DOCKET NO: FST CV 23-6060302 S	:	**STATE OF CONNECTICUT**
	:	**SUPERIOR COURT**
WHITAKER, JEROME	:	**JUDICIAL DISTRICT OF**
V.	:	**STAMFORD/NORWALK**
	:	**AT STAMFORD**
CITY OF STAMFORD	:	**APRIL 24, 2024**

MEMORANDUM OF DECISION

Defendant City of Stamford (the "City") has moved for summary judgment to dismiss this employment discrimination lawsuit. For the reasons stated below, the motion is granted.

The Standards for Deciding a Motion for Summary Judgment

"The standards . . . [for] review of a . . . motion for summary judgment are well established. Practice Book [§17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . ." *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107,

115-16 (2012), quoting *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 558-60 (2001). (Citations omitted).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent...." *Zielinski v. Kotsoris*, 279 Conn. 312, 318 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci v. Sax*, 313 Conn. 786, 799 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016).

There Are No Genuine Issues of Material Facts to be Tried.

In this lawsuit plaintiff alleged that his termination by the City as a Deputy Fire Marshal was the result of racial discrimination in violation of C.G.S. § 46a-60 (b) (1) and that the proffered reason of insubordination was a pretext.[1] The incident related to plaintiff's comments at a meeting of fire marshals, during the covid pandemic, called by his direct supervisor; when plaintiff was informed that he and other fire marshals would have to perform inspections that plaintiff protested should have been done by health inspectors, plaintiff persisted in his protests and was told by his white direct supervisor to "shut up" or he would be charged with insubordination; matters became heated and escalated to a confrontation with the supervisor. Plaintiff was placed on administrative leave. The white Chief of the City Fire Department later terminated him for insubordination. Plaintiff filed a grievance under the applicable collective bargaining agreement that was arbitrated before the State Labor Board, which found there was just cause to terminate plaintiff for insubordination.

As evidence of discrimination, plaintiff pointed to disparate treatment between him as an African American and the case of a white firefighter who was not terminated but was only docked fifteen vacation days for what plaintiff argued was similar insubordination. He also pointed to the white supervisor who he said goaded him and was not disciplined for the same altercation.

To establish a prima facie case of employment discrimination, the complainant must prove that: (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the

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[1] C.G.S. § 46a-60 provides, in pertinent part: "(b) It shall be a discriminatory practice in violation of this section: (1) For an employer... to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color...."

adverse action occurred under circumstances giving rise to an inference of discrimination. See *Department of Transp. v. Commission on Human Rights and Opportunities*, 272 Conn. 457, 463 n. 9 (2005).[2] The City conceded for purposes of this motion plaintiff can satisfy the first three prongs to establish a prima facie case of employment discrimination, but argued that, as a matter of law, plaintiff cannot prove that his firing was racially discriminatory and that the stated reason for his termination,[3] insubordination, was a pretext for employment discrimination.[4]

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[2] "We note that the analytical framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (McDonnell Douglas), and its progeny is used to determine whether a complainant may prevail on a claim of disparate treatment under our state law. ... 'McDonnell Douglas and subsequent decisions have established an allocation of the burden of production and an order for the presentation of proof in ... discriminatory-treatment cases.... First, the [complainant] must establish a prima facie case of discrimination.... In order to establish a prima facie case, the complainant must prove that: (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination.' ... Once the prima facie case has been established, the employer then must produce legitimate, nondiscriminatory reasons for its adverse employment action. ... 'This burden is one of production, not persuasion; it can involve no credibility assessment.' ... Once the employer produces legitimate, nondiscriminatory reasons for its adverse employment action, the complainant then must prove, by a preponderance of the evidence, that the employer intentionally discriminated against him. ... 'Although intermediate evidentiary burdens shift back and forth under this framework, [t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [complainant] remains at all times with the [complainant].... [I]n attempting to satisfy this burden, the [complainant]-once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision-must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination.'" 272 Conn. at 463 n. 9.

[3] "'The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor....'" See *Agosto v. Premier Maintenance, Inc.*, 185 Conn.App. 559, 573 (2018) (citation omitted). Among the circumstances that may be considered to satisfy the fourth prong of the *McDonnell Douglas* test to show an inference of discrimination are: "'(3) the more favorable treatment of employees not in the protected group; or (4) the sequence of events leading to the plaintiff's discharge or the timing of the discharge.'" *Agosto*, 185 Conn.App. at 575, 583-84 (citation omitted).

[4] "'The burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is de minim[i]s.... Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination is whether the circumstances giv[e] rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive.' ... 'Though caution must be exercised in granting [a motion for] summary judgment where intent is genuinely in issue ... summary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact.'" *Agosto*, 185 Conn.App. at 570 (citation omitted).

"'To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff's employment] .... Of course, to defeat summary judgment ... the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors.'" *Marrero v. Hoffman of Simsbury, Inc.*, 220 Conn.App. 649, 664 (2023) (citation omitted).

Plaintiff points to disparate treatment he received in terms of the severity of discipline as compared to two white fire marshals under similar circumstances. The first was his supervisor, David Francis ("Francis"), who was the person who confronted him at the meeting and received no discipline for their argument. The other fire marshal offered for comparison was Nicola Tamburro ("Tamburro"), who broke Covid protocol and engaged in a verbal confrontation with a co-worker, whose discipline was to forfeit fifteen days of vacation.

"In order for comparator evidence to be probative it 'must establish that the plaintiff and the individuals to whom she seeks to compare herself were similarly situated in all material respects .... [A]n employee offered for comparison will be deemed to be similarly situated in all material respects if (1) ... the plaintiff and those [she] maintains were similarly situated were subject to the same workplace standards and (2) ... the conduct for which the employer imposed discipline was of comparable seriousness.'" *Marrero*, 220 Conn.App. at 665 (citation omitted).

The City argued that neither Francis nor Tamburro could be considered comparators as a matter of law. In other words, the City contends neither comparator could be found to be "similarly situated in all material respects" by a reasonable jury.

As a supervisor, according to the City, Mr. Francis would be held to a different standard of conduct than plaintiff. A reasonable jury, however, could conclude that as to the altercation at the core of the insubordination charge, both men were subject to the same standard against workplace confrontations. However, Francis' conduct during the altercation was not "of comparable seriousness" as it related to insubordination. Plaintiff, unlike Francis, was resisting participation in the inspection program instituted by the Department, which itself would be insubordinate even if he had not disrespected and disregarded orders from his supervisor.[5]

Tamburro was involved with a workplace confrontation with a co-worker under circumstances that were dissimilar to this case because, although he violated Covid protocols recently put into place, Tamburro was not insubordinate to a superior or refused to carry out his duties assigned to him as fire marshal.

The City pointed out that neither Francis nor Tamburro had any past disciplinary history and thus were not comparable to plaintiff, who had four prior incidents related to insubordination. In *Marrero*, the Appellate Court upheld summary judgment dismissing a pregnancy discrimination claim of a plaintiff who asserted she was treated differently from her comparator, in part, "[b]ecause the plaintiff and [the comparator] had very different discipline histories, the fact that the plaintiff was dismissed and [comparator] was not is insufficient to

[5] Plaintiff argued he was not insubordinate; he merely questioned the inspection policy announced at the meeting.

demonstrate that the defendant's reason for terminating the plaintiff's employment was pretextual." 220 Conn.App. at 665-66.

Neither Francis nor Tamburro were similarly situated in all material respects to plaintiff and so their circumstances did not have probative value in proving disparate treatment. *Marrero*, 220 Conn.App. at 665. Without similar comparators plaintiff is not able to show he was treated differently in the discipline meted out by the Fire Chief by reason of his race. See *Trejo v. Yale New Haven Hospital, Inc.*, 218 Conn.App. 781, 807 (2023).

Given his history of insubordination and the serious nature of the insubordination at the meeting, the Fire Chief was within his rights to terminate plaintiff for the reasons stated in the termination letter: the most recent insubordination incident and his history of insubordination. The circumstances surrounding the termination were such that no inference of racial discrimination could be drawn and there was no evidence to suggest the stated reasons for termination were pretextual.[6]

The City also argued that plaintiff is collaterally estopped to deny he was insubordinate because he lost an arbitration on the grievance he filed under the collective bargaining agreement in which the State Labor Board as arbitrator found that he was fired for just cause.[7] Although an arbitration award is entitled

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[6] That the Fire Chief was white, and plaintiff was African American alone does not raise an inference of racial discrimination. The City also presented evidence the Fire Chief had in the past terminated two white firefighters for serious misconduct.

[7] The question presented to the State Labor Board for determination was: "Did the City of Stamford have just cause to terminate the Grievant, Jerome Whitaker?" The arbitration award included factual findings of insubordinate conduct that could be held to have preclusive effect. The Labor Board's decision, at page 13, states: "In summary, [Plaintiffs] refusal to obey an order and abusive comments toward his supervisors as described by the witnesses were inappropriate and when told to stop speaking so that the directive could be explained, he engaged in a series of expletives and came close to physical contact with his supervisor. This behavior is unacceptable and rises to the level of insubordination ...."

to collateral estoppel effect on the issues actually presented and necessarily decided by the arbitrator, see e.g., *Doyle v. Universal Underwriters Insurance Company*, 179 Conn.App. 9, 14-18 (2017), the issue of racial discrimination was not presented to or reached by the arbitrator. Although the plaintiff may not relitigate the issue of whether there was just cause to terminate under the collective bargaining agreement, he would have been able to assert the discrimination claims that were never presented in the arbitration. The arbitration award did preclude relitigating whether the conduct found to be insubordinate by the arbitrator had occurred and whether there was just cause to terminate him for insubordination under the collective bargaining agreement. Under these circumstances where an inference of discriminatory motivation may not be drawn from the evidence submitted, the arbitration award affirmed that there were legitimate, nondiscriminatory reasons for plaintiff's termination.

The City presented uncontroverted evidence of a nondiscriminatory reason for its employment termination decision; the plaintiff failed to present sufficient evidence to raise a genuine issue of material fact that the reason given was pretextual; summary judgment is appropriate. The City met its burden of proving that it was entitled to judgment as a matter of law. Plaintiff failed to meet his burden of presenting evidence that would show there were genuine and material issues of fact that his termination occurred under circumstances giving rise to an inference of discrimination or that the stated reasons for his termination, his insubordination with a history of insubordination, was a pretext for racial discrimination.

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Krumeich, J.T.R.

Notice sent to all counsel of record on 4/24/2024. J. Baker (AC)

Decision entered in accordance with the foregoing 4/24/2024.