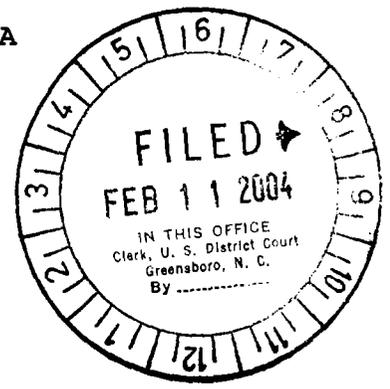


IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

L. J. PETTYJOHN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ESTES EXPRESS LINES, )  
 )  
 Defendant. )

1:02CV00476



MEMORANDUM OPINION AND ORDER

Eliason, Magistrate Judge

This case involves a claim of job discrimination based on race. It is now before the Court on defendant's motion for summary judgment.

Facts

The facts, as shown by the evidence in the record, are as follows. It should be noted that the material facts in the case are undisputed. Where there is an assertion of a factual dispute, each party's position will be noted.

Defendant is a trucking firm which employed plaintiff from 1993 until June 7, 2001. During that time, plaintiff, who is African-American, was assigned to several different positions and his job performance was generally satisfactory. In January of 2000, plaintiff was working as a Pick-Up and Delivery or P & D driver. Persons in this position drive local routes to pick up and deliver freight at various commercial locations. Plaintiff's job description required that he be able to lift a minimum of 100 pounds and the route that he ran required that he be able to sit

for 30-40 minutes at a time while driving. Plaintiff also agreed in his deposition that he actually did sometimes lift over 100 pounds in driving his route. (Pl. Dep. at 112) These requirements were apparently not a problem for plaintiff prior to January 24, 2000.

On January 24, 2000, plaintiff slipped on ice and fell on a loading dock, thereby injuring his head and back. He was out of work for about a week before attempting to return to his P & D route in February of 2000. He found that he could not do so due to an inability to lift, sit, and drive as needed. After this, his physician imposed a restriction that plaintiff could do no lifting. The no lifting restriction remained in effect until May of 2000 when plaintiff was allowed to lift 55 pounds occasionally with no repetitive squatting, crouching, or kneeling. During this entire period, plaintiff was assigned to light duty work as a guard in the guard house at the entrance to defendant's trucking terminal. He stated in his deposition that he suffered no discrimination during this time period. (Id. at 156)

In May of 2000, after plaintiff's restrictions had been raised to allow him to lift up to 55 pounds and sit and drive, defendant offered him a line-haul position at top pay. This position involved driving a truck from one facility to another with no lifting of freight by the driver. Although plaintiff was cleared to perform this position by his doctor, after three or four days his buttocks and hip became numb and the doctor stated that he could no longer perform the work. (Id. at 165) Plaintiff was

returned to his duties in the guard shack. In October of 2000, plaintiff received a further series of rehabilitation treatments and then had his lifting restriction raised, but only to 75 pounds. Also, he could not sit for longer than 30 minutes at a time. (These restrictions remained in place from October of 2000 through at least the time of plaintiff's deposition in November of 2002. At his deposition, plaintiff stated that he had not been reevaluated after October of 2000.)

Following his attempt to drive in the line-haul position, plaintiff continued to work in the guard house for most of the remainder of the time that he worked for defendant. At some point or points, he requested to return to the P & D position, but was not allowed to do so. Eventually, on February 23, 2001, plaintiff filed a complaint with the EEOC alleging that he was being discriminated against based on his race because he was forced to work in the guard shack until he was completely recovered while Caucasian employees who also had "weight restrictions" continued to work in P & D positions. (Id., Ex. 21)

Later, on March 28, 2001, plaintiff was given a drug test. Defendant states that this was because it had received reports of "bizarre" behavior by plaintiff, including accusing an African-American co-worker of trying to run over him, attempting to take pictures of that person, posting signs in his own vehicle warning that "While You're Taking Pictures of Me, God is Taking Pictures of You," telling co-workers that people were spying on him and asking an Assistant Manager for a lock for the guard house door "so the

goons could not get in." (McPherson Aff. ¶ 11)<sup>1</sup> Plaintiff admits that he believed the co-worker tried to run him over, that he took pictures of the co-worker, and that he did post signs in all four windows of his truck. (Pl. Dep. at 266-269) He did not remember telling anyone that people were spying on him and, although he did say that he asked for a lock, he denied saying anything about goons. (Id.)

At some point during the time he was working in the guard shack, defendant began to have plaintiff alternate between the guard shack position and a maintenance job which paid somewhat better. Eventually, plaintiff was transferred to the maintenance position full time. About two weeks later, on June 7, 2001, plaintiff attended a mediation session in an attempt to settle a workers' compensation claim that he was pursuing based on his January 2000 injuries. At that mediation, he signed a document entitled "Memorandum of Agreement of Mediation Conference." This document stated that the matter had been settled by consent, that defendant's attorney was to draw up an agreement, and that, among other things, the terms of the agreement were a payment of \$45,500 by defendant and a resignation of employment by plaintiff. (Id.,

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<sup>1</sup>Defendant claims that plaintiff stated in his deposition that people told him he was acting odd or bizarre in the spring of 2001 and cites to page 124 of plaintiff's deposition as support for the statement. While plaintiff's testimony on page 124 of his deposition transcript does say that people told him this at some point, he says that he does not remember the time frame. On page 125 of the deposition transcript, defendant's attorney then establishes through further questioning that plaintiff's testimony is that people made the statements in the spring of 2000 and that no one told plaintiff he was acting odd or bizarre in the spring of 2001.

Ex. 2) The attorney who represented plaintiff at the mediation was deposed as a part of the current case and stated that the settlement agreement did include plaintiff's resignation, that plaintiff had the opportunity to read the agreement before signing, and that such terms are a standard part of workers' compensation agreements in the trucking industry. (Johnson Dep. at 48-49)

Although plaintiff signed the mediation agreement wherein he agreed to resign, he still called defendant later in the day on June 7, 2001, told a manger that the mediation was over, and asked if he should come in to work. He was initially told that he should. However, about ten minutes later, the manager called back and informed him that he no longer needed to come back to work. Plaintiff said "okay," the conversation ended, and plaintiff did not further attempt to contest the end of his employment at that time. (Pl. Dep. at 54)

In his deposition, plaintiff agreed that he signed the mediation agreement and that the agreement stated that he resigned, but stated that he did so on advice of his attorney and that he did not intend to resign. (Id. at 57, 67) Stephanie Hicks, defendant's Manager of Workers' Compensation, has submitted an affidavit stating that defendant considered plaintiff to have resigned as of June 7, 2001, that his employment was ended as of that date, that plaintiff accepted the payment of \$45,500, and that he never returned it or revoked the mediation agreement. (Hicks Aff. ¶¶ 3-5)

### Plaintiff's Claims

In his complaint, plaintiff raises two separate, but similar, claims for relief. His first claim simply states that the actions of defendant mentioned in the complaint constitute unlawful discrimination on account of plaintiff's race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (Title VII). His second claim states that those acts also constitute discrimination in violation of 42 U.S.C. § 1981. The more specific allegations to which plaintiff is apparently referring in order to support such claims are that: (1) defendant allowed Caucasian drivers with restrictions similar to plaintiff to continue to work as P & D drivers while it kept plaintiff in the guard house, (2) plaintiff was given an unexplained drug test, (3) plaintiff was subjected to "various forms of harassment" as he sought to regain his P & D job and settle his workers' compensation claims, and (4) plaintiff was fired on the day that he settled his workers' compensation case with the reasons for the firing being his race and the EEOC charges he had previously filed. (Complaint, ¶ 8)

Defendant now moves for summary judgment on both of plaintiff's claims. In response to that motion, plaintiff generally does not provide evidentiary support for most of his allegations. He does attempt to add allegations that he and other injured African-American employees were accommodated with work in the guard house, while similarly injured Caucasian workers were accommodated with office jobs. In support, he offers declarations

from two former co-workers. Plaintiff further makes the unsupported statement that the resignation provision of his workers' compensation agreement is not allowed by North Carolina's Workers' Compensation Rules and that defendant's attempt to secure the resignation was against public policy and without consideration. It should be noted that the complaint has not been amended to include these new claims; however, these claims are subject to dismissal in any event.

#### Summary Judgment Standard

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence in a light most favorable to the non-moving party. Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990). When opposing a properly supported motion for summary judgment, the party cannot rest on conclusory statements, but must provide specific facts, particularly when that party has the burden of proof on an issue. Id. "The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (emphasis added). A mere scintilla of evidence will not suffice. Rather, there must be enough evidence for a jury to render a

verdict in favor of the party making a claim. A few isolated facts are not sufficient. Sibley v. Lutheran Hosp. of Maryland, Inc., 871 F.2d 479 (4<sup>th</sup> Cir. 1989).

#### Discussion

As an initial matter, plaintiff's claims under Title VII and 42 U.S.C. § 1981 can be analyzed together using the same proof scheme. Gairola v. Commissioner of Va. Dept. of General Services, 753 F.2d 1281, 1285 (4<sup>th</sup> Cir. 1985). This proof scheme is set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under the McDonnell Douglas paradigm, a plaintiff can prove a claim of racial discrimination with either direct evidence or by using the prima facie case rebuttable presumption. Moore v. City of Charlotte, NC, 754 F.2d 1100, 1104-05 (4th Cir.), cert. denied, 472 U.S. 1021, 105 S.Ct. 3489, 87 L.Ed.2d 623 (1985).

Where, as here, a plaintiff has provided no direct evidence of racial discrimination, McDonnell Douglas allows a plaintiff to advance his case by relying on a rebuttable presumption of discrimination through establishing a prima facie case. Generally, a plaintiff must prove a set of facts from which the law allows a jury to conclude that in the absence of any further explanation, the adverse employment action was the product of racial discrimination. Duke v. Uniroyal Inc., 928 F.2d 1413, 1418 (4th Cir.), cert. denied, 502 U.S. 963, 112 S.Ct. 429, 116 L.Ed.2d 449 (1991). If he succeeds in producing evidence to support this prima facie case, defendant must then come forward with a legitimate,

nondiscriminatory reason for its allegedly discriminatory actions. Should it do so, the ultimate burden then switches back to plaintiff to show that defendant's proffered reason for its actions is a pretext for illegal discrimination or that some other improper reason, such as retaliation, was a motivation for the actions. Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 544-545 (4<sup>th</sup> Cir. 2003).

Plaintiff's first claim is that he was not given a P & D or office job based on his race. He may establish a prima facie case by showing that (1) he is a member of a protected class, (2) that he was qualified for the P & D and office positions, (3) that he sought these positions, and that (4) he was not given those positions under circumstances giving rise to an inference of discrimination. Id.

No one disputes that anyone who has a racial classification is part of a protected class. Plaintiff is an African-American and is, thus, covered. However, he has not produced any evidence that he was qualified for the P & D job. There is clear evidence in the record, supported by plaintiff's own testimony, that P & D drivers must occasionally pick up 100 pounds and that this was part of the job description. And, plaintiff admitted that sometimes he had to lift more than 100 pounds. Because plaintiff's restrictions following his accident never allowed him to pick up over 75 pounds, he never met this requirement and so was not qualified for the P & D job.

It is not entirely certain, but plaintiff may be attempting to claim that, because Caucasian drivers with similar restrictions were allowed to work as P & D drivers, there was no 100 pound lifting requirement for the job. If so, the argument fails because plaintiff has not provided the Court with any evidence that Caucasian drivers with lifting restrictions less than 100 pounds worked as P & D drivers. Plaintiff merely makes allegations that this occurred and allegations will not substitute for evidence in the face of a summary judgment motion. This lack of proof also results in plaintiff being unable to establish the final element of his prima facie case, i.e. that he was denied the P & D position under circumstances giving rise to an inference of discrimination. Therefore, plaintiff cannot establish the second or fourth elements of a prima facie case regarding this allegation that he was denied a P & D position due to his race.

As for the office job allegations, plaintiff fails to establish any element other than the first one. Plaintiff has not provided any evidence regarding the qualifications for those jobs or whether he met those qualifications. He has also failed to provide evidence that he ever sought an office position. Finally, the affidavits he uses to support his allegations, that injured Caucasian employees were given office jobs while injured African-American employees were assigned to the guard house, are wholly conclusory and hopelessly vague. They fail to offer any comparison of job requirements for the guard house and office positions and fail to discuss the qualifications or physical limitations of the

employees allegedly involved. (Jenkins Dec., Herbin Dec.) Moreover, the allegations in the affidavits are at least partially contradicted by plaintiff's own deposition testimony which states that he worked in the guard house with a Caucasian employee. (Pl. Dep. at 105, 249) Consequently, plaintiff cannot establish the second, third, or fourth elements of a prima facie case as to this claim.<sup>2</sup> For all these reasons, plaintiff's claims that he was denied both the P & D and office positions due to his race fail and defendant's motion for summary judgment will be granted as to those claims.

Moving on to plaintiff's claims that he was illegally terminated either because of his race or in retaliation for his filing a complaint with the EEOC, these claims fail for the most basic of reasons. To establish a prima facie case as to either of these claims, plaintiff must show that he was terminated. See generally Moore, 754 F.2d at 1105-06 (discriminatory discharge); Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994) (retaliation). Yet, plaintiff has not established that he was terminated. In fact, the evidence shows unequivocally that he resigned his employment when he settled his workers' compensation claim. Not only has defendant introduced the agreement which plaintiff signed, wherein he agreed that he would resign, but plaintiff admitted in

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<sup>2</sup>Defendant additionally points out that plaintiff has not established any disparate treatment by showing that a transfer to the guard shack instead of the office was an adverse employment action because there was a substantial meaningful difference between the jobs. Boone v. Goldin, 178 F.3d 253, 256 (4<sup>th</sup> Cir. 1999). The claim is denied for this reason as well.

his deposition that he read and signed that agreement. (Pl. Dep. at 55)

There perhaps may be some question as to whether plaintiff fully understood all of the details and implications of the agreement when he signed it or even at the time of his deposition. (Tr. at 64-70; but see n.3, infra) However, plaintiff's possible lack of understanding does not change the fact that the agreement is entirely clear in stating that plaintiff agreed to resign as a part of his settlement. Not only that, but the attorney who represented plaintiff at the workers' compensation mediation testified that plaintiff's resignation was indeed a part of the negotiated agreement, that it was included in the written agreement, that plaintiff had an opportunity to read the agreement before signing it, that the attorney advised him to do so, and that he believes that plaintiff did read the agreement. (Johnson Dep. at 48-50) Plaintiff also accepted a \$45,500 payment as agreed and never attempted to revoke the agreement or returned the payment.<sup>3</sup> (Hicks Aff. ¶ 5) Whether or not plaintiff now believes that he resigned, the evidence indisputably establishes that he agreed to resign in return for a payment from defendant and that he did in fact do so. Plaintiff was not terminated and, therefore, cannot

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<sup>3</sup>According to plaintiff, two weeks after the settlement, defendant offered him his P & D job if he would return the money but he declined the offer. (Pl. Dep. at 75-79) This casts great doubt on plaintiff's position that he did not know what was occurring in regard to the settlement and that he wanted to remain employed by defendant.

establish a prima facie case with respect to any termination claim.<sup>4</sup>

Having failed to establish his claims that he was given inferior job assignments due to his race or that he was terminated, plaintiff is left only with the vague statement in his complaint that he suffered "various forms of harassment" and the contention that he was given an unexplained drug test. Plaintiff has not identified, much less given evidence of, any "harassment" beyond the job assignment and termination allegations discussed above. Therefore, he cannot proceed with any claim based on this allegation. As for the drug test, it is not "unexplained." Defendant has produced evidence that it tested plaintiff due to a number of instances of odd behavior on his part, several of which plaintiff admitted. (McPherson Aff. ¶ 11; Pl. Dep. at 93, 265-269) More importantly, while plaintiff's attorney included references to the drug test in the complaint and in plaintiff's response brief, plaintiff himself testified in his deposition that he had been given several drug tests while working for defendant and that he had no "gripe or beef" with the tests. (Pl. Dep. at 100, 273-274)

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<sup>4</sup>Plaintiff makes arguments that the resignation agreement violated the public policy of North Carolina. As an initial matter, plaintiff has failed to explain how, even if correct, this would impact his federal claims. Assuming only for the sake of argument that it would, plaintiff has also failed to establish that the agreement to resign did violate public policy. He has cited no case law supporting his argument and the attorney who represented him for his workers' compensation claim testified that such resignation clauses are standard in the trucking industry. (Johnson Dep. at 48) Clearly, North Carolina's Industrial Commission would not approve agreements that violated public policy and resignation agreements would not be "standard" in any industry if the Commission were not approving them.

Finally, plaintiff has produced no evidence suggesting that the tests were racially motivated or given in retaliation for his EEOC filing. All of the evidence in the record suggests that plaintiff's behavior was the sole reason for the tests. For all of these reasons, plaintiff's remaining claims fail and defendant's motion for summary judgment will be granted in its entirety.

**IT IS THEREFORE ORDERED** that defendant's motion for summary judgment (docket no. 13) be, and the same hereby is, granted and that this action is dismissed.

  
United States Magistrate Judge

February 11, 2004