

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

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RICHARD RODGERS,  
Plaintiff,

v.

MEMORANDUM and ORDER

STATE OF WISCONSIN DEPARTMENT  
OF VETERANS AFFAIRS,  
Defendant.

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04-C-930-S

Plaintiff Richard Rodgers commenced this civil action under Title VII claiming that the defendant State of Wisconsin Department of Veterans Affairs discriminated against him because of his race and in retaliation for complaining about race discrimination.

On April 22, 2004 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

#### FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Richard Rodgers is an African-American adult resident of Milwaukee, Wisconsin. Defendant State of Wisconsin Department of Veterans Affairs (WDVA) is an agency of the State of Wisconsin with its principal offices located in Madison, Wisconsin. The functions performed by the WDVA are (a) to administer benefit programs for Wisconsin residents who honorably served in the United

States armed forces, (b) administer benefits for the spouses and children of certain deceased veterans, (c) offer low-interest rate home loans, home improvement loans and personal loans, (d) award education grants to qualified veterans, (e) provide health care aid and subsistence and grants to needy veterans, (f) administer two Veterans Homes in Wisconsin which provide long-term nursing care and retirement opportunities, (g) operate three cemetery sites in Wisconsin, (h) provide assistance to homeless veterans, (i) provide discharge review assistance to veterans who are within the criminal justice system, (j) manage a Veterans Museum and (k) assist Wisconsin veterans who are filing pension or other claims with the Veterans Administration.

Effective November 6, 2000 plaintiff was appointed to a WDVA position with the classification title of Veterans Program Specialist-Senior and the working title of Veterans Regional Coordinator that was headquartered in Madison, Wisconsin. His duties were to serve as a department representative for education, promotion and outreach within his assigned state region. The Regional Coordinator serves as the primary liaison between the WDVA and the County Veterans Service Officers and is responsible for ensuring that all employees of governmental and private agencies within the assigned region likely to work with or for veterans or their dependents are knowledgeable about the purpose and procedures of the Veterans Assistance Program and other benefits offered by

the WDVA. In August 2001 plaintiff was assigned to the post of Regional Coordinator for Milwaukee County and worked from an office in the Milwaukee County War Memorial Center.

Every February the WDVA assists with the annual "Wisconsin Veterans Salute to the Legislature", an event to provide veterans the opportunity to thank state legislators for their support of veterans and to look at the future of veterans' issues in Wisconsin. Legislators are invited to the "Salute" to talk with veterans from their districts. On February 24, 2004 plaintiff was told by Andrew Schuster, WDVA's Public Affairs Director, not to attend the "Salute" to minimize travel costs. Scott McFarlane, another Regional Coordinator, who was white was also told not to attend for the same reason.

In March 2004 WDVA employed six persons with the classification title of Veterans Program Specialist-Senior and the working title of Veterans Regional Coordinator headquartered around the state. In a memorandum distributed to all staff and dated March 1, 2004 John Scocos, WDVA secretary, said that "Phase 1 of the reorganization would involve the transfer of Regional Coordinators to "Non-Veterans Trust Fund funded positions." The Regional Coordinator positions were funded by the Veterans Trust Fund which was diminishing.

Early in 2004 a Risk Manager Position with the WDVA became available at the Veterans Home in King, Wisconsin. WDVA was not

required by union contract or civil service procedures to announce this Risk Manager position for open competition. Scott McFarlane who was the Veterans Regional Coordinator in Green Bay, Wisconsin transferred to the Risk Manager position effective April 18, 2004. McFarlane, who is white, was qualified for the position.

DVA then decided to eliminate all but two of the remaining Regional Coordinator Positions. This reduction of the positions required the WVDA to implement a layoff process. The Regional Coordinator position held by Nathaniel Nez was exempted from the layoff process because of the uniqueness of this position in its outreach to Wisconsin's tribal veterans. The second Regional Coordinator position was to be filled by one of the remaining four Regional Coordinators.

The process was implemented in accordance with the collective bargaining agreement that covered the positions which required seniority to be the principal factor in determining the affected employees. The seniority dates of the four Regional Coordinators were: Bob Buhr, March 19, 1979; Mel Brandl, February 18, 1980; Franciene Halverson, September 16, 1985 and Richard Rodgers; August 10, 1987.

Prior to implementing its layoff plan WDVA offered available positions to the Regional Coordinators in seniority order. Franciene Halverson who is Native American accepted a transfer to an Agency Liaison position.

The most senior remaining Regional Coordinator Bob Buhr who was white was to be retained and the two least senior coordinators, Brandl and plaintiff, would be laid off. On May 25, 2003 layoff notification letters were sent to Brandl who was white and plaintiff. After these letters were sent Bob Buhr accepted a Real Estate Specialist position. Brandl, the Regional Coordinator with the next most seniority, was then retained as a Regional Coordinator. The WDVA offered plaintiff the position of Veteran Claims Officer 2 which he accepted in lieu of layoff after declining two previously offered positions.

Plaintiff's new position allowed him to retain his employment at an equivalent salary and benefits. Any future pay adjustments would be in accordance with the Wisconsin State Employees Union-Professional Social Services bargaining agreement. He also maintained restoration rights to his former classification for five years. This personnel transaction was processed as a demotion because the pay range maximum of the new position was lower than the pay range maximum of the Regional Coordinator Position.

The duties of plaintiff's new position were to represent veterans/dependents in presenting claims before the U.S. Dept. Of Veterans Affairs for all benefits to which entitled. Plaintiff was to provide advocacy, counseling, referral and follow-up service to those veterans/dependents needing assistance to help stabilize their life's quality.

On March 28, 2005 plaintiff voluntarily resigned from his position as a Veterans Claims Officer. Plaintiff's voluntary demotion did not result in any loss of pay through the date of his voluntary resignation.

On or about April 6, 2004 plaintiff filed a charge of discrimination based upon race with the EEOC and the Wisconsin Equal Rights Division. On May 5, 2004 the charge was amended to include the elimination of his position. He states in this amended charge as follows: "I believe these actions are due to my race (Black) and in retaliation for having recently filed a charge of discrimination against the Department."

#### MEMORANDUM

In his response plaintiff conceded that defendant is entitled to judgment as matter of law on his claims except his claim that his race was a factor in defendant's refusal to place plaintiff in a non Veterans Trust funded position or in a position in a pay range comparable to and with duties commensurate with his position as a Regional Coordinator. In reply defendant argues that plaintiff did not plead this race discrimination claim in his complaint. Both his Equal rights complaint and his civil complaint, however, contain a race discrimination claim concerning his failure to be placed in a comparable position. Accordingly the Court will address the merits of this race discrimination claim.

Plaintiff claims he was discriminated on the basis of his race when he was not given a position in the same classification as his previous position or placed in a non-Veterans Trust Fund funded position. Plaintiff has presented no direct evidence of discrimination and relies on the burden shifting methodology for indirect proof. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Plaintiff must first establish a *prima facie* case of discrimination by showing he was a member of a protected class, he was meeting his employer's legitimate performance expectations, he suffered an adverse employment action and similarly situated employees not in the protected class were treated more favorably. Traylor v. Brown, 295 F. 3d 783, 788 (7<sup>th</sup> 2002).

Plaintiff's argument is that defendant's refusal to place him in a non-Veterans Trust Fund funded position or in a position with the same classification as his previous position was an adverse employment action. Defendant argues that since plaintiff voluntarily accepted the position as Veterans Claims Officer 2 which was at the same salary and benefit level he did not suffer an adverse employment action. Plaintiff may have, however, suffered an adverse employment action when he was not given the same opportunities for positions as the other Regional Coordinators who were not minorities.



To show a prima facie case plaintiff would also have to show that non-minorities were given better positions similarly situated to him. In March 2004, of the four remaining Regional Coordinators (plaintiff, Buhr, Halverson and Brandl) plaintiff had the least seniority. Accordingly, he was not similarly situated to them. Plaintiff has also not shown that he was similarly situated to Scott McFarlane who transferred to the Risk Manager position prior to the implementation of the layoff plan. Plaintiff has not raised a genuine issue of material fact concerning a prima facie case of race discrimination.

Had he shown a prima facie case defendant would then be required to articulate a non-discriminatory legitimate reason for not providing him a position in the same classification as his previous position. The elimination of plaintiff's position as Regional Coordinator was because of economic reasons. Further, plaintiff had the least seniority of the four Regional Coordinators which were subject to the collective bargaining agreement lay-off plan.

Plaintiff would then have to prove that these reasons were pretextual. Id. The analysis of pretext focuses on what the decisionmaker honestly believed. Little v. Illinois Department of Revenue, 369 F.3d 1007 (7<sup>th</sup> Cir. 2004). Plaintiff has not shown that the defendant did not honestly believe the Regional

Coordinator positions needed to be eliminated or that plaintiff had the least seniority of the Regional Coordinators.

Plaintiff argues that pretext may be shown by the fact that he was not allowed to attend the "Salute to the Legislature". Although he argues that this was because of his race the undisputed facts indicate both he and Scott McFarlane, a white Regional Coordinator, were told not to attend the event to minimize travel expenses. He has not shown that the real reason for his non-attendance at this event was his race. In addition this incident does not show that the real reason plaintiff did not get a comparable position to the other Regional Coordinators was his race and not his lack of seniority and lack of funding.

Plaintiff has not raised a genuine issue of material fact concerning his race discrimination claim. As a matter of law the Court finds that the defendant did not discriminate against plaintiff because of his race when eliminating his Regional Coordinator position and offering him another position in lieu of layoff. Defendant's motion for summary judgment will be granted.

#### ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

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IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 18<sup>th</sup> day of May, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge