UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

PERFECTION STEEL TREATING, INC., and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ("UAW") LOCAL 985,

Defendants.
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CASE NO.: 99-CV-70011-DT
99-CV-72668-DT

HON. PATRICK J. DUGGAN

OPINION

On January 5, 1999, plaintiff United States Equal Employment Opportunity Commission ("EEOC") filed a complaint against defendant Perfection Steel Treating, Inc. ("PST") alleging that actions were taken against charging party Dwayne White ("White") in violation of Title I of the Americans with Disabilities Act of 1990 ("ADA"). On May 26, 1999, the EEOC filed a similar complaint against defendant International Union, United Automobile Workers ("UAW").[1] On June 30, 1999, this Court entered an Order consolidating the cases. These matters are before the Court on both defendants' motions for summary judgment. A hearing was held on defendants' motions on January 27, 2000.

[1] This Case was originally assigned to the Honorable Gerald E. Rosen. On June 16, 1999, an Order was entered transferring the case to this Court.

Background

White began his employment with PST in 1993 and worked primarily as a furnace operator. For a brief period of time, White was a shift leader. As a shift leader, White was responsible for supervising fellow plant employees. PST asserts that White was demoted from his shift leader position "after having attendance problems." (Def. PST's Mot. for Summ. J. at 3). One of the employees supervised for a short time by White, Dayton Lawson, was subsequently terminated by PST. Lawson filed a lawsuit claiming discrimination under the ADA. White testified at trial on behalf of Lawson.

In its position statement regarding Lawson's discharge, PST alleged that Lawson was terminated for not meeting standards required for non-probationary employees. Plaintiff contends that White "provided the [EEOC] with statements in direct contravention of [PST's] position." (Pl.'s Resp. to Def. PST's Mot. for Summ. J. at 1).

Prior to testifying on behalf of Lawson, White had already reached the third level of discipline under PST's attendance policy, because he had accumulated too many unexcused absences. On October 15, 1997, White accumulated another unexcused absence, which required his discharge under the attendance policy. On October 25, 1997, White was terminated by PST for repeated violations of its attendance policy.

White requested afternoon shift steward Herb Reedus to write a grievance on his behalf, following his termination. Reedus replied that he would inform chief steward Hugh Murdoch of White's request. (Reedus Dep. at 65). Reedus testified that he did not believe he had the authority to write the grievance on White's behalf because White did not work on his shift. (*Id.* at 67). It is

undisputed that defendant UAW was required to file all grievances within three days of the action being protested, or the grievance would be deemed untimely. Although witness testimony differs as to the reasons for the delay, it is undisputed that White's grievance was untimely filed after the three-day period.

Subsequent to his termination, White filed a "Charge of Discrimination" against defendant PST with plaintiff EEOC. White claims that he filed the charge on October 30, 1997; however, the charge is dated November 5, 1997.

Plaintiff claims that White was terminated by defendant PST in retaliation for his testimony that was unfavorable to PST.[2] Plaintiff further claims that defendant UAW retaliated against White as well, when it failed to timely process his grievance.

Discussion

Standard of Review

Summary judgment will be granted "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). The moving party bears the burden of informing the court of the basis for his or her motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The movant must demonstrate either the absence of a genuine issue of fact or the absence of evidence supporting the nonmoving party's case. *See id.* at 325, 106 S. Ct. at 2554.

Entry of summary judgment is appropriate "against a party who fails to make a showing

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[2] Defendant PST's plant manager, Sudhindra N. Sammadar, testified that he believed that White's testimony was actually favorable to PST. (Sammadar Dep. at 96-99).

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S. Ct. at 2552. The substantive law identifies which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

When determining whether there is a genuine issue for trial, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); *accord Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "Although [the nonmoving party] is entitled to a review of the evidence in the light most favorable to him or her, the nonmoving party is required to do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994) (quoting *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356).

Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting FED. R. CIV. P. 56(e)). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512.

Retaliation Claim Against Defendant PST

The ADA provides that: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] . . . ." 42 U.S.C. § 12203(a).

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must demonstrate: (1) that the plaintiff engaged in protected activity; (2) that the defendant was aware of the protected activity; (3) that the plaintiff suffered an adverse employment action; and (4) that a causal connection existed between the protected activity and the adverse action. *Walborn v. Erie County Care Facility*, 150 F.3d 584, 588-89 (6th Cir. 1998) (citing *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987)).

A plaintiff's establishment of a *prima facie* case "in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981). Once the plaintiff has presented a *prima facie* case, the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for which the plaintiff was rejected or someone else was preferred. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994) (citing *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094).

The plaintiff, however, retains the burden of persuasion and must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. "This burden 'merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination.'" *Cline v. Catholic Diocese of Toledo*, __F.3d__, No. 98-3527, 1999 WL 1256186, at *8 (6th Cir. Dec. 28, 1999) (quoting *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095). A plaintiff may meet the burden of persuading the Court that he or she has been the victim of retaliation, "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." *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095 (quoting *McDonnell Douglas*, 411 U.S. at 804-05, 93 S. Ct. at 1825-26).

Although rejection of the defendant's proffered reason will permit the trier of fact to infer intentional discrimination, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993), such rejection must be based on competent evidence.

> The jury may not reject an employer's explanation, however, unless there is a sufficient basis *in the evidence* for doing so. To allow the jury simply to refuse to believe the employer's explanation would subtly, but inarguably, shift the burden of persuasion from the plaintiff to the defendant . . . .

Manzer, 29 F.3d at 1083 (emphasis in original).

Once the employer has come forward with a nondiscriminatory explanation for terminating the plaintiff, "the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation." *Id.* A plaintiff "must establish that the decision complained about as retaliatory would not have been made 'but for' the protected status of the plaintiff." *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1068 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S. Ct. 516, 112 L. Ed. 2d 528 (1990).

Plaintiff must show that the proffered reasons had no basis in fact, that the proffered reasons did not actually motivate the adverse employment action, or that they were insufficient to motivate the action. *Manzer*, 29 F.3d at 1084. By contrast, where the plaintiff fails to factually challenge the reasons proffered by the defendant, "a plaintiff must introduce additional evidence of discrimination because the reasons offered by the defendant are not directly challenged and therefore do not bring about an inference of discrimination." *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 346 (6th Cir. 1997).

Defendant PST concedes that White meets the first three prongs of the test. However, it argues that there is no evidence of a causal connection between his termination "and either his

testimony in the Lawson trial or his discrimination charge." (Def. PST's Mot. for Summ. J. at 11).

Defendant PST employs a four-step progressive discipline procedure for its attendance policy. The first step is a verbal warning. The second, a written warning. The third, a three-day suspension. The fourth step results in termination of the offending employee. It is undisputed that White had reached the third step of the discipline procedure before he testified in the Lawson trial. White reached the fourth step when he had an unexcused absence on October 15, 1997 (after the Lawson trial). While it is true that White's termination was subsequent to his testimony in the Lawson trial, it is also true that the reason for his termination, *i.e.*, his fourth step violation for an unexcused absence, took place after the Lawson trial.

In *Walborn*, the Sixth Circuit held that an employee who identified several adverse actions taken against her after she had requested a reasonable accommodation under the ADA, failed to demonstrate a causal connection because she had also suffered adverse action before engaging in the protected activity. *Walborn*, 150 F.3d at 589. Prior to testifying on behalf of Lawson, White had already reached step three of the attendance discipline procedure.

Pursuant to *Walborn*, this Court cannot conclude that simply because White suffered another adverse employment action after he testified, after he had previously accumulated three others prior to testifying, that there is a causal connection between his testimony and the adverse employment action. *Id.*; *accord Cooper v. City of N. Olmstead*, 795 F.2d 1265, 1272 (6th Cir. 1986) ("The mere fact that [the plaintiff] was discharged four months after filing a discrimination claim is insufficient to support an [inference] of retaliation."). Plaintiff has offered nothing other than the fact that White's discharge came after the protected activity. Evidence of such a temporal relationship alone, without more, is insufficient to establish a causal connection. *Cooper*, 795 F.2d at 1272; *Butler v.*

City of Prairie Village, Kan., 172 F.3d 736 (10th Cir. 1999) ("The mere temporal proximity of Plaintiff's protected speech to his termination is insufficient, without more, to establish retaliatory motive.").

Defendant PST further argues that no causal connection exists between White's discrimination charge, allegedly filed with the EEOC on October 30, 1997, but dated November 5, 1997, and defendant PST's failure to reinstate him. Defendant PST does not consider one's termination "final" until either the union grievance procedure runs its course, or the time expires for the employee to timely file a grievance. It is undisputed that White did not timely file a grievance within the three working day period allotted for doing so.

The collective bargaining agreement ("CBA") addresses untimely filed grievances: "If the union fails to process a grievance within the applicable time limits, the grievance shall be considered settled as of the last Company disposition." Thus, as mandated by the CBA, White's untimely grievance was "settled as of the last Company disposition," and he was terminated. The Court cannot conclude that there is a causal relationship between White's discrimination charge and defendant PST's following the strictures of its CBA with defendant UAW.

Further, defendant PST did not even receive White's EEOC charge until November 7, 1997. Hence, White's three-day grace period expired on October 29, 1997, nine days before defendant PST even received the EEOC charge for which it is accused of retaliating against White, and one day before White even claims it was filed. Thus, White cannot logically contend that he was retaliated against for filing the EEOC charge because his termination became final under the CBA well before defendant PST ever received a copy of the charge.

Disparate Treatment

Plaintiff devotes considerable attention in its response brief to the issue of disparate treatment. It is plaintiff's contention that other employees who should have been terminated for reaching the fourth step in the attendance discipline procedure were not, and that White was singled out for dismissal because he testified in the Lawson matter.[3] However, plaintiff has not offered sufficient proof on its disparate treatment claim. In assessing the "similarly situated" criterion of disparate treatment, the Sixth Circuit has concluded:

> Thus to be deemed "similarly situated," the individuals with whom plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992).

Defendant PST does not address each of plaintiff's comparables individually in its reply brief. Instead, defendant PST concedes that it made a total of eighteen "mistakes" in the administration of its attendance policy during the evaluation process of "over a thousand absences and tardies," relating to all of its employees. (Def. PST's Reply at 3). The Court notes that accidental differences in treatment of employees is inevitable in "most business organizations of any size." *E.E.O.C. v. Flasher Co., Inc.*, 986 F.2d 1312, 1320 (10th Cir. 1992). "An inference of illegal discrimination based upon protected class characteristics is not legally compelled by irrational or accidental disparate treatment." *Id.* at 1321.

White, himself, was actually the beneficiary of defendant PST's mistakes on two occasions.

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[3] The Court notes that two other employees who testified on behalf of Lawson, Miguel Foster and Milton Willis, remain in the employ of defendant PST.

Defendant PST could have terminated White for unsatisfactory attendance as far back as February 2, 1995; however, PST miscounted White's tardies and thus he was not terminated.[4] (Johnson Aff. at ¶ 3). Further, White accumulated several unexcused absences in late August 1997, nearly two years after White began cooperating with plaintiff, which would have caused his termination; however, because defendant PST failed to timely serve White with a reprimand, he could not be discharged.[5] (*Id.* at ¶ 4). In sum, plaintiff has failed to persuade this Court that the alleged disparate treatment was anything more than mistakes and inadvertence on the part of defendant PST.[6] Accordingly, plaintiff cannot establish a *prima facie* case.

Further, even if it is assumed that plaintiff established a *prima facie* case, the presumption of discrimination disappeared when defendant PST articulated legitimate, nondiscriminatory reasons for White's termination, *i.e.*, his unacceptable attendance record and following the provisions of the CBA. *See St. Mary's Honor Ctr.*, 509 U.S. at 507-09, 113 S. Ct. at 2747-48. An employee's work violations constitute a legitimate, nondiscriminatory reason for termination. *Walborn*, 150 F.3d at 589. It is undisputed that White had a fourth step violation for an unexcused absence that was not timely grieved. Plaintiff has offered no evidence to rebut the fact that this legitimate

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[4] Counsel for plaintiff conceded to this Court at oral argument that White should have been terminated, but for a mistake in application of the attendance policy, at least two months prior to his actual termination date.

[5] An agreement between defendants PST and UAW required all reprimands to be served on employees within three working days of the completion of payroll.

[6] Counsel for plaintiff stated at oral argument that it is not plaintiff EEOC's contention "that the attendance policy was incorrectly applied, but that it was strictly applied against White, because of his testimony." However, in rebuttal, counsel for defendant PST identified three other PST employees, similar to White, who were also terminated due to repeated violations of the attendance policy.

nondiscriminatory reason was not the true reason for White's discharge.

Plaintiff has failed to sustain its ultimate burden of proof that defendant PST's proffered reason for White's discharge was a mere pretext for retaliation for his testimony. *Id.* at 507-08, 113 S. Ct. at 2747-48; *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282-83 (6th Cir. 1991), *cert. denied*, 503 U.S. 945, 112 S. Ct. 1497, 117 L. Ed. 2d 637 (1992). Plaintiff has certainly failed to demonstrate that White's termination would not have occurred "but for" his having testified against defendant PST. *Canitia*, 903 F.2d at 1068. Accordingly, defendant PST's motion for summary judgment shall be granted.

Retaliation Claim Against UAW

As stated previously, to establish a *prima facie* case of retaliation under the ADA, a plaintiff must demonstrate: (1) that the plaintiff engaged in protected activity; (2) that the defendant was aware of the protected activity; (3) that the plaintiff suffered an adverse employment action; and (4) that a causal connection existed between the protected activity and the adverse action. *Walborn*, 150 F.3d at 588-89. Defendant UAW contends that White cannot meet prong one – namely, he cannot demonstrate that he engaged in protected activity. This Court agrees.

The Court is at a loss to construe how White possibly engaged in protected activity against defendant UAW. Plaintiff states in its response: "White clearly engaged in protected activity when he provided an affidavit during the investigation, . . . testified in direct opposition to his employer's position at trial, . . . and filed EEOC charges of his own against his employer." (Pl.'s Resp. to Def. UAW's Mot. for Summ. J. at 9) (emphasis added). Accepting all of the foregoing as true, White still

fails to meet prong one.[7]

Not one of the "protected activities" listed above was engaged in against defendant UAW. Further, White neither testified about defendant UAW nor against it at Lawson's trial. (Def. UAW's Mot. for Summ. J. at 11). All of the activities were engaged in against defendant PST. Therefore, this Court cannot conclude that White engaged in protected activity against defendant UAW. Accordingly, White cannot establish a *prima facie* case of retaliation.

Assuming, *arguendo*, that plaintiff could establish a *prima facie* case, the presumption of discrimination disappeared when defendant UAW articulated legitimate, nondiscriminatory reasons why the grievance on behalf of White was not timely filed, *i.e.*, White's failure to timely provide documentation for his absence and the fact that Reedus did not believe it was proper for him to write the grievance because he did not supervise White. *See St. Mary's Honor Ctr.*, 509 U.S. at 507-09, 113 S. Ct. at 2747-48. Plaintiff has failed to sustain its ultimate burden of proof that defendant UAW's proffered reasons were merely a pretext in retaliation for White's testimony. *Id.* at 507-08, 113 S. Ct. at 2747-48; *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282-83 (6th Cir. 1991), *cert. denied*, 503 U.S. 945, 112 S. Ct. 1497, 117 L. Ed. 2d 637 (1992). Accordingly, defendant UAW's motion for summary judgment hall also be granted.[8]

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[7] When questioned by this Court at oral argument counsel for plaintiff was unable to articulate any protected activity that White had engaged in against defendant UAW.

[8] The Court further believes that defendant UAW is entitled to summary judgment because White failed to exhaust his internal union remedies. It is undisputed that plaintiff failed to exhaust. The Sixth Circuit has held that one must exhaust internal union remedies as a prerequisite to suit. *See Ryan v. General Motors Corp.*, 929 F.2d 1105 (6th Cir. 1989). "It is well established that union members, *particularly U.A.W. members*, must exhaust the internal union remedies provided in their constitution before resorting to the courts." *Reinhardt v. International Union, U.A.W.*, 636 F. Supp. 864, 867 (E.D. Mich. 1986) (emphasis added) (citing *Clayton v. International Union, U.A.W.*, 451

Conclusion

For the reasons set forth above, the Court shall grant defendant PST's and defendant UAW's motions for summary judgment.

A Judgment consistent with this Opinion shall issue forthwith.

FEB 08 2000

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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U.S. 679, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981)). Accordingly, summary judgment is also proper on exhaustion grounds.