IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
NO. 4:98-CV-136-H(3)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

FRANCISCO G. SANTANA,
Plaintiff/Intervenor

v.

SEARS, ROEBUCK & CO.,
Defendant.

ORDER

CIV DB #62, P-10

This matter is before the court on defendant's motion for summary judgment filed on August 31, 1999. Plaintiff/Intervenor, Francisco G. Santana ("Santana"), filed a response on October 12, 1999. Plaintiff, Equal Employment Opportunity Commission ("EEOC"), filed its response on October 18, 1999. On October 25, 1999, Sears filed a single reply that addressed both responses. The time to file additional pleadings has lapsed; therefore, this matter is ripe for adjudication.

STATEMENT OF THE CASE

Santana, a Hispanic-American, was born in Mexico City and later moved to the United States. In 1985, while living in California, Sears hired Santana to work as a part-time loss prevention associate in its Costa Mesa store. Sears hired Santana on a part-time basis because Santana had a full-time job in the United States Marine Corps. Santana worked at Sears until the

Marines transferred him to Cherry Point, North Carolina, in late 1995.

Prior to his transfer, Santana visited the Sears store in Morehead City, North Carolina, and spoke with William Mansfield ("Mansfield"), the loss prevention supervisor. Santana inquired about openings in the loss prevention department and according to Santana, Mansfield seemed excited about possibly acquiring a loss prevention associate with Santana's experience. After Santana returned to California, Mansfield told the store personnel manager, Teri Katsekes ("Katsekes"), that he had spoken to a man from California with loss prevention experience that was interested in transferring to the Morehead City store. Several weeks later, Santana spoke with Katsekes on the phone and he alleges that Katsekes indicated that a job would be waiting for him when he arrived from California.

In late December 1995, after relocating to Cherry Point, Santana again visited the Morehead City Sears store and requested employment. Mansfield told Santana that a position would not be available until after the holiday season. When Santana returned in January, Mansfield informed him that no positions were available. Accordingly, Santana placed an application on file in the personnel department and gave Mansfield his telephone number in case a position became available. Over the next seven months, Santana submitted two additional applications: the first on March 23, 1996,

and the second on July 20, 1996. After receipt of the July 20, 1996, application, Katsekes sought approval for a budget increase to cover the expense of hiring Santana. In October 1996, Patty Haynes ("Haynes"), the Human Resource Specialist at the Morehead City store, called Santana and arranged for an interview on October 26, 1996.

On October 26, 1996, Haynes conducted Santana's initial interview. Santana alleges that during the interview, Haynes commented on his accent and inquired as to where he was "originally from . . ." Santana informed Haynes that he was born in Mexico City. At the conclusion of the interview, Haynes offered Santana a job as a stock clerk. Santana informed Haynes of his loss prevention experience, to which Haynes allegedly replied, "you're the guy from California." Haynes then took Santana to meet with Katsekes. Santana contends that Katsekes became disinterested during the interview. Santana attributes the alleged disinterest to his accented speech and Hispanic national origin. Despite Santana's perception of the interview, Katsekes was impressed enough to immediately offer Santana a part-time loss prevention job, subject to Santana passing a drug test, a background check, and approval of Katsekes' request for a budget increase.

Prior to Santana starting work, store manager Patricia Kiely ("Kiely"), learned of Katsekes' decision to hire Santana. Kiely informed Katsekes that she did not approve of the hire. Kiely

based her decision on a telephone conversation with Ann Manherz ("Manherz"), a loss prevention manager for approximately 120 stores. During the conversation, Manherz told Kiely about a California loss prevention agent, currently looking for work in the southeast, who had been the subject of a sexual harassment investigation at a Sears store in California. Thus, at the time Kiely made the decision not to hire Santana, Kiely had never met, seen, talked to, or reviewed any written documents relating to Santana. In fact, Kiely does not even recall knowing his name.

Soon, Santana contacted Katsekes to discuss his employment status. Katsekes told Santana that the additional hours for a loss prevention associate had not been approved. Katsekes did not tell Santana that Kiely directed her not to hire Santana based on the telephone conversation between Kiely and Manherz.

Based on the facts recited above, Santana filed an administrative charge of discrimination against Sears on March 5, 1997. The charge contained allegations of national origin and race discrimination. On September 16, 1998, plaintiff EEOC filed this suit against Sears. The EEOC alleges that Sears refused to hire Santana because of his national origin and that such refusal violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"). Santana intervened in the action on December 16, 1998. Sears responded to the parties' complaint and denied subjecting Santana to any unlawful employment

discrimination. Sears now moves for summary judgment on the grounds that no genuine issue of material fact exists.

COURT'S DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e) (emphasis added)). Summary judgment is not a vehicle for the court to resolve disputed factual issues. See Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. See Anderson, 477 U.S. at 249. In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. See United States v. Diebold, Inc., 369 U.S. 654, 655

(1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247-48.

II. Title VII Claim for National Origin Discrimination

A. Standard of Proof Under Title VII

An employer charged with national origin discrimination is entitled to summary judgment if the plaintiff fails to establish a prima facie case or fails to raise a factual dispute regarding the reasons the employer proffers for the alleged discriminatory act. See Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995). Furthermore, "the mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. (internal citations omitted). To establish a claim under Title VII, a plaintiff must show that "but for the employer's motive to discriminate against plaintiff on the basis of [national origin]," the adverse job action would not have occurred. Id. (internal citations omitted).

A plaintiff may make out a prima facie of national origin discrimination by proffering direct evidence of discrimination or indirect evidence "whose cumulative probative force, apart from the presumption's operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for the plaintiff's [national origin discrimination]," the

defendant would not have taken the adverse employment action. Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir.1986). In the absence of such evidence, a plaintiff must resort to the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973), presumption framework.

In this case, plaintiffs have no direct evidence of discrimination; therefore, they must satisfy the proof scheme established in McDonnell Douglas. Under McDonnell Douglas, a plaintiff faced with a motion for summary judgment must first establish a prima facie case of discrimination by a preponderance of the evidence. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); Henson, 61 F.3d at 274. Plaintiffs allege disparate treatment based on Santana's Hispanic national origin.

To establish a prima facie case for discriminatory treatment, the plaintiffs must prove four things: (1) Santana is a member of the protected class; (2) Santana sought and was qualified for a position of employment; (3) Santana was rejected for that employment; and, (4) the position was filled by a similarly qualified individual from outside the protected class under circumstances giving rise to an inference of unlawful discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L.Ed. 2d 207, 101 S.Ct. 1089 (1981); Alvorada v. Board of Trustees of Montgomery Comm. College, 928 F.2d 118, 121 (4th Cir. 1991).

If the plaintiffs establish a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the failure to hire. See McDonnell Douglas, 411 U.S. at 802. Sears' burden is one of production, not of persuasion; therefore, Sears is not required to prove the absence of discriminatory motive. See Henson, 61 F.3d at 274-75. After Sears articulates a legitimate nondiscriminatory reason, the plaintiffs bear the ultimate burden of persuasion. The plaintiffs must show that Sears' proffered reason is merely a pretext for discrimination and that it was motivated, in fact, by a discriminatory purpose. See St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 515 (1993)("[A] reason cannot be proved to be 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason."(emphasis omitted)).

B. Santana's Prima Facie Case

Sears concedes that plaintiffs meet the first three elements of the prima facie case for national origin discrimination. However, Sears contends that plaintiffs fail to satisfy the fourth element. To satisfy the fourth element of the prima facie case, plaintiffs must prove two things: (1) that the part-time loss prevention position was filled by a similarly qualified individual from outside the protected class; and, (2) the hiring occurred under circumstances giving rise to an inference of unlawful

discrimination. There is no dispute that shortly after Sears refused to hire Santana, they hired Virginia Born ("Born"), a Caucasian with less experience than Santana, to fill the part-time loss prevention position. Thus, plaintiffs easily satisfy the first requirement. The issue is whether the circumstances surrounding the hiring of Born give rise to an inference of discrimination.

Plaintiffs argue that an unlawful inference of discrimination arises for several reasons. Initially, plaintiffs argue that an inference of discrimination exists because Sears hired an individual outside the protected class with significantly less experience in loss prevention than Santana. Plaintiffs also argue that Kiely's purported rationale for not hiring Santana is implausible, thus giving rise to an inference of discrimination. Plaintiffs find Kiely's claim, that she declined to hire Santana because of his possible involvement in a sexual harassment incident that occurred in California, to be disingenuous. As stated, Kiely's information and decision were based on a phone conversation with Manherz, a regional loss prevention manager. Plaintiffs are incredulous that a professional such as Kiely would refuse to hire Santana based solely on the Manherz conversation, with no additional investigation to determine whether Santana was actually involved in the sexual harassment. Plaintiffs also find fault in

Kiely's claim that she was unaware of Santana's national origin at the time she made the decision not to hire him, given Santana's frequent visits to the store, multiple applications, and that his national origin is obvious from meeting him or knowing his surname. According to plaintiffs, the circumstances above raise an inference of discrimination.

Sears maintains that despite hiring an individual outside the protected class, with less experience than Santana, the circumstances do not give rise to an inference of discrimination. In support of their argument, Sears shows that Katsekes actually offered Santana a job, an occurrence entirely inconsistent with discrimination. Additionally, there is no evidence that Kiely directed Katsekes not to hire Santana because of his Hispanic origin or that Kiely told Katsekes to hire Born because she was Caucasian. In fact, Sears continues to maintain that Kiely was not even aware of Santana's national origin at the time she decided not to hire him.

Ultimately, the court finds that when viewed in the light most favorable to the plaintiffs, Sears' questionable rationale for refusing to hire Santana is sufficient to give rise to an inference of discrimination. Accordingly, the court finds that plaintiffs have presented a prima facie case of national origin discrimination.

C. Pretext

Having found that plaintiffs presented a prima facie case of national origin discrimination, Sears must satisfy its burden of production by articulating a legitimate nondiscriminatory reason for the refusal to hire Santana. Sears asserts that Kiely refused to hire Santana because she believed that Santana had been involved in a sexual harassment matter while working as a loss prevention agent in California. Sears contends that Kiely made the decision to avoid the risk of employing someone who might sexually harass employees in the Morehead City store. The court finds that Sears has met its burden of producing a legitimate nondiscriminatory reason for the decision not to hire Santana. The burden of persuasion now shifts back to plaintiffs to show two things: (1) Sears' reason is false; and, (2) discrimination was the real reason behind the decision not to hire Santana.

Plaintiffs begin by attacking the veracity of Sears' legitimate nondiscriminatory reason. Plaintiffs contend that Sears' reasons for refusing to hire Santana are internally inconsistent and contradicted by the evidence. However, even if plaintiffs' evidence establishes "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, it is not in itself sufficient, under this Circuits precedents, to survive [Sears] motion for summary judgment." Gillins v. Berkely Elec. Co-

op. Inc., 148 F.3d 413, 416 (4th Cir. 1998)(internal citations omitted). To avoid summary judgment in this circuit, the plaintiffs must satisfy a "pretext-plus" standard. Under "pretext-plus," the plaintiffs must do more than attack the "the veracity of the employer's proffered justification. The plaintiffs must [develop] some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action." Id. at 417. In other words, plaintiffs must show that the "real reason" Sears refused to hire Santana was his Hispanic national origin.

Initially, the court notes that plaintiffs offered no credible evidence to dispute the veracity of Sears' legitimate nondiscriminatory reason. Plaintiffs simply offer their own conjecture as to Kiely's motivation for refusing to hire Santana. Nevertheless, even assuming arguendo that plaintiffs successfully challenged the veracity of Sears' reason for not hiring Santana, which they did not do, plaintiffs did not present any evidence of national origin discrimination sufficient to support a jury finding in their favor.

Plaintiffs argue that national origin played a role in his non-selection for two reasons: (1) during Santana's interview with Haynes, she allegedly asked him where he was from; and, (2) during Santana's interview with Katsekes, she appeared to become

"disinterested." (Santana Dep. at 190-199.) Plaintiffs' arguments are not at all indicative of discrimination. Haynes' question as to where Santana was from is a standard question asked in almost every interview. Further, there is no evidence that Haynes ask the question with any discriminatory motive. Plaintiffs' allegation regarding Katsekes' level of "interest" are similarly unpersuasive. Katsekes, like Haynes, offered Santana a job at the conclusion of the interview. The job offers are inconsistent with plaintiffs' theory of discrimination, as well as the "disinterest" supposedly exhibited by Katsekes during the interview.

Plaintiffs also failed to put forth any evidence that Kiely discriminated against Santana on account of his Hispanic national origin. Kiely asserts that she had no knowledge of Santana's national origin at the time she made the decision not to hire him and Santana failed to bring forth credible evidence to the contrary. Plaintiffs cite Kiely's lack of diligence in investigating whether Santana was actually involved in sexual harassment as evidence of discriminatory animus. While Kiely may have made a poor decision in failing to investigate whether Santana actually committed sexual harassment in California, that failure is not evidence of discrimination. Kiely's lack of diligence is not at issue. The issue is whether Kiely discriminated against Santana, "not the wisdom or folly of [Kiely's] business judgment."

Jiminez v. Mary Washington College, 57 F.3d 369, 383 (4th Cir. 1995). See McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991)("Title VII does not require that employment decisions be impeccable. It only frowns on employment decisions that are based on race, color, religion, sex or national origin . . ."). Kiely's conduct in no way constitutes an unlawful employment decision because there is no evidence that Santana's national origin played a role in Kiely's decision to not investigate.

Plaintiffs' claim of national origin discrimination is further weakened by the fact that since becoming store manager in July 1995, Kiely has hired seven Hispanic individuals. Kiely hired four of the individuals prior to the time Santana submitted his application for employment. Additionally, a fifth individual was being processed for employment at that time Santana was regected. Sears argues, and the court agrees, that it is illogical for Kiely to hire these Hispanic employees and then discriminate on Santana based on his Hispanic heritage.

Even viewing all the evidence in the light most favorable to the plaintiffs, the court finds no evidence that national origin discrimination motivated the defendant's refusal to hire Santana. Accordingly, the court GRANTS defendant's motion for summary judgment.

CONCLUSION

For the reasons stated above, the court GRANTS defendant's motion for summary judgment. The clerk is directed to close this case.

This 2nd day of February, 2000.

MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
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