

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

KEVIN ANDERSON, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	
	:	
Defendant.	:	No. 96-5404

MEMORANDUM

Reed, J.

March 31, 1998

The three plaintiffs, Kevin Anderson ("Anderson"), Broadus Williams ("Williams"), and George Lewis ("Lewis") are Street Supervisors in the Transportation Department of the School District of Philadelphia ("School District"). All three, who are African-American, allege, among other claims of discrimination, that the School District discriminated against them in its testing and promotion procedures. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1331. The School District seeks partial summary judgment on all claims of discrimination in promotion and testing on two bases. Procedurally, the School District argues that Williams and Lewis cannot boot-strap their promotion and testing claims onto the untimely promotion and testing claim of Anderson. Substantively, the School District argues that no genuine issue of material fact exists on the promotion and testing claims as the plaintiffs have produced no evidence to support their claims. Further, because the only claim of Williams is one for discrimination in promotion and testing, the School District argues that

Williams must be dismissed as a plaintiff. For the reasons that follow, the motion for summary judgment regarding the claim of discrimination in testing and promotion of Anderson and Lewis will be granted and the motion regarding the claim of discrimination in testing and promotion of Williams will be denied.¹

I. BACKGROUND

On July 22, 1994, Anderson filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) against defendant. Anderson claimed that he was discriminated against on the basis of his race by his supervisor, Louis Campanaro (“Campanaro”) and made three succinct allegations: (1) after Campanaro became Anderson's supervisor, Anderson's otherwise clean record was soiled by frivolous disciplinary actions taken against him; (2) during Campanaro's tenure the number of Street Supervisors who were African-American diminished from ten out of eleven to only five and no African-Americans had been promoted or placed in acting promotional positions; and (3) on July 7, 1994, Anderson had been suspended for four days and told that further disciplinary action would result in his dismissal.

Thereafter, plaintiffs Williams and Lewis also filed EEOC complaints against defendant on October 24, 1995 and November 14, 1995 respectively. Williams alleged that a test for the position of Senior Street Supervisor he took on June 3, 1994 was racially prejudicial. Williams alleged that his immediate supervisor, Campanaro, and another employee of defendant on a panel of three judges were instructed by John Lombardi, Campanaro's supervisor, to skew

¹ Because I find the claim of Williams for discrimination in testing and promotion survives summary judgment, there is no need to reach the claim of the School District that Williams should be dismissed because his only claim is one for discrimination in testing and promotion.

the scores in favor of Lombardi's Caucasian candidate, Joseph Zuggi ("Zuggi"). Moreover, Williams alleged that, because Zuggi was an outsider and had no experience in defendant's Transportation Department, Williams was more qualified for the position, which required five years of experience in the Transportation Department.

Lewis alleged that, inter alia, he was discriminately disciplined by defendant as part of an on-going policy of racial discrimination by the upper management in defendant's Transportation Department. Without discriminatory testing and promotion practices which kept African-Americans out of management positions, Lewis concluded he would not have faced such discriminatory treatment.

Defendant responded to none of the EEOC complaints. Anderson received a right to sue letter dated July 19, 1996. On August 2, 1996 plaintiffs filed a complaint in this Court against defendant. Defendant filed its first motion for summary judgment thirteen days later, challenging the timeliness of the EEOC complaints of Williams and Lewis because they based their allegations on incidents that occurred over three hundred days before the filing of their complaints with the EEOC² and, consequently, failed to exhaust administrative remedies. In an Order dated December 13, 1996 (Document No. 9), this Court denied defendant's motion and held that:

[t]his court recognizes the single filing rule, which excuses failure to comply with the administrative requirements under Title VII by permitting a Title VII plaintiff who has failed to comply with the [EEOC] filing requirements to seek redress of his or her claims in the same lawsuit as a plaintiff who has timely filed an EEOC complaint, provided that the claim of the non-complying plaintiff arises out of

² Under 42 U.S.C. § 2000-5(e), any charge of discrimination "shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred."

substantially similar discriminatory treatment and in the same time frame as alleged in the claim of the complying plaintiff;

Plaintiff Anderson, a street supervisor in the transportation department of the school district of Philadelphia, filed a timely complaint with the EEOC . . . alleging continuous race discrimination on or about July 7, 1994, including harassment by his supervisor [Campanaro], failure to promote black individuals in the department, and unwarranted suspension from work duty and other disciplinary action;

Having reviewed the EEOC complaint filed on October 24, 1995 by Plaintiff Williams, a street supervisor, like Anderson, in the transportation department of the school district of Philadelphia, alleging continuous race discrimination . . . including racial bias in promotions, unfair testing procedures for promotions, and a consistent pattern of discrimination practices against African-Americans in the transportation department, and assuming that Williams did not file a timely complaint with the EEOC, I find the single filing rule applies to the complaint of Williams as it alleges substantially similar racial discrimination that occurred in the same time frame as the discrimination alleged by Anderson;

Having reviewed the EEOC complaint filed . . . by Plaintiff Lewis, a street supervisor, like Anderson, in the transportation department of the school district of Philadelphia, alleging continuous race discrimination . . . including unfair testing procedures, a racially biased system for promotions, denial of promotion based on race, harassment by his supervisor Louis D. Campanaro, unwarranted discipline, and a consistent pattern of discriminatory practices against African-Americans in the transportation department, and assuming that Lewis failed to exhaust his administrative remedies, I find that the single filing rule applies to the complaint of Lewis as it alleges substantially similar racial discrimination that occurred in the same time frame as the discrimination alleged by Anderson; and

The allegations contained in the EEOC complaint of Anderson provided notice to the defendant of the alleged racially biased system in promotion of street supervisors and the alleged harassment by Campanaro asserted by Williams and Lewis in their complaints, such that defendant will not suffer undue prejudice by defending against the claims of Williams and Lewis in the instant lawsuit.

In the instant motion, defendant recasts its challenge to the ability of Williams and Lewis to boot-strap testing and promotion claims onto the EEOC complaint of Anderson. In the wake of discovery, the defendant argues that Anderson never considered his EEOC complaint as

challenging discriminatory practices in promotion and testing. Moreover, defendant argues, the EEOC complaint of Anderson does not include a timely challenge to defendant's discriminatory promotion and testing practices because Anderson took the test for promotion in 1992, over a year before the filing of his EEOC complaint. Relying on Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997), which was handed down after the December 13, 1996 Order of this Court and held that a plaintiff alleging harassment under a “continuing violation” theory could not include an otherwise untimely discrimination in promotion claim, the defendant argues that the promotion and testing claims of Lewis and Williams can not be boot-strapped onto Anderson's discrimination in discipline claim, which is the only timely claim Anderson alleged.

In the alternative, defendant argues that no genuine issue of material fact exists with respect to the claims against the promotion and testing practices of defendant entitling it to summary judgment on those claims. First, defendant points out that each plaintiff merely suspects that the test results were rigged, but none has evidence of discrimination. Second, through an affidavit from Campanaro, defendant points out that the number of Street Supervisors who are African-American has remained proportional to the total number of Street Supervisors during the time of the allegations of the plaintiffs. Moreover, defendant proffers statements made by the plaintiffs in their depositions that no Street Supervisor who was African-American was forced to leave during the years in issue.

In response, plaintiffs argue that the prior Order of this Court dated December 13, 1996 disposing of defendant's first summary judgment motion resolves defendant's procedural challenges in this motion. The plaintiffs contend that this Court retains jurisdiction of the claims of Lewis and Williams even if Anderson cannot prove all of the allegations in his complaint.

The plaintiffs further reason that, without discrimination in promotion and testing which kept African-Americans out of management positions in the department, Anderson and Lewis would not have faced other forms of discrimination in the workplace. Therefore, the plaintiffs argue that Anderson and Lewis have claims for discrimination in promotion and testing based on the alleged discrimination against Williams in his test for promotion which happened within three hundred days of the filing of the EEOC complaint of Anderson.

In response to defendant's motion on substantive grounds, plaintiffs allege the existence of witnesses and evidence that clearly establish their case, but only attach with their response the test materials and scores from the test for a promotion to Senior Street Supervisor in 1994 in which Williams participated and was denied the promotion. The test consisted of three parts: a multiple choice examination that was anonymous and clearly objective, an essay examination that was anonymous and subjective, and an oral examination before three judges which was subjective and not anonymous.³ In the multiple choice section, Williams scored 91.425%, placing second, and Zuggi scored only 78.57%, nearly the lowest score of eleven candidates. In the more subjective, essay section, Williams maintained his rank with a score of 70 and Zuggi scored a 65. The plaintiffs point out that 65 was the exact score that Zuggi needed to qualify for the final, oral evaluation. Finally, in the subjective, oral examination, in which anonymity is fully precluded, Zuggi scored 92.33, while Williams only received a 77. Williams

³ In addition to the scores on these tests, the School District considered whether a candidate was a veteran in making promotional decisions. Both Williams and Zuggi were eligible for a veterans' preference. The veterans' preference guaranteed that any veteran who passed the examinations would be placed at the top of the list of eligible candidates. Although one white candidate scored higher than Williams on every portion of the test, this candidate was not eligible for the veterans' preference and thus placed lower on the list of eligible candidates.

argues that the skewed results clearly prove the existence of a conscious motive or policy to discriminate on the basis of race by the School District.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" then a motion for summary judgment may be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-61 (1970). The movant can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case;" the movant is not required to produce affidavits or other evidence to establish that there are no genuine issues of material fact. Celotex, 477 U.S. 323-25.

Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts, showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes,

398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50.

Summary judgment is disfavored in employment discrimination cases. See Oldham v. West, 46 F.3d 985, 988 (8th Cir. 1995); Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989); Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988); Thornborough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 640 (5th Cir. 1985); Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 759 (9th Cir. 1980); Miller v. Beneficial Management Corp., 855 F. Supp. 691, 707 (D.N.J. 1994); Frey v. Penn. Airlines, 859 F. Supp. 137, 144 (M.D. Pa. 1992). In an employment discrimination case, the plaintiff faces the difficult task of proving the intent or motive of the defendant. See Jalil, 873 F.2d at 707; Frey, 859 F. Supp. at 144. Motive and intent usually are not supported by direct evidence and most evidence is in the hands of the defendant. See Oldham, 46 F.3d at 988; Jalil, 873 F.2d at 707; Frey, 859 F. Supp. at 144. However, summary judgment is appropriate in an employment discrimination case when plaintiff relies on “mere inferences, conjecture, speculation or suspicions.” Huggins v. Teamsters Local 312, 585 F. Supp. 148, 150-51 (E.D.Pa. 1984) (citing Robin Constr. Co. v. United States, 345 F.2d 610, 613 (3d Cir. 1965)).

III. DISCUSSION

A. Timeliness of Anderson’s EEOC Complaint and the Ability of Lewis and Williams to Bootstrap onto Anderson’s EEOC Complaint

I find that Anderson did not allege a timely claim for discrimination in promotion and testing because Anderson did not allege that he took a test for promotion within three hundred days before he filed his EEOC complaint. Indeed, the plaintiffs admit in their brief in response to the motion for summary judgment that Anderson's unsatisfactory work record, allegedly the result of discriminatory discipline, precluded him from competing for promotion during the three hundred day period. (Pl.'s Mem. at 7).

Although I find that Anderson does not have a timely claim for promotion and testing himself, an issue that was not addressed by this Court or challenged by the parties in the previous motion for summary judgment, the other claims of discrimination he alleged were based on events that occurred within three hundred days of his filing with the EEOC. Thus, Anderson is a complying plaintiff and as long as the claims of discrimination in testing and promotion by Lewis and Williams are substantially similar to and occurred in the same time frame as the allegations of discrimination in Anderson's complaint, Lewis and Williams may boot-strap their otherwise untimely claims of discrimination onto the complaint of Anderson. Defendant misconstrues the single filing rule as an issue capable of attack with each new development in the record. Only the face of the EEOC complaints determines whether or not a worker may boot-strap onto a co-worker's timely EEOC complaint. See e.g. Shannon v. Hess Oil Virgin Islands Corp., 100 F.R.D. 327, 331 (D.V.I. 1983) (quoting Foster v. Gueory, 655 F.2d 1319, 1322 (D.C. Cir. 1981)). Thus, the Order of this Court dated December 13, 1996 already established that

Lewis and Anderson may boot-strap their claims for discrimination in promotion and testing onto the timely complaint of Anderson.⁴

The School District argues that if Anderson does not have a timely claim for promotion and testing, the claims of Williams and Lewis must also fail because, in order to bootstrap onto Anderson's complaint, Anderson must be a complying plaintiff as to the claims of discrimination in promotion and testing. In support of this, defendant argues that Rush, a case that was decided since the December 13, 1996 Order, precludes, as a matter of law, bootstrapping testing and promotion claims on claims of discrimination in discipline or harassment. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3rd Cir. 1997). However, Rush is inapposite. In Rush, the plaintiff sued her employer under a "continuing violation" theory for sexual harassment that had continued for years including events that occurred more than three hundred days before the filing of her EEOC complaint. She also alleged discrimination in promotion and training which occurred more than three hundred days before the filing of the

