IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RODOLFO MARTINEZ,

Plaintiff,

v.

STATE OF WISCONSIN
DEPARTMENT OF HEALTH AND
FAMILY SERVICES,

Defendant.

OPINION AND ORDER

99-C-762-C

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In this civil action for monetary and declaratory relief, plaintiff Rodolfo Martinez contends that defendant State of Wisconsin Department of Health and Family Services violated his rights under 42 U.S.C. § 1983, 29 U.S.C. §§ 621-634 (the Age Discrimination in Employment Act) and 42 U.S.C. § 2000(e)-2(a)1 (Title VII of the Civil Rights Act of 1964, as amended). Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Now before the court is defendant's motion for summary judgment. Because I find that plaintiff's claims under 42 U.S.C. § 1983 and the Age Discrimination in Employment Act are barred by the Eleventh Amendment and that no trier of fact could conclude reasonably that defendant discriminated

against plaintiff on the basis of his national origin, defendant's motion for summary judgment will be granted.

Despite being warned to propose facts in opposition to defendant's motion for summary judgment in an order entered on July 12, 2000, plaintiff has not done so. Although plaintiff has disputed many defendant's proposed facts, he has not supported many of the alleged disputes of fact with citations to competent evidence. Instead, he has cited to his own affidavit, but there is no record evidence to show that plaintiff's affidavit testimony is based on personal knowledge, as required by Fed. R. Civ. P. 56. As was explained in both the Procedures to be Followed on a Motion for Summary Judgment, a copy of which plaintiff received with the Preliminary Pretrial Conference Order on December 15, 1999, and the order entered July 12, 2000, defendant's proposed facts not properly disputed will be considered undisputed for the purpose of deciding the motion for summary judgment. From facts proposed by defendant, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff is a Mexican-American male who is 49 years old. On October 13, 1997, plaintiff was hired as a regulation compliance investigator 3, nurse aid abuse investigator, at the State of Wisconsin Department of Health and Family Services. Plaintiff's duties included

investigating allegations of abuse, neglect and misappropriation of property with regard to elderly and developmentally disabled residents.

On July 15, 1998, plaintiff was interviewed for an investigator position with the City of Madison Equal Opportunity Commission and was given test materials for the position. Plaintiff left the building with the materials and the police were called. At approximately 1:00 p.m. that day, an employee from plaintiff's unit reported to his supervisor that police officers had detained and handcuffed plaintiff directly outside of the department building. At approximately 4:30 p.m., plaintiff returned to his office area, followed shortly by two plainclothes detectives. The detectives found the EOC exam documents in plaintiff's portfolio and left with plaintiff and the documents. Plaintiff ultimately pleaded "no contest" to an amended charge of disorderly conduct.

On July 16, 1998, supervisors in the department decided to investigate the incident to determine whether department work rules had been violated. On July 20, 1998, plaintiff was placed on desk duty while the department conducted a preliminary investigation. On July 30, 1998, plaintiff sent a written complaint to a supervisor requesting an explanation for the change in his working conditions. He was told about the investigation and that he would remain in pay status and on desk duty during pending its outcome.

On August 7, 1998, plaintiff filed another complaint regarding a non-Spanish co-

worker's use of Spanish words that offended him. Plaintiff's supervisors investigated the complaint, told the co-worker not use Spanish words in the workplace and wrote to plaintiff to inform him of their actions.

On August 31, 1998, plaintiff was sent notice of a pre-termination meeting to be held on September 2, 1998 and was placed on paid administrative leave pending that meeting. At the meeting plaintiff was given the option of resigning or being terminated.

Plaintiff was terminated on September 9, 1998 for violations of department work rules Nos. 1, 5 and 7. Plaintiff's termination letter stated that he had taken the test materials without permission, had denied doing so when asked about it by his supervisor and that he had not denied it during the September 2 pretermination meeting. The letter also stated that because his position as an investigator had "high ethical requirements" and demanded "fully credible investigations" regarding matters including theft, there was a "substantial relationship" between his position and the alleged theft.

No other employees at the department had been accused of wilfully misappropriating and concealing another governmental agency's confidential materials. If a similar incident had occurred with another employee, that employee would have received a similar disciplinary action.

OPINION

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). In employment cases, where intent and credibility are especially crucial, summary judgment standards are rigorously applied. See Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038 (7th Cir. 1993). However, even in employment discrimination cases, the non-moving party must carry his burden with more than mere conclusions and allegations. See Celotex, 477 U.S. 321-22.

The Eleventh Amendment prevents federal courts from hearing claims brought against state agencies for monetary and declaratory relief under 42 U.S.C. § 1983 or 29 U.S.C. §§ 621-634. See Kimel v. Florida Board of Regents, 120 S.Ct. 631, 650 (2000); Quern v. Jordan, 440 U.S. 332, 337 (1979). Accordingly, plaintiff's claims against defendant under those statutes are barred under the Eleventh Amendment and must dismissed.

Plaintiff's remaining claim is that he was discriminated against on the basis of his national origin in violation of Title VII. In the absence of direct evidence, plaintiff must prove discrimination by indirect evidence, which is usually done through the burden-shifting formula established in McDonnell Douglas Corp v. Green, 411 U.S. 792, 802-805 (1973). However, because "the prima facie elements were never meant to be applied rigidly," Pilditch, 3 F.3d at

1116, the court "may advance to the ultimate issue in a summary judgment analysis and consider the discrimination question" regardless whether plaintiff has established a prima facie case. E.E.O.C. v. Our Lady of Resurrection Med. Center, 77 F.3d 145, 149 (7th Cir. 1996). When a plaintiff has not met the burden of showing that a defendant's nondiscriminatory reason for its actions is a pretext, it is not necessary to decide whether the plaintiff established a prima facie case of discrimination. See Holmberg v. Baxter Healthcare Corp., 901 F.2d 1387, 1391 (7th Cir. 1990). To expedite the process, the court may proceed directly to the pertinent issue: whether the plaintiff can show that the defendant illegally discriminated against him. See Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir. 1985). I need not consider whether plaintiff can establish a prima facie case of illegal discrimination because I find that even if he could, he cannot establish by a preponderance of the evidence that defendant's articulated reasons for its actions are pretextual. See id.

"The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the employer honestly believes the reasons it offers." Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1029 (7th Cir. 1998) (quoting McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992)). Pretext is not simply a bad or stupid reason; it is "a lie, specifically a phony reason for some action." Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996). Plaintiff has

produced no evidence that suggests defendant did not genuinely believe its stated reason for firing him. His supervisors believed he had stolen materials from another government agency, hid them in his office and lied to his supervisor about it. That is a legitimate reason for firing an employee, particularly one whose job includes investigating theft, and it is unrelated to plaintiff's national origin. Moreover, it is undisputed that no other employee had been accused of a similar crime, but if one had he would have met with a similar fate. Accordingly, defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that the motion of defendant State of Wisconsin Department of Health and Family Services for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 11th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge