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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No. CV 03-7023 GAF (JTLx) Date April 20, 2006

Title EEOC v. Universal Pictures, et al.

SC-11113

Present: The Honorable **GARY ALLEN FEESS**

Marilynn Morris

None

N/A

Deputy Clerk

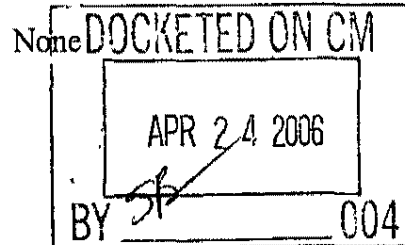
Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None



Proceedings: (In Chambers)

**RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT****A. THE PENDING CASE AND MOTION FOR SUMMARY JUDGMENT**

This case arises out of Frank Davis's performance as First Assistant Director ("FAD") on the film *2 Fast 2 Furious* ("FF2"). Defendant Universal Pictures, Inc. hired Davis to work as Director John Singleton's FAD on that film, but later terminated his employment long before principal shooting had been completed. Davis, who is African-American, complained to the Equal Employment Opportunity Commission ("EEOC") that his termination and replacement with a Caucasian FAD was racially motivated. The EEOC investigated, concluded that the claim had merit, and filed this lawsuit. Davis intervened.

Universal Pictures and co-defendant Vivendi Universal Entertainment LLLP (jointly referenced as "Universal" or "Defendants") now move for summary judgment on the discrimination claims brought by the EEOC and Davis. They contend that Davis was terminated not because he is African-American but because of his inadequate performance as FAD on *FF2*. In this motion, they argue that the undisputed facts demonstrate that Davis cannot establish a *prima facie* case of discrimination because he cannot present facts showing that he was qualified to work as FAD on *FF2*. Further, they contend that, even if Davis has established sufficient evidence to make a *prima facie* case, no evidence has been presented to show that Universal's proffered reasons for Davis's termination were a pretext to conceal a discriminatory animus.

174

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CLERK**B. DISCUSSION****1. THE SUMMARY JUDGMENT STANDARD**

The Court's resolution of a motion for summary judgment does not, in the first instance, involve an assessment of the merits but rather a determination of whether material issues in the case are the subject of a factual dispute. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 256 (1986) (moving party has the burden of demonstrating the absence of a genuine issue of fact for trial). If, but only if, the Court concludes that the material facts in the case are undisputed, the Court then proceeds to determine whether those undisputed facts warrant the entry of judgment for the moving party. Thus, regardless of the apparent strength of the moving party's case or defense, if the Court must resolve factual disputes to reach a decision on the merits, then summary judgment cannot be granted. As set forth below, the Court concludes that, although Defendants insist that they terminated Davis because he was an unpleasant, disagreeable, and marginally qualified FAD who had fallen behind schedule on a project beyond his competence, that conclusion is based on facts that Davis has adequately disputed. The following briefly explains the basis for the Court's ruling on this motion.

**2. THE MCDONNELL DOUGLAS TEST**

In discrimination cases, defense motions for summary judgment are analyzed under the Supreme Court's McDonnell Douglas test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The analysis proceeds in three stages: first, the plaintiff bears the burden of presenting a *prima facie* case of discrimination; if that is accomplished, the burden shifts to the defendant to present evidence of a legitimate, non-discriminatory reason for the termination; at that point, the burden shifts back to the plaintiff to present evidence that the proffered reason is a pretext to conceal a discriminatory motive for the termination. Id. at 802; Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 658 (9th Cir. 2002); Lyons v. England, 307 F.3d 1092, 1112 (9th Cir. 2002); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

***a. The Prima Facie Case***

To establish a *prima facie* case, the plaintiff must demonstrate: (1) that he belongs to a protected class; (2) that he was qualified for the position; (3) that he was subjected to an adverse employment action; and (4) that similarly situated non-African-American individuals were treated more favorably. McDonnell Douglas, 411 U.S. at 802; Aragon, 292 F.3d at 658; Chuang v. University of Cal. Davis, 225 F.3d 1115, 1123-24 (9th Cir. 2000). "[T]he burden of

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U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

establishing a *prima facie* case of disparate treatment is not onerous.” Burdine, 450 U.S. at 253. This *prima facie* showing only requires sufficient evidence which “gives rise to an inference of unlawful discrimination.” Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994); William W. Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial § 14:159.2, at 14-51 (2005).

Here the Court concludes that Plaintiff has shown evidence supporting a *prima facie* case of unlawful discrimination. Three of the four elements are not in dispute: he belongs to a protected class; he was subjected to an adverse employment action and he was replaced by a similarly situated white male. However, citing out-of-Circuit or other nonbinding decisions, e.g., King v. Rumsfeld, 328 F.3d 145, 149 (4th Cir. 2003), Defendants assert that Plaintiff has not demonstrated the “qualified for the position” element because Defendants found him to be unqualified. According to Defendants, whether Plaintiff has established that element turns on the “legitimate expectations of the employer” at the time of the termination. In the Court’s view, the argument begs the question and conflates the *prima facie* case analysis with the pretext inquiry. Here, the record demonstrates the following: (1) Defendants hired Davis to work as the FAD after inquiring into his background and experience on other films, (e.g., Liem Decl., Ex. O [Fenady Depo.] at 90; Statement of Genuine Issues (“SGI”) ¶ 5); (2) Davis meets the DGA minimum requirements to work as a FAD on the projects, (Liem Decl., Ex. B [Lynch Depo.] at 117; *id.*, Ex. B [Davis Depo.] at 117; Davis Decl. ¶¶ 4-6); and (3) Director John Singleton unambiguously states that Davis was qualified for the position (he had requested that Davis be hired), and that Davis was performing satisfactorily on the project, (Liem Decl., Ex. 18 [EEOC Affidavit of Singleton] at Bates 0158-0160). In fact, Singleton made clear that had Davis performed poorly on *FF2*, Singleton would have terminated Davis himself. (*Id.* at 0174). Under these circumstances, and given case law holding that the plaintiff has a very minimal burden of establishing a *prima facie* case at the summary judgment stage, the Court can hardly conclude that Davis was not qualified to perform the duties of FAD on *FF2*. See, e.g., Burdine, 450 U.S. at 253; Lyons, 307 F.3d at 1112.

**b. Pretext**

Because Davis has established a *prima facie* case, the burden shifts to Defendants to present evidence of a legitimate, non-discriminatory basis for the termination. Here Defendants have presented such evidence, and Plaintiffs do not contend otherwise. Accordingly, the burden then shifts to Davis to establish facts suggesting that the proffered explanation constitutes a pretext to conceal unlawful discrimination. Although this is the single most vigorously contested issue between the parties, and Defendants insist that Plaintiffs’ evidence fails to

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CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 03-7023 GAF (JTLx) Date April 20, 2006

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contain any reference to race, the evidence plainly establishes issues of fact for trial on pretext.

Plaintiffs can establish pretext in one of two ways: "either 'directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1068 (9th Cir. 2003) (quoting Burdine, 450 U.S. at 256). Direct proof would typically involve some evidence that a decision maker harbored discriminatory animus without inference or presumption, such as the use of racial epithets or other comments suggesting bias or prejudice. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998). Where a plaintiff offers direct evidence of a discriminatory motive, Circuit case law teaches that very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive. Id. at 1220; Lowe v. Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985). Where the Plaintiff presents indirect evidence, a more specific, substantial showing must be made. Godwin, 150 F.3d at 1221. This does not mean, however, that Plaintiff's burden is greater in such cases. As the Circuit has recently reiterated, a motion for summary judgment cannot be entered where a plaintiff presents circumstantial evidence that would give rise to an inference that an adverse employment action was motivated by illegal discrimination.

