to certification when deposing the Plaintiffs in this case or conducting any discovery. The correspondence between the parties provided along with the instant motion is not clear on the issue. However, Plaintiffs claim that they have insufficient discovery to respond to the motion because their ten previous depositions in this case have concentrated on RadioShack's national policies and promotion practices.

Chief among Plaintiffs' discovery complaints is their inability to depose Bruce Teufel, the Plaintiffs' current district manager. Defendants rely upon Teufel's declaration in support of this motion to explain his decisions against promoting Payne to the Moorestown Mall store in 2001 and 2002. However, as demonstrated by their own correspondence, Plaintiffs have scheduled and cancelled Teufel's deposition twice, on October 20, 2004 and November 23, 2004, cancelling both times due to scheduling conflicts created by Plaintiffs' counsel. Only one attempt has been made since January 2005 to schedule the deposition. As a result, the failure to depose Teufel is not attributable to RadioShack.

Furthermore, the Federal Rules of Civil Procedure do not require a defendant to wait until the close of discovery to make a motion for summary judgment. Fed. R. Civ. P. 56(b)

(“A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part thereof.”). As a result, I see no reason to delay already protracted proceedings in this case. The record is sufficient to make a determination on the present motion.

II. FACTUAL BACKGROUND

Defendant RadioShack is a consumer electronics speciality retailer of wireless communications, electronic parts, batteries, and accessories. RadioShack owns and operates approximately 5,000 retail stores across the country, with its top five markets in New York, Los Angeles, Chicago, Philadelphia and Dallas/Fort Worth. The company has divided its retail stores into four divisions (Northeast, Southwest, West, and Midwest), which are subdivided into twenty-three regions and more than two-hundred districts. Plaintiffs are current RadioShack employees and employed in District 0521 in the Philadelphia Region within RadioShack’s Northeast Division, who allege that they have been discriminated against by virtue of their race in the past and that RadioShack discriminates against African American store managers by refusing to promote them above the position of store manager.

A. OVERSTONE CUMMINGS

Plaintiff Overstone Cummings (“Cummings”) was hired in RadioShack’s Cherry Hill Mall store as a sales associate in 1986. At the time of his hire, he expressed his interest in promotional opportunities. Less than one year later, he was promoted to store manager of RadioShack’s Blackwood, New Jersey store. His next position as a store manager was in the Berlin, New Jersey store in 1988-89. Cummings was promoted again and returned to the Cherry Hill Mall store, one of the largest in the district, as manager in 1989.

While the Cherry Hill Mall was undergoing renovations in 1991, Cummings was demoted from the Cherry Hill Mall store to the Brookhaven store. Following the discovery of a \$20,000 discrepancy in the turnover inventory at the Cherry Hill Mall store, Cummings was terminated by RadioShack. However, while an investigation was conducted, Cummings was reinstated as a sales associate at The Gallery store in Philadelphia. The investigation yielded no actual discrepancy, and Cummings' then district manager, Pete Reinhardt, was demoted by RadioShack for falsifying the inventory. Cummings was reinstated and promoted back to store manager, serving at the Front and Olney and Cheltenham and Green stores. In 1994, Cummings took over the Cheltenham Mall Store, where he increased the store's sales volume to over one million dollars. After requesting a return to a New Jersey store in 1998, Cummings was transferred to the Cherry Hill Mall store, also a store with over one million dollars in sales. Cummings continues to manage the Cherry Hill Mall store.

B. TODD PAYNE

Plaintiff Todd Payne ("Payne") began his career at RadioShack in 1989 at the Deptford Mall store as a sales associate. After a brief leave of absence, Payne returned to RadioShack as a manager-trainee in 1991. One month into the trainee program, Payne was placed as a manager in RadioShack's Collingswood location. However, because he received little training or assistance as a manager from his district manager, Payne had difficulty managing the location and was later demoted to the Deptford Mall store as a sales associate. In 1993, Payne was promoted to manager of the Wenonah store with a sales volume of approximately \$500,000. In 1996, Payne was promoted to the Plymouth Meeting Mall store; however, his sales figures at that store were impacted by renovations. After unsuccessfully applying for the position

twice, Payne was promoted to the Moorestown Mall Store, a store with over one million dollars in sales volume, in 2003.

In 2001, while managing the Plymouth Meeting Mall store, Payne applied for a opening as manager of the Moorestown Mall Store. At that time, there were two interested candidates from within the district. The district manager, Bruce Teufel, compared the candidates using RadioShack's Performance Scorecard, an analysis of the financial results of each store for the previous fiscal year. The candidate selected over Payne was ranked first out of twenty-six stores in the district, while Payne was ranked eighteenth. When the position again became available in 2002, Payne was again considered for the Moorestown Mall store, but was not selected because his performance had not improved. As there were no other acceptable candidates in the district, Teufel requested a recommendation from an adjacent district and hired that person. The selected candidate ranked 168th out of 267 managers in the region, while Payne was ranked 208th. When the Moorestown Mall position was again open in 2003, Payne's performance data had significantly improved and his overall performance exceeded that of the other interested candidates. As a result, Payne was selected for the position and has remained there since 2003.

C. JOHNNIE BATES

Plaintiff Johnnie Bates ("Bates") began working for RadioShack as a sales associate in 1996. After leaving for a brief period of time, he returned to RadioShack in 1997 and was placed as a manager-in-training. That same year, Bates became manager of RadioShack's Flourtown store, which had a sales volume of \$600,000. At the end of 1999, Bates was demoted to the Horsham store, which had a lower sales volume of \$400,000. In 2000, Bates

was promoted to the Warminster store, which had a sales volume of \$600,000. In 2001, Bates elected to step down from his store manager position and take a position as a part time sales associate in the Cherry Hill Mall store, enabling him to take a course to become a health care technician. Bates currently works as a sterilization technician at Presbyterian University Hospital, working at RadioShack approximately four hours per week.

III. DISCUSSION

RadioShack presents three arguments in its Motion for Summary Judgement. First, RadioShack argues that many of the incidents of racial discrimination alleged by the Plaintiffs are excluded because they are either untimely or are not adverse employment actions protected by statute. Second, RadioShack argues that Plaintiffs' discrimination claims relating to their store assignments within the statute of limitations fail because Plaintiffs have presented no evidence from which a jury could conclude its explanation for those decisions was pretext. Finally, RadioShack argues that the Plaintiffs have failed to establish a *prima facie* case for failure to promote because Plaintiffs have not applied for positions beyond the store manager level. After a discussion of the applicable law, each of these arguments will be considered in turn.

A. APPLICABLE LAW

It is well established that a plaintiff bears the ultimate burden of proving intentional discrimination by a preponderance of the evidence. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). A plaintiff must prove that the alleged impermissible consideration was a determinative factor in the adverse employment action about which she complains. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

Where, as here, no direct evidence of discrimination exists, a plaintiff may prevail by producing circumstantial evidence of discrimination under the analytical framework established by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. See also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). The elements of proof required under Title VII and section 1981 are identical. Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 499 (3d Cir. 1999).

Under this burden shifting framework, the plaintiff must first establish a *prima facie* case of discrimination by presenting facts which, if unrebutted, would support an inference of discrimination. If the plaintiff succeeds in establishing a *prima facie* case the burden then shifts to the employer, who must merely articulate a legitimate, non-discriminatory reason for the employment decision. Burdine, 450 U.S. at 254. Once the employer has articulated a legitimate business reason for the decision, any presumption of discrimination drops from the case, and the plaintiff must satisfy her ultimate burden of proving discrimination. Id. at 256.

The ultimate burden of persuasion remains at all times with the plaintiff, who is required to prove by a preponderance of the evidence that the legitimate reason proffered by the defendant is pretextual and that the defendant intentionally discriminated against the plaintiff. Hicks, 509 U.S. at 515-16; Burdine, 450 U.S. at 252-53. In order to prevail, a plaintiff must establish not only that the articulated reason was fabricated, but also that discrimination was the real reason for the adverse employment action. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); Hicks, 509 U.S. at 515-16; Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). The plaintiff cannot prevail merely by suggesting that employment decisions were wrong or mistaken. Instead, the plaintiff must

demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for [the asserted] nondiscriminatory reasons.

Fuentes, 32 F.3d at 765 (citation and internal quotation marks omitted).

B. EXCLUDED CLAIMS

1. Timeliness

As an initial matter, a claim must be timely filed. Under Title VII, an aggrieved employee must file a charge of discrimination with the Equal Employment Opportunity Commission within 300 days of the adverse employment action. 42 U.S.C. § 2000e-5(e)(1). Failure to timely file a charge with the EEOC precludes the assertion of the claim later in litigation. E.g., Velex v. QVC, Inc., 227 F. Supp. 2d 384, 396 (E.D. Pa. 2002). An action under section 1981 for race discrimination requires no administrative filing; however, such an action must be brought within four years of the conduct alleged to be discriminatory. Jones v. R.R. Donnelly & Sons, Co., 124 S. Ct. 1836 (2004). While nothing prohibits the employee from using any past discriminatory acts as background evidence in support of a timely claim, untimely acts may not form the basis of the lawsuit. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 133 (2002). Since this action was filed in October 2003, Plaintiffs must demonstrate an adverse employment action taking place after October 1999 in order to sustain an action. As a result, many of Plaintiffs claims are excluded as untimely.

Specifically, Cummings' 1991 termination due to the improperly conducted takeover inventory of the Cherry Hill Mall store is untimely and cannot form the basis of a claim.

While we may view this termination as evidence in support of a timely charge, it cannot form the basis of recovery. Id.

2. Non Adverse Employment Actions

Furthermore, Title VII and section 1981 provide a remedy for adverse employment actions based upon race. However, they do not provide a remedy for every minor remark or uncivil gesture that an employee may find bothersome. An adverse employment action is one that “alters the employee’s compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.” Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997). Minor or “trivial actions that merely make an employee unhappy are not sufficient . . . otherwise every action that an irritable, chip-on-the-shoulder employee did not like would form the bases of a discrimination suit.” Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 787 (3d Cir. 1998). “Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of the decision.” Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1993).

Plaintiffs allege a series of hearsay statements attributed to other RadioShack employees, some supervisory and some not. However, none of the statements alleged relate specifically to the store assignments or the alleged failure to promote Plaintiffs above the store manager level. As a result, they are not actionable claims in and of themselves and are excluded.

C. STORE TRANSFERS

The only employment decisions falling within the statutory period are the claims made by Bates and Payne regarding their store assignments between 1999 and 2003. In 2001 and 2002, Payne was “passed over” for promotion to the Moorestown Mall store in favor of other applicants for the position, and in 1999, Bates was demoted from the Flourtown store to the lower volume Horsham store. In both instances, RadioShack argues that they were undertaken using the results of its performance scorecard. In Payne’s case, the applicants selected for the Moorestown Mall store over Payne were both ranked higher on the score card. In 1999, Bates fell to nineteenth out of twenty in his district with a net profit loss of 18.51 percent. As a result, Bates was demoted to a lower volume store.

Plaintiffs have brought forth no evidence demonstrating that RadioShack’s reliance on the performance scorecard is pretext for racial discrimination. In order to prevail, Plaintiffs may not simply express a belief that RadioShack’s decisions was wrong or mistaken. Rather, plaintiffs must present evidence such that a reasonable factfinder could rationally find the reason unworthy of credence, and hence infer that discrimination was more likely than not a determinative factor of the decision. See Fuentes, 31 F.3d at 765; Ezold, 983 F.2d at 531, 533. As Plaintiffs cannot meet the required burden to establish pretext, summary judgment is appropriate for these claims.

D. FAILURE TO PROMOTE

In order to establish a *prima facie* case for a failure to promote claim, a plaintiff must establish that (1) she belongs to a protected category; (2) she applied for and was qualified for a job in an available position; (3) was rejected; (4) and after the rejection, a non-member of

the protected class was treated more favorably. Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997).

Plaintiffs have failed to make a *prima facie* case for failure to promote in this case. Bates no longer qualifies to become a district manager because he no longer works as a store manager. Furthermore, while Cummings and Payne are undoubtedly qualified to serve as district managers, neither has applied for the position despite invitations from RadioShack to do so. Without making an application for the district manager training program, Plaintiffs have failed to state a *prima facie* case for failure to promote.

Plaintiffs' arguments that they should be relieved from the obligation to apply for a promotion because they have never received the necessary recommendations required for participation in the district manager training program are unavailing. Such an argument ignores the process used by RadioShack to select applicants for the program. Store managers may apply to the training program with or without invitation from a district manager, at which time RadioShack solicits the candidate's manager's opinion. A recommendation is not a prerequisite to the submission of an application by a candidate. In addition, there is no evidence that Plaintiffs ever made an attempt to secure a recommendation to the training program, or otherwise apprise RadioShack of their interest in opportunities above the store manager level.

Furthermore, RadioShack invited all store managers in the Philadelphia region, including Cummings and Payne, to attend annual open houses for the district manager training program, the first step in applying for that program. Neither of the eligible Plaintiffs attended the open houses, applied for the training program, or even asked to be considered for the program.

As a result, Plaintiffs cannot state a *prima facie* case for a failure to promote, and summary judgment for RadioShack is appropriate.

IV. CONCLUSION

As I have concluded that Plaintiffs have failed to show that RadioShack's nondiscriminatory reasons for their transfers within the statute of limitations are pretext, and that they have failed to establish a *prima facie* case for failure to promote, RadioShack's motion for summary judgment will be granted.

An appropriate Order follows.

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TANDY CORPORATION, d/b/a and a/k/a	:	
RADIOSHACK CORPORATION,	:	
	:	
_____	:	
Defendant.	:	

ORDER

AND NOW, this 1st day of August, 2005, upon consideration of Defendant RadioShack Corporation's Motion for Summary Judgment (Doc. No. 13), the Response in opposition, and the Reply thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly

ROBERT F. KELLY S.J.