IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEMETRIUS L. WILLIAMS,

Plaintiff,

v.

DAVID M. WOLFE, OSKAR M. ANDERSON, PETER EISCH, WISCONSIN DEPARTMENT OF JUSTICE and WISCONSIN DEPARTMENT OF REVENUE,

Defendants.

OPINION and ORDER

06-C-686-C

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In this civil action for declaratory, injunctive and monetary relief, plaintiff Demetrius Williams, a computer technology specialist formerly employed by the Wisconsin Department of Justice, is proceeding on claims that his rights under the equal protection clause and 42 U.S.C. § 1981 were violated when (1) defendant David Wolfe treated plaintiff less favorably because of his race while he was employed by the Department of Justice; (2) defendants Oskar Anderson, Peter Eisch, and Wolfe withdrew an offer of employment with the Department of Revenue because of his race; and (3) defendant Wolfe refused to rehire plaintiff at the Department of Justice because of his race. Plaintiff contends also that

defendants Wisconsin Department of Justice and Wisconsin Department of Revenue violated his rights under Title VII of the Civil Rights Act of 1964 by refusing to hire him because of his race. Jurisdiction is present under 28 U.S.C. § 1331.

Now before the court is defendants' motion for summary judgment. Because plaintiff has come forward with no evidence suggesting that defendants violated his rights under federal law by discriminating against him because of his race, the motion will be granted.

Before turning to the undisputed facts, several preliminary matters require attention. First, I note that plaintiff has proposed repeatedly as fact that there has not been enough discovery in the case to allow him to adduce evidence on certain key points, such as the race of defendants' coworkers and the relative qualifications of persons who were hired or promoted when he was not. Plaintiff raises these arguments in his brief as well, and invites the court to deny summary judgment because of defendants' alleged discovery violations.

In the preliminary pretrial conference order issued on January 18, 2007, dkt. #4, at 3-5, the magistrate judge directed the parties to "undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines" and to "file discovery motions promptly if self-help fails." Further, they were advised that "parties who fail [to file discovery motions] may not seek to change the schedule on the ground that discovery proceeded to slowly to meet the deadlines" imposed by the court. Id. at 5. If plaintiff believed that defendants were not forthcoming in producing discoverable

documents, his remedy was to file a timely discovery motion. He did not do so. Therefore, insofar as plaintiff seeks to avoid summary judgment by alleging discovery violations, his arguments are unavailing.

In responding to defendants' motion for summary judgment, plaintiff did not file any response to defendants' proposed findings of fact. Instead, he filed proposed findings of his own, some of which are at odds with facts proposed by defendants while others are not. After defendants filed their reply in support of their motion for summary judgment, plaintiff filed a "Motion to Supplement Plaintiff's Opposition to Summary Judgment and Response to Defendants' Proposed Findings of Fact." In his motion to supplement, plaintiff asserts that he "is of the understanding that the defendants' proposed findings of fact are disputed through Plaintiff' proposed findings of fact." Dkt. #46, at 1. Nevertheless, he is seeking permission to file untimely responses to defendants' proposed findings "so that there is no misunderstanding" which facts he disputes. Id. Although ordinarily such a request would be denied, in this case defendants have taken the anticipatory step of filing a reply in support of their proposed findings of fact. The reply takes account of plaintiff's proposed supplemental responses. Because it will not prejudice defendants if I consider both plaintiff's response and defendants' reply, plaintiff's motion to supplement will be granted.

From the parties proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Demetrius Williams is an African American man. He lives in Madison, Wisconsin.

Since 2002, defendant David Wolfe has been employed by the Wisconsin Department of Justice's Bureau of Computing Services as Application Section Manager.

Defendant Peter Eisch is employed by the Wisconsin Department of Revenue as Applications Development Manager.

Defendant Oskar Anderson is employed by the Wisconsin Department of Revenue as Chief Information Officer.

B. Plaintiff's Employment

1. Wisconsin Department of Justice

On October 29, 2001, defendant Wolfe hired plaintiff to work for the Wisconsin Department of Justice Bureau of Computing Services as an "information systems development services senior." Plaintiff was hired at a rate of $25.49 an hour, the maximum salary available for the position. Three other individuals held the same position as plaintiff: one was Caucasian, one was Hispanic and one was Asian. These other workers were paid starting rates of $22.75, $16.72 and $20.25 an hour.

In October 2002, defendant Wolfe became plaintiff's supervisor. Defendant Wolfe assigned similar work to plaintiff and his three coworkers. (What this work was exactly, the parties do not say.) Defendant Wolfe met twice weekly with each staff member; at those meetings, each staff member would provide Wolfe with an estimated time for completion of his or her assigned projects. Often, plaintiff's estimates were longer than his coworker's estimates and he exceeded his estimates more often than they did. However, plaintiff produced high quality work and his speed was not a performance concern from his employer's perspective. At no time during his employment with the Department of Justice was plaintiff told that he worked more slowly than his coworkers or that he took longer to complete jobs than his supervisors expected.

On a number of occasions, plaintiff told defendant Wolfe that he wanted to increase his salary by qualifying for reclassification or obtaining a discretionary compensation adjustment. A reclassification occurs when a filled position is assigned to a different, usually higher, civil service class based on changes in the relative responsibilities of a position or the attainment of higher education or experience by the person who fills the position. A discretionary adjustment is a pay increase that may be used by management to correct for inequities among employees of a similar pay grade.

When asked, defendant Wolfe explained to plaintiff how discretionary compensation awards worked and answered his questions about the process. During the time plaintiff was

employed at defendant Department of Justice, neither he nor his coworkers received a discretionary compensation award. Defendant Wolfe did not think plaintiff should be given a discretionary adjustment because plaintiff earned more than his coworkers already even though they performed the same tasks as he.

In late 2002, plaintiff applied for a promotion to the position of systems development services consultant. Plaintiff did not score well enough on the examination for that position to be considered for an interview. A white male with better scores than plaintiff was hired to fill that position.

During plaintiff's tenure at defendant Department of Justice, one of his coworker's positions was reclassified to the position of specialist (a position higher than plaintiff's) because over time she had begun to perform more complicated tasks than plaintiff or his other two coworkers. In October 2003, in response to plaintiff's inquiries, defendant Wolfe wrote plaintiff a memo outlining what plaintiff would have to do to qualify for a position reclassification. Because plaintiff had been hired at a senior level, he was not eligible for automatic reclassification and because his job duties did not change, he was not given a discretionary reclassification.

Some time before November 2003, plaintiff talked to defendant Wolfe about his concern that he was being underutilized in his position, performing tasks that were too simple for his senior level. Plaintiff asked defendant Wolfe to help him develop a "career

plan" listing the steps plaintiff needed to take in order to be promoted. Defendant Wolfe told plaintiff that he could develop a career plan for him but that it "would only be an exercise." Offended by what he perceived as defendant Wolfe's condescension, plaintiff abandoned his request for a career plan.

At plaintiff's request, defendant Wolfe met with plaintiff on a number of occasions between 2004 and 2005 to discuss plaintiff's career plans. At these meetings plaintiff informed defendant Wolfe that he wanted to "advance to a higher level" and "move into management." Defendant Wolfe did not hold similar career planning meetings with other staff members.

Although defendant Wolfe knew plaintiff wanted to advance professionally, he did not increase plaintiff's job responsibilities.

2. Wisconsin Department of Revenue

Sometime before 2005, defendant Wisconsin Department of Revenue adopted an integrated tax system. Originally, the department paid contractors to maintain the system and train the department's employees to use the system. When it became apparent that none of the department's current employees were qualified to take over the maintenance of the new system, the department decided to recruit and hire four new state employees (three administrators and one specialist) to replace the contract laborers.

In late February 2005, plaintiff applied for the newly created administrator and specialist positions. Defendant Department of Revenue hired one of its already-employed specialists, Keith Gross (a white male), to fill the first open administrator position. Gross performed better than plaintiff on both the written and oral portions of the job interview.

The remaining administrator positions, newly created specialist position and the specialist position vacated by Gross were offered to four former contract employees (all of whom were of Asian or Indian descent). These employees had more on-the-job experience with the department's tax system than did plaintiff.

In mid-April 2005, after one of the contractors declined the department's job offer, defendant Eisch contacted plaintiff, who was the next most qualified candidate for the specialist position. Defendant Eisch discussed plaintiff's salary requirements with him at that time (the parties dispute whether Eisch promised to pay plaintiff the maximum available salary); ultimately however, defendant Department of Revenue decided to extend plaintiff a formal salary offer at the same rate it had offered the other newly hired specialists.

On April 21, 2005, defendant Eisch and plaintiff exchanged email messages regarding plaintiff's references and proposed starting date. Plaintiff provided defendant Eisch with one reference letter and indicated that he did not want to agree to a starting date until the department provided him a written job offer. Defendant Eisch responded by telling plaintiff that he could not extend a written offer until plaintiff agreed upon a starting date and

provided the names of three references with whom Eisch could speak.

On May 2, 2005, plaintiff provided the names of three references (none of whom had supervised him at the Department of Justice) and proposed a potential starting date of May 23, 2005. Defendant Eisch contacted plaintiff's references, each of whom recommended plaintiff strongly.

On May 3, 2005, plaintiff submitted a letter of resignation to defendant Wolfe, effective May 17, 2005.

On May 6, plaintiff met with defendant Eisch, who gave him a formal appointment letter listing a start date of May 29, 2005, and a starting salary of $36.50 an hour. (At some point—the parties do not say when—the proposed starting date was changed to May 31, 2005.) Plaintiff did not accept the offer, but instead asked to meet with "business users" of the department's tax program.

On Monday, May 11, plaintiff asked the Department of Justice to change his termination date to June 7. He did not request an exit interview.

On Monday, May 16, defendant Eisch sent plaintiff an email asking him "where he was in [his] decision-making" process. Plaintiff responded that he would have an answer for defendant Eisch by May 20. However, on May 20, plaintiff contacted defendant Eisch and told him that he had just learned that a friend of his had died and he was not ready to make a decision. On May 26, defendant Eisch responded to plaintiff, saying that he "understood"

and asking plaintiff to meet with defendant Anderson.

On May 31, at 7:30 a.m., plaintiff sent defendants Eisch and Anderson an email message, saying that he was "confused" by the salary offer because it was not the maximum allowable salary for the position. In addition, plaintiff wrote that he would be arriving at the department that morning because his offer letter indicated that May 31 was to have been his starting date. Defendants Eisch and Anderson were not expecting plaintiff's arrival because he had not yet accepted the job offer.

When plaintiff arrived at 8:00 that morning, defendant Eisch met with him. Plaintiff asked whether he would have to serve a probationary period because he had been a permanent employee of the Department of Justice. He also requested again that he be given the maximum allowable salary. (It is not entirely clear what else defendant Eisch and plaintiff may have discussed.) Plaintiff did not begin work that day.

Defendant Eisch contacted the Department of Revenue's Human Resources Department and was informed that plaintiff would be required to serve a six-month probationary period and would be paid the same salary as the other newly hired specialists. On June 2, 2005, defendant Eisch emailed plaintiff telling him that the salary offer stood. Defendant Eisch asked plaintiff to provide him with a new proposed starting date so Eisch could issue an updated offer as the starting date listed in the original offer had come and gone. Plaintiff responded that compensation was a problem; he asked again for a higher

starting salary.

On June 8, 2005 (one day after plaintiff's resignation from the Department of Justice became final), defendant Eisch emailed plaintiff stating that the salary offer was firm and asking plaintiff to propose an acceptable starting date. Defendant Eisch gave plaintiff a response deadline of June 13 at 4:00 p.m.

On June 13, at 3:58 p.m., plaintiff sent an email to defendant Eisch (with a copy to defendant Anderson) stating that he accepted the department's offer but would be unable to start on June 27. Plaintiff did not propose a different starting date. Defendant Eisch responded by reminding plaintiff that he needed a starting date so a new offer letter could be issued. Defendant Eisch suggested July 11. He ended his note with the sentence "Welcome aboard!"

Three days later, on June 16, defendant Eisch sent defendant Anderson the following email message:

> Oskar—I have not heard back from Demetrius on this request for a start date, even after having left him a voicemail on Tuesday. I am starting to get uneasy about how this is going. Particularly since he waited until literaly [sic] the last two minutes before responding with his acceptance. I am leaning toward giving him yet another deadline for giving us a date, then meeting with him (offsite) to personally deliver it and talk about what's been going through his mind with:
>
> - Long delays in acceptance originally
> - Showing up on his original start date to talk, and scaring us all into thinking he was reporting for duty

- Why he was concerned about a probationary period
- Reasons for bringing up the appt. max. a third time, after written notification we would not be changing the offer
- Failure to specify a start date in his acceptance (below)
- Not getting back to me on this after asking

> If we're going to proceed with this hire I need to make sure we get started on the right foot. I will *have* to do something on Monday. Any advice?

On June 20, after having received no response from plaintiff to his earlier communications, defendant Eisch emailed plaintiff asking to meet with him "somewhere downtown" to present the offer letter and "cover final questions." Plaintiff responded by email later that day, declining to meet with defendant Eisch at the time Eisch had proposed and asking him to mail the offer letter. Plaintiff indicated that he would be available to start work on July 11.

Later in the day on June 20, defendant Anderson contacted defendant Eisch and asked him to delay any further action on plaintiff's hire. On June 17, Matt Miszewski, the administrator of the Division of Enterprise Services at the Wisconsin Department of Administration, had contacted defendant Anderson and suggested that Anderson speak with Frank Ace before finalizing plaintiff's hire. When defendant Anderson spoke with Ace on June 20, Ace suggested that Anderson contact defendant Wolfe.

Defendant Anderson spoke with defendant Wolfe on June 21, 2005. In an email message to defendant Eisch and Patricia Jackson-Ward (a human resources employee for the

Department of Revenue), defendant Anderson summarized his conversation with defendant Wolfe as follows:

> I received some unsolicited advice on Demetrius today. Last Friday I received a call from Matt Miszewski regarding our shared server environment. As a side note, he commented that he heard we were talking to Demetrius regarding employment and urged me to talk to Frank Ace (D[epartment] o[f] J[ustice] C[hief] I[nformation] O[fficer]) before we finalized anything.
>
> I called Frank yesterday and he referred me to Dave Wolfe, to whom Demetrius reported. I connected with Dave this morning, and he offered the following:
>
> > •Demetrius left DOJ about a month ago. Dave and he had a disagreement on Demetrius' value to the organization. In Dave's opinion, when Demetrius was hired at DOJ a couple of years ago he was brought on at a salary too high in the salary range of senior compared to the other DOJ developers. As a consequence, he has not received any [discretionary compensation award] recognition while other programmers have. This was a point of contention between the two, which Dave documented in some form of letter to Demetrius, and shortly after that Demetrius resigned and left without telling anyone where he was going.
> >
> > •Again in Dave's opinion, Demetrius is a slow developer compared to the other DOJ programmers. Dave attributes some of the slowness to extended analysis times before starting development. Dave said that the final code is good quality, but the output is low compared to his other developers.
> >
> > •Dave was very surprised that Demetrius had applied for another state job; since he seemed determined to return to the private sector.
>
> I would suggest that you sit down with Pat and discuss your whole experience in recruiting Demetrius, step by step, and get her advice on what to do next. We didn't ask for this additional information, but now that we have it I

> wanted Pat to know about it and to give us some advice on how to react. I think that you have other, positive references, on Demetrius, so we need some advice on how to call this one . . . .

Defendant Wolfe characterizes the conversation in a slightly different way, recalling that he told defendant Anderson that plaintiff's work quality was good even if it was a bit slow. In addition, defendant Wolfe told defendant Anderson that although plaintiff "fit in" well with his coworkers, he "differentiated himself" from his coworkers by wearing a suit, carrying a Daytimer and sometimes using a tape recorder during business meetings. Defendant Wolfe did not believe his reference was a negative one.

On June 22, after consulting with the Department of Revenue's legal counsel, defendant Eisch sent plaintiff the following email message:

> Demetrius -
>
> Thank you for considering employment with the Wisconsin DOR. I regret to inform you of our decision to withdraw the previous offer of employment. We have recently received a late-arriving negative reference that compels us to rescind our offer. In addition, considering the lengthy course of negotiations that have transpired since May 6 when I originally presented the offer Letter to you, we believe your interest in this position is not at a level that would allow you to be successful here. Best wishes in your search for a more suitable position.
>
> Peter Eisch
> Application Development Chief

Ultimately, the position which had been offered to plaintiff was never filled.

In 2005, the Office of Technology Services employed 120 people. Only four were

African American.

3. Wisconsin Department of Justice (Part II)

After learning that he would not be hired by defendant Department of Revenue, plaintiff contacted defendant Wolfe and asked to be reinstated into his former position. By then, the position had been eliminated as part of the department's budget reduction plan.

DISCUSSION

In this lawsuit, plaintiff is pursuing claims of race discrimination under three different legal theories. He contends that defendants have violated his rights under the equal protection clause of the Fourteenth Amendment, 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 by the manner in which they treated him during and after his employment with the Wisconsin Department of Justice and during his employment negotiations with the Wisconsin Department of Revenue. Although each of these laws is governed by different standards, they all share a common thread: to prevail on a claim under any one of them, plaintiff must adduce evidence that he has been treated adversely because of his race. See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229-30 (1995) (equal protection clause prohibits government from treating any person unequally because of race); General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375,

389-390 (1982) (§ 1981 prohibits only purposeful discrimination because of race in formation of contracts); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2179 (2007) (Title VII prohibits discrimination in employment because of race).

In response to a motion for summary judgment, a plaintiff may show discrimination using a variety of methods, ranging from direct proof of racial animus to the McDonnell-Douglas burden shifting analysis often employed in cases arising under Title VII. However, a plaintiff may not rely on rank speculation to support a claim of racial discrimination. Despite his counsel's colorful use of rhetoric, plaintiff has failed to back up his allegations of discrimination with admissible evidence of discrimination under any method of proof.

With respect to plaintiff's claims against defendant Department of Justice and Wolfe, the undisputed facts reveal that plaintiff was not reclassified or given a discretionary compensation award while he was employed at defendant Wisconsin Department of Justice not because he was African American, but because he was already paid more highly than his colleagues for performing similar work. Plaintiff takes issue with defendant Wolfe's failure to devise a career plan for him or channel more complex work his way; however, defendant Wolfe was under no obligation to treat plaintiff more favorably than his coworkers. Plaintiff has failed to produce evidence that he was treated less favorably than his coworkers; if anything, the facts reveal that defendant Wolfe provided plaintiff with *more* career advice than he provided to the other information systems development services senior. Plaintiff

may not have liked the advice he received but that is not grounds for a claim of race discrimination.

Plaintiff's complaints against defendants Wisconsin Department of Revenue, Eisch and Anderson suffer from the same defect. Plaintiff has adduced no evidence suggesting that these defendants failed to hire him because of his race. The undisputed facts reveal that after defendant Eisch made an initial offer to plaintiff at the same salary rate offered to all other newly hired specialists. Plaintiff did not accept the position for some time. Even after his acceptance, plaintiff raised repeated questions about the salary that had been established for the position, failed to provide a starting date despite multiple requests to do so and delayed responding to defendant Eisch's repeated email messages. Later, defendant Anderson learned from defendant Wolfe that plaintiff expressed concerns about his salary at his old position and that plaintiff's opinion of his own work had been higher than his supervisor's opinion of that work.

From these facts, a jury could draw many conclusions: that plaintiff was not hired because his expectations of the position did not match the expectations of defendants Eisch and Anderson; because plaintiff delayed the hiring process for a period of many weeks; because defendant Wolfe's recommendation was less than glowing; or because of some combination of these factors. A jury could not, however, conclude reasonably that the decision of defendants Department of Revenue, Eisch and Anderson to rescind plaintiff's job

offer had anything to do with his race.

The Court of Appeals for the Seventh Circuit has stated repeatedly that summary judgment is the "put up or shut up" moment in a lawsuit. A party's failure to show what evidence he has to convince a trier of fact to accept his version of the facts entitles the opposing party to summary judgment in its favor. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Because plaintiff has failed to meet his burden of coming forward with any evidence from which a jury could find that any defendant discriminated against him because of his race, defendants' motion for summary judgment will be granted in its entirety.

ORDER

IT IS ORDERED that

1. Plaintiff's "Motion to Plaintiff's Opposition to Summary Judgment and Response to Defendants' Proposed Findings of Fact" is GRANTED.

2. The motion for summary judgment of defendants David Wolfe, Oskar Anderson,

Peter Eisch, Wisconsin Department of Justice and Wisconsin Department of Revenue is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 18th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge