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United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES EQUAL EMPLOYMENT COMMISSION, Plaintiff,
James FERGUSON, Plaintiff–Intervenor
v.
FOSTER WHEELER CONSTRUCTORS, INC., et al Defendant.

No. 98 C 1601. | July 12, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, J.

***1** Before this court is Defendants Foster Wheeler Construction, Inc.'s ("FW Const.")[1] and Pipefitters Assoc. Local Union 597 ("Union")[2] motion for partial summary judgment on Plaintiff–Intervenor James Ferguson's ("Ferguson") non-graffiti claims. Defendants' motion is granted.

I. Facts

A. Local Rule 12

In the Northern District of Illinois, a party submitting a motion for summary judgment must submit a "statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law ..." Local Rule 12(M). Local Rule 12(N) states that "[a]ll material facts set forth in the 12(M) statement will be deemed to be admitted unless controverted in the [12(N)] statement." A party defending against summary judgment must point to specific portions of the record that support its interpretation of the case or the facts will be deemed admitted. *See Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 921–22 (7th Cir.1994) (observing that the Seventh Circuit has "repeatedly upheld the strict enforcement of [Local District Rules 12(M) and 12(N)], sustaining the entry of summary judgment when the non-movant has failed to submit a factual statement in the form called for by the pertinent rule and thereby conceded the movant's version of the facts."); *Valenti v. Qualex, Inc.,* 970 F.2d 363, 369 (7th Cir.1992) ("A Rule 12 responsive statement that is a flat denial, without reference to supporting materials, or with incorrect or improper references, and containing irrelevant additional facts, has no standing under Rule 12(N).");

Rather than providing a 12(N) Response to FW Const.'s 12(M) Statement, Ferguson, acting pro se, provided his own "12(M) Statement," which the court views as a 12(N) Statement of Additional Facts. While the court is forgiving of a pro se plaintiff's failure to follow all of the technical rules and, thus, has looked at Ferguson's Statement of Facts to see if it contradicts any of the factual statements in FW Const.'s 12(M) Statement, the vast majority of these statements are not relevant to Ferguson's *non-graffiti* claims. (*See* Ptf's 12(N) Stmt. ¶¶ 9, 11, 13, 18–23, 25–36.) Ferguson also makes broad assertions about the treatment of African–Americans on work sites in general and on FW Const. work sites other than the Robbins site. (*See* Ptf's 12(N) Stmt. ¶¶ 8, 18–19.) Finally, other than citing to the Equal Employment Opportunity Commission's ("EEOC") Third Amended Complaint in support of his 12(N) Stmt. ¶¶ 3–6, Ferguson cites to no evidence. Other than statements that are material and that FW Const. has admitted despite the lack of support, the court will not consider Ferguson's factual statements.

B. Facts

Ferguson is an African–American and is a resident of Markham, Illinois. (Dft's 12(M) Stmt. ¶ 3.) Ferguson is a charging party named in the EEOC's Third Amended Complaint in this action. (Dft's 12(M) Stmt. ¶ 4.) The EEOC's Third Amended Complaint alleges that FW Const. engaged in unlawful employment practices, including:

> ***2** a. Subjecting Ferguson and other African American employees to racial harassment by, among other things, permitting the portable toilets at the facility to remain covered with racially offensive graffiti; and
>
> b. Subjecting female employees to sexual harassment by, among other things, permitting portable toilets to remain covered with sexually offensive graffiti.

(Dft's 12(M) Stmt. ¶ 4.) Ferguson has intervened in this lawsuit and is maintaining additional claims against FW Const. and the Union. (Dft's 12(M) Stmt. ¶ 5.) Count I of Ferguson's Amended Complaint in Intervention alleges that Ferguson "was subjected to different and less favorable terms and conditions of employment than similarly situated non-African-American employees" in violation of 42 U.S.C. § 1981, including being subjected to racial slurs and racially offensive graffiti" and Ferguson and his wife being "made the subject of sexually explicit and offensive graffiti"; Count II alleges that Ferguson was laid off on August 2, 1996 in retaliation for complaints about racial and sexual graffiti in violation of Title VII. (Dft's 12(M) Stmt. ¶ 5.) FW Const. is a Delaware corporation based in New Jersey, that constructs industrial facilities and was responsible for constructing the Robbins Resource Recovery Facility ("Robbins project"). (Dft's 12(M) Stmt. ¶ 6.) The Robbins Facility was finished in October 1996; by November 1996, all clean-up work at the site was complete and all local construction and office employees of FW Const. were off the Robbins site. (Dft's 12(M) Stmt. ¶ 7.)

Ferguson began working at the Robbins site on or about November 27, 1995. (Dft's 12(M) Stmt. ¶ 8.) Ferguson obtained the Robbins job through the Union. (Dft's 12(M) Stmt. ¶ 8.) Ferguson expected to do pipefitting in the field when he was hired but was instead assigned a job in the pipefitters' materials trailer, accepting material that came in from the distributors and handing out material requested by foremen. (Dft's 12(M) Stmt. ¶ 9.) Ferguson's immediate supervisor was Bryan Speers ("Speers"). (Dft's 12(M) Stmt. ¶ 9.)

1. July 1996 transfer

Ferguson continued to work in the materials trailer until July 1, 1996. (Dft's 12(M) Stmt. ¶ 10.) At that time, reductions in the pipefitting force at the site eliminated the need to have someone in the materials trailer, and Speers was going to handle distributing material as necessary rather than have someone work full time in the trailer. (Dft's 12(M) Stmt. ¶ 10.) There was "no necessity of having anybody in that trailer to hand out material because there wasn't that many people left on the job" and there was not that much material left. (Dft's 12(M) Stmt. ¶ 10.) The piping superintendent, Dennis Hahney ("Hahney"), told Ferguson that he had to lay him off on June 28 because work was running out. (Dft's 12(M) Stmt. ¶ 11.) Ferguson replied that there were five others Hahney could instead lay off. (Dft's 12(M) Stmt. ¶ 11.) Ferguson did not get laid off at that time but was instead sent out to a field job on July 1. (Dft's 12(M) Stmt. ¶ 11.)

***3** Ferguson claims that he was transferred to the field for discriminatory reasons. (Dft's 12(M) Stmt. ¶ 11.) Ferguson did not prefer the trailer job to working in the field. (Dft's 12(M) Stmt. ¶ 12.) Ferguson was sent to the site to be a pipefitter, and it did not matter to him where he was assigned to work. (Dft's 12(M) Stmt. ¶ 12.) Ferguson did not look at being put in the field as a demotion and made the same amount of money in the field. (Dft's 12(M) Stmt. ¶ 12.) Other, white pipefitters were working in the field while he worked in the trailer; he made the same amount of money as the white pipefitters in the field. (Dft's 12(M) Stmt. ¶ 12.)

After Ferguson went back to work at the job in the field, Speers took over the material job. (Dft's 12(M) Stmt. ¶ 13.) At that point, the job was only periodic, "due to the fact that the manpower on the job had dropped and there was only a handful of people or a couple dozen people still out there." (Dft's 12(M) Stmt. ¶ 13.) When people needed material, they called Speers, who would unlock the trailer and get the material for them. (Dft's 12(M) Stmt. ¶ 13.) While Ferguson was in the field, Speers had two summer apprentices, including Adam Swan ("Swan"), bring material that was left in the field back to the trailer so that unused material could be accounted for. (Dft's 12(M) Stmt. ¶ 14.) Summer apprentices were "usually college students, or kids bound for college to earn a little income." (Dft's 12(M) Stmt. ¶ 14.) Ferguson never had the job of going into the field to collect unused material. (Dft's 12(M) Stmt. ¶ 14.) Ferguson believes that he was replaced by Swan and that Swan got his duties at the material trailer because Hahney and Swan's father were friends. (Dft's 12(M) Stmt. ¶ 15.) Ferguson was angry about (as he believed) being replaced by Hahney's friend's son. (Dft's 12(M) Stmt. ¶ 15.)

Hahney, Union Business Agent Steve Toth ("Toth"), and Ferguson had a meeting on July 10 at which Ferguson stated that "he took me out of the trailer and put a young kid who is not even a union member in my place." (Dft's 12(M) Stmt. ¶ 16.) Toth told Ferguson that he would get him back in the trailer; Hahney put Ferguson back in the trailer. (Dft's 12(M) Stmt. ¶ 16.)

Ferguson believes that Hahney put him in the field on July 1 because of his race is "I was black. The kid there was white, and he's not [even] an apprentice." (Dft's 12(M) Stmt. ¶ 17.) When asked at his deposition, "Do you have any facts indicating that this was due to your race and not due to Mr. Hahney doing a favor for a friend's son?", Ferguson replied, "I don't have anything additional. That's it." (Dft's 12(M) Stmt. ¶ 17.) Ferguson has been a Union journeyman pipefitter for about 27 years and earned over $25 per hour on the Robbins job. (Dft's 12(M) Stmt. ¶ 18.) Swan was not even an apprentice and was paid at a lower rate than were journeyman pipefitters. (Dft's 12(M) Stmt. ¶ 18.) Ferguson notes that he supervised and trained Swan without being a foreman or being paid foreman wages. (Ferguson 12(N) Stmt. ¶¶ 14–15.)

2. August 1996 layoff

***4** In addition to claiming that he was transferred for discriminatory reasons, Ferguson claims that he was laid off on August 2, 1996 because of retaliation or discrimination. (Dft's 12(M) Stmt. ¶ 19.) National contractors typically hire local pipefitters to work on specific jobs; this was the procedure on the Robbins project. (Dft's 12(M) Stmt. ¶ 20.) Union pipefitters often work on a succession of specific construction projects for different employers, rather than long-term for a single employer, and Ferguson never had "any anticipation of permanent employment from any of his construction company employers." (Dft's 12(M) Stmt. ¶ 20.)

Hahney testified that the material trailer job was over at the end of July. (Dft's 12(M) Stmt. ¶ 21.) FW Const. could not have a full-time man in the trailer anymore. (Dft's 12(M) Stmt. ¶ 21.) Hahney told Ferguson that he was being laid off because "the job was winding down" and did not mention Ferguson having complained about anything. (Dft's 12(M) Stmt. ¶ 21.) Hahney testified that he kept Ferguson "until the very end until [he] had to lay him off." (Dft's 12(M) Stmt. ¶ 21.) Hahney did not lay Ferguson off because of his complaints but because "it was just that a lot of people were getting laid off at that point." (Dft's 12(M) Stmt. ¶ 21.)

Ferguson first saw racial graffiti directed at him on July 15, 1996. (Dft's 12(M) Stmt. ¶ 22.) Ferguson pointed the graffiti out to Hahney on July 22, 1996; before that date, Ferguson had never told anyone or made any complaint to FW Const. about graffiti. (Dft's 12(M) Stmt. ¶ 22.) Hahney testified that Ferguson had not complained about the graffiti or anything else of a racial nature prior to Hahney telling Ferguson that he was going to be laid off on July 28, 1996. (Dft's 12(M) Stmt. ¶ 23.) Until Ferguson showed Hahney the graffiti directed at Ferguson, Hahney had not seen any of that particular graffiti. (Dft's 12(M) Stmt. ¶ 23.) Hahney instructed that it be covered over. (Dft's 12(M) Stmt. ¶ 23.) When asked, "Do you have any evidence that you were laid off for discriminatory reasons or because of retaliation for complaining?", Ferguson testified, "No, I don't have no evidence, no." (Dft's 12(M) Stmt. ¶ 24.)

Thirteen pipefitters were laid off with Ferguson in a reduction in force ("RIF") on August 2–3, 1996. (Dft's 12(M) Stmt. ¶ 25.) Ferguson was one of the 13; Ferguson concedes that not all of the people on the August 2–3 layoff list are African–American. (Dft's 12(M) Stmt. ¶ 25.)

Ferguson is not claiming any damages for not getting a promotion. (Dft's 12(M) Stmt. ¶ 26.) Ferguson was happy in the trailer and never asked to be promoted. (Dft's 12(M) Stmt. ¶ 26.) Ferguson is not claiming anything related to overtime. (Dft's 12(M) Stmt. ¶ 27 .) Ferguson admits that he does not have any evidence of having been sexually harassed as a man. (Dft's 12(M) Stmt. ¶ 28.) Other than the noose, the racial graffiti in the portable toilets, being moved from the trailer to the field, and being laid off on August 2, 1996, Ferguson is not claiming that anything else constituted racial discrimination or harassment. (Dft's 12(M) Stmt. ¶ 29.)

II. Summary Judgment Standard

***5** Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Cox v. Acme Health Serv., Inc.,* 55 F.3d 1304, 1308 (7th Cir.1995). A

genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928, 931 (7th Cir.1995). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *Hedberg,* 47 F.3d at 931. If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Rule 56(e); *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552–53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511.

III. Analysis

A. Discriminatory transfer

Where, as here, a plaintiff does not proffer direct or circumstantial evidence of discrimination,[3] the plaintiff may use the burden shifting formula of *McDonnell Douglas Corp v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817 (1973) to attempt to establish discrimination. First, Ferguson has the burden of proof to establish by a preponderance of the evidence that he "(1) was a member of a protected class; (2) was qualified for the job in question or was meeting her employer's legitimate performance expectations; (3) suffered an adverse employment action; and (4) the employer treated similarly situated persons not in the protected class more favorably." *Bragg v. Navistar International Transportation Corp.,* 164 F.3d 373, 376 (7th Cir.1998). If Ferguson successfully establishes his prima facie case, "the burden shifts to the defendant who must produce a legitimate, non-discriminatory reason for plaintiff's treatment to avoid liability. The plaintiff then has the opportunity to demonstrate that the proffered explanation is pretextual." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d 716, 723 (7th Cir.1998).

Ferguson has failed to establish his prima facie case. While he has established the first two prongs of being a member of a protected class and of being qualified for the job in question, Ferguson has not established either the third or fourth prong. As to the third prong, Ferguson argues that his transfer to a position in the field was an adverse employment action. However, Ferguson has not demonstrated that a field position was in any way inferior to Ferguson's original position in the materials trailer. Ferguson subjectively viewed both jobs as equally desirable, and both jobs paid the same wages. Ferguson has provided no evidence to show that the two jobs differed in any meaningful way (i.e., in responsibility, in interest, or in benefits). As to the fourth prong, Ferguson argues that Swan was treated more favorably. Swan, however, was not similarly situated to Ferguson; he held a different position than Ferguson, was paid less than Swan, and performed different tasks from Ferguson. *See Auston v. Schubnell,* 116 F.3d 251, 254 (7th Cir.1997) (finding that plaintiff had failed to establish that other employees alleged treated more favorably were similarly situated to plaintiff because plaintiff had not shown "whether any or all of these other 53 people were in the same department as [plaintiff], reported to same supervisor, worked the same hours, were returning from leaves of absence, or were otherwise similarly situated."); *Blackwell v. Bob Evans Farm. Inc.,* 1996 WL 406654,*4 (N.D.Ill.1996) ("In order to show that he was similarly situated to Marzolf, Blackwell is required to prove that 'all of the relevant aspects of his employment situation were 'nearly identical" to those of Marzolf's employment; '[t]he similarity between the compared employees must exist in all relevant aspects of their employment circumstances." ') (quoting *Pierce v. Commonwealth Life Ins. Co.,* 40 F.3d 796, 802 (6th Cir.1994)); *Marlborough v. American Steel Foundries,* 1996 WL 82467,*3 (N.D.Ill.1996) (finding that employees allegedly treated more favorably were not similarly situated to plaintiff because they did not hold "similar or comparable positions" to plaintiff).

***6** Even if Ferguson did establish a prima facie case, summary judgment on his discriminatory transfer claim would be appropriate in light of FW Const.'s legitimate business reason for the transfer. Ferguson does not challenge FW Const.'s claim that there was insufficient work to justify having a full-time employee in the materials trailer. Nor does he proffer evidence to show that Ferguson's claim that he was transferred due to the lack of work is a pretext, which requires a showing that "(1) the proffered reasons for [transferring] him had no basis in fact; (2) the proffered reasons did not actually motivate his [transfer]; or (3) the reasons were insufficient to motivate his [transfer]." *Biolchini v. General Electric Co.,* 167 F.3d 1151, 154 (7th Cir.1999).[4]

B. Retaliatory discharge

"A prima facie case of retaliation is made when the plaintiff shows that (1) he engaged in statutorily protected expression; (2) he suffered an adverse action by his employer; and (3) there is a causal link between the protected expression and the adverse action." *Rabinowitz v. Pena,* 89 F.3d 482, 488 (7th Cir.1996). At issue in this case is the question of the causal link.

The court finds that Ferguson has failed to establish the existence of a causal link between the protected expression and the adverse action. Ferguson's only evidence appears to be that of timing: he complained to Hahney on July 22, 1996 and was terminated on August 2, 1996. While a suspiciously short period of time between the employee engaging in statutorily protected expression and the employee suffering an adverse employment action may provide evidence of retaliation, "the temporal sequence analysis is not a magical formula which results in a finding of a discriminatory cause." *Foster v. Arthur Anderson, LLP,* 168 F.3d 1029, 1034 (7th Cir.1999) (using retaliation case law to discuss plaintiff's claim that she was terminated for making a request for accommodation pursuant to the Americans with Disabilities Act). Even if Ferguson's short timeframe argument was not undermined by a fundamental factual problem, his argument would be severely hampered by his failure to challenge FW Const.'s allegation that he was terminated because there was insufficient pipefitters work to maintain the number of pipefitters on the site in general or, specifically, in the materials trailer. That said, there is a fundamental factual problem to Ferguson's argument: Hahney has testified (without contradiction) that he was the decisionmaker *and* that he was unaware of Ferguson's complaints prior to informing Ferguson of the decision to terminate him. Because Ferguson's claim relies solely on suspicious timing,[5] the fact that the decisionmaker did not know of Ferguson's statutorily protected expression until after making the decision dooms Ferguson's retaliation claim.

IV. Conclusion

For the foregoing reasons, Defendants' motion for partial summary judgment as to Ferguson's non-graffiti claims is granted.

Footnotes

1 This motion was also filed by Foster Wheeler Illinois, Foster Wheeler USA, and Foster Wheeler Corporation, which have all been dismissed from this case.

2 The Union has adopted FW Const.'s motion for partial summary judgment.

3 Ferguson in his brief makes unsubstantiated allegations of rampant racism at both Foster Wheeler and the Union. (*See, e.g.,* Plaintiff's Resp. Mem. at 2 ("Foster Wheeler Corporation and Pipefitter Local Union 597 both mirror and admire racist organization [sic] such as the KKK and the Nazis. Together these Giants in their fields supported ethnic cleansing and terror by using fear as their weapons of mass destruction."). Ferguson, however, offers no evidence in support of this claim. More specifically, Ferguson offers no evidence that Hahney, the person who decided to transfer him, was racially motivated. *Cf. Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d 716, 723 (7th Cir.1998) (discussing direct evidence of discrimination in the context of a Pregnancy Discrimination Act case; "Direct evidence of discriminatory intent in pregnancy discrimination cases generally is in the form of an admission by a supervisor or decision maker that the employee was suspended because she was pregnant.").

4 Indeed, the only alternative reason suggested by Ferguson's deposition Hahney's action, was his claim that Hahney was motivated out of friendship with Swan's father. Nepotism might not be a good means for making employment decisions; however, the discrimination laws are not aimed at stopping employers from using "bad" motivations, but only at stopping employers from using *discriminatory* employment motivations.

5 Ferguson does not identify what pipefitters remained on the site after the August 2–3 layoff and, thus, cannot show that persons who did not complain were treated more favorably, a fact which would be useful to him in establishing retaliation. Similarly, Ferguson's failure to identify what pipefitters remained on the site precludes any claim of discriminatory discharge for the same reason that Ferguson's discriminatory transfer claim fails: because Ferguson has failed to show that similarly situated persons outside of his protected class were treated more favorably.