

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KENNETH A. PAYNE
:
:
v. : Civil Action No. DKC 2006-1814
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GIANT OF MARYLAND, LLC
:
:

MEMORANDUM OPINION

Presently pending and ready for resolution in this case is the motion of Defendant Giant of Maryland, LLC for summary judgment (paper 79).¹ The issues are fully briefed and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons that follow, Defendant's motion will be denied.

I. Background

In February 1986, Plaintiff Kenneth A. Payne began working for Defendant at a warehouse in Landover, Maryland. Defendant fired Plaintiff in October 1992. Subsequently, Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that his termination was motivated by racial discrimination, and later sued Defendant in the United States District Court for the District of Columbia alleging violations of Title VII and 42 U.S.C. § 1981. Plaintiff and Defendant settled that case in August 1996. Pursuant to the settlement agreement, Plaintiff's disciplinary

¹ Other subsidiary motions (to seal and to strike exhibits) are also pending and will be resolved in this opinion.

record was expunged and he returned to work at the Landover warehouse.

In January 1998, Plaintiff was suspended for three days and placed on final warning in connection with an incident at the office of a physician retained by Giant. Payne protested the severity of the disciplinary action by filing a grievance and a charge of racial discrimination with the EEOC. In July 2000, Defendant issued a written warning to Plaintiff as a result of a dispute over the use of a photocopier. Payne asked that Giant review the security camera film, which captured the incident in question, but alleges that Giant refused. Plaintiff protested the warning by filing a grievance and a charge of racial discrimination with the EEOC.

Plaintiff alleges that on April 18, 2002, while he was working for Giant as a Produce Janitor, his supervisor, Edward Tillery, directed him to work outside his assigned area, insulted him, and falsely reported that Payne had threatened him. Later that day, the Warehouse Operations Manager and Shift Superintendent convened a meeting with Payne and Tillery to discuss the incident. At the end of the meeting, Plaintiff was suspended pending an investigation of the incident by Ralph Washington. Plaintiff was fired by the Director of the Distribution Center, Robert Haywood, after a conference call on April 26, 2002. Local 730, the Union representing Plaintiff, grieved his dismissal and took the matter

to arbitration. The arbitration hearing was conducted in Washington, D.C. in June 2003. In March 2004, the arbitrator issued a decision denying Plaintiff back pay, but ordering his reinstatement on the condition that Plaintiff enter into a last chance agreement.

Payne filed a petition in the United States District Court for the District of Columbia to modify the arbitral award. The court dismissed the petition in October 2004. After filing and then withdrawing an appeal, Payne sought reinstatement with Giant on the terms specified by the arbitrator. Giant refused to reinstate him. Plaintiff brought this suit against Defendant alleging racial discrimination in violation of 42 U.S.C. § 1981. Specifically, Plaintiff alleged that termination of his employment in 2002, and the subsequent refusal to reinstate him on the terms specified by the arbitrator, constituted racial discrimination. Furthermore, Plaintiff alleged that termination of his employment and refusal to reinstate him constituted retaliation for his prior complaints about racial discrimination. On August 8, 2007, Plaintiff's race discrimination claim was dismissed pursuant to Fed.R.Civ.P. 41(a)(1)(ii).

Defendant filed a motion for summary judgment on September 13, 2007. Plaintiff opposed the motion and the case was then stayed pending consideration by the Supreme Court of the United States of whether a retaliation claim is cognizable under section 1981 in *CBOSC West Inc. v. Humphries*, No. 06-1431. Following the Court's

holding that a retaliation claim is encompassed under the statute, 553 U.S. ____, 128 S.Ct. 1951, 2008 WL 2167860 (May 27, 2008), the case was reopened on June 5, 2008.

II. Motion for Summary Judgment

A. Standard of Review

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; see also *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of S.C. v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. See *United States v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592,

595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. See *Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4th Cir. 1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. Analysis

A plaintiff may defeat summary judgment and establish a claim for employment discrimination through one of two methods of proof. First, a plaintiff may establish a claim of discrimination by demonstrating through direct or circumstantial evidence that his race, sex, national origin or age was a motivating factor in the employer's adverse employment action. See, e.g., *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (en

banc). "The second method of averting summary judgment is to proceed under a 'pretext' framework, under which the employee, after establishing a *prima facie* case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination." *Id.* at 285. Once the plaintiff has presented a *prima facie* case, "the burden [of production] shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* at 285. If the employer meets its burden of production, "the *McDonnell Douglas* frame-work-with its presumptions and burdens-disappear[s], and the sole remaining issue [is] discrimination *vel non*." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000)(internal quotation marks and citations omitted). "In other words, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's stated reasons 'were not its true reasons, but were a pretext for discrimination.'" *Hill*, 354 F.3d at 285 (quoting *Reeves*, 530 U.S. at 143).

A plaintiff may prove retaliation by using either the direct method or the indirect, burden-shifting method. *Rhoads v. F.D.I.C.*, 257 F.3d 373, 391 (4th Cir. 2001).² If the plaintiff makes such a

² The United States Court of Appeals for the Fourth Circuit has held that a "'plaintiff can prove illegal retaliation under . . . § 1981' in the same manner as he establishes retaliation under Title VII." *Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) (quoting *Bryant v. Aiken Reg'l Med. Ctrs.*, (continued...))

showing, then the burden shifts to the employer to offer a non-discriminatory basis for the adverse employment action. *Matvia v. Bald Head Island*, 259 F.3d 261, 271 (4th Cir. 2001). The employee then has the opportunity to prove that the asserted reason is pretextual. *Id.*; see also *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 (4th Cir. 2000) (“The *McDonnell Douglas* burden-shifting scheme applies in analyzing retaliation claims”).

Under the indirect method of proof, to establish a *prima facie* case of retaliation, Plaintiff must show: (1) he engaged in protected activity, (2) Defendant took action that would be materially adverse to a reasonable employee or job applicant, and (3) there is a causal connection between the protected activity and the asserted adverse action. *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 n.2 (4th Cir. 2007).

1. *Prima Facie* Case

Defendant challenges Plaintiff’s ability to establish the third element of his retaliation claim. Defendant asserts that its decisionmakers were unaware of Plaintiff’s protected activity and therefore Plaintiff cannot establish a causal link as required under the third element of the *prima facie* case. “Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer’s knowledge that the plaintiff engaged in a protected activity is absolutely necessary to

²(...continued)
Inc., 333 F.3d 536, 543 (4th Cir. 2003)).

establish the third element of the *prima facie* case." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). Defendant argues that Washington cannot be shown to have had knowledge of Plaintiff's various charges against Defendant prior to his recommendation to Haywood that Plaintiff be terminated. Defendant relies on Washington's testimony that he was not aware of Plaintiff's prior lawsuit. Furthermore, Defendant states that while Haywood was aware that Plaintiff had settled a lawsuit against Defendant around the time of his 1996 reinstatement, he did not know that Plaintiff's lawsuit alleged that Defendant discriminated against him on the basis of race. Thus, Defendant contends that Plaintiff's history of complaints cannot have been the basis for Washington's decision to terminate him. Moreover, Defendant contends that even if Haywood made the decision to terminate him and, even if the court assumes for purposes of this motion that Plaintiff has produced a dispute of material fact as to whether Washington and Haywood learned of Plaintiff's history of complaints at the April 26 conference call prior to his termination, Plaintiff still cannot establish causation because the decision to terminate him was already "in process" before the time of the call.

"Normally, very little evidence of a causal connection is required to establish a *prima facie* case." *Tinsley v. First Union Nat. Bank*, 155 F.3d 435 (4th Cir. 1998)(abrogated on other grounds as recognized in *Gilliam v. South Carolina Dept. Of Juvenile*

Justice, 474 F.3d 134 (4th Cir. 2007)). Mere closeness in time between engaging in protected activity and an employer's firing an employee may be sufficient for *the prima facie* causation element of a retaliation claim. See *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989)(an employee's firing within three and a half months of her engaging in protected activity was sufficient to establish the causation element). However, the passage of time tends to negate the inference of discrimination, *Dowe*, 145 F.3d at 657, and the Fourth Circuit has held that intervals as short as thirteen months are "too long" to establish causation in the absence of other evidence of retaliation. *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998).

Plaintiff contends that Haywood, not Washington, was the official who made the decision to terminate Plaintiff's employment. According to Plaintiff, Haywood had a history of retaliating against black employees who complained of employment discrimination. Furthermore, Plaintiff asserts that, despite his insistence otherwise, Haywood did know that Payne had sued Giant for racial discrimination after his first firing. Plaintiff cites Haywood's affirmative answer to a deposition question asking whether he was "informed that Mr. Payne had filed a lawsuit alleging racial discrimination?" (Paper 84, Ex. 1, Haywood Dep., at 139). Thus, Plaintiff contends that Haywood was aware of Plaintiff's race discrimination lawsuit over his 1998 termination. However, Haywood explains that while he understood Plaintiff filed

"some type of lawsuit in the mid-1990s," he did not know that Payne had asserted race discrimination. (Paper 84, Ex. A, Haywood Dep., at 150-52). Therefore, Plaintiff's contention that Defendant conceded knowledge of the prior lawsuit fails.

Next, Plaintiff argues that his EEOC history was discussed in a Haywood-moderated April 26 conference call during which the ultimate decision to terminate his employment occurred. Plaintiff contends that it was during this call, in which Haywood first expressed his opinion that Plaintiff should be terminated to his superiors Jack O'Keefe, Joe Urban, Ted Garret and Linda Duvall, that the firing decision occurred. Washington and Haywood both deny hearing anything about Payne's EEO history during that call, although Garrett testified that "[a]fter Mr. Payne's suspension, in a conference call, I recall giving the history of complaints Mr. - Mr. Payne filed." Thus the parties dispute whether Washington and Haywood were made aware of Plaintiff's history of race discrimination complaints during the conference call on April 26. Defendant argues that even if they were, Plaintiff cannot establish a *prima facie* case of retaliation because: 1) his termination was already "in process" prior to the call; and 2) the passage of six years between Plaintiff's reinstatement and his termination in 2002 would preclude the finding of a causal connection. Defendant cites *Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001), for the proposition that "[e]mployers need not suspend previously planned [employment actions] upon discovering that a [discrimination] suit

[or charge] has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatsoever of causality." Thus, Defendant argues that because Washington suspended Plaintiff and recommended to Haywood that Plaintiff be terminated and Haywood reviewed Washington's report and recommendation and concluded that Plaintiff should be terminated, all prior to the April 26 conference call, even if Plaintiff could show that Washington and Haywood might have learned about his prior complaints during the call, that evidence would not establish the causation element because his termination was already "in process" by that time. However, this evidence is simply not concrete or definite enough to establish that the discussion during the conference call was totally irrelevant to the decision to terminate Plaintiff or that the decision to terminate was reached prior to it. See, e.g., *Benders v. Bellows and Bellows*, 515 F.3d 757, 764 (7th Cir. 2008) (reliance on *Clark Co.* defense premature where there is a material dispute of fact as to the timing of the decision to terminate).

Next, Defendant relies on *Causey v. Balog*, 162 F.3d at 803, for the proposition that the passage of thirteen months is "too long" to establish causation in the Fourth Circuit, and states that because Plaintiff's reinstatement was six years prior to his termination, it occurred "too long" ago to establish causation. However, Plaintiff also asserts that he filed two additional EEOC complaints between his 1996 reinstatement and his 2002 termination.

Moreover, while Defendant is correct that the passage of time tends to negate the inference of causation, Defendant does not clearly identify when Plaintiff's last protected or oppositional activity occurred and Plaintiff does not rely on timeliness alone to establish causation. Plaintiff notes that Haywood identifies Plaintiff's "making a comment that Tillery did not like light-skinned people" as one of the major factors he considered in reaching his decision to terminate Plaintiff. Thus, Haywood himself has stated that he considered Plaintiff's complaints about discrimination in the workplace in reaching his decision to terminate Plaintiff. Therefore, Defendant seems to acknowledge that Haywood made, or at the very least was involved in, the decision to terminate Plaintiff. Further, Haywood has provided evidence of causation himself because, regardless of the timing of Plaintiff's prior EEOC activity, Haywood considered Plaintiff's complaint regarding race discrimination in the workplace at the very time of the decision to terminate. Thus, Plaintiff does not rely on mere closeness in time to establish causation and the precise timing of his prior EEOC activity is moot. For all these reasons and because Plaintiff's burden of proof at the *prima facie* stage "is not onerous," *Burdine*, 450 U.S. at 253, Plaintiff has made a sufficient showing of a causal connection.

2. Legitimate Nondiscriminatory Reason & Pretext

Defendant asserts that Plaintiff was terminated because of legitimate nondiscriminatory reasons that Plaintiff cannot undermine as pretext. Principally, Defendant maintains that Plaintiff was terminated because Washington reached a good faith conclusion that Plaintiff threatened Tillery, thereafter threatened Washington, and refused to retract or clarify his statement and that Haywood decided to sustain Washington's decision because Plaintiff's conduct was threatening and inappropriate.

An employer is entitled to judgment where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148. Thus, a key factor for courts to consider is "the probative value of the proof that the employer's explanation is false." *Id.* at 149. Fourth Circuit and Supreme Court precedent explain that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Hux v. City of Newport News*, 451 F.3d 311, 317 (4th Cir. 2006)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

When reviewing a defendant's proffered reason for discharge and a plaintiff's corresponding claim of pretext, the court must "keep in mind that Title VII is not a vehicle for substituting the

judgment of a court for that of the employer." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 298-99 (4th Cir. 1998)(internal quotation omitted). The court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions." *DeJarnette*, 133 F.3d at 299 (internal quotation omitted). Thus, once Defendant articulated a nondiscriminatory reason for Plaintiff's termination, it did not become this court's "province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason" for the adverse employment action. *DeJarnette*, 133 F.3d at 299 (internal quotation omitted).

Defendant carried its burden to present legitimate nondiscriminatory reasons for Plaintiff's firing. Plaintiff, however, has produced sufficient evidence to raise a dispute as to whether Defendant's purported legitimate rationale for his termination was pretext.

Washington learned that Tillery had lied to him when he asserted that Plaintiff had threatened him unprovoked. First, Washington admitted to not believing Tillery's claim that he did not call Plaintiff a "punk bitch" because Washington believed Michael Williams who witnessed the interaction between Plaintiff and Tillery and told Washington that the incident resulted from Tillery using that slur against Plaintiff. Second, Washington subsequently learned that Tillery had been lying about the incident

because Tillery acknowledged that fact prior to Plaintiff's dismissal.

Furthermore, Plaintiff presents evidence that during the phone call in which the decision to terminate him was reached, Defendant's employees discussed Plaintiff's history of employment discrimination complaints. While Washington and Haywood both deny hearing that portion of the conversation, Plaintiff's evidence is sufficient to produce a dispute of material fact as to whether his history of discrimination complaints was discussed immediately prior to his termination.

Finally, Haywood admits that he considered Plaintiff's allegation that his immediate supervisor discriminated against him on the basis of the color of his skin in making the decision to fire Plaintiff. Discrimination on the basis of color is prohibited by Title VII and could form a reasonable basis for an employment discrimination complaint. At the very least, Haywood's acknowledgment that he considered Plaintiff's complaint raises a dispute of fact as to whether his termination was based on his complaints of unlawful discrimination in the workplace. Thus, the court need not reach Plaintiff's purported comparator evidence or address Defendant's motion to strike that evidence, because, even without that evidence, Plaintiff has produced a material dispute of fact sufficient to deny Defendant's motion for summary judgment. Accordingly, the motion for summary judgment will be denied and the motion to strike will be denied as moot.

III. Motions to Seal

Plaintiff seeks to seal the unredacted version of the memorandum of law filed in support of his opposition to the motion for summary judgment, while Defendant seeks to seal the entire reply memorandum in support of its motion for summary judgment. Both motions are unopposed. Plaintiff filed a redacted version of his memorandum, but neither party offers any explanation in support of sealing other than citing the Confidentiality Order entered in this case on October 23, 2006 (papers 46, 47), which requires the sealing of material marked "confidential" by the parties.

There is a well-established common law right to inspect and copy judicial records and documents. *See Nixon v. Warner Commc'ns Inc.*, 435 U.S. 589, 597 (1978). If the public's right of access is outweighed by competing interests, however, the trial court may, in its discretion, seal those documents from the public's view. *See In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984). Local Rule 105.11 governs motions to seal and provides that:

Any motion seeking the sealing of pleadings, motions, exhibits or other documents to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection. The Court will not rule upon the motion until at least 14 days after it is entered on the public docket to permit the filing of objections by interested parties. Materials that are the subject of the motion shall remain temporarily sealed pending a ruling by the Court. If the motion is denied, the party making the filing will be given an opportunity

to withdraw the materials. Upon termination of the action, sealed materials will be disposed of in accordance with L.R. 113.

Because neither party complied with the requirements of Local Rule 105.11, the motions to seal will be denied, subject to renewal. The parties will have 15 days to renew their motion with a memorandum that complies with Rule 105.11 or to remove, redact, or renew their memoranda. In the meantime, the papers will remain temporarily under seal. If the parties do not renew their motions, the papers will be unsealed.

IV. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment will be denied. The motions to seal will be denied and the motion to strike will be denied as moot. A separate Order will follow.

_____/s/_____
DEBORAH K. CHASANOW
United States District Judge