⁴ Moreover, the primary concern of the Court in deciding whether to apply the single filing rule is "whether there is sufficient similarity as to prevent frustration of Title VII policies." Trbovich v. Ritz-Carlton Hotel Co., 920 F. Supp. 1030, 1033 (E.D. Mo. 1995); see also Shannon, 100 F.R.D. at 331 ("[W]here the complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts, then [the claims are not substantially similar]"). In addressing the similarity of discriminatory treatment, this Court considered notice to the defendant and the likelihood of conciliation by the defendant. The Court considered the likelihood that the EEOC would have touched on the bootstrapping plaintiffs' claims in the course of investigating the timely complaint. See Howlett v. Holiday Inns, Inc., 49 F.3d 189, 195 (6th Cir.), cert. denied, 116 S.Ct. 379 (1995); Snell v. Suffolk County, 782 F.2d 1094, 1100 (2d Cir. 1986); Forehand v. Fla. State Hosp., 839 F. Supp. 807, 818 (N.D. Fla. 1993), rev'd on other grounds, 89 F.3d 1562 (11th Cir. 1996). The Court also determined the likelihood that the defendant would have been more conciliatory in resolving the boot-strapped complaint than it was in resolving the timely complaint. See Tolliver v. Xerox Corp., 918 F.2d 1052, 1058 (2d Cir. 1990), cert. denied, 499 U.S. 983 (1991); Trbovich, 920 F. Supp. at 1034; Shannon, 100 F.R.D. at 332. Although the School District is a vast organization, any investigation of defendant's alleged discrimination of Anderson would, inevitably, touch on the grievances of the handful of other African-American Street Supervisors immediately under Campanaro, including those of Williams and Lewis. See e.g. Howlett, 49 F.3d at 195. Given that the defendant did not respond to any of the EEOC complaints of the plaintiffs, this Court had no reason to believe (and defendant did not offer any evidence) that defendant would have been more conciliatory with the promotion and testing claims of Lewis and Williams than it was with Anderson's claims of discrimination.

EEOC complaint. The Court of Appeals for the Third Circuit in Rush held that the otherwise untimely claims of discriminatory firing or denial of promotion of plaintiff could not be pursued under a claim of harassment as part of the “continuing violation.” Thus, Rush was only concerned with limiting use of a continuing violation theory of harassment to resuscitate stale claims that were not filed within three hundred days of their occurrence, not with the ability of one plaintiff to boot-strap onto the timely complaint of another plaintiff under the single filing rule.

To summarize, the claim of Anderson for discrimination in testing and promotion is untimely as Anderson has alleged no events that occurred to him that would form the basis of a claim for discrimination in testing and promotion within the three hundred days before filing the complaint. Thus, the School District is entitled to summary judgment on that claim against Anderson. Williams and Lewis, however, can boot-strap their discrimination in testing and promotion claims onto the complaint of Anderson under the single filing rule and according to the Order of the Court dated December 13, 1996. Thus, I will proceed to address the arguments of the parties regarding the substance of the claims of Lewis and Williams for discrimination in promotion and testing.

**B. Sufficiency of Plaintiffs’ Evidence of Discrimination
in Promotion and Testing**

Defendant argues that the plaintiffs have insufficient evidence of discriminatory testing and promotion among the Street Supervisors in defendant’s Transportation Department to survive a motion for summary judgment. Defendant asked each plaintiff in his deposition to

support his belief that the testing and promotion procedures were discriminatory. Because the plaintiffs could not, themselves, substantiate their beliefs, defendant concludes that plaintiffs have no support for any claim of discrimination in testing and promotion. In addition, the defendant attached an affidavit by Campanaro stating that African-Americans had been promoted in the Transportation Department during the time in question.

Defendant relies heavily on Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985), to support its argument. In Holley, the Court of Appeals for the Eighth Circuit upheld a directed verdict in favor of the employer in an ADEA discriminatory firing suit because “[the case of plaintiff], at base, depends on . . . subjective reactions, which simply are not sufficient to make his case.” Id. at 1168. However, the court in Holley went on to observe that, if the case were not a reduction-in-force case, the testimony of plaintiff would carry more force because the firing of plaintiff would lack a significant, legitimate explanation. Id.

In support of his claim of discrimination in testing and promotion, Williams offers the scores and testing materials from his 1994 test for promotion.⁵ As Williams argues, his excellent performance on the multiple choice portion was met by a comparably poor evaluation on the oral portion. Similarly, Zuggi’s dismal performance on the objective and anonymous multiple choice portion was met by a miraculous naissance of knowledge and ability in the oral portion. Indeed, Zuggi scored the lowest possible score in the written portion that permitted him

⁵ In their brief, the plaintiffs suggest that “there is significant evidence that the promotion practices of the defendant are discriminatory” and that named and unnamed witnesses “will testify” about critical issues in the case. However, the plaintiffs attach neither affidavits nor other evidence to support these naked allegations as required by Federal Rule of Civil Procedure 56(e). At one point, the plaintiffs explain the absence of proof of the testimony of a key witness by stating that defendants never deposed the witness. The choice of a defendant not to depose the witness of a plaintiff does not eliminate the requirement that plaintiff attach some evidence of the testimony of the witness if relying on that testimony to support opposition to a motion for summary judgment.

to continue. Yet, in the oral rounds Zuggi scored even higher than the one white candidate who consistently scored higher than Williams, but who was not eligible for veterans' preference.

I find that a genuine issue of material fact exists as to whether Williams was discriminated against in the scoring of his test and thus his chance for promotion. A reasonable fact finder could compare the scores of Williams and Zuggi and conclude that a discriminatory motive informed the subjective evaluation of the oral portion of the examination when the identity and race of the candidates were as plain as the noses on their faces.⁶ Thus, Williams has carried his burden to withstand this motion for summary judgment.

However, I conclude that Lewis has produced no evidence to show that a genuine issue of material fact exists on his claim of discrimination in testing and promotion. Lewis claims that the other forms of discrimination he suffered were by the white managers who obtained their management positions through discriminatory testing and promotion practices designed to foster an atmosphere of discrimination against African-Americans. Thus, Lewis relies on the evidence of discrimination in the test for promotion of Williams to support his claim of discrimination in testing and promotion. However, Lewis does not offer any evidence of

⁶ Much like United Ass'n of Black Landscapers v. Milwaukee, 916 F.2d 1261, 1266 (7th Cir. 1990), Williams' "evidence, though sparse, [is] sufficient." In Black Landscapers, plaintiff offered his own belief that he had been discriminated against when denied promotion and also offered a comment made by a Bureau Chief that, despite plaintiff's excellent performance on examinations, the defendant "could fill the supervisor position with a 'warm body.'" Id. Though equivocal in significance, such inferential evidence is sufficient to survive summary judgment here.

In addition, if Williams or Zuggi testify, a jury may be able to assess the speaking ability and knowledge of the Transportation Department of each candidate in determining whether the scores given to Williams and Zuggi were based on their oral abilities or their race. This is an issue of the credibility of the witnesses which is left to the jury. Indeed, such evidence of one's oral ability cannot readily be attached to a response to a motion for summary judgment.

discrimination in any test for promotion in which Lewis participated. Thus, Lewis has failed to carry his burden to withstand this motion for summary judgment.⁷

IV. CONCLUSION

For the above reasons, defendant's motion for partial summary judgment will be denied as to the claims of discrimination in testing and promotion of Williams, but granted for the claims of discrimination in testing and promotion of Anderson and Lewis.

An appropriate Order follows.

⁷ In addition, Anderson similarly failed to produce evidence to support his opposition to the School District's motion for summary judgment, and thus, summary judgment will be entered against Anderson on his claim of discrimination in testing and promotion on this ground as well.

**IN THE UNITED STATES DISTRICT COURT
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KEVIN ANDERSON, et al.,	:	CIVIL ACTION
	:	
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v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	
	:	
Defendant.	:	No. 96-5404

ORDER

AND NOW, this 31st day of March, 1998, upon consideration of the motion of defendant School District of Philadelphia for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 13), the response of plaintiffs Kevin Anderson (“Anderson”), Broadus Williams (“Williams”), and George Lewis (“Lewis”) thereto (Document No. 14), and upon review of the pleadings, depositions, affidavits, reports, and other discovery of record, and for the reasons set forth in the foregoing memorandum, it is accordingly hereby **ORDERED** that the motion by the defendant is **DENIED** as it relates to the discrimination in testing and promotion claim of Williams and **GRANTED** as it relates to the discrimination in testing and promotion claims by Anderson and Lewis.

JUDGMENT IS HEREBY ENTERED in favor of the defendant and against Anderson and Lewis on their claims of discrimination in testing and promotion as they appear in paragraphs XVIII of Count I and XXXVIII of Count II of the complaint.

LOWELL A. REED, JR., J.