

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GLENDALE STEWART,

Plaintiff,

v.

ERIK K. SHINSEKI,
Secretary, Department of Veterans Affairs,

Defendant.

OPINION and ORDER

10-cv-456-bbc

From June 2008 to September 2008 plaintiff Glendale Stewart was employed as a housekeeping aide at the veterans hospital in Madison, Wisconsin. He alleges that hospital administrators initially rejected his application because he is an African American and because of a disability related to his back. (Defendant Erik Shinseki was not personally involved in the events of this case, but he is the proper defendant because he is the secretary of the agency that employed plaintiff. 42 U.S.C. § 2000e-16.(c).) Although plaintiff was hired a few weeks later, he says this was only because the discrimination against him was obvious in light of his superior qualifications compared to the other candidates. However, according to plaintiff, from the moment he was hired, his supervisors, his coworkers, the

union and the human resources department conspired to have him fired. After he injured himself at work, they refused to allow plaintiff to work “light duty,” instead requiring him to take leave. Ultimately, he was fired. Defendant says it was because plaintiff was combative and insubordinate, acted inappropriately in front of patients and was the subject of several complaints from his coworkers. Plaintiff says he was fired because of his race, color and disability and because he complained about his mistreatment.

After screening plaintiff’s complaint under 28 U.S.C. § 1915, dkt. #11, I allowed him to proceed on the following claims:

(1) defendant refused to hire him as a housekeeping aid at the veterans hospital in May 2008 because of his race and color and because of a disability related to his back, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act;

(2) after defendant later hired him in June 2008, defendant refused to allow him to work “light duty” because of his race, color and disability, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act; and

(3) defendant terminated plaintiff because of his race, color, disability and because he threatened to file a complaint with the EEOC, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act.

I dismissed a hostile work environment claim that plaintiff had alleged on the ground that he had not identified any conduct that was “severe” or “pervasive.” Boumehti v.

Plastag Holdings, LLC, 489 F.3d 781, 788 (7th Cir. 2007); Luckie v. Ameritech Corp., 389 F.3d 708, 713 (7th Cir. 2004).

In addition to the three claims listed, both sides assume that plaintiff is proceeding on a claim that defendant failed to provide him a reasonable accommodation for his disability when supervisors refused to put him on light duty. Although I did not discuss that claim in the screening order, because the parties have treated the claim as one that was included in the complaint, I will do so as well. Hutchins v. Clarke, 661 F.3d 947, 957-58 (7th Cir. 2011) (“[A] pleading can be constructively amended when both parties expressly or impliedly consent to the constructive amendment.”).

Two motions are now before the court: (1) plaintiff’s motion for appointment of counsel; and (2) defendant’s motion for summary judgment. Because plaintiff filed his motion at the same time that he filed his summary judgment materials and he did not ask for a stay while his motion was pending, I understand him to be asking for counsel to represent him at trial in the event that I deny defendant’s summary judgment.

Defendant seeks summary judgment on the following grounds:

- with respect to the allegedly discriminatory hiring decision, the delay in hiring plaintiff does not constitute an adverse employment action;
- with respect to all of plaintiff’s claims for disability discrimination, plaintiff has failed to show that he is disabled within the meaning of

the Americans with Disabilities Act;¹

- with respect to all of plaintiff's claims, he has failed to adduce any evidence that defendant discriminated against him because of his race, color or disability or because he threatened to file a complaint with the EEOC.

Because I agree with defendant on each of these grounds, I am granting his motion for summary judgment and denying plaintiff's motion for appointment of counsel as moot.

OPINION

A. Disability Discrimination

A threshold question for all of plaintiff's claims under the Americans with Disabilities Act is whether he was disabled within the meaning of the statute. Because the relevant conduct in this case occurred before the ADA was amended on January 1, 2009, I must look to the law as it existed before the amendments. EEOC v. AutoZone, Inc., 630 F.3d 635, 639 (7th Cir. 2010); Fredricksen v. United Parcel Service, Co., 581 F.3d 516, 521 (7th Cir. 2009).

A person is disabled under the ADA if: (1) he has a physical or mental impairment

¹ Defendant cites the Rehabilitation Act as the relevant statute, but it makes no difference for the purpose of this case which statute is controlling because the substantive requirements of the two statutes are the same. Jackson v. City of Chicago, 414 F.3d 806, 810 n.2 (7th Cir. 2005).

that substantially limits one or more of his major life activities; (2) he has a record of such impairment; or (3) he is regarded as having such impairment by his employer. Hancock v. Potter, 531 F.3d 474, 479 (7th Cir. 2008). Although defendant argues in his opening brief that plaintiff is not disabled under the statute, plaintiff ignores this issue in his 47-page opposition brief, which means that it is waived. Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007). In particular, plaintiff fails to identify a major life activity that is substantially limited by his back injury.

In his proposed findings of fact, plaintiff says that his “ability to function is affected after he has been re-injured or after his condition has flared. At this point he cannot walk, sit or stand for any perio[d] of time.” Plt.’s PFOF ¶ 66, dkt. #46. However, plaintiff admits that he has a serious flare up like that “two or three times” a year, dkt. #47-35, at 21, and that the flare ups last for “3-5 days.” Plt.’s PFOF ¶ 27, dkt. #46. “An impairment is a disability only when its impact is permanent or long term”; impairments that are substantially limiting for short periods of time do not qualify. Brunker v. Schwan's Home Service, Inc., 583 F.3d 1004, 1008 (7th Cir. 2009) (plaintiff with multiple sclerosis not disabled under ADA because symptoms were “intermittent”). See also Toyota Motor Manufacturing, Kentucky v. Williams, 534 U.S. 184, 198 (2002); Mobley v. Allstate Insurance Co., 531 F.3d 539, 545 (7th Cir. 2008). Thus, a condition that is debilitating only a few times a year for a few days at a time does not qualify as a disability under the

ADA.

Plaintiff states in various places throughout his brief and proposed findings of fact that he has a “service connected disability” for “L5-S1 disc disease.” He cites a decision by the Department of Veterans Affairs from 2003, in which his condition was found to be “30% disabling.” Dkt. #47-18. It is not clear what that means and neither side explains it. In any event, as defendant points out, a finding by one agency for its own purposes that the plaintiff was disabled is not controlling, particularly when there has been a significant passage of time since the agency’s finding. Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806 (1999); Feldman v. American Memorial Life Insurance Co., 196 F.3d 783, 791 (7th Cir.1999). Defendant cites several cases in which courts have concluded that an employee suing under the ADA or the Rehabilitation Act was not disabled under those statutes, even though the Department of Veterans Affairs made a similar finding to the one plaintiff received. DiCarlo v. Potter, 358 F.3d 408, 418-19 (6th Cir. 2004) (20% disability); Novak v. Principi, 442 F. Supp. 2d 560, 563, 567 (N.D. Ill. 2006) (30% disability). Plaintiff cites no contrary authority.

Because plaintiff has failed to show that he had a disability within the meaning of the ADA, I am granting defendant’s motion for summary judgment with respect to this claim.

B. Race and Color Discrimination

1. Delay in hiring

On April 11, 2008, plaintiff applied for a position as a housekeeping aide with defendant; 17 applicants were interviewed for the position; on May 15, 2008, plaintiff was told that he was not selected for the position; in early June 2008, defendant offered him another position as a housekeeping aide; on June 22, 2008, he began working for defendant, two weeks after the first person started. Ultimately, defendant hired four housekeeping aides around the same time: Roshandran Mahendran (Asian American), Daniel Greyer (Caucasian), Timothy Stromer (Caucasian) and plaintiff (African American). Neither side suggests that the four positions were different in any relevant respect. Three people were involved in the selection process: John Butterbaugh (the hospital's housekeeping officer), Duane Rose (a supervisor) and Darryl Kalepp (also a supervisor).

Plaintiff disputes some of these facts and many others on the ground that he “cannot say one way or the other whether this actually happened as explained,” but he cites no evidence to contradict defendant’s proposed findings. Under this court’s Procedure to Be Followed on Motions for Summary Judgment II.E.2, “[t]he court will not consider any factual propositions made in response to the moving party’s proposed facts that are not supported properly and sufficiently by admissible evidence.” In other words, when one party has evidence to support a fact and the other side has no contrary evidence, the court must

accept that fact as undisputed. Plaintiff received a copy of the Procedure with the preliminary pretrial conference order, dkt. #21, and again with the briefing schedule for defendant's summary judgment motion. Accordingly, in any situation in which either party disputed a proposed finding of fact without citing his own evidence to contradict the proposed fact, I have treated the proposed finding as undisputed, so long as it was supported by admissible evidence.

With respect to the merits, defendant argues that the delay of a few weeks is not sufficiently severe to sustain a discrimination claim. He cites Haywood v. Lucent Technologies, Inc., 323 F.3d 524, 532 (7th Cir. 2003), in which the court concluded that one-month delay in receiving a transfer was not sufficiently adverse, and Bannon v. University of Chicago, 503 F.3d 623, 628-29 (7th Cir. 2007), in which the court concluded that a two-month delay in receiving a promotion was not sufficient. Plaintiff does not cite any contrary authority or even respond directly to this argument.

Even if I assume that the delay plaintiff experienced is sufficient, I agree with defendant that plaintiff has failed to adduce any evidence of discrimination. Plaintiffs may prove discrimination through different evidentiary frameworks, often called the "direct" method and the "indirect" method. Van Antwerp v. City of Peoria, Illinois, 627 F.3d 295, 297 (7th Cir. 2010); Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003). Although plaintiff does not identify which method he wishes to use, that is not fatal to his

claim. The ultimate question on summary judgment in any discrimination case is whether a reasonable jury could find that the defendant discriminated against the plaintiff because of a characteristic protected by federal law. Simple v. Walgreen Co., 511 F.3d 668, 670-71 (7th Cir. 2007); Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996). Accordingly, I will consider whether plaintiff can meet that general standard.

Defendant says that plaintiff was ranked below the other three candidates because he did not seem motivated to work at the hospital. When asked why he wanted to work there, plaintiff said, “because I need a job.” Plaintiff does not deny saying this, but he says he gave other reasons as well, such as “good benefits and pay” and “future advancement.” Plt.’s Resp. to Dft.’s PFOF ¶ 27, dkt. #45. However, these additional responses simply support defendant’s view that plaintiff was not really interested in the particular job, only what the job would get him, and that he wanted to move on as soon as possible. In fact, plaintiff admits in his brief that he told the interviewer that “he was not planning on being in the housekeeping aide position very long.” Plt.’s Br., dkt. #44, at 4. It is not surprising that an employer would consider an applicant’s level of interest in deciding whether to hire him.

In attempting to rebut defendant’s stated reason for not choosing him first, plaintiff’s primary argument is that he was more qualified than the other three candidates who were hired. (The parties agree that Mahendran was hired before plaintiff, but neither side says when Stromer and Greyer were hired. For the purpose of this motion, I will assume that

plaintiff was hired after each of the other applicants.) Evidence of a plaintiff's qualifications relative to the chosen candidates may show discrimination if the "differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." Mlynczak v. Bodman, 442 F.3d 1050, 1059-60 (7th Cir. 2006). I will consider each of the reasons he believes he was the most qualified.

First, plaintiff says that he had "more specialized experience" than the other candidates because he has a degree in electronics technology. However, he fails to explain why he believes that his background gave him an edge for a housekeeping position and he cites no evidence that his electronics experience was important to defendant. The job announcement plaintiff cites does not list it as a relevant qualification. Dkt. #47-2.

Second, plaintiff says that he has a "10-point veteran preference," which was higher than the other candidates. Plaintiff does not explain what that means, but defendant says that veterans "are assigned certain point ratings corresponding with their time in service."

Dft.'s PFOF ¶ 17, dkt. #35. This argument is a nonstarter because it is undisputed that defendant did not distinguish among the candidates using point ratings. Plaintiff seems to think that defendant *should* have taken point ratings into consideration and he goes as far as saying that "federal regulations" required defendant to do so, though he does not identify any regulations defendant violated. Plt.'s Br., dkt. #44, at 6. In any event, plaintiff is

proceeding on claims for discrimination on the basis of race and color. Thus, it is irrelevant to this case whether defendant failed to comply with some other federal law.

Finally, plaintiff says that Stromer “does not have a veteran preference at all.” Plt.’s Br., dkt. #44, at 4. Again, plaintiff does not explain what that means, but defendant says that a veteran is “preference eligible” if he or she has “a service-connected disability” or has “served in the military during war time.” Dft.’s PFOF ¶ 14, dkt. #35. See also 5 U.S.C. § 2108.

Defendant acknowledges that the housekeeping aide positions were subject to the Veterans Employment Opportunities Act of 1998 and that he was required to give first consideration to preference eligible veterans. Dow v. General Services Administration, 590 F.3d 1338, 1339 (Fed. Cir. 2010). To support his argument that Stromer was not preference eligible, plaintiff cites a document titled “notification of personnel action” that seems to be a summary of Stromer’s appointment to the housekeeping position. Under the entry for “Veterans Preference for RIF” there is an “X” in the box for “NO.” Dkt. #47-11, at 9.

Even if I assume that Stromer was not preference eligible, this argument fails for two reasons. First, in determining which candidates were preference eligible, Butterbaugh, Rose and Kalepp relied on a document prepared by an employee in the human resources department who was not otherwise involved in the selection process. The document

identifies Stromer (and the other candidates whom defendant hired) as preference eligible. Dkt. #36-1. Thus, even if Stromer was not in fact preference eligible, plaintiff points to no evidence that the decision makers were aware of that. Second, even if they were aware, again, plaintiff is not suing defendant for violating the Veterans Employment Opportunities Act. It does not follow that, if defendant was failing to apply one federal statute, he was discriminating on the basis of race and color as well.

In his proposed findings of fact, plaintiff tries to support his claim with statistics, saying that 43 out of 49 of defendant's housekeeping aides are white, Plt.'s PFOF ¶ 22, dkt. #46, and that defendant was "involved in 15 or 20 EEO processes within the last year." Id. at ¶ 23. Defendant objects to these proposed findings, but even if I assume that they are true, they do not support plaintiff's claim.

With respect to the racial make up of defendant's housekeeping aides, the Court of Appeals for the Seventh Circuit has stated on numerous occasions that raw numbers are not enough to prove a claim. Unless the context for those numbers is known, they provide little insight into the motivation for a particular decision. Norman-Nunnery v. Madison Area Technical College, 625 F.3d 422, 431 (7th Cir. 2010); Nichols v. Southern Illinois University-Edwardsville, 510 F.3d 772, 782 (7th Cir. 2007); Barricks v. Eli Lilly & Co., 481 F.3d 556, 559 (7th Cir. 2007). With respect to the other proceedings, again, these are not probative without knowing their context, particularly because plaintiff does not even know

the outcome of any of those proceedings.

The rest of plaintiff's argument with respect to this claim is nothing but speculation. He makes a number of bold accusations, such as "[d]efendant is notorious for not hiring blacks." Plt.'s Br., dkt. #44, at 9. He makes similar statements regarding his other claims as well: "blacks are walking on thin ice in the place," id. at 11; "the VA Hospital is known for harassing African Americans and causing unnecessary problems for them," id.; "the working environment of the Madison VA Hospital reeks with racism." Id. at 12. However, none of these statements are supported by admissible evidence, so I cannot consider them. Defendant is entitled to summary judgment on this claim.

2. Request for light duty

Plaintiff believes that defendant discriminated against him on the basis of his race and color when defendant denied his request for a light duty assignment after he aggravated a back injury on August 30, 2008. Defendant says that Butterbaugh denied plaintiff's request in accordance with hospital policy. In particular, defendant treats injuries differently depending on whether an employee hurt himself at work. If an injury occurs at work, the employee may be assigned light duty while he recovers. If the injury occurs outside work, he must use sick leave or vacation time until he recuperates fully. (Defendant says he makes this distinction in accordance with the Federal Employees Compensation Act.) Relying on

information from Rose, Butterbaugh denied plaintiff's request on the ground that plaintiff admitted that he had aggravated his back injury outside work.

According to plaintiff, he aggravated his back injury while "pulling trash" at work and he accuses Rose of lying to Butterbaugh. However, plaintiff admitted in his deposition that he told Rose at the start of his shift on August 30 that he "was having problems with his back." Plt.'s Dep., dkt. #32, at 65. In addition, hospital records indicate that plaintiff told emergency room staff that he had hurt his back the previous day. Dkt. #43-2.

