

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

JASON GOBER,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-521-S

EAST TOWNE SUITES, INC.

Defendant.

Plaintiff Jason Gober commenced this lawsuit under Title VII against East Towne Suites, Inc. In his first amended complaint he alleges that he was terminated because of his race in April 2005 and was not hired for a position in June 2005 in retaliation for filing a discrimination complaint.

On February 15, 2007 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 Jason Gober is an African-American male adult resident of Dane County, Wisconsin. In April 2005 plaintiff was an inmate at the Huber Center in Dane County, serving a term for disorderly conduct.

Defendant East Towne Suites, Inc. operates a hotel on the east side of Madison, Wisconsin. Terry Gray was the General Manager at

East Towne Suites. Jessica Potts was the Guest Service Manager at East Towne Suites. There are four departments at the hotel: maintenance, housekeeping, front desk and café.

On January 19, 2005 Nathan Cook, a Caucasian male, was hired for a front desk position. Cook did not have a criminal record when he was hired. Cook was fired on February 8, 2005 because he did not report for work.

In March and April 2005 plaintiff applied twice for a position as hotel front desk clerk at defendant East Towne Suites. On his application he stated that he had been convicted of disorderly conduct in the past five years even though he had been convicted of more than one felony or misdemeanor for forgery and theft during that period of time.

Potts hired Gober as hotel front desk clerk who started on April 12, 2005. When Gray returned from vacation he terminated Gober's employment on April 18, 2005, not knowing plaintiff's race at the time. Gray believed that the hiring of Gober was premature because the hotel's busy season was several weeks away. At that point Gray considered re-hiring Gober in the summer when the hotel was busier.

Gray believed that plaintiff's forgery and theft convictions rendered him unfit and unqualified to work as a hotel front desk clerk because he would have access to money, room keys and credit card information. Gray also believed he was unqualified for

housekeeping and maintenance jobs because he would have access to keys and guest property.

Gober was convicted of criminal damage to property in Dane County Circuit Court in 2004. In 2002 Gober was convicted of battery and disorderly conduct. In 1998 Gober was found guilty of disorderly conduct, two counts of forgery and one count of theft.

In 2005 East Towne Suites had a policy or practice of keeping job applications on file when applicants applied too early for a position. It did not keep the applications of terminated employees for future positions.

On April 21, 2005 and May 2, 2005 defendant placed advertisements in the newspaper for the Assistant Café Manager position. Plaintiff was qualified to fill positions in the café in the summer of 2005.

On May 17, 2005 Plaintiff filed a *pro se* charge of discrimination against the defendant alleging that he was fired because of his race and his criminal record. Gray learned that plaintiff had filed this discrimination complaint in June 2005.

On August 11, 2005 defendant hired an African American John Clark for the position of front desk clerk. John Clark was the first front desk clerk hired after plaintiff's termination.

In March 2006 Terrance Gray when referring to plaintiff said, "we don't hire people who sue us." On May 15, 2006 plaintiff filed

a complaint alleging retaliation concerning defendant's decision not to hire him for an open position in the summer of 2005.

In May 2005 plaintiff worked part-time for Platinum Concepts and Kaiser Ford. Plaintiff also worked for TruGreen Chemlawn in July 2005. He quit these jobs.

It is disputed whether Potts had the authority to hire front desk clerks without Gray's approval. It is also disputed whether plaintiff applied for any positions at East Towne Suites in the summer of 2005 after he was terminated.

MEMORANDUM

There are two methods to prove race discrimination; the direct method and the indirect method. Under the direct method plaintiff must present evidence that points directly to a discriminatory reason for the employer's action. Blise v. Antaramian, 409 F. 3d 961, 966 (7th Cir. 2005). He can demonstrate through suspicious timing, ambiguous statements, behavior toward other employees in the protected group, and other evidence from which an inference of discriminatory intent might be drawn. Phelan v. Cook County, 463 F.3d 773, 780 (7th Cir. 2006

Plaintiff contends that a Caucasian employee Nathan Cook was treated more favorably than he by the defendant. Nathan Cook did not have a criminal record when he was hired by Gray. Plaintiff has not shown that a similarly situated Caucasian employee was

treated more favorably than he was treated. Further, in August 2005 Gray hired an African American front desk clerk.

It is undisputed that Terrance Gray did not know Gober's race when he terminated him. There is no evidence presented from which it could be inferred that Gray's reason for terminating Gober was race. Plaintiff has not shown direct evidence that the defendant discriminated against him on the basis of race when it terminated him.

Plaintiff may also prove race discrimination using the indirect method of proof. To establish a prima facie case of discrimination, plaintiff must establish (1) that he belongs to a protected class; (2) that his performance met his employer's legitimate expectations; (3) that he suffered an adverse employment action and (4) similarly situated employees not in his protected class received more favorable treatment. Brummett v. Sinclair Broadcast Group, Inc., 414 F.3d 686, 692 (7th Cir. 2005).

Plaintiff has not shown that similarly situated employees not in his protected class received more favorable treatment. He has not established a prima facie case of race discrimination.

Had plaintiff demonstrated a prima facie case of discrimination, the burden shifts to the employer to articulate legitimate reasons for its actions. Dunning v. Simmons Airlines, Inc., 62 F.3d 863, 868 (7th Cir. 1995). The two reasons that the defendant gives for terminating plaintiff are that he was hired

prematurely by Jessica Potts and that his criminal record was inconsistent with the requirements of the front desk clerk position.

The burden then shifts to plaintiff to show that the reasons were pretextual for discrimination or retaliation. Pretext means more than an unusual act; it means something worse than a business error; pretext means deceit to cover one's tracks. Kulumani v. Blue Cross Blue Shields Assoc., 244 F.3d 681, 685 (7th Cir. 2000). Plaintiff has not presented evidence that Gray's reasons for terminating plaintiff were a pretext for race discrimination.

Defendant is entitled to judgment in its favor on plaintiff's race discrimination claim. Its motion for summary judgment will be granted on this claim.

Under the direct method of proof plaintiff may defeat summary judgment on his retaliation claim by presenting direct evidence that he engaged in protected activity and as a result suffered an adverse employment action. Phelan v. Cook County, 463 F.3d 773 (7th Cir. 2006). In this case plaintiff filed a race discrimination complaint with the EEOC in May 2005 and was not hired by the defendant for an open position in the café in June 2005.

It is undisputed that in March 2006 Terrance Gray stated "we don't hire people who sue us." This admission is sufficient to defeat the defendant's motion for summary judgment on plaintiff's retaliation claim.

In Phelan, the Court stated that the case must be tried unless the defendant presents un rebutted evidence that he would have taken the adverse employment action absent the retaliatory motive. Id. at 788. Factual disputes remain whether plaintiff would have been hired for a position by the defendant in the summer of 2005 absent a retaliatory motive. Defendant's motion for summary judgment on plaintiff's retaliation claim will be denied.

Defendant seeks judgment in its favor on the issue that plaintiff did not mitigate his damages because he quit three jobs after not being hired by the defendant. Defendant must show that plaintiff failed to exercise reasonable diligence to mitigate his damages and there was a reasonable likelihood that the plaintiff might have found comparable work by exercising diligence. Hutchinson v. Amateur Electronic, 42 F.3d 1037, 1044 (8th Cir. 1994). Defendant has not shown at this stage of the proceedings that plaintiff failed to mitigate his damages and will not be granted judgment in its favor on this issue.

ORDER

IT IS ORDERED that defendant's motion for summary judgment on plaintiff's race discrimination claim is GRANTED.

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IT IS FURTHER ORDERED that defendant's motion for summary judgment on plaintiff's retaliation claim and for mitigation of damages is DENIED.

Entered this 28th day of March, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge