

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

LEVESTER KEITT	:	CIVIL ACTION
vs.	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	NO. 96-4739
	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 24th day of June, 1998, upon consideration of defendant School District of Philadelphia's ("District") Motion for Summary Judgment (Document No. 16, filed Jan. 29, 1998), plaintiff Levester Keitt's Answer to the defendant District's Motion for Summary Judgment (Document No. 17, filed Feb. 13, 1998), and defendant District's Supplemental Memorandum in Support of its Motion for Summary Judgment (Document No. 18, filed Feb. 19, 1998), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** as follows:

The Motion for Summary Judgment of defendant School District of Philadelphia is

GRANTED.

JUDGMENT is **ENTERED** in favor of defendant School District of Philadelphia and against plaintiff Levester Keitt.

MEMORANDUM

1. Background: Plaintiff Levester Keitt brings this employment discrimination action under Title VII of the Civil Rights Act, as amended, 42 U.S.C. ' 2000e et. seq. **The Court exercises jurisdiction pursuant to 28 U.S.C. ' 1331.**

Plaintiff worked, at all times relevant to this litigation, as an auditor for the defendant School District of Philadelphia. His job title was Auditor II, a position to which he was promoted in 1982. The instant litigation arises out of plaintiff's allegations that the District, in 1994, began acting in

a racially discriminatory manner. He makes three claims: First, plaintiff alleges that non-minority auditors have been given more opportunity for “overtime” work than minority auditors. In particular, plaintiff alleges that he was denied the opportunity to work overtime during the summer of 1995. Second, plaintiff alleges that the District assigned minority auditors to “high crime” areas more frequently than it assigned non-minority auditors to those areas. Third, plaintiff alleges that he was racially harassed by Herb Schectman – who was, at the time the suit was filed, the Director of Benefits Services. The basis of this last claim is that Mr. Schectman laughed whenever he saw plaintiff.

These claims were initially raised before the Philadelphia Commission on Human Relations (“PCHR”). After conducting a fact-finding meeting and field investigation, the PCHR determined that plaintiff’s claims were unsubstantiated. The Equal Employment Opportunity Commission (“EEOC”) concurred in this conclusion, issuing plaintiff a right to sue letter dated April 4, 1996.

Plaintiff has supplied the Court with no evidence – neither documents, interrogatories nor deposition testimony – in his Answer to defendant’s Summary Judgment Motion. In contrast, defendant has supplied the Court with substantial evidence in support of its Motion. With respect to the issue of overtime assignments, defendants submitted the following:

A June 8, 1995 memorandum from defendant, addressed to the “Staff,” invited all who were interested to apply for overtime work. Defendant’s Memorandum of Law In Support of It’s Motion to Dismiss [hereinafter Def. Memo.], Ex. O.

A June 12, 1995 memorandum signed by plaintiff informed the defendant that he would be interested in overtime work after July 10, 1995. Def. Memo., Ex. P.

By letter from the District, plaintiff was informed of an overtime opportunity starting on July 25, 1995. Def. Memo., Ex. Q. He was

also informed of this opportunity in telephone messages left on a home answering machine. Def. Memo., Ex. R (Deposition of Plaintiff, dated December 22, 1997, p. 40.)

In his deposition, plaintiff acknowledged that he had been offered overtime work, and stated that he did not accept the overtime because he believed it would violate a collective bargaining agreement. Def. Memo., Ex. R. (Deposition of Plaintiff, dated December 22, pp. 38-39).

Of the two African-American Auditor II's other than plaintiff, one, Phyllis Washington, was offered and worked overtime in the summer of 1995, Def. Memo., Ex. T (Affidavit of Phyllis Washington, dated December 11, 1997, & 4), and the other, Darrel Baxter, was offered and voluntarily rejected an overtime assignment in the summer of 1995. Def. Memo., Ex. U (Affidavit of Darrel Baxter, dated December 4, 1997, & 4).

