IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MATTHEW YOUNG,

Plaintiff,

v.

MADISON AREA TECHNICAL COLLEGE and JACK BRENEGAN,

Defendants.

OPINION AND ORDER

99-C-451-C

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In this civil action for injunctive and monetary relief, plaintiff Matthew Young contends that defendants Madison Area Technical College and Jack Brenegan terminated him from his job on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2, and 42 U.S.C. §§ 1981(a), 1981(b) and 1983. Defendants have moved for summary judgment, arguing that plaintiff cannot establish that he was discriminated against on the basis of his race.

A motion for summary judgment will be granted if, after taking into account the facts alleged by both sides, "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). From the facts proposed

by the parties, I find the following to be material and undisputed. I summarize only those facts that were submitted as proposed findings of fact. Because plaintiff failed to respond to defendants' rebuttal of his proposed findings, defendants' assertions of fact in the rebuttal are accepted as true.

UNDISPUTED FACTS

Defendant Jack Brenegan was the athletic director at defendant Madison Area Technical College from 1979 until the time relevant to this lawsuit. There were no blacks on the coaching staff or in the athletic department when defendant arrived at the college. (I will use the term "defendant" to refer to defendant Jack Brenegan and "the college" to refer to defendant Madison Area Technical College. All of plaintiff's claims against defendant Madison Area Technical College are based on the actions of defendant Brenegan, its employee.) Defendant hired five blacks for the coaching staff during his tenure. The college's coaching staff in 1995-96 included twenty whites and two blacks.

In August 1989, defendant hired plaintiff Matthew Young, a black man, as assistant men's basketball coach. In December 1991, defendant hired plaintiff as head coach. Plaintiff replaced Michael Dyer after Dyer resigned in the middle of the 1991-92 season. Dyer was hired by defendant and was the first black in the athletic department. Before resigning, Dyer

alleged that he had been harassed in the athletic department by defendant and that he was mistreated because of his race. Defendant Brenegan considered Dyer a nemesis in the department, in part because Dyer had filed a discrimination complaint with the state's Equal Rights Division against defendant and the college in 1992. The Equal Rights Division issued a no probable cause determination and Dyer did not appeal. Dyer also sent a letter dated February 20, 1992, to the national office of the National Junior College Athletic Association. In the letter, Dyer stated that James Ruhly, attorney for the college, suggested that "an investigation of eligibility violations should be conducted independent of the racial harassment and employment discrimination complaint that I filed against Mr. Brenegan."

In February 1993, plaintiff was ejected from a basketball game in La Crosse after protesting a call by the officials and receiving two technical fouls. Defendant Brenegan learned about the incident from the athletic director for Western Wisconsin Technical College; he discussed it with plaintiff after it occurred and kept notes on the matter.

In November 1993, plaintiff was ejected from a game in Madison after receiving two technical fouls for his vigorous protest of a call by game officials. Defendant again discussed the incident with plaintiff after the game and reprimanded him verbally.

On September 28, 1995, plaintiff became upset with a student who incorrectly hooked up a soda dispenser at a fund raiser. Plaintiff confronted the student verbally and engaged him

in a pushing match. In response to the incident, defendant placed a reprimand in plaintiff's personnel file.

Defendant had informed plaintiff before November 18, 1996, that plaintiff's performance needed to improve but had never told plaintiff that he would be terminated if his performance did not improve.

On November 18, 1996, plaintiff offered Dyer a position as academic adviser and assistant coach on his staff for the second semester of the 1996-1997 season. The college's practice is to allow coaches to hire their own staff and assistant coaches. On November 22, 1996, Dyer accepted the academic adviser position. At the time that plaintiff offered Dyer a position, Al Studdesville was volunteering as an academic adviser to the men's basketball team. Defendant knew that Studdesville was not satisfying his obligations as a student adviser. Plaintiff had indicated to defendant that he was unhappy with Studdesville's performance.

On November 23, 1996, two players collided while going for the ball during the last seconds of a championship basketball game between Rochester Community College and defendant Madison Area Technical College. Because the officials believed neither player had an advantage, they did not stop play. Plaintiff became upset, protested the call and slammed his hand on a chair several times. The officials ignored him. Plaintiff continued to protest. If the officials had made the call, plaintiff's players would have gone to the free throw line and the

player of the opposing team would not have recovered the ball and made a shot. Presumably, defendant Madison Area Technical College would have won the game.

Defendant believed that plaintiff's conduct was inappropriate. He thought about the matter on November 24 and on November 25, 1996, he met with plaintiff to discuss plaintiff's behavior at the November 23 basketball game. Defendant told plaintiff that his failure to stop protesting the "no call" was a disservice to everyone and was inappropriate behavior. Defendant directed plaintiff to submit appropriate letters of apology to Rochester's coach and to the officials. Defendant left the contents of the letters to plaintiff's discretion. Plaintiff knew that defendant would see the letters because defendant was to distribute them when they were finished. When defendant met with plaintiff on November 25, defendant had not decided how to reprimand plaintiff. Defendant did not indicate that he might have to terminate plaintiff because of the incident.

On November 25, after plaintiff and defendant had discussed plaintiff's unprofessional behavior at the basketball game, plaintiff informed defendant that he had offered Dyer a position on his staff. Defendant and plaintiff discussed hiring an assistant coach who would also serve as an academic adviser. Because Dyer had filed a discrimination complaint against defendant, defendant was not happy that plaintiff wished to hire Dyer. On November 25, defendant believed that plaintiff knew that Dyer had filed a complaint of discrimination. The

proposed hiring of Dyer was unacceptable to defendant because there was an existing academic adviser in place and because of Dyer's 1992 complaint of racial discrimination. Defendant told plaintiff that he could not hire Dyer and indicated that the reason was because Dyer had filed a complaint alleging race discrimination. Defendant was not angry about plaintiff's suggestion that Dyer be hired. Later that day, plaintiff wrote to Dyer to advise him that the job offer was withdrawn. As far as defendant was concerned, the request to hire Dyer was a "dead issue" at that point.

On November 25 or 26, 1996, defendant contacted the officials at the November 23 basketball game and requested that they provide written documentation about the incident. Defendant received two letters from the two officials, both of whom are white. The officials described the events involving plaintiff and demanded that immediate attention be given to their concerns. They accused plaintiff of verbally berating them in an unprofessional manner, confronting them in a hallway after the game to continue his protest and refusing to heed their request to leave the hallway area. The officials were disturbed by plaintiff's behavior.

Steve Nass, the college's athletic trainer, also wrote to defendant regarding the November 23 game. Nass is white. Nass stated that plaintiff's outburst in reaction to the "no call" was excessive and embarrassing. Nass stated that after the game, he witnessed plaintiff having a conversation with Michael Dyer in the hallway in which plaintiff said "I don't care

about Jack, if he says anything I'll tear his throat out."

On November 26, plaintiff submitted to defendant two letters of apology addressed to Rochester's coach and the officials. While plaintiff was present, defendant glanced at the letters and indicated acceptance of them, but did not read them for content or sincerity. Defendant asked plaintiff for a third letter of apology to be addressed to the college and the department. Defendant was cordial to plaintiff and expressed no anger.

Plaintiff wrote a third letter dated November 26, 1996, to defendant; defendant found the letter to be satisfactory. That same day, defendant handed a letter to plaintiff. In the letter, defendant informed plaintiff that "[i]n your letter to the officials, which consisted of only two sentences, you failed to address the inappropriateness of your conduct and provide a sincere apology. The letter to the coach of Rochester Community College does not express any remorse or acknowledge any personal responsibility for your behavior." Defendant informed plaintiff that the letters were unacceptable. Defendant directed plaintiff to provide him with sincere letters of apology by November 27; plaintiff failed to do so. Defendant asked plaintiff to think about it over the Thanksgiving weekend, November 28 to December 1. Plaintiff had not revised the letters as of December 2.

Before terminating plaintiff, defendant consulted with William Strycker, Carol Bassett and Lauanne Stroley regarding his difficulties with plaintiff. Defendant spoke first to Carol

Bassett, an associate in human resources, and at that time had not decided whether to terminate plaintiff. On November 26, defendant met with Strycker, vice-president for human resources. Defendant indicated that he was having problems with plaintiff and discussed plaintiff's behavior at the November 23 basketball game and defendant's opinion that plaintiff's apology letters were not "sincere or appropriate for the incident." Defendant indicated to Strycker that he had had previous problems with plaintiff, including two other incidents of ejection from basketball games and a confrontation with a student.

Plaintiff sent Strycker a letter dated November 27, in which he stated that "Mr. Brenegan's letter of reprimand is a continuation of his anger over my recent offer to MATC Psychology Instructor, Michael Dyer to join my staff. Since I am not on campus during the school day, I thought it would be beneficial to bring Mr. Dyer in as an academic adviser and assistant coach. This would allow my players to received [sic] additional in-house support during the school day." Plaintiff also mentioned that he had received defendant's letter of November 26 and asked that it be rescinded.

Defendant had three or four meetings with Strycker before he decided to terminate plaintiff. Defendant believes that he met with plaintiff and then with Strycker on November 27. Defendant did not advise Strycker that he was going to terminate plaintiff because he had not yet decided to do so. At some time before he terminated plaintiff, defendant saw the

November 27 letter from plaintiff to Strycker. Defendant discussed the content of plaintiff's letter with Strycker.

On December 2, 1996, plaintiff was terminated for his unprofessional conduct in being ejected from the two 1993 basketball games as well as the 1995 physical confrontation with a student, his unprofessional and inappropriate conduct during and after the November 23 basketball game, his failure to acknowledge responsibility for self-discipline and his insubordinate behavior in refusing to provide appropriate letters of apology. Defendant made the primary decision to terminate plaintiff.

On March 20, 1997, plaintiff filed a complaint with the state of Wisconsin's Equal Rights Division.

Plaintiff was a casual employee whose employment was not governed by any union contract or labor agreement. The college had different discipline policies in place for full-time and casual employees. Discipline of casual employees was largely left to the discretion of the supervisor; they were not entitled to have their terminations reviewed by the college board. Discipline of full-time employees was governed by written rules and regulations and was carried out with the participation of the human resources department and other supervisors. Defendant Brenegan's policy regarding discipline was to have a face-to-face meeting with both casual and full-time employees and if the matter could not be resolved, to issue a written

reprimand.

On two occasions, defendant terminated the employment of white softball coaches with no written reprimand or opportunity to apologize. One allegedly made sexual advances toward his players and the other used department funds improperly. Both were casual employees. Defendant discussed the incidents with them before they were terminated.

On another occasion, Leo Kalinowski, a white baseball coach, also a casual employee, was reprimanded verbally after being ejected from a game in 1993. Defendant did not require him to write a letter of apology after this incident. Kalinowski was required to write a letter of apology in 1998 after his team failed to participate in a state tournament. After writing an appropriate letter, Kalinowski was permitted to stay on. Kalinowski was probably the only casual employee besides plaintiff who had to send out a letter of apology while defendant was athletic director.

Jeff Richardson is a white employee who demonstrated a lack of courtesy and respect for office staff. Defendant did not require Richardson to write a letter.

OPINION

Plaintiff brings claims under Title VII and 42 U.S.C. §§ 1981 and 1983. Because the same burden-shifting approach applies to determining whether plaintiff's employment

discrimination claims under any of the statutes have merit, the claims will be addressed together. Plaintiff's retaliation claim will be addressed separately.

I. EMPLOYMENT DISCRIMINATION

In order to sustain a claim for race discrimination, plaintiff must show that his race was a determining factor in defendant's decision to fire him. When racial discrimination is based on a claim of disparate treatment, proof of intentional discrimination is required. See Eiland v. Trinity Hospital, 150 F.3d 747, 751 (7th Cir. 1998). Intentional discrimination may be demonstrated through direct or indirect evidence. See id. In direct evidence cases, the plaintiff must offer evidence that requires no further inferences or presumptions that an impermissible factor was included in the employer's decision making process. See Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569 (7th Cir. 1989) ("[D]irect evidence, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption."). Plaintiff has no direct evidence of discrimination, such as discriminatory statements by defendant Brenegan or other decision makers at defendant Madison Area Technical College. In the absence of direct evidence, a plaintiff in Title VII, § 1981 and § 1983 actions must abide by the burden-shifting formula set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973). See Pilditch v. Board of Education of City of Chicago,

3 F.3d 1113, 1116 (7th Cir. 1993).

A plaintiff who believes he was fired from a position because of his race can establish a prima facie case by showing that (1) he is a member of a protected class; (2) he was qualified for the position or was meeting legitimate performance expectations; (3) he suffered an adverse employment action; and (4) the employer treated similarly situated employees outside the class more favorably. See Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1035 (7th Cir. 1999). If a plaintiff satisfies all of these elements, the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for its action. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Flores v. Preferred Technical Group, 182 F.3d 512, 514 (7th Cir. 1999). If the defendant articulates a nondiscriminatory reason, it has satisfied its burden of production and the McDonnell Douglas test is no longer relevant. See Burdine, 450 U.S. at 255. The plaintiff then must establish by a preponderance of the evidence that the defendant's proffered nondiscriminatory reason is pretextual. See Burdine, 450 U.S. at 256; Flores, 182 F.3d at 514-515.

Plaintiff's claim fails on the second prong of a prima facie case. Plaintiff has failed to show that he was meeting legitimate performance expectations. Plaintiff was fired after his fourth incident of acting inappropriately. After each incident defendant Brenegan imposed a greater amount of discipline: after the first incident, defendant discussed plaintiff's behavior

with him; after the second incident, defendant reprimanded plaintiff verbally; after the third incident, defendant placed a letter of reprimand in plaintiff's file; and after the fourth incident, defendant requested that plaintiff write letters of apology before ultimately firing him. Plaintiff's demonstrated inability to control his temper and his failure to accept officials' calls with which he disagreed fall short of meeting defendants' legitimate performance expectations for a coach. Plaintiff has failed to propose any facts, such as positive performance evaluations, suggesting that he was meeting defendants' legitimate expectations. Cf. Johnson v. Zema Systems Corp., 170 F.3d 734, 743 (7th Cir. 1999) ("[plaintiff] bears a burden only of producing some evidence that he was meeting [defendant's] legitimate expectations").

Plaintiff has also failed to meet the fourth prong of a prima facie case. Plaintiff has not shown that defendants treated similarly situated non-blacks more favorably. Plaintiff argues that white employees were not fired after similar behavior. Plaintiff has not presented evidence that any other employees had the same record of inappropriate behavior as he did, that is, he has not shown that anyone else was given three chances to improve his behavior before being fired in response to a fourth incident. Two white coaches were fired with no written reprimand or opportunity to apologize after engaging in more serious misconduct (making sexual advances toward players and improper use of department funds) than plaintiff. Plaintiff was also treated more favorably than another white coach, Leo Kalinowski because, as plaintiff admits, he was

not reprimanded verbally until after he had been ejected from two games whereas Kalinowski was reprimanded after his first ejection. Later, after plaintiff had been terminated, Kalinowski was asked to write out an apology after his second episode of misconduct. In contrast, plaintiff was not asked to apologize in writing until the fourth time he misbehaved. Jeff Richardson, a white employee, was not treated more favorably than plaintiff. Although Richardson was not made to write an apology letter after he showed a lack of respect to office staff, plaintiff was not made to write an apology letter until he had shown a lack of respect to officials at a public game and a student on four different occasions.

Defendant's asserted reason for firing plaintiff tends to show both that plaintiff was not meeting his employer's legitimate expectations and that defendant had a non-pretextual nondiscriminatory reason for its action. See Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1113 (7th Cir. 1998) (recognizing that factual inquiry relevant to issue of pretext often overlaps with analysis whether, for purposes of establishing the prima facie case, employee was performing his job well enough to meet employer's legitimate expectations). Although plaintiff had not been told that he would be fired if his performance did not improve, defendant had warned him before the November 23, 1996 basketball game that his performance needed to improve. Plaintiff had discussed his inappropriate behavior with defendant on at least two prior occasions and therefore knew that defendant would not

consider his continued protesting of the "no call" on November 23 to be acceptable behavior.

Even accepting for the purpose of argument that plaintiff could make out a prima facie case of race discrimination, plaintiff has failed to allege facts sufficient to support a finding that defendant's proffered nondiscriminatory reason for plaintiff's discharge is pretextual. Defendant believed that plaintiff's conduct was inappropriate. It appears that others, including the game officials, agreed. Plaintiff's sole argument on his discrimination claim is that defendant treated plaintiff differently from similarly-situated white coaches. Plaintiff ignores his history of inappropriate behavior and focuses on the November 1996 basketball game. For the reasons already stated, plaintiff has failed to show that similarly-situated whites were treated more favorably. Plaintiff must do more than assert that the explanation given for his termination was pretextual. Because defendant Brenegan hired plaintiff and promoted him before firing him seven years later, the natural inference is that the firing did not result from an improper discriminatory motive. See Johnson, 170 F.3d at 744-45 (discussing "same-actor inference"). Plaintiff has failed to provide even the minimal amount of evidence required to rebut this inference.

Because plaintiff has adduced no evidence that implies that race played a part in the decision to fire him, defendants' motion for summary judgment on plaintiff's Title VII, § 1981 and § 1983 claims will be granted.

II. RETALIATION

It is unclear why plaintiff believes he has been the subject of retaliation. In his complaint, he asserts that defendant Brenegan used the basketball incident as a pretext to terminate plaintiff when the real reason for plaintiff's termination was that plaintiff's offer to Dyer indicated a lack of loyalty to defendant and because of the "alleged conflict related to the appropriate letters of apology." In his brief, however, plaintiff argues only that he was terminated because of his November 27 letter to Strycker. Plaintiff has failed to state a claim of retaliation on either ground.

The retaliation provision of Title VII forbids an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding , or hearing under this title." 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, plaintiff must offer evidence that 1) he engaged in statutorily protected expression; 2) he suffered an adverse employment action; and 3) there is a causal link between the two. See Gonzalez v. Ingersoll Milling Machinery Co., 133 F.3d 1025, 1035 (7th Cir. 1998).

Plaintiff has not showed that he engaged in statutorily protected expression. Rather than protest an unlawful employment practice in the letter to Strycker, plaintiff simply stated

that his belief that defendant Brenegan was angry that plaintiff had offered a position to Dyer. However, plaintiff failed to put into dispute defendants' proposed finding of fact that defendant Brenegan was not angry that plaintiff had offered the position to Dyer. Plaintiff did not oppose unlawful employment practices in any of his conversations with defendant. Plaintiff requested to hire Dyer; defendant refused. Although defendant's refusal may have been because Dyer had filed a discrimination complaint against him four years earlier, in asking to hire Dyer, plaintiff did not assert that Dyer had been the victim of discrimination in the past. Because plaintiff was not opposing an unlawful discrimination practice, his statements were not statutorily protected expression.

Even if plaintiff did engage in statutorily protected expression, he has failed to demonstrate a causal link between that expression and his termination. "In order to demonstrate the 'causal link,' [plaintiff] must demonstrate that [defendant] would not have taken the adverse action 'but for' the protected expression." Gleason v. Mesirow Financial, Inc., 118 F.3d 1134, 1146 (7th Cir. 1997). Plaintiff believes that the timing of events support his causation argument. However, before defendant knew that plaintiff had offered a coaching position to Dyer, he had already required plaintiff to write letters of apology and indicated that plaintiff would be disciplined for his behavior at the November 23 basketball game. On November 26, before plaintiff had even written the letter to Strycker, defendant advised

plaintiff that his letters of apology were unacceptable and should be rewritten. Plaintiff's failure to rewrite the letters as requested destroys any implication that he was fired for a retaliatory motive. Defendant has presented several legitimate reasons for plaintiff's termination; plaintiff has failed to lay the groundwork from which the inference could be drawn that plaintiff would not have been terminated but for his request to hire Dyer.

Even if plaintiff had made out a prima facie case, he would have to show that defendant's explanation for the termination is pretextual. See Gleason, 118 F.3d at 1146 (McDonnell Douglas burden-shifting analysis applies to retaliation claims). "[B]ecause defendant has offered multiple reasons for [his] decision, [plaintiff] must show that *all* were pretextual." Mills v. Health Care Service Corp., 171 F.3d 450, 459 (7th Cir. 1999) (emphasis added). As discussed above with respect to the employment discrimination claims, plaintiff has not offered evidence from which a reasonable trier of fact could conclude that there is anything pretextual about defendant's articulated reasons for firing him. See Gleason 118 F.3d at 1147 (same pretext analysis applies to both retaliatory discharge and discriminatory discharge claims and does not require separate analysis).

ORDER

IT IS ORDERED that:

1. The motion of defendants Madison Area Technical College and Jack Brenegan for summary judgment on plaintiff's claims of discrimination and retaliation in violation of Title VII, 42 U.S.C. §§ 1981 and 1983 is GRANTED;

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

Entered this _____ day of February, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge