

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KENNETH SMITH *
Plaintiff *
* CIVIL NO. 3:06CV0240 (PCD)
VS. *
*
STATE OF CONNECTICUT, DEPT. *
OF CORRECTION *
Defendants * FEBRUARY 2, 2007

**PLAINTIFF'S MEMORANDUM OF LAW
RE: OPPOSITION TO SUMMARY JUDGMENT**

I STATEMENT OF FACTS

The plaintiff, Kenneth Smith ("Smith") began his tenure with the State of Connecticut's Department of Correction ("DOC") as a Corrections Officer ("CO") in 1990. Smith more than capably performed his duties as a Corrections Officer. (Exh. 4). Smith's leadership abilities were recognized as he was requested several occasions to serve as an Acting Lieutenant in a supervisory role. (Smith DT at 17). The Lieutenant's role is central to DOC operations at the facility level. "A Lieutenant is considered a ranking individual in the Department of Corrections. They're responsible for running the day to day activity in a correctional facility. They post correctional officers on the daily post assignments. They are responsible for handling on site supervision of any incident that may happen in the correctional facility from a minor medical issue with an inmate up to and including hostage situations or fights between other inmates or other such situations. They handle the attendance records for correction officers generally speaking. They do payroll packages. They hire the overtime for the next three

(3) shifts and do vacation schedules. (Osten DT at 13; Exh. 5). In December 2000, Smith was officially promoted to Lieutenant and was transferred to the Hartford Correctional Center (“HCC”) under the direction of Warden Lee. (Smith DT at 16-17).

From December 2000 through November 2004, Smith sustained his exemplary work performance with the DOC. In fact, Smith was under serious consideration to ascend to the role of Captain at the DOC’s Northern Correctional Center (Smith DT at 13-14; Osten DT at 46). While at the Hartford facility, Smith occasionally worked with fellow Lieutenant Rhonda Arnold (“Arnold”). Smith’s exerted all efforts to maintain a degree of professionalism. (Smith at DT at 17-18).

Unfortunately, Smith’s and Arnold’s relationship eroded, thereby adversely impacting their careers at the DOC due to Arnold’s admitted childish behavior and lack of judgment. (Exh. 10/Arnold’s statement to Security Division). Arnold made it stingily clear that communications with Smith were to be kept at a minimum even when involving professional obligations. (Smith DT at 24). In keeping with his duties as a DOC Lieutenant, Smith proceeded to prepare the schedule for the following shifts. Smith contacted Arnold for the sole purpose of inquiring whether she was available for overtime work on November 20, 2004. (Smith DT at 24). Arnold informed colleague Lieutenant Angeles that she would report on November 20th. (Smith DT at 24). Upon her arrival on the 20th, Arnold proceeded to serve as the catalyst for a verbal and ultimately physical exchange that she initiated, escalated and sustained (Exh. 10). According to the DOC Security

Division investigation Arnold reported to work on November 20th in a diminutive office that housed the Lieutenants on duty: Smith, Arnold and Brown. Arnold asked Lieutenant Brown to exit the room, in an “effort” to get at the heart of her exchange with Smith on the 19th. Thereupon, she falsely claimed that Smith struck her. (Exh. 10: Arnold statement). An allegation that the Security Division could not substantiate. (Ex. 10 at p. 7-8). *Id.* As Smith was preparing to conduct the roll call for that morning Arnold took the roster from Smith and refused to return it to Smith. In fact, she sat on the roster (Exh. 10). Smith and Arnold’s colleague, Lieutenant Godding (“Godding”) entered the room to provide resolution. (Exh. 10: Godding statement). Godding’s directed Smith to leave the room. Smith began to comply as Godding instructed Arnold to relinquish the roster. (*Id.*) Godding claimed Smith “reacted” to Arnold rising from her chair. Notably, Godding observed and the investigation *concluded* Arnold struck Smith first and continued to push and kick Smith. (Exh. 10 at pp. 7-8).

Smith and Arnold were relieved of their duties and placed on Administrative Leave. A Security Division investigation was sanctioned. All witnesses were interviewed by Security Investigator Captain Tremblay (Exh. 10). Ultimately, the investigation concluded that Smith and Arnold violated Administrative Directives 2.17 concerning employee misconduct and 2.22 the DOC’s Workplace Violence Policy. (Exh. 7). Once the investigation was completed, the DOCs Human Resources Division headed by Director of Human Resources Dan Callahan (“Callahan”), began to contemplate the appropriate level of discipline. Callahan recommended that Smith be terminated, (Exh. 13). The recommendation was

rubber stamped by DOC Commissioner Theresa Lantz on January 21, 2005 (Exh. 9).

Consequently, Smith instituted grievance proceedings under the Collective Bargaining Agreement (“CBA”). Following an evidentiary hearing, the arbitrator concluded that Smith’s discharge was for “just cause” as defined by applicable DOC and State of Connecticut policies and procedures. (Def. Exh. 4).

II GOVERNING LAW AND ARGUMENT

A. STANDARD OF REVIEW

The burden on a motion of summary judgment is on the moving party to demonstrate “there is no genuine issue as to any material fact” and that it is entitled to judgment as a matter of law Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986). An issue of fact is “material” if it “might affect the outcome of the suit under the governing law” while an issue of fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the non-moving party”. *Konikoff v. Prudential Ins. Co. Of Am.* , 234 F. 3d 92, 97 (2d Cir. 2000).

When applying the standard, the court must resolve all ambiguities and draw all reasonable emphasis against the moving party. *Anderson* 477 U.S. at 248. “Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Weinstock v. Columbia University*, 224 F. 3d 33, 41 (2d Cir. 2000). Summary

Judgment is appropriate if the non-moving party fails to offer enough evidence to enable a reasonable jury to return a verdict in its favor. If the plaintiff fails to provide any proof of a necessary element of the plaintiff's case, then there can be no genuine issue as to any material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986).

However, "when deciding when this drastic provisional remedy should be granted in the discrimination case, additional consideration should be taken into account. A trial court must be cautious about granting summary judgment to an employer, when its intent is at issue. *Montana v. First Federal Savings and Loans Assoc.* 869 F. 2d 100, 103 (2d Cir. 1989). Because writings directly supporting a claim of intention discrimination are rarely, if ever, found among an employee's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed would show discrimination. Finally, the trial court's task at the summary judgment motion stage of litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not in deciding them. Its duty, in short, is confined at this point to issue finding, it does not extend to resolution. *Id.*

B. SMITH CAN SUSTAIN A PRIMA FACIE CASE UNDER TITLE VII AND PROVIDE SUPPORTING EVIDENCE OF PRETEXT

Smith must establish a prima facie case and proffer sufficient evidence that the sustained adverse action arose from circumstances supporting a reasonable inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A Title VII claimant must establish: (1) membership in a protected class; (2) qualifications for the position at issue; (3) an adverse employment action; (4) that the adverse employment action occurred under circumstances supporting an inference of discrimination. The prima facie case is governed by a burden shifting framework whereby once Smith establishes a prima facie case, the DOC must counter with a legitimate non-discriminatory reason for its employment decision relative to Smith. Thereupon, the ultimate burden of production and persuasion returns to Smith to proffer sufficient evidence that the reasons proffered by the DOC are false, illogical or otherwise unworthy of credence. In sum, Smith must offer sufficient and persuasive evidence that the DOC's reasons for his termination constitute pretext. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Smith has easily met the *de minimis* burden of establishing the prima facie case. *Byrnie v. Town of Cromwell Brd. of Educ.* 243 F. 3d 93, 102 (2d Cir. 2001). Smith, as an African American, is clearly a member of a protected class. Additionally, he is clearly qualified for the position of DOC Lieutenant. Smith laid the groundwork for his promotion to Lieutenant during his service as a CO for the

period 1986 through 2000. He consistently compiled excellent overall performance ratings for the period 1997 through 1999. In 1998, Smith was selected for the DOC's Circle of Merit Award. Accordingly, Smith was elevated to Acting Lieutenant in March 1999 and subsequently promoted to Correctional Lieutenant at the HSC in December 2000. (Exh. 4). Smith continued to distinguish himself as a Lieutenant as it was known within DOC circles that he was seriously considered for elevation to the rank of Captain at the DOC's Northern Correctional Center. (Smith DT at 13). Thus, the record firmly establishes and leaves no room for doubt that Smith was qualified for the position of Lieutenant.

Moreover, it is uncontroverted that Smith sustained an adverse employment action. Indeed, Smith's employment was terminated in January 2005 purportedly due to the findings of the Security Division's investigation and the Department of Human Resources recommendation of dismissal. (Exhs. 10, 14). Again, there could be no serious challenge that Smith's termination does not constitute a "material change in the terms and conditions of employment." *Galabya v. NY Brd of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). Lastly, Smith maintains he can sustain that his termination occurred under circumstances supporting a reasonable inference of discrimination. The record contains an instance of two (2) Lieutenants, one black and one white, engaging in a physical confrontation that was deemed a violation of the DOC's workplace violence policy. The white Lieutenant was issued a five (5) day suspension for his misconduct. According to Callahan, the white Lieutenant, Andre Chounard, had a spotty, at

best, work record and was already walking a thin line as he had prior disciplinary matters. (Osten DT at 47-52). Chounard was the subject of a discrimination suit and had, in fact, been transferred to Hartford by the DOC to quell the uproar. (Osten DT at 47-52).

Significantly, Chounard retained his rank of Lieutenant only to be demoted to CO when shortly after the five (5) day suspension he was cited yet again for misconduct resulting in the death of an inmate. (*Id.*)

While the role of Lieutenant is a significant one with in the DOC hierarchy, all DOC employees are obligated to abide by the administrative directives to conduct themselves professionally when both on and off duty. (Exh. 7/A.D. 2.17). To that end, the record also contains comparators of DOC employees holding the rank of correctional officer, counsel or instructor that engaged in conduct that violated both Administrative Directors 2.17 and 2.22 respectively, yet, received less severe discipline. For example, Instructor Maureen Reilly, was deemed to have violated Administrative Director 2.17 and 2.22 by engaging in offensive and threatening behavior during the performance of her duties. Riley was reinstated after a fifteen (15) day suspension. (Osten DT at 58-62) (Exh. 8 at p. 83). Notably, Reilly's final disposition did not even reach the level of arbitration. The DOC felt it prudent to resolve her matter at the Step 3 stage of the grievance procedure. Osten recalled that she had no prior disciplinary history at the time of the incident and a satisfactory work record. Additionally, the following DOC employees, all white males, were cited for violation of A.D. 2.22 and their cases were resolved short of termination; specifically at the suspension level: Edward

Sczurek was issued a five (5) day suspension; Scott Copida was issued a five (5) day suspension (Exh. 11/Response to Interrogatory No. 10; Exh. 8 at pp. 21, 92; Exh. 14).

The DOC has stated that Smith's violation of Administrative Directives 2.17 and 2.22 respectively are legitimate, non-discriminatory reasons for his termination. (Exh. 9). Additionally, Callahan also relied upon "the serious nature of the incident" to the extent it entailed a physical altercation to justify his recommendation. (Callahan DT at 16). The following constitutes Smith's rebuttal and supporting evidence to create a genuine issues of material fact regarding the pretextual nature of the DOC's termination of Smith.

The record is clear that employees recommended for dismissal and in fact terminated do not necessarily remain terminated as the DOC and the applicable bargaining units employ Stipulated Agreements to negotiate an agreed upon level of discipline that quite often includes reinstatement of the employee to his or her current rank. (Callahan DT at 37-38; Osten DT at 39-44). The DOC considers the nature of the incident, the employee's performance record and prior disciplinary history. (Callahan DT at 37-38).

Additionally, the Chounard incident is of particular probative value as it involved two (2) Lieutenants at the same facility who engaged in a conduct deemed violative of A.D. 2.22. Yet, Chounard was only issued a suspension and permitted to retain his rank of Lieutenant. The DOC frames the Chounard incident as being remote in that it pre-dates the Workplace Violence Policy. However, it is well-settled that the Workplace Violence Policy was implemented

as a result of an Executive Order of Governor Rowland following the tragedy of the shootings at the Connecticut Lottery in 1999. (Osten DT at 20-2; Callahan DT at 53-54). It is illogical to claim that the concerns over workplace violence and safety have changed or dissipated since 2000; in fact, they should have been more heightened for an incident that occurred within a year of the tragedy that prompted the Executive Order. Moreover, misconduct that would now violate A.D. 2.22 is easily addressed under A.D. 2.17 (Osten DT at 21). To the extent an employer's proffered reason for an adverse action is incoherent and illogical has been viewed as probative of pretext. *Windham v. Time Warner, Inc.*, 275 F.3d 179 (2d Cir. 2001). The Chounard incident is also probative because it raises a genuine issue of material fact as to whether Smith and Chounard are similarly situated. An aggrieved employee under Title VII is similarly situated to a proffered comparator when they are similarly situated in all material respects. All material respect varies from case to case. *Norville v. Staten Island University*, 196 F.3d 89 (2d Cir. 1999). The *Norville* court shed light on what constitutes similarly situated when it concluded that the plaintiff and comparator must be subject to the same workplace standards and whether the conduct for which discipline was imposed was of comparable seriousness. There is no dispute that the DOC's Administrative Directives applied to all employees. Moreover, although Directive 2.22 was implemented until 2001, such conduct was certainly violative of Administrative Directive 2.17 broadly defining the areas of misconduct subjecting a DOC employee to discipline. (Exh. 7). Smith and Chounard are charged with the same job duties as required by the DOC (Ex. 5).

Lastly, there is no requirement that the plaintiff and the proffered comparator be identical. Callahan minimized the Chounard incident to the extent it entailed chest bumping and pushing. (Callahan DT at 44). In contrast to Smith's incident, the DOC Security Division investigation *concluded* Arnold struck Smith first and continued to strike Smith even when Lieutenant Godding intervened. (Ex. 10 at p. 7-8). The Security Division investigation noted that no bruises were noticeable when it conducted its interview with Arnold on December 9, 2004. (Exh. 10 at 6). Thus, Osten's focus was to find relevant incidents to persuade the arbitrator of the Union's position that Smith was more severely disciplined. Osten sought examples where the participants were of the same rank as Smith and occurred at the same facility and had a physical component (Osten DT at 47-52).

The Chounard incident is also probative as his work record and disciplinary history paled in comparison to Smith's, yet Smith was the victim of a harsher penalty. (Callahan DT at 46-47; Osten DT at 47-52). The aforementioned comparators engage in similar misconduct yet were the benefactors of less severe discipline than Smith, even when he had a comparable performance record and disciplinary history (Reilly) and had a performance record and discipline history that overwhelmingly suggested he was an asset to the DOC (Chounard). It is well-settled that when a plaintiff is the subject of more severe treatment for similar conduct of an employee outside a protected class, genuine issues of material fact regarding pretext and thus

discriminatory animus is best left determined by a trier of fact. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The DOC's termination of Smith is also discriminatory in that there is no real consideration as to Smith posing a long-term threat to the agency should he remain in his employ. According to Callahan, the seriousness of the incident prompted placing Smith and Arnold on administrative leave in an effort to separate the employees and determine they should return to the same facility or whether it was more prudent to transfer them to different facilities respectively. (Callahan DT at 25-27). Notably, Callahan admitted that returning Smith to the DOC's employ was not ruled out during the Threat Assessment Team's, as comprised for purposes of Smith's incident, determination. (Callahan DT at 32). Moreover, despite Osten's efforts to be included on the threat assessment team, the team was a closed circle of Callahan, the HCC Warden and Joe Schwiedel, the personal resources director for HCC. (Callahan DT at 23-24).

Despite Callahan's claim that including a Union representative on the assessment team, posed a conflict, the decision makers were all DOC officials with no input from the other official deemed relevant by the A.D. 2.22. (Exh. 7). There is sufficient evidence in the record to create a genuine issue of material fact that the DOC strayed from its own policies in not having a full compliment of members of the Threat Assessment Team as proscribed by A.D. 2.22. *Kirschner v. Office of the Comptroller of New York*, 973 F.2d 88, 93-94 (2d Cir. 1992). In effect, the Threat Assessment Team, as comprised for consideration of Smith's conduct, facilitated a unilateral decision to terminate Smith.

III CONCLUSION

Accordingly, Smith maintains that the record is replete with genuine issues of material fact to call into question his termination from the DOC. Smith has offered sufficient comparators to support his disparate treatment claim as those not in a protected class were treated more favorably for engaging in similar misconduct of comparable seriousness. Moreover, despite the stated response of dismissal, the DOC frequently engages in a procedure that reinstates terminated employees to their current position: Stipulated Agreements. Purportedly, the decision to enter into a Stipulated Agreements is governed by the nature of the incident at issue, the employee's work record and disciplinary history, all of which militated overwhelmingly in Smith's favor. Yet, comparators such as Maureen Reilly and Andrew Chounard were afforded the opportunity to remain with the DOC with far less severe consequences.

Furthermore, there are genuine issues of material fact to support the nature of the incident justified Smith's retention. The Security Division's investigation concluded Arnold initiated the physical aspects of the November 20, 2004 incident by first striking Smith. Smith offered evidence of mitigating circumstances as his response to Arnold's action was of a self-defense posture. Moreover, Smith attempted to comply with Lieutenant's Godding's directive to leave the office only to find himself subject to an assault. Factual findings that were glossed over by the DOC and arbitrator.

WHEREFORE, based upon the foregoing, Smith respectfully requests that the court that the court deny the DOC's Motion for Summary Judgment relative to his claims under Title VII.

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CERTIFICATION

I hereby certify that on this 2nd day of February, a copy of the foregoing Plaintiff's Memorandum of Law Re: Opposition to Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

_____\s\
Marc L. Glenn