In this case, Plaintiff presents both kinds of evidence. Plaintiff presents evidence of Matthew Weiner's telephone interview with production manager Terry Miller, who defense counsel concedes had a role in the decision to terminate Davis, regarding a position to replace Jason Roberts, Davis's second assistant director on *FF2*. Weiner reports that Miller asked Weiner, "what color are you, are you black?" (Plaintiff's Additional Facts ("PAF") ¶ 777; Liem Decl., Ex. H [Weiner Depo.] at 119:8-119:17). Such an inquiry, which Weiner found surprising and defense counsel concedes was improper, is the kind of remark that the Circuit has found sufficient to give rise to an inference that the termination decision was motivated by illegal discrimination. Lindahl v. Air France, 930 F.2d 1434, 1438-39 (9th Cir. 1991) (direct evidence of sexual stereotyping where employer believed that the female candidates get "nervous" and "easily upset"); see also Cordova v. State Farm Ins., 124 F.3d 1145, 1150 (9th Cir. 1997) (direct evidence of race discrimination where employer referred to a Mexican-American employee as a "dumb Mexican"); Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1111 (9th Cir. 1991) (direct evidence of sex stereotyping where employee referred to female plaintiff as "an old warhorse" and to her students as "little old ladies"). Miller's statement alone would probably be sufficient to defeat summary judgment, but the record also contains circumstantial evidence suggesting that the proffered explanations, which varied over time, are not worthy of belief.

The evidence in this case indicates that Universal could not terminate Davis, except with

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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2006 APR 20 PM 3:01

Case No. CV 03-7023 GAF (JTLx)

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just cause, but that it delayed several months before it provided an explanation for the termination. (Davis Decl. ¶ 61; Liem Decl, Ex. 26 [2/3/03 Universal Position Statement to EEOC]; *id.*, Ex. B [Lynch Depo.] at 215:10-13; 219:17-220:11). This delay, combined with the assertion, denied by Singleton, that Singleton approved the termination, gives rise to an inference that the explanation is not a reason but a rationalization. Singleton adamantly asserts that Davis was performing satisfactorily and that Singleton would have terminated Davis had he not performed. Moreover, Defendants' description of Davis's shortcomings further suggest pretext. For example, the record contains evidence that Davis was terminated because Defendants wanted to pursue a more expedited shooting schedule that was beyond Davis's capacity to implement. (Liem Decl., Ex. 25 [3/13/03 Lynch Affidavit] at 7-9; *id.*, Ex. C [Singleton Depo.] at 116:15-117:16; *id.*, Ex. G [Mitchell Depo.] at 127:1-7; *id.*, Ex. 136 [9/10/02 Email]). However, the record also contains evidence that principal photography fell behind the expedited schedule after Franklin, Davis's Caucasian replacement, had been hired and that Franklin was never terminated. (PAF ¶¶ 553-54). Indeed, it appears that principal photography finished in approximately the same number of days allowed under the original schedule given to Davis. Finally, several months after Davis's termination, Defendants for the first time and only in the most terse of terms claimed that safety concerns attributed to Davis's performance as FAD were a factor in his termination. (Liem Decl., Ex. 26 [2/5/03 Universal Letter to EEOC] at Bates 0019 ("[C]ommunication with the crew was extremely important to safely and efficiently organizing the production activity."). Safety was not mentioned again until September 28, 2004, almost two years after Davis's termination. (*Id.*, Ex. 28 [9/28/04 Universal's Response to EEOC's Interrogatories]). The delay in reporting this alleged reason for termination raises a question regarding its legitimacy, particularly since second unit safety incidents and filming delays occurred under Mr. Waxman's supervision as FAD of the second unit without repercussions to or termination of Waxman, who is Caucasian. (PAF ¶ 570). These facts, among many others, raise a genuine issue for trial regarding the true motive for Davis's termination, and could support an inference that he was terminated because of race.

### C. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment on the discrimination claims brought by EEOC and Davis is **DENIED**. Likewise, Defendants' motion for summary judgment on Plaintiffs' prayer for injunctive relief must also be **DENIED** under controlling Ninth Circuit authority. *See, e.g., EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987) (citations omitted).

IT IS SO ORDERED.