With respect to assignment of African-American auditors to schools in "high crime" neighborhoods, the defendant submitted the following evidence:

Plaintiff was not aware of any complaints by other auditors about their assignments in these "high crime" neighborhoods, nor was plaintiff aware of any auditors who had been "attacked or assaulted" as a result of these assignments. Def. Memo., Ex. 1 (Deposition of Plaintiff, dated December 22, 1997, pp. 19-20, 21).

The assignments were handled by Tuyet Hoa Ost who made the assignments principally based on where an auditor lived – thus, an auditor would be assigned to a school closest to his or her home when possible. Def. Memo., Ex. 3 (Affidavit of Tuyet Hoa Ost, dated January 21, 1998, & 6).

Plaintiff acknowledged that this was how assignments were "purportedly" made, Def. Memo., Ex. 2 (Def. Interrogatory No. 43), and also agreed that he and the other minority auditors lived in neighborhoods he had classified as "high crime." Def. Memo., Ex. 4 (Deposition of Plaintiff, dated December 22, 1997, pp. 29-30).

Plaintiff took no steps to investigate his allegation that minority auditors were assigned to "high crime" neighborhoods. Def. Memo., Ex. 5, (Def. Interrogatory No. 55).

With respect to the issue of plaintiff's harassment at the hands of Herbert Schechtman, defendants have offered the following evidence:

Herbert Schechtman stated that he has had "no contacts with respect to any work related matter" with plaintiff since March 7, 1993. Def. Memo., Ex. V (Affidavit of Herbert Schechtman, dated January 23, 1998, & 5).

Plaintiff stated that Phyllis Washington observed Mr. Schechtman's behavior, Def. Memo., Ex. W (Deposition of Plaintiff, dated December 22, 1997, p. 61), but Ms. Washington denies having seen Mr. Schechtman act in a "mean spirited" or "derogatory"

manner toward plaintiff. Def. Memo., Ex. T. (Affidavit of Phyllis Washington, dated December 11, 1997, && 6-7).

Plaintiff complained about Mr. Schectman's behavior to the District by letter dated August 16, 1993, Def. Memo., Ex. X, which complaint was acknowledged by the District by letter dated August 23, 1993. Def. Memo., Ex. Y. The District informed plaintiff that it had spoken with Mr. Schectman who denied having laughed at plaintiff. Id.

Plaintiff agreed that he saw Mr. Schectman no more than five or so times a year. Def. Memo., Ex. W (Deposition of Plaintiff, dated December 22, 1997 p. 60).

Plaintiff acknowledged that Mr. Schectman's behavior did not affect his work with the District. Def. Memo., Ex. W (Deposition of Plaintiff, dated December 22, 1997, p. 61).

The current lawsuit is not the first time plaintiff has turned to the courts for relief from alleged discrimination at his workplace. On October 2, 1992, plaintiff, with others, filed suit against the School District in the Eastern District of Pennsylvania alleging that it promoted auditors in a racially discriminatory manner. See Complaint, Cromartie, et. al. v. Jahss, et. al., C.A. No. 92-5750 (E.D. Pa. Oct. 2, 1998). That lawsuit was settled by the parties in 1993; as part of the Settlement Agreement, the plaintiffs released the District "from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses . . . arising out of the employment relationship to the date of this Agreement" Id., at & 8. Because plaintiff is seeking, in the instant suit, damages premised on racially motivated employment actions taken by the District in or before 1993, this prior lawsuit is relevant to the within Motion.

With respect to the issue of promotions, plaintiff – in response to the interrogatory, "Are you claiming any loss of earnings or impairment of earning capacity because of these incidents?" – stated that he was seeking \$400,000 based on "what my earning capacity would have been had there

not been racial discrimination in promotions” Def. Memo., Ex. F (Def. Interrogatory No. 13). While plaintiff did not raise this claim in the body of his Complaint, he did address the issue of his lack of promotion in an exhibit attached to his Complaint; in that attached document, plaintiff detailed events surrounding the promotion of others in his department – all of which occurred prior to 1993.

2. Legal Standard: In deciding a motion for summary judgment the Court must determine whether there exist any triable issues of fact. See Anderson v. Liberty Lobby, 477 U.S. 242, 247-49 (1986). A court must grant the motion if it finds that the pleadings, together with depositions, admissions, answers, interrogatories, and affidavits present “no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). In responding to a motion for summary judgment, the non-moving party must present “more than a mere scintilla of evidence in its favor” and may not rely on unsupported assertions or conclusory allegations. See Williams v. Borough of Westchester, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). “When considering a motion for summary judgment, the court must view all evidence in favor of the non-moving party. . . . Additionally, all doubts must be resolved in favor of the non-moving party.” Securities and Exchange Commission v. Hughes Capital Corp., 124 F.3d 449, 452 (3d Cir. 1997) (citations omitted). With these standards in mind, the Court will address each defendant’s Motion.¹

¹ The Court notes that plaintiff, when setting forth the standard for summary judgment, relied on the law of Pennsylvania, and not federal law.

3. Discussion:

a. Damages for “Failure to Promote”: An allegation that an employer failed to promote an employee on the basis of race is a discreet claim under Title VII. See Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 483-85 (3d Cir. 1997) (holding that “failure to promote” is not a continuing violation for statute of limitations purposes). Plaintiff makes no allegations in the body of his Complaint that he was not promoted on account of race although in an exhibit attached to his Complaint, plaintiff details the various promotions in his department prior to 1993. See Complaint, Ex. B. To the extent that plaintiff’s interrogatory answer, together with this exhibit, can be read as stating a “failure to promote” claim, plaintiff is clearly referring to the subject matter of his prior lawsuit. That is, the “failure to promote” claim arises out of the District’s actions before 1993. Because plaintiff released all claims arising out of his employment relationship prior to 1993 – when he settled the prior suit – plaintiff is barred from making such claims in the instant litigation.² Because it reaches this conclusion, the Court need not address those remaining issues raised by defendant’s Motion relating to the “failure to promote” claim

b. Overtime Assignments: As to plaintiff’s allegation that minority and non-minority workers were treated differently with respect to overtime assignments, plaintiff must first make a prima facie showing of discrimination. See McDonnell Douglas Corp.

² Plaintiff, in his Memorandum responding to defendant’s Motion for Summary Judgment, argues that the doctrines of res judicata and collateral estoppel do not apply in this case. The Court does not address these arguments as it holds only that plaintiff is barred from raising the “failure to promote” claim for actions prior to 1993 by the express release of claims contained in the Settlement Agreement he signed. The Court notes that even were plaintiff not barred by his release, a claim that the District failed to promote plaintiff prior to 1993 could not be raised in this suit under Title VII as such a claim must be filed within 300 days of the alleged acts, see 42 U.S.C. ' 2000e-5(e); Rush, supra, and this suit was not started until 1996.

v. Green, 411 U.S. 792, 802 (1973) (stating that a plaintiff may make a prima facie showing of discrimination by demonstrating: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.”); see also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (“The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.”). This framework for proving a violation of Title VII applies to workplace discrimination as well as hiring discrimination, see, e.g., Wilson v. Susquehanna Twp. Police Dept., 55 F.3d 126 (3d Cir. 1995) (applying McDonnell framework to case involving failure to promote female employee), and may be advanced on a theory of disparate treatment. See, e.g., McDonnell Douglas, supra. Plaintiff has the burden of showing that the discrimination was motivated by racial animus. See, e.g., Lewis v. University of Pittsburgh, 725 F.2d 910, 914 (3d Cir. 1984) (“To establish employment discrimination, it must be shown that the employer bore a racially discriminatory animus against the employee, and that this animus manifested itself in some challenged action, whether it be dismissal, failure to promote, or failure to hire.” (citations omitted)).

If the plaintiff establishes a prima facie case of discrimination, a presumption arises that the defendant discriminated against the plaintiff, see Burdine, 450 U.S. at 254, and the burden of production shifts to the defendant to articulate some legitimate

nondiscriminatory reason for the adverse employment action. See McDonnell Douglas, 411 U.S. at 802-03. In this case, however, plaintiff has not made out a prima facie case of disparate treatment: the evidence shows that he was offered, and refused, an overtime assignment; other African-American auditors were also offered overtime assignments. There is no evidence that white auditors were treated differently with respect to assignments of overtime work.³

Because there is no genuine issue of material fact, the Court has granted defendant's Motion for Summary Judgment as to this claim.

c. Racially Motivated Job Assignments to "High Crime" Areas: Plaintiff must meet the same standard with respect to this claim as with his claim that overtime assignments were racially biased. As he has failed to submit any evidence that assignments to certain areas were racially motivated, and as the defendant presented evidence of a rational and racially neutral reason for its assignments – making assignments based on where an auditor lives, see McDonnell Douglas, 411 U.S. at 802-03 (holding that if plaintiff makes prima facie showing, defendant must come forward with evidence of legitimate, non-discriminatory reason for its employment practice) – the Court concludes that there is no genuine issue of material fact as to this claim. It has, therefore, granted defendant's Motion for Summary judgment with respect to the claim that minorities are assigned to "high crime" areas.⁴

³ Plaintiff alleges in his Complaint that two white Auditor II's were given "de facto promotions" and preference in overtime work even though all the minority Auditor II's had greater seniority. Complaint **&& 12-14. Plaintiff has come forward with no evidence to support these claims.**

⁴ Plaintiff, in opposition to the Motion for Summary Judgment, cites 42 U.S.C. ' 1983, the 13th Amendment and cases interpreting those laws. **Such arguments are not apt in a claim premised on Title VII.**

d. Harassment by Herbert Schectman: The allegations regarding Mr.

Schectman's laughter would appear to amount to a claim of a hostile work environment.

The Third Circuit has established a five prong test for a hostile work environment claim under Title VII:

In order to establish a claim for employment discrimination due to an intimidating or offensive work environment, a plaintiff must establish, "by the totality of the circumstances, the existence of a hostile or abusive environment which is severe enough to affect the psychological stability of a minority employee." Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir.1990) (quoting Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1510 (11th Cir.1989)). Specifically, a plaintiff must show: (1) that he or she suffered intentional discrimination because of race; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same race in that position; and (5) the existence of respondeat superior liability. Id.; West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir.1995). As the Supreme Court has emphasized: whether an environment is "hostile" or "abusive" can be determined only by looking at the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, ----, 114 S.Ct. 367, 371, 126 L.Ed.2d 295, 302 (1993).

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996).

Plaintiff has failed to present evidence which creates a genuine issue of material fact as to any element of this claim. Plaintiff agreed during his deposition that he saw Mr. Shchectman no more than five or so times a year. The Court concludes that even if Mr. Schectman laughed every time he saw plaintiff, five incidents a year does not amount to "pervasive and regular" harassment. While a showing of "overt racial harassment is not necessary to establish a hostile environment. . . [there must be] a showing that race is a substantial factor in the harassment, and that if the plaintiff had been white [he] would not have been treated in the same manner." 85 F.3d at 1083 (citing Andrews, 895 F.2d at

1485). Plaintiff has not demonstrated that Mr. Schectman's laughter was racially motivated. Indeed, he has not even demonstrated that it was harassing, as the only witness – Ms. Wahsington – stated that she thought Mr. Schectman's behavior was neither "mean spirited" nor "derogatory." Finally, plaintiff acknowledged that Mr. Schectman's behavior did not affect his work, and has offered no evidence that he was otherwise detrimentally affected.

For the foregoing reasons, the Court has granted defendant's Motion for Summary Judgment with respect to his claim that he was harassed by Mr. Schectman.

4. Conclusion: For the reasons set forth above, the Court has granted defendant's Motion for Summary Judgment.

BY THE COURT:

JAN E. DUBOIS