Regardless where plaintiff aggravated his back injury, he has not shown that defendant denied his request for a light duty assignment because of his race or color. Throughout his brief and proposed findings of fact, plaintiff accuses Rose of trying to sabotage his job. For example, he says that he "had problems with Mr. Rose practically since he started working at the facility. Mr. Rose told lies about things that did not happen and things that plaintiff did not say." Plt.'s PFOF ¶ 54, dkt. #46. However, "a personality conflict" or even "a heated dislike" between an employee and his supervisor is not evidence of discrimination in violation of federal law. Benuzzi v. Board of Education of City of Chicago, 647 F.3d 652, 664 (7th Cir. 2011); Uhl v. Zalk Josephs Fabricators, Inc., 121 F.3d 1133, 1137 (7th Cir. 1997). Thus, even if Rose lied to Butterbaugh, that does not help plaintiff without evidence that any dislike Rose had for plaintiff was related to plaintiff's race or color. Despite plaintiff's strong belief that Rose is racist, the law is clear that plaintiff's

subjective beliefs are irrelevant, Sanderson v. Henderson, 188 F.3d 740, 746 (7th Cir.1999), and plaintiff points to no admissible evidence to support his belief.

Alternatively, plaintiff argues that defendant's discriminatory intent is shown because Stromer was allowed to work light duty after he was injured. Elkhatib v. Dunkin Donuts, Inc., 493 F.3d 827 (7th Cir. 2007) (plaintiff may prove discrimination with evidence that similarly situated employee outside plaintiff's group received more favorable treatment). In support, he cites his own deposition, in which he testified that Stromer told him "sometime in July or August" that he had been working light duty. Plt.'s Dep., dkt. #47-16, at 40-41. Defendant objects to this testimony on the ground that it is hearsay. Although neither side develops an argument regarding hearsay, I agree with defendant that it is because plaintiff is testifying about another party's statement and relying on it for the truth of the matter asserted in the statement. Fed. R. Evid. 801(c).

Statements are not considered hearsay if they are made by an employee of a party and the employee made the statement "on a matter within the scope of that [employment] relationship." Fed. R. Evid. 801(d)(1)(D). Although Stromer's alleged statement was related to his job, that is not enough. Williams v. Pharmacia, Inc., 137 F.3d 944, 950 (7th Cir. 1998) ("[N]ot everything that relates to one's job falls within the scope of one's agency or employment."). Rather, the statement must be related to a decision that the declarant is charged with making. Id. (complaints of other coworkers regarding their treatment at

work did not fall within Rule 801(d)(1)(D) because coworkers “were the subjects of those decisions; they did not make them”). Because Stromer did not have authority to grant his own request for a light duty assignment, his alleged statement is inadmissible hearsay.

In any event, plaintiff admits in his deposition testimony that Stromer never told him *why* he was working light duty. Plt.’s Dep., dkt. #47-17 at 83-84 (“I don’t know what he was hurt at I didn’t ask him what his condition was. None of my business.”) In fact, plaintiff does not even say that Stromer told him that his assignment was related to *any* injury, whether at work or elsewhere. Although defendant says that Stromer *was* injured outside work (and required to take leave), Butterbaugh Decl. ¶¶ 5-6, dkt. #37, defendant’s records show that this occurred at the end of September, after plaintiff was fired. Dkt. #37-1. Thus, that injury could not be the reason Stromer was assigned light duty in “July or August” when plaintiff spoke to him. This leaves plaintiff without any evidence that a similarly situated employee received more favorable treatment.

The rest of plaintiff’s argument regarding this claim is irrelevant or unintelligible. I am granting defendant’s summary judgment motion as to this claim as well.

3. Termination (includes retaliation claim)

On September 16, 2008, plaintiff was terminated from his housekeeping position by Keith Bednar, the chief of the environmental and support service section at the hospital. I

allowed plaintiff to proceed on a claim that defendant fired him because of his race and color and because he threatened to file a complaint with the EEOC. In his brief and proposed findings of fact, plaintiff discusses other speech as well, such as a letter to Representative Tammy Baldwin. Plt.'s Br., dkt. #44, at 27; Plt.'s PFOF ¶ 67, dkt. #46. To the extent plaintiff means to argue that defendant retaliated against him for writing that letter or for engaging in any speech other than his EEOC complaint, plaintiff waived that claim by failing to include it in his complaint.

Defendant says that plaintiff was fired for various incidents involving loud, abusive and disrespectful language toward supervisors and coworkers, sometimes in the presence of patients. For example, Rose says that: (1) plaintiff argued with him in front of other employees on August 13, 2008 over a scheduling issue, using a loud voice; (2) other employees complained about working with plaintiff because he was argumentative and used profanity in front of patients (one of them wrote in a letter to Rose that plaintiff was "very short tempered and showed no sign of being reasonable cooperative or a team player," dkt. #32-3); (3) on September 11, 2008, plaintiff accused Rose of lying to him in a loud and abusive tone; and (4) on September 16, 2008, after Rose gave plaintiff a window washing assignment, plaintiff complained loudly on multiple occasions that he could not wash some of the windows for various reasons; when Kalepp and Rose told plaintiff to lower his voice because patients were in the area, plaintiff said that he "did not need two supervisors telling

him what to do.” Dft.’s PFOF ¶¶ 59-95, dkt. #35. Kalepp, Butterbaugh and Bednar testified that they witnessed similar conduct, Kalepp Decl. ¶ 7, dkt. #39, Butterbaugh Decl. ¶ 7, dkt. #37; Bednar Decl. ¶ 8, dkt. #36, and Bednar testified that he discussed plaintiff’s conduct with Butterbaugh and Rose approximately six times in the two months before plaintiff was fired. Bednar Decl. ¶ 8, dkt. #36 .

Plaintiff attempts to dispute many of these facts, but often he cites no evidence to support a different version. Further, he admits that (1) he had an “argument” with Rose about his schedule, telling him, “I shouldn’t have to suffer for your mistakes,” Plt.’s Dep., dkt. #32, at 94, 103 and 136; (2) he said to a coworker, “how do you expect me to do all this shit,” *id.* at 129; (3) he told his supervisors that he could not clean some of the windows because there were “items on the window sills,” Plt.’s Resp. to Dft.’s PFOF ¶ 86, dkt. #45; and (4) on the day he was fired, he was speaking to Rose in a loud voice, *id.* at ¶ 97. Although he says that his coworkers misrepresented his interactions with them, he does not deny that they complained about him. Thus, even if plaintiff genuinely disputes some of the testimony of defendant’s witnesses, these admissions mean that he cannot show that all of defendant’s concerns are pretextual. Senske v. Sybase, Inc., 588 F.3d 501, 507 (7th Cir. 2009) (general rule is that plaintiff must show that all of defendant’s reasons for adverse action are pretexts).

Plaintiff cites other evidence in an attempt to show pretext, but none of it is

persuasive. First, he says that defendant initially did not explain why he was being fired, except to say that he exhibited “unsatisfactory conduct.” The court of appeals has stated that a defendant’s failure to explain its reasons for a decision until litigation may support a finding of pretext, e.g., Fischer v. Avanade, Inc., 518 F.3d 393 (7th Cir. 2008), but plaintiff cites no evidence showing that happened in this case. In fact, plaintiff has submitted documents from August and September in which defendant discussed the many problems with plaintiff’s conduct at work, dkt. ##47-47, 47-48 and 47-49, and he admits in his brief that Butterbaugh explained the reasons in person on two days after plaintiff was terminated. Plt.’s Br., dkt. #44, at 28.

Second, plaintiff cites a document from the Wisconsin Department of Workforce Development that includes the finding that “[t]he employee’s discharge was not for misconduct connected with his employment.” Dkt. #47-39. Plaintiff does not explain what the document is, but it seems to be a decision granting his request for unemployment benefits. This decision cannot support plaintiff’s claim because state administrative proceedings do not have preclusive effect on Title VII claims. University of Tennessee v. Elliott, 478 U.S. 788 (1986). It does not even have any persuasive value because the agency did not provide any reasons for its decision.

The only piece of evidence supporting plaintiff’s retaliation claim is the timing of plaintiff’s termination. It is undisputed that plaintiff was fired the same day his supervisors

found out that he planned to file a complaint with the EEOC. Although suspicious timing may be evidence of retaliation, the Court of Appeals for the Seventh Circuit has stated repeatedly that generally it is not enough in isolation to prove a claim. Sauzek v. Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000). Particularly because defendant began documenting problems with plaintiff's performance several weeks before they learned about his EEOC complaint (or his letter to Tammy Baldwin), this case does not present one of the rare exceptions to the rule.

ORDER

IT IS ORDERED that

1. Defendant Erik Shinseki's motion for summary judgment, dkt. #33, is GRANTED.
2. Plaintiff Glendale Stewart's motion for appointment of counsel, dkt. #48, is DENIED as moot.

3. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 27th day of February, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge