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Jeff Singdahlsen

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SOLOMON BROWN, Plaintiff, v. COMMONWEALTH OF VIRGINIA, DEPARTMENT OF CORRECTIONS, Defendant.	)	C.A. 91CV00357

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for a bench trial on the plaintiff's claims under Title [illegible] of 1964, 42 [illegible] Court heard the [illegible] Leave Restricti [illegible] May of 1990 beca [illegible] I written r [illegible] his previousl [illegible] ility Commissio [illegible] ring the bench [illegible] of Fact and [illegible] pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Title VII - race
- discriminatory discipline
- retaliation

FINDINGS OF FACT

1. The plaintiff, Solomon Brown ("Brown"), is an adult

black male who, at the times relevant to this case, was employed by the defendant, the Commonwealth of Virginia, Department of Corrections ("Department of Corrections").

2. At all relevant times, the defendant was subject to the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

3. The present suit was brought pursuant to the issuance of Right to Sue letters from the EEOC. Defendant's Exhibits 29 & 30.

4. Brown began his employment with the Department of Corrections on December 12, 1980.

5. Brown was originally assigned to the Powhatan Correctional Center ("PCC"), which is a state prison facility located in State Farm, Virginia.

6. On April 24, 1990, Brown was, as a result of disciplinary problems, transferred to the Powhatan Reception and Classification Center ("PRCC"), which is a separate facility located within the perimeter of PCC.

7. Upon arrival at PRCC, Brown was placed on B-break and the 8:00 a.m. to 4:00 p.m. shift. Brown was notified, however, that this was temporary pending an assessment of personnel needs at PRCC. Testimony of Michael C. Hintz ("Hintz").

8. On April 30, 1990, Lieutenant Hintz informed Brown that he would be working the 4:00 p.m. to 12:00 midnight shift, B-break, effective May 13, 1990. Defendant's Exhibit 15.

9. Brown objected stating that he had been promised day shift, A-break by Dr. Guerney, Lieutenant Flint, and Warden

Williams. Lieutenant Hintz contacted these individuals and determined that Brown had never been promised a particular shift. Testimony of Hintz.

10. When Lieutenant Hintz informed Brown of the shift change, Brown complained, mumbling that he had already made plans for the days A-break would have off. Brown also generally made it known that he would do whatever was necessary to get those days off. Testimony of Hintz.

11. Brown called in sick on May 1-4, 1990. These days corresponded to the days that employees on the A-break had off. Defendant's Exhibit 19, at 2; Testimony of Hintz.

12. Brown also called in sick on May 16, 1990. His call was taken by Sergeant Martin. Sergeant Martin had been advised by Lieutenant Hintz that he expected Brown to call in sick because the sixteenth corresponded to a day off for A-break. Hintz told Martin to instruct Brown to bring a doctor's excuse with him when he reported for work. When Brown called to report in sick, Martin informed him that he would need to bring in a doctor's excuse. Brown replied that that would be no problem because he already had an excuse. Defendant's Exhibit 20, at 3; Testimony of Hintz and Robert R. Martin ("Martin").

13. Brown took sick leave for May 17 and May 18, 1990, as well. Defendant's Exhibit 19, at 2; Testimony of Brown.

14. On May 17, 1990, after a review of Brown's sick leave revealed that he had used 46.7 hours of sick leave in less than a month at PRCC, Hintz placed Brown on Sick Leave Restriction. Plaintiff's Exhibit 13; Testimony of Hintz.

15. When Brown returned to work on May 19, 1990, he did not have a doctor's excuse ("sick slip"). Lieutenant Hintz instructed Brown to bring sick slip in the following day. Defendant's Exhibit 20, at 2; Testimony of Hintz.

16. Brown also failed to bring in a sick slip on May 20, 1990. Hintz instructed him to bring in a sick slip by 2:00 p.m. on May 21, 1990. Defendant's Exhibit 20, at 2; Testimony of Hintz.

17. Again, on May 21, 1990, Brown failed to bring in a slip. Brown eventually brought in a note from his doctor on May 24, 1990. The doctor's note stated that Brown had called in sick because of side effects caused by new blood pressure medication. Plaintiff's Exhibit 20.

18. On May 29, 1990, Brown was issued a Group II written notice for failure to follow supervisor's instructions for his repeated failure to bring in a sick slip as directed by his supervisor. The Group II written notice called for a 5 day suspension with a recommendation of termination.[1] Defendant's Exhibit 20.

19. A supervisor has the authority under Institutional Operating Procedures to require verification of a sick leave. White employees have previously been instructed by their respective supervisors to bring in an excuse for their absence. White employees have also been disciplined for various failures

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[1] The termination recommendation was based on a Group III notice received by Brown while he was at PCC. When the Group III notice was rescinded through the State Employee Grievance Procedure, the termination was voided; Brown was reinstated and given back pay and benefits.

to follow their supervisor's instructions. Defendant's Exhibit 38; Defendant's Exhibit 42, § E.3.A., at 6; Defendant's Exhibit 44, § X.B., at 6; Testimony of Gerry S. Flint ("Flint"), Hintz, Martin, and David A. Williams ("Williams").

20. Brown appealed the Group II written notice through the State Employee Grievance Procedure. The Group II written notice was upheld, but the five day suspension was removed. Testimony of Brown.

21. On September 16, 1990, at approximately 2:00 p.m., Brown called the PRCC and informed Lieutenant Flint that he was not sure when he could get to work because his wife had to work and he was having trouble finding a baby-sitter. Lieutenant Flint told Brown that he would have to make some sort of arrangement and to report to work as soon as possible. Defendant's Exhibit 24, at 2; Testimony of Brown and Flint.

22. Brown called back at approximately 3:45 p.m. and talked to Lieutenant Hintz. Brown told Hintz that he would be in sometime between 6:00 p.m. and 7:00 p.m. Hintz told Brown that would be okay but to get there as soon as possible. Defendant's Exhibit 24, at 2; Testimony of Hintz.

23. At approximately 6:00 p.m., Brown called back to inform Hintz that he could not find a baby-sitter and that he would not be coming in at all. Hintz responded that Brown had had sufficient time to find a baby-sitter and that his not coming in at all was unacceptable. Brown said that he was not coming in, that he had ample vacation time, and that they would just have to see what tomorrow night brought. Hintz reiterated that this was

not acceptable and that he was expected to come in. Defendant's Exhibit 24, at 2; Testimony of Hintz.

24. On September 25, 1990, Brown was issued a Group I written notice for "abuse of state time" based on his failure to report to work even though he was neither sick nor granted annual leave. Defendant's Exhibit 24, at 1.

25. A Group I written notice for "abuse of state time" is in accordance with the Employee Standards of Conduct and Performance for the Virginia Department of Corrections. The Standards provide that "Group I Offenses include . . . [a]buse of state time. Examples include unauthorized time away from the work area, use of state time for personal business, abuse of sick leave, etc." White employees have also been disciplined for abuse of state time. Defendant's Exhibit 44, § IX.B., at 5; Testimony of Hintz.

26. In accordance with the State Grievance Procedure, Brown filed a timely grievance regarding this Group I written notice. Warden Williams, in reviewing the action, granted Brown credit for three hours of leave without pay because he felt it had been implied that Brown could come in at 7:00 p.m. Otherwise, the discipline was upheld. Testimony of David Williams.

CONCLUSIONS OF LAW

1. The inquiry on Brown's claim of racial discrimination is "whether the defendant intentionally discriminated against the plaintiff." Texas Department of Community Affairs v. Burdine,

450 U.S. 248, 253 (1981). In other words, Brown must show that he was treated "less favorably than others" because of his race. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see also Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The plaintiff always retains the ultimate burden of persuasion with respect to the defendant's motivation. Burdine, 450 U.S. at 253, 256.

2. The plaintiff has failed to establish his prima facie case. Brown introduced no direct evidence of a discriminatory intent. He has also failed to introduce sufficient circumstantial evidence to establish a prima facie case. The essence of the prima facie case is the introduction of evidence that allows the Court to infer that the plaintiff was discriminated against; i.e., that he was treated differently because of his race. See, e.g., Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir.), cert. denied, 472 U.S. 1021 (1985).

3. Brown introduced no evidence of a general pattern of racial discrimination by the employer. See Moore, 754 F.2d at 1105. He also failed to introduce sufficient evidence to allow the Court to infer that he was treated less favorably than similarly situated white employees. See Id. at 1106. The only evidence introduced by the plaintiff tending to show different treatment was personal testimony that he was not aware of any white officers who were placed on Sick Leave Restriction while they were out sick and against whom that Sick Leave Restriction was enforced retroactively. The plaintiff's testimony, however, misconstrues the basis for his Group II written notice. The

evidence was not that the Sick Leave Restriction was applied retroactively, nor that he was disciplined for failing to comply with the Sick Leave Restriction. Rather, he was disciplined for repeatedly failing to follow the direct instruction of his supervisor to bring in a sick slip the following day. The unrefuted evidence established that white employees were subject to the same requirements and were disciplined for the same types of infractions as the plaintiff.

4. Even if the plaintiff had established a prima facie case, the defendant's evidence rebutted the plaintiff's case by advancing a legitimate nondiscriminatory reason for the termination. See Burdine, 450 U.S. at 256. The burden then falls on the plaintiff to show by a preponderance of the evidence that the defendant's explanation is merely a pretext. Burdine, 450 U.S. at 256; United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983). The plaintiff's evidence fails to show that the defendant's explanations were pretextual.

5. The evidence establishes that Brown was given a Group II written notice because of his failure to follow supervisors' instructions. Given the plaintiff's expressed dissatisfaction with being assigned to night shift, B-break, and the "coincidental" correspondence between the plaintiff's sick leave and the off-days for employees on A-break, it was perfectly reasonable for Lieutenant Hintz to have been suspicious of the plaintiff's illness and to have required him to bring in a medical excuse for his absence. The plaintiff, however, in the face of three separate requests for a sick slip, failed, on any

of the three requested days, to bring in his slip.[2]

6. An employer needs to have the flexibility to adopt reasonable work policies for its employees and to demand that its employees adhere to them. This is especially true in the context of a correctional facility where the safety of all involved is directly affected by the presence or absence of the employee and by his willingness to adhere to supervisory directives.

7. To establish a prima facie case of retaliation in violation of Title VII, the plaintiff must demonstrate

(1) that he engaged in protected activity;
(2) that the defendant took adverse employment action against him; and
(3) that a causal connection existed between the protected activity and the adverse action.

Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989). The plaintiff's evidence is insufficient to establish a "causal connection" between his filing an EEOC claim and his receipt of a Group I written notice for abuse of state time.

8. The Court's findings of fact clearly demonstrate that Brown wilfully chose not to come into work even though he was neither sick nor had been approved for vacation. The imposition of a Group I written violation for the plaintiff's actions is expressly provided for in the written policies of the Department of Corrections. Further, there was evidence that white employees were disciplined for similar violations.

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[2] The plaintiff tries to put a great deal of weight on the doctor's note and what he claims was a clearly valid excuse for his absence. The plaintiff fails to recognize, however, that the bona fides of his excuse were not at issue. He was not written up for missing work without a valid excuse, but for failing to follow his supervisors' explicit instructions to bring the note in on a specific day.

9. While the Court may sympathize with the plaintiff's concern for the welfare of his children, it can not say that the plaintiff was given an inadequate opportunity to find a baby-sitter or that the defendant's strict adherence to its attendance policies was unreasonable. As discussed, a corrections facility needs to be able to rely on its employees adhering to their work schedules. The tremendous potential for harm caused by a unexpected staffing shortage in a corrections facility is all too apparent.

10. For these reasons, both of Brown's claims will be dismissed with prejudice and judgment will be entered for the defendant.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law and the accompanying Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE