

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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| CLARENCE WOOTEN, |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION |
| v. |) | |
| |) | No. 03-2138-CM |
| |) | |
| UNIFIED GOVERNMENT OF |) | |
| WYANDOTTE COUNTY/KANSAS |) | |
| CITY, KANSAS, |) | |
| |) | |
| Defendant. |) | |
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MEMORANDUM AND ORDER

Plaintiff Clarence Wooten, appearing pro se, brings suit against defendant Unified Government of Wyandotte County/Kansas City, Kansas alleging violations of Title VII of the Civil Rights Act of 1964 and the Kansas Act Against Discrimination (“KAAD”). Pending before the court is defendant’s Motion for Summary Judgment (Doc. 45).

I. Facts

As a preliminary matter, the court notes that plaintiff’s response brief fails to adequately respond to, much less controvert, defendant’s statement of uncontroverted facts. Plaintiff simply and summarily denies defendant’s statement of facts without citing to any evidentiary support. Local Rule 56.1 requires that “[e]ach fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable,

shall state the number of the movant's fact that is disputed." D. Kan. Rule 56.1(b)(1). Plaintiff complied with none of these requirements.

On September 13, 2001, defendant hired plaintiff on a probationary basis as an Electric Utility Operator at the Nearman Power Plant. Plaintiff is an African-American male. Because of plaintiff's probationary status, plaintiff was required to achieve qualification on the "C" and "B" positions within 120 days of his hire date. To meet the requirements for the "B" position, plaintiff was required to, among other things, successfully answer questions regarding the operation of the Nearman Power Plant and individual plant systems. Plaintiff's supervisors were Kevin Miller, Dal McCracken, Pat Kneel, and John Fuentes, who evaluated plaintiff's job performance. On January 10, 2002, defendant terminated plaintiff's employment, after plaintiff failed to meet the qualifications for the "B" position within the probationary period.

On the same date of plaintiff's hire, defendant also hired Michael Lee on a probationary basis for the same position of an Electric Utility Operator at the Nearman Power Plant. Like plaintiff, Lee is an African-American male. Defendant required Lee to meet the same qualifications as that of plaintiff, and within 120 days, Lee achieved qualification on the "B" operator position. The same individuals supervised and evaluated Lee.

As stipulated in the Pretrial Order, plaintiff's last day of reporting to work was January 10, 2002, the date upon which plaintiff cleared out his locker. On January 11, 2002, plaintiff filed with defendant an internal complaint of discrimination. On June 30, 2002, plaintiff filed a Charge of Discrimination with the federal Equal Employment Opportunity Commission ("EEOC") and the Kansas Humans Rights Commission ("KHRC"). Plaintiff alleges that defendant did not formally

terminate him until September 2002, after receipt of plaintiff's discrimination complaints and unsuccessful EEOC mediation.

II. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving

party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must “set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Adler*, 144 F.3d at 671. “To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Id.* Finally, the court notes that summary judgment is not a “disfavored procedural shortcut;” rather, it is an important procedure “designed to secure the just, speedy and inexpensive determination of every action.” *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The court acknowledges that plaintiff appears pro se and his response is entitled to a somewhat less stringent standard than a response filed by a licensed attorney. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, this does not excuse plaintiff from the burden of coming forward with evidence to support his claims as required by the Federal Rules of Civil Procedure and the local rules of this court. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). Even a pro se plaintiff must present some “specific factual support” for his allegations. *Id.*

III. Discussion

In its Motion for Summary Judgment, defendant argues that summary judgment is appropriate on plaintiff’s discrimination and retaliation claims because plaintiff has failed to establish a prima facie case for either claim.

A. Discrimination Claim

Plaintiff claims that defendant discriminated against him on the basis of his race. Plaintiff contends he was subjected to discriminatory substandard training and discriminatory evaluations by defendant. Because of these alleged discriminatory employment conditions, plaintiff claims he failed to meet the “B” position’s qualifications and was therefore unlawfully terminated.

To determine whether plaintiff can survive summary judgment, the court applies the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973). Under *McDonnell Douglas*, in order to survive summary judgment, plaintiff must first establish a prima facie case of discrimination. Once plaintiff establishes his prima facie case, the burden shifts to defendant to offer a legitimate, nondiscriminatory reason for its employment decision. If defendant makes such a showing, the burden reverts to the plaintiff to show the proffered nondiscriminatory reason is pretextual. If plaintiff meets this last burden, the motion for summary judgment must be denied.

To establish a prima facie case of discriminatory discharge, plaintiff must show that: (1) he belongs to a protected class; (2) he was qualified for his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination. *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1417 (10th Cir. 1993). In its Motion for Summary Judgment, defendant sets forth a slightly different standard for discrimination, one that requires plaintiff to show a similarly situated nonminority employee was treated differently. Defendant argues that, because there were no similarly situated nonminority employees available for comparison, plaintiff cannot meet this prima facie standard, and his claim should accordingly be dismissed.

Courts in this district have used the prima facie elements set forth in *Nannie & the Newborns*, particularly when similarly situated nonminorities are not present. *See Tran v. Standard Motor Prod., Inc.*, 10 F. Supp. 2d. 1199, 1206-1207 (D. Kan. 1998) (applying *Nannie & the Newborns* standard when plaintiff could not show that similarly situated non-Vietnamese employees were treated differently, but plaintiff did offer evidence that created an inference of discrimination). A showing of disparate treatment is merely one way to satisfy the third element, but it is not a requirement.

In this case, plaintiff points to no similarly situated nonminority employee to whom the court can compare plaintiff. As such, the court looks to whether plaintiff has put forth any evidence giving rise to an inference of discrimination. Significantly, plaintiff fails to present *any* evidence that gives rise to an inference of discrimination. In fact, the evidence in the record establishes that Lee, who also is African-American, was evaluated by the same supervisors and achieved the necessary qualification. Such a fact undermines plaintiff's claim of discriminatory treatment. Absent any evidence of discriminatory treatment, plaintiff cannot satisfy the prima facie case for discrimination, and summary judgment is appropriate. The court notes that, once defendant moves for summary judgment, plaintiff "may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (quoting Fed. R. Civ. P. 56(e)). Plaintiff has failed to present any evidence to show that a genuine issue of fact exists.

B. Retaliation Claim

Plaintiff contends that, after engaging in the protected activity of filing discrimination complaints with defendant, the EEOC, and the KHRC, defendant retaliated by terminating his employment. The court applies the *McDonnell Douglas* framework, set forth above, to retaliation claims. *Burrus v. United Tel. Co.*, 683 F.2d 339, 343 (10th Cir. 1982). To sustain a prima facie case of retaliation, plaintiff must show (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. *Kendrick v. Penske Transp. Serv., Inc.*, 220 F.3d 1220, 1234 (10th Cir. 2000). Defendant argues that it is entitled to summary judgment because plaintiff cannot establish the necessary causal connection.

For protected activity to be causally connected to an adverse employment action, the employee must be subjected to the adverse action subsequent to or contemporaneous with the protected activity. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 n. 2 (10th Cir. 1999). Plaintiff's first protected activity occurred on January 11, 2002, when plaintiff filed with defendant an internal complaint of discrimination. On June 30, 2002, plaintiff filed a discrimination complaint with the EEOC and the KHRC.

Plaintiff contends defendant terminated his employment, not on January 10, 2002, but rather in September 2002, after plaintiff filed his complaints and participated with defendant in an unsuccessful EEOC mediation. But, when asked in his deposition about his last day of work, plaintiff responded it was on January 10, 2002. Plaintiff also testified that he cleaned out his locker on that day, exited the premises, and did not receive correspondence from defendant thereafter. The evidence in the record clearly establishes that plaintiff's date of termination was January 10,

2002. Accordingly, the necessary causal connection cannot exist because the protected activity occurred after the adverse employment action. Plaintiff cannot establish a prima facie case of retaliation, and the court therefore grants defendant's Motion for Summary Judgment on this claim.

Even assuming plaintiff's termination did not occur until September 2002, summary judgment would still be appropriate. Defendant sets forth a legitimate, nondiscriminatory reason for termination, that plaintiff failed to qualify for his position within the 120 day probationary period. Following the *McDonnell Douglas* analysis, plaintiff must then show defendant's reason is pretextual to survive summary judgment. "Mere conjecture that the employer's explanation is pretext is insufficient to defeat summary judgment." *Anderson*, 181 F.3d at 1179 (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). In this case, plaintiff presents no evidence that defendant's reason for terminating him was more likely motivated by a discriminatory reason or that defendant's proffered explanation is unworthy of belief. Because no genuine issue of material fact exists, the court grants summary judgment.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment (Doc. 45) is granted. This case is hereby dismissed.

Dated this 24 day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge