IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLENDALE STEWART,

OPINION and ORDER

Plaintiff,

10-cv-456-slc[1]

v.

ERIK K. SHINESKI,
Secretary, Department of Veterans Affairs,

Defendant.

- -

Plaintiff Glendale Stewart has filed an amended complaint to address violations of Fed. R. Civ. P. 8 in the original complaint. The new complaint is 27 pages long and many of the allegations are redundant or extraneous. In addition, the complaint is difficult to follow at times because plaintiff does not set forth his allegations in chronological order but moves back and forth in time, often leaving gaps in his story. However, the amended complaint includes enough facts to satisfy Rule 8. I conclude that plaintiff states a claim upon which relief may be granted for claims that defendant Erik Shineski discriminated against him because of his race, color, disability and his threat to file a complaint with the

[1] I am exercising jurisdiction over this case for the purpose of this order.

Equal Employment Opportunity Commission. However, plaintiff's claim for racial harassment fails because his allegations do not suggest that he was subjected to severe or pervasive conduct.

In his complaint, plaintiff alleges the following facts, which I have construed liberally, as required by Haines v. Kerner, 404 U.S. 519, 521 (1972).

ALLEGATIONS OF FACT

Plaintiff is an African American and a veteran. He has "L5-S1 disc disease with radiculopathy," a lower back condition caused by an injury he sustained while he was in the Navy. In April 2008, plaintiff applied for a position as a housekeeping aid at the veterans hospital in Madison, Wisconsin. In May 2008, defendant hired two Caucasians and one Asian for the position; he did not select plaintiff was not selected, even though plaintiff was more qualified than the candidates who were hired.

In June 2008, defendant hired plaintiff as a housekeeping aid. However, defendant planned to terminate plaintiff as soon as possible. In late August 2008, plaintiff injured his back while he was "pulling trash on the second floor" and was taken to the hospital. As a result, plaintiff was out on sick leave until September 11, 2008. A supervisor named Duane Rose stated falsely that plaintiff had hurt himself at home.

When plaintiff returned to work, he had a discussion with Rose about a letter Rose

"supposedly gave" to the union president "stating what had taken place on August 30, 2008 and August 31, 2008 when plaintiff's back failed." "As a result of Plaintiff questioning Mr. Rose over the issue, Mr. Rose ended up pushing Plaintiff as [they] were exiting the housekeeping aide's office that morning, then lied and said that Plaintiff walked into his hands."

In September 2008, defendant refused to allow plaintiff to work in a "light duty" position on the ground that plaintiff "would be a liability to the company if allowed to work," even though defendant allowed a white employee to work light duty and plaintiff's doctor "had already cleared him to work light duty after his return to work." Defendant then began to discuss removing plaintiff because he was not able to come to work and because plaintiff "was not being honest about his sick time."

On September 15, 2008, plaintiff had a meeting with Robert Kelter, the "Chief of Social Work and Chaplin Service." During the meeting, plaintiff told Kelter that he "had plans to file an EEOC complaint." On September 16, plaintiff complained to the "Chief of Environmental Services" about "the incident." Plaintiff was fired the same day on the ground of "unsatisfactory conduct." All of defendant's reasons for delaying plaintiff's hiring and then firing him are pretexts for discrimination.

OPINION

I understand plaintiff to be raising the following claims:

(1) defendant refused to hire him as a housekeeping aid at the veterans hospital in May 2008 because of his race and color and because of a disability related to his back;

(2) after defendant hired plaintiff in June 2008, defendant refused to allow him to work "light duty" because of his race, color and disability, even though his doctor had "cleared" him to do such work;

(3) defendant subjected plaintiff to a hostile work environment when a supervisor pushed plaintiff;

(4) defendant terminated plaintiff because of his race, color, disability and his threat to file a complaint with the EEOC.

Plaintiff also includes a section in his complaint called "Unfair Treatment During the EEOC Administrative Process," but I assume plaintiff has included that as background information. Plaintiff cannot sue the Secretary of the Department of Veteran Affairs for unfair treatment he believes he received from the administrative law judge. Further, because the administrative proceedings do not have preclusive effect on this court, Kremer v. Chemical Construction Corp., 456 U.S. 461, 470 n.7 (1982), plaintiff is not harmed if he believes the administrative law judge made erroneous decisions.

Each of plaintiff's claims relates to employment discrimination that is prohibited

under Title VII and the Americans with Disabilities Act, both of which apply to the federal government under 2 U.S.C. § 1311:

(1) disparate treatment because of race or color, 42 U.S.C. § 2000e-2(a);

(2) retaliation against employees for "oppos[ing]" racially discriminatory practices, 42 U.S.C. § 2000e-3; (opposition includes making an oral complaint, Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009));

(3) disparate treatment on the basis of disability, 42 U.S.C. § 12112;

(4) racial harassment, Ford v. Minteq Shapes and Services, Inc., 587 F.3d 845, 847 (7th Cir. 2009).

Under Swanson v. Citibank, N.A., 614 F.3d 400, 405 (7th Cir. 2010), a plaintiff may state a claim for discrimination if the "complaint identifies the type of discrimination that [the plaintiff] thinks occur[red] . . ., by whom . . . and when." Plaintiff has satisfied this standard with respect to his claims that defendant refused to hire him, refused to allow him to work light duty and fired him because of various protected characteristics and conduct. However, plaintiff may not proceed on his harassment claim because the conduct must be sufficiently severe or pervasive as to alter the conditions of his employment. Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 788 (7th Cir. 2007); Luckie v. Ameritech Corp., 389 F.3d 708, 713 (7th Cir. 2004). A single push is neither severe nor pervasive. E.g., Jenkins v. New York State Dept. of Corrections, No. 01-754, 2002 WL 205674 at *6-7 (S.D.N.Y.

Feb. 8, 2002) (one-time occurrence of verbal harassment and shove not severe or pervasive).

With respect to those claims on which plaintiff is moving forward, he should know that he will not be able to stand on his allegations at later stages in the case. To prove his claims at summary judgment or trial, he will have to come forward with specific facts showing that a reasonable jury could find in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed. R. Civ P. 56.

With respect to his claims for disability discrimination, plaintiff will have to show that he has a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). In general, being "substantially limited" means that "a person must be 'either unable to perform a major life function, or [be] significantly restricted in the duration, manner, or condition under which the [person] can perform a particular major life activity, as compared to the average person in the general population.'" Peters v. City of Mauston, 311 F.3d 835, 843 (7th Cir. 2002) (alterations in original) (quoting Contreras v. Suncast Corp., 237 F.3d 756, 762 (7th Cir. 2001)). A back injury may meet this standard if it substantially impairs an employee's ability to walk or stand. Williams v. Excel Foundry & Machine, Inc., 489 F.3d 309, 311 (7th Cir. 2007).

With respect to all of his discrimination claims, plaintiff will have to show that his race, color or disability was one of the reasons his hiring was delayed and he was later terminated. Hossack v. Floor Covering Associates of Joliet, Inc., 492 F.3d 853, 860 (7th Cir.

2007). Similarly, to prevail on his retaliation claim, plaintiff will have to show that his allegation of racial discrimination was one of the reasons he was suspended and terminated.

Discrimination and retaliation claims are classic examples of claims that are easy to allege but hard to prove. Many pro se plaintiffs make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

A plaintiff can prove discrimination and retaliation claims in various ways. For example, plaintiff may adduce evidence that defendant treated similarly situated employees who are not African American better than they treated him, Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006), or that defendant consistently treated poorly other black employees or employees who complained about discrimination. Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008). A "similarly situated" employee is someone who is "directly comparable" to the plaintiff in all material respects." Grayson v. O'Neill, 308 F.3d 808, 819 (7th Cir. 2002). Relevant factors may include whether the employees had the same job description, were subject to the same standards, were subject to the same supervisor and had comparable experience, education and other qualifications. Bio v. Federal Express Corp., 424 F.3d 593, 597 (7th Cir. 2005).

In addition, plaintiff may rely on evidence of suspicious timing or discriminatory statements by a decision maker or statements suggesting that the decision maker was bothered by plaintiff's complaints about discrimination. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). However, even if plaintiff was fired a short time after he complained, that closeness in time is rarely enough to prove an unlawful motive without additional evidence. Mobley v. Allstate Insurance Co., 531 F.3d 539, 549 (7th Cir. 2008) ("Evidence of temporal proximity, however, standing on its own, is insufficient to establish a causal connection for a claim of retaliation.")

Evidence of discrimination may include a showing that defendant's reasons for his actions are pretextual. Simple v. Walgreen Co., 511 F.3d 668 (7th Cir. 2007). A "pretext" is more than just a mistake or a foolish decision; it is a lie covering up a true discriminatory or retaliatory motive. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006). "[T]he question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason was his reason: not a good reason, but the true reason." Id. at 417-18. A plaintiff may show that a decision is pretextual with evidence that an employer's stated motive did not actually motivate the decision, Freeman v. Madison Metropolitan School District, 231 F.3d 374, 379 (7th Cir. 2000), that defendant "grossly exaggerated" the

seriousness of an incident, Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept., 510 F.3d 681, 693 (7th Cir. 2007), that defendant violated its own policies and procedures, Davis v. Wisconsin Dept. of Corrections, 445 F.3d 971, 976-77 (7th Cir. 2006), or with any other evidence tending to show that the employer's stated reason is false.

Finally, plaintiff should know that Title VII includes various procedural requirements that a plaintiff must satisfy before filing a lawsuit in federal court. One important requirement is that a plaintiff may not bring a discrimination claim until he has received a "right to sue" letter from the Equal Employment Opportunities Commission. 42 U.S.C. § 2000e-5(f). Once he receives that letter, he has 90 days to file a lawsuit. Prince v. Stewart, 580 F.3d 571, 574 (7th Cir. 2009). See also 42 U.S.C. § 2000e-5(e)(1) (plaintiff must file charge with EEOC within 300 days of alleged unlawful employment practice). Although defendant has the burden to prove that plaintiff failed to meet these requirements, if defendant meets that burden, plaintiff's claims will have to be dismissed. Salas v. Wisconsin Dept. of Corrections, 493 F.3d 913 (7th Cir. 2007). Thus, before plaintiff proceeds further, he should consider whether he will be able to obtain the necessary evidence to prove his claims and whether he has satisfied all the procedural requirements of bringing this suit. Fed. R. Civ. P. 11.

ORDER

IT IS ORDERED that

1. Plaintiff Glendale Stewart is GRANTED leave to proceed on the following claims:

> (1) defendant refused to hire him as a housekeeping aid at the veterans hospital in May 2008 because of his race and color and because of a disability related to his back, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act;
>
> (2) after defendant later hired him in June 2008, defendant refused to allow him to work "light duty" because of his race, color and disability, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act;
>
> (3) defendant terminated plaintiff because of his race, color, disability and because he threatened to file a complaint with the EEOC, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act.

2. Plaintiff's claim that defendant subjected him to a hostile work environment is DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.

3. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his

documents.

4. Under Fed.R.Civ.P. 4(i)(2), a party suing a federal employee in his official capacity "must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the . . . employee"; under Rule 4(i)(1)(A), to serve the United States, a party must "deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought, . . . send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office" and "send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C." For the sake of expediency, I will send this order and plaintiff's amended complaint to defendant, the local United States attorney and the United States Attorney General by certified mail. Plaintiff should not attempt to complete service on his own behalf.

Entered this 2d day of November, 2010.

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