IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FRANCISCO SALAS,

Plaintiff,

OPINION AND ORDER

v.

05-C-399-C

WISCONSIN DEPARTMENT OF CORRECTIONS, a state governmental agency; RICHARD F. RAEMISCH, individually; WILLIAM A. GROSSHANS, individually; DENISE A. SYMDON, individually; MARIE FINLEY, individually; and LEANN MOBERLY, individually,

Defendants.

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In this civil action for monetary relief, plaintiff Francisco Salas contends that defendants Richard Raemisch, William Grosshans, Denise Symdon and LeAnn Moberly, all employees of the Wisconsin Department of Corrections, discriminated and retaliated against him because of his age, race and national origin and because he testified against the department in proceedings before the Equal Employment Opportunity Commission. Plaintiff contends that defendants' actions violated his rights under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983.

Jurisdiction is present under 28 U.S.C. § 1331.

Before the court is defendants' motion to dismiss plaintiff's ADEA and Title VII claims against all defendants. The motion will be granted in part and denied in part. (Defendants have filed a motion for summary judgment which will be decided in a separate order.) Plaintiff's ADEA and Title VII claims against defendants Raemisch, Grosshans, Symdon and Moberly will be dismissed because the ADEA and Title VII do not authorize suits against individual supervisors. Plaintiff's ADEA claim against the Wisconsin Department of Corrections will be dismissed because, as a state agency, the department is entitled to sovereign immunity. However, defendants' motion to dismiss will be denied with respect to plaintiff's Title VII claims against the Wisconsin Department of Corrections because plaintiff has stated a claim against the department for discriminatory firing based upon his national origin and color.

I draw the following facts from the allegations of plaintiff's complaint.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Francisco Salas is an adult male of Hispanic descent, born on July 28, 1947. At all times relevant to this lawsuit, he was employed by the Wisconsin Department of Corrections.

Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin.

At all times relevant to this lawsuit, defendant Richard Raemisch was employed as Deputy Secretary of the Wisconsin Department of Corrections.

At all times relevant to this lawsuit, defendant William Grosshans was employed as acting administrator or assistant administrator of the Wisconsin Department of Corrections Division of Community Corrections.

At all times relevant to this lawsuit, defendant Denise Symdon was employed as a regional chief of the Wisconsin Department of Corrections Division of Community Corrections.

At all times relevant to this lawsuit, defendant Marie Finley was employed as assistant to the regional chief of the Wisconsin Department of Corrections Division of Community Corrections.

At all times relevant to this lawsuit, defendant Leann Moberly was employed as a field supervisor with the Wisconsin Department of Corrections Division of Community Corrections.

B. Plaintiff's Employment with the Wisconsin Department of Corrections

From January 27, 1986 to June 1989, plaintiff was employed by defendant Wisconsin

Department of Corrections Division of Adult Institutions as a correctional officer. He was promoted to the position of Social Worker in June 1989, Social Worker 2 in June 1991 and Social Worker 3 in June 1993. In August 1993, plaintiff became a Licensed Social Worker, certified by the Wisconsin Board of Social Workers, Marriage and Family Therapists and Professional Counselors. Plaintiff trained all newly-hired prison social workers and was the team leader for the Emergency Response Unit's hostage negotiation team. Plaintiff assisted in the development of the NEXUS drug and alcohol treatment program.

In October 1995, plaintiff was transferred to the Division of Community Corrections as a Senior Probation/Parole Agent. In that position, plaintiff co-facilitated sex offender, anger management and cognitive intervention treatment groups.

C. Testimony Before the Equal Employment Opportunity Commission

On July 28, 2003, plaintiff participated as a witness in a proceeding before the United States Equal Employment Opportunity Commission regarding a complaint filed by Darren Rogers, one of plaintiff's co-workers, alleging racial discrimination in the workplace. Defendants were aware that plaintiff testified at the hearing on behalf of Rogers.

On March 17, 2004, plaintiff "explicitly opposed" the way in which the Department of Corrections handled its investigation of Roger's discrimination claim. Plaintiff asserted that the investigation techniques the department used in that case chilled employees'

openness and participation in the investigation. Defendants knew that plaintiff had been openly critical of the way the department handled the investigation.

D. Termination of Plaintiff's Employment

In a letter dated March 18, 2004, defendant Raemisch terminated plaintiff's employment because of plaintiff's alleged violation of Wisconsin Department of Corrections Work Rules 2, 4 and 6. Work Rule 2 requires employees to follow policies and procedures, including the fraternization policy and arrest and conviction policy. Work Rule 4 prohibits negligence in the performance of assigned duties. Work Rule 6 prohibits employees from falsifying records, knowingly giving false information or knowingly permitting, encouraging or directing others to do so.

In the March 18, 2004 letter, Raemisch alleged that from August 17, 2001 to September 23, 2003, plaintiff failed to supervise Kevin Hageman, a minimum risk offender and that plaintiff falsified information regarding Hageman on a "Form 506." Both allegations were false. Raemisch's letter stated explicitly, "This [termination] action is not based on previous discipline."

It was defendant Wisconsin Department of Corrections's policy not to terminate employment on the ground that an employee had made the errors attributed to plaintiff. No one else plaintiff's age or of non-Hispanic origin had been fired by the department for

the same reason plaintiff was fired.

Defendants Grosshans, Symdon, Finley and Moberly investigated plaintiff's alleged rule violation in a way that was designed to "build a false case in support of the termination of plaintiff's employment." One or more defendants altered, destroyed or removed evidence in order to build a false case against plaintiff.

At the time plaintiff was fired, he worked at the Division of Community Corrections office located in Madison, Wisconsin. The office employed 33 people. Plaintiff was the only Hispanic male and one of only two Hispanic employees in the office. At the time of his termination, plaintiff was 56 years old. Plaintiff was replaced with a worker more than ten years younger than he.

OPINION

When a federal court reviews the sufficiency of a complaint, "its task is necessarily a limited one." Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511 (2002). To decide whether a plaintiff has stated a claim under Fed. R. Civ. P. 12(b)(6), the court must "accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in the plaintiff's favor." Moranski v. General Motors Corp., 433 F.3d 537, 539 (7th Cir. 2005). A claim may not be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding,

467 U.S. 69, 73 (1984). The question is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence in support of his claims. Swierkiewicz, 534 U.S. at 511.

A. ADEA

The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). The Act authorizes individuals to bring suit against employers, whom the Act defines as "persons" employing twenty or more individuals, and agents of such persons. 29 U.S.C. §§ 626(2), 630(b).

Plaintiff has named four of his former supervisors — Raemisch, Grosshans, Symdon and Moberly — as defendants to his ADEA claim. Under the principle of respondeat superior, employers may be held responsible under the ADEA for discriminatory actions taken by supervisors against lower level employees. See, e.g., Smith v. Metropolitan School Dist. Perry Township, 128 F.3d 1014, 1024 (7th Cir. 1997) (discussing employer liability for actions of agents under ADA); Williams v. Banning, 72 F.3d 552, 553-554 (7th Cir. 1995) (discussing agent liability under Title VII). However, the Act does not authorize suits brought directly against individual supervisors. United States Equal Employment Opportunity Commission v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir.

1995) (no individual liability under Title VII, ADA or ADEA); Cheng v. Benson, 358 F. Supp. 2d 696, 700 (N.D. Ill. 2005) (collecting cases). Therefore, plaintiff has not stated a claim under the ADEA against defendants Raemisch, Grosshans, Symdon and Moberly.

In addition to his former supervisors, plaintiff has named his former employer, the Wisconsin Department of Corrections, as a defendant to his age discrimination claim. Although the text of the ADEA defines employers to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency," 29 U.S.C. § 630(b), the United States Supreme Court has held that the ADEA cannot extend to state agencies unless those agencies first consent to suit. Kimel v. Florida Board of Regents, 528 U.S. 62, 88 (2000).

Under the Fourteenth Amendment, Congress has power to pass laws guaranteeing that states insure equal protection for all citizens. U.S. Const. amend. XIV, § 5. However, legislation that abrogates states' rights is constitutional only insofar as it constitutes a measured response to a documented pattern of illegal behavior. See, e.g., Tennessee v. Lane, 541 U.S. 509, 531 (2004) (approving abrogation of sovereign immunity under Americans with Disabilities Act in response to states' denial of access to courts for persons with disabilities); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (upholding Title VII's abrogation of sovereign immunity). In Kimel, 528 U.S. at 88, the Court considered "whether the ADEA [wa]s in fact just such an appropriate remedy or, instead, merely an

attempt to substantively redefine the States' legal obligations with respect to age discrimination." After reviewing the legislative record of the ADEA, the Court concluded that

> Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age . . . Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field . . . The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Id. at 91.

Plaintiff's former employer, the Wisconsin Department of Corrections, is an agency of the state of Wisconsin. Because the department has not waived the sovereign immunity to which it is entitled, plaintiff's age discrimination claim against defendant Wisconsin Department of Corrections must be dismissed.

B. Title VII

Like the ADEA, Title VII authorizes suits against employers, not employees. AIC Sec. Investigations, 55 F.3d at 1281. The Court of Appeals for the Seventh Circuit has held repeatedly that Title VII does not authorize suits filed against supervisors in their individual capacities. Williams, 72 F.3d at 553 -554; Robinson v. Sappington, 351 F.3d 317, 332 n. 9 (7th Cir. 2003). For that reason, plaintiff has failed to state a claim against defendants

Raemisch, Grosshans, Symdon and Moberly for terminating his employment because of his race, color, ancestry or national origin. However, unlike the ADEA, Title VII's abrogation of state sovereign immunity has been upheld as a valid response to the widespread and well-documented problem of discrimination. Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 722 (2003) (citing Fitzpatrick , 427 U.S. at 456). Therefore, state sovereign immunity does not bar plaintiff's Title VII claim against the Wisconsin Department of Corrections.

In his complaint, plaintiff alleges that he was one of two Hispanic workers employed by the Wisconsin Department of Corrections Division of Community Corrections at its Madison, Wisconsin office. Moreover, he alleges that defendants terminated his employment because of his "national origin, color [and] ancestry." Cpt., dkt. # 2, at 8. Because the terms "national origin" and "ancestry" are synonymous in meaning under Title VII, Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 89 (1973), plaintiff's discrimination claim has two components: national origin and color.

Defendants contend that plaintiff has failed to state a claim against the Wisconsin Department of Corrections because his complaint does not indicate the "hue of his skin" or "the country from which his forebear[er]s came." Dft.'s Br., dkt. # 11, at 7-8. Defendants contend that the term "Hispanic" is a racial description only, and is insufficient to establish either plaintiff's national origin or his color. Consequently, defendants contend, plaintiff's

Title VII claims should be dismissed in their entirety under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Before deciding whether plaintiff's allegation that he is Hispanic is relevant to his race, national origin or color, it is worth noting that to state an actionable claim under Title VII all plaintiff must do is allege that his status as a "Hispanic" man was a motivating factor in his termination. Title VII makes it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1239 (2006). The Supreme Court has explained that the words of the statute were chosen to promote "equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 617 (1999) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971)). Therefore, Title VII is violated whenever an employer's decision to take adverse action against an employee is motivated by the employee's race, color, religion, sex, or national origin. Although the statute names race, color and national origin individually, an employee who shows that any named factors motivated his termination will have proven his Title VII claim.

Complaints alleging a violation of civil rights under Title VII are subject to the same

pleading standards as any other case; no heightened standard is required. Moranski, 433 F.3d at 539. Therefore, so long as the complaint "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," generally it will survive a motion to dismiss. Swierkiewicz, 534 U.S. at 512 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).

1. Discrimination on the basis of national origin

Defendants contend that the plaintiff's national origin discrimination claim should be dismissed because plaintiff did not identify in his complaint the country from which he or his ancestors originated in his complaint. According to defendants, plaintiff's self-identification as "Hispanic" is a statement of his "race" but not of his national origin.

Laying aside the contentious debate regarding social and anthropological constructions of "race" and how it should be defined, see, e.g., Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 (1987), the meaning and use of the term "Hispanic" contradicts defendants' assertion. The New Oxford American Dictionary 806 (2001) defines the word Hispanic as "of or related to Spanish-speaking countries, especially those of Latin America." The American Heritage Dictionary 832 (4th ed. 2000) defines the word similarly and explains its usage as follows:

Though often used interchangeably in American English, Hispanic and Latino

> are not identical terms, and in certain contexts the choice between them can be significant. Hispanic, from the Latin word for "Spain," has the broader reference, potentially encompassing all Spanish-speaking peoples in both hemispheres and emphasizing the common denominator of language among communities that sometimes have little else in common . . . In practice, however, this distinction is of little significance when referring to residents of the United States, most of whom are of Latin American origin and can theoretically be called by either word . . . Hispanic, the term used by the U.S. Census Bureau and other government agencies, is said to bear the stamp of an Anglo establishment far removed from the concerns of the Spanish-speaking community.

Because the term Hispanic relates to language and culture, it is an ethnic designation more than a racial classification, used to refer to individuals of Spanish-speaking descent, whether from Spain itself or from Spanish-speaking Latin-American countries.

The Equal Employment Opportunity Commission defines

> national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the *physical, cultural or linguistic characteristics of a national origin group*.

29 C.F.R. § 1606.1 (emphasis added). Although common use of the term Hispanic "has blurred the line between race and national origin discrimination," Torres v. City of Chicago, 2000 WL 549588, *2 (N.D. Ill. 2000), recognizing the term as a characterization of plaintiff's national origin is consistent with both its common meaning and with the Equal Employment Opportunity Commission's broad definition of national origin discrimination. Because I find that plaintiff has designated his national origin adequately by alleging that he

is Hispanic, defendant's motion to dismiss plaintiff's national origin discrimination claim will be denied.

2. Discrimination on the basis of color

Technically speaking, "color discrimination" is distinct from racial discrimination. Cynthia Nance, Colorable Claims: The Continuing Significance of Color under Title VII Forty Years After Its Passage, 26 Berkeley J. Emp. & Lab. L. 435, 462 (2005). Despite the legal distinction between the concepts, many courts conflate claims of racial and color discrimination. Id. at 464. The reason for this is clear:

> People often confuse skin color and race because skin color is used to assign people to racial categories. Indeed, color is commonly used to describe the difference between racial categories (i.e., Black is used to describe African-Americans and White is used to describe Caucasians). In addition, people are misled because of the positive correlation between the values associated with being a member of the White race and the values attributed to a lighter skin tone.

Trina Jones, Shades of Brown, The Law of Skin Color, 49 Duke L.J. 1487, 1498 (2000). Although color may be a factor in racial discrimination (for example, when an employer prefers a white job candidate over an equally qualified black candidate), color discrimination refers specifically to preferring an individual because of the *hue* of his skin (for example, treating a light-skinned African woman more favorably than a dark-skinned African woman). Nance, supra, at 438-39.

In this case, plaintiff does not allege that he was treated differently from the other Hispanic employee in his office because of the hue of his skin. Nevertheless, he clearly believes that the way he looked (that is, his "color") caused defendants to treat him differently from other similarly-situated employees. Just as racial and national origin classifications can often blur, Saint Francis College, 481 U.S. at 614 (Brennan, J., concurring), so too can designations relating to skin color. E.g., Oranika v. City of Chicago, 2005 WL 2663562, *3 (N.D. Ill. 2005) (finding race, national origin and color discrimination claims under Title VII based upon allegation that plaintiff was "Nigerian"). Although individuals of Hispanic origin may have skin tones that range from dark to fair, the term Hispanic is often associated with color as well as ethnicity. To pretend otherwise would be patently disingenuous.

To survive dismissal, plaintiff's complaint must do no more than put defendants on notice of the allegations against them. Although plaintiff's allegations could have been made with greater precision, there is no question that defendants understand the nature of his charges. Plaintiff's allegation that he is Hispanic, combined with his contention that defendants discriminated against him because of the color of his skin, is sufficient to state a claim under Title VII. Therefore, defendants' motion to dismiss will be denied with respect to plaintiff's claim that defendants terminated his employment because of his color.

ORDER

IT IS ORDERED that defendants' motion to dismiss is

1. GRANTED with respect to plaintiff's ADEA claim against all defendants;

2. GRANTED with respect to plaintiff's Title VII claims against defendants Richard Raemisch, William Grosshans, Denise Symdon and LeAnn Moberly; and

3. DENIED with respect to plaintiff's Title VII claims against defendant Wisconsin Department of Corrections.

Entered this 17th day of April, 2006.

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