UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EDGAR HARRIS,	)	
	)	
Plaintiff,	)	
	)	**Cause No. 4:11-cv-02023-CEJ**
v.	)	
	)	
PLANNED PARENTHOOD OF THE ST. LOUIS REGION AND SOUTHWEST MISSOURI,	)	
	)	
Defendant.	)	

DEFENDANT'S TRIAL BRIEF

In accordance with the Court's Case Management Order, Defendant Planned Parenthood of the St. Louis Region and Southwest Missouri ("Defendant" or "Planned Parenthood") hereby submits its Trial Brief. Defendant terminated Plaintiff Edgar Harris's ("Plaintiff") employment after he made a threat of violence in the workplace, in violation of Defendant's zero tolerance workplace violence policy, and then lied about actions Defendant took following that threat. Plaintiff has produced no evidence that Defendant terminated his employment on the basis of race. Defendant had a legitimate, nondiscriminatory reason for firing Plaintiff, and he has no evidence that this reason was a pretext. Accordingly, Defendant is not liable for race discrimination under Title VII.

I. FACTUAL BACKGROUND

Since 2006, Defendant has employed nine security guards, including Plaintiff, all of whom are African-American. Defendant hired Plaintiff as a security guard on March 30, 2009. Mr. Tom Hemingway, Defendant's Vice-President of Finance and Operations, supervises the security guards and hired Plaintiff. Plaintiff was an at-will employee. When he was hired, Plaintiff was provided with a copy of the Employee Manual for Planned Parenthood of the St.

Louis Region ("Employee Manual"), and he acknowledged that he "must abide by the policies and procedures contained in the Manual or which may come into existence in the future."

The Employee Manual states that employees should generally provide at least 30 minutes notice of absences, tardiness or early departures. However, the Manual goes on to state that "some departments require more than 30 minutes advance notice." Security was one of those departments. The Employee Manual further provides that "[a]bsence without notice and permission of your supervisor (except in cases when notice is not possible) or repeated absenteeism, tardiness or early departure from work may result in disciplinary action."

Defendant's Employee Manual also contains a section entitled "Zero Tolerance Workplace Violence Policy" ("Workplace Violence Policy"). The Workplace Violence Policy states:

> PPSLR strives to be a safe, open, affirming and great place to work.
>
> The safety and security of employees and volunteers is of vital importance to PPSLR. Therefore, PPSLR has adopted this Zero Tolerance Policy for workplace violence. Acts or threats of physical violence, including intimidation, harassment and/or coercion, which involve or affect PPSLR employees, volunteers or clients/patients, or which occur on PPSLR premises, will not be tolerated.
>
> The prohibition against threats and acts of violence applies to all persons associated with PPSLR, including, but not limited to, PPSLR personnel, contract and temporary workers, volunteers and interns and anyone else on PPSLR premises. Violation of this policy by an employee will result in disciplinary action, up to, and including, termination. Violation of this policy, by anyone, may also result in criminal charges.

(emphasis added.) The Workplace Violence Policy provides specific examples of workplace violence, which include but are not limited to "[t]hreatening physical or aggressive conduct directed toward another individual," "[v]eiled threats of physical harm or like intimidation" and "[p]ossession of, or advocating illegal use of, firearms, bombs, or weapons . . . ." Finally, the Workplace Violence Policy provides that "PPSLR will immediately investigate any complaint of

actual, threatened or suspected violence, and will take appropriate action which may include, depending on the circumstances . . . termination, suspension or other disciplinary action . . ." (emphasis added).

During the month of September 2011, Plaintiff violated Defendant's Attendance Policy on at least three occasions. Consequently, on September 13, 2011, Mr. Hemingway, Plaintiff's supervisor, held a meeting with Plaintiff and his fellow security guard, Mario Melvin, who is also African-American, to discuss Plaintiff's inability to follow the attendance policy. During the September 13th meeting, Plaintiff became very disgruntled and threatening to both Mr. Melvin and Mr. Hemingway.

On September 27, 2011, Plaintiff informed Mr. Hemingway that he needed to be absent from work on September 28, 2011 because of a court date. When Mr. Hemingway informed Plaintiff that he had, yet again, failed to follow the Attendance Policy and that no guard could handle his shift, Plaintiff became angry. When Mr. Hemingway got in his car to leave the premises for the day, he stopped to speak with Plaintiff. Plaintiff said he did not have any questions for Mr. Hemingway, and then stated "I should shoot this place up."

Mr. Hemingway left the premises and immediately called another Planned Parenthood employee, Mary Kogut, to monitor Plaintiff's behavior. Mr. Hemingway was ultimately able to arrange for guard coverage the next day, but Plaintiff refused to answer the telephone when Mr. Hemingway called the guard desk to report that coverage was available. Eventually, at Mr. Hemingway's request, a co-worker named Alison Gee informed Plaintiff that his shift was covered. Later that evening, Plaintiff called Ms. Kogut to say he was available to work. Ms. Kogut informed Plaintiff that his shift was covered and that he had been told not to report by a co-worker. Plaintiff denied receiving that notice. This denial was a lie. Both Ms. Kogut and

Mr. Hemingway also contacted Cathy Williams, Defendant's Vice-President of Human Resources, on September 27, 2011, to report what had transpired.

Because Plaintiff's threat to "shoot this place up" violated Defendant's Workplace Violence Policy, and because he was dishonest about learning that he did not need to report for his September 28th shift, the decision was made to terminate his employment. On September 28, 2011, Mr. Hemingway and Ms. Williams contacted Plaintiff "to inform him that his employment with [Defendant] was terminated due to his verbal threat against the organization on September 27, 2011." Defendant terminated Plaintiff's employment on September 28, 2011.

Plaintiff filed the current lawsuit on November 18, 2011. He alleges that Defendant's termination of his employment violated Title VII of the Civil Rights Act of 1964 because Defendant purportedly discriminated against him on the basis of race. During the course of discovery, Defendant served interrogatories on Plaintiff, including an interrogatory that asked him to "state any and all facts supporting your allegation that Planned Parenthood terminated your employment on the basis of race." In response, Plaintiff wrote: "Ms. Williams believed Tom Hemingway whom [sic] is a white man. Hearsay allegations with no investigation and no evidence to support his claim. I feel my situation involves race bias because it was presumed that what Tom Hemingway said was true." Plaintiff has produced no other facts, documents and/or evidence to support his claim of race discrimination. Defendant adamantly denies Plaintiff's claim. Plaintiff's race was not a factor in Defendant's decision to terminate Plaintiff's employment.

II. LEGAL ARGUMENT AND AUTHORITY

Cases alleging race discrimination under Title VII are evaluated under the burden-shifting framework set forth by the United States Supreme Court in *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792 (1973). *See Valdepena v. Research Psychiatric Center*, 2012 U.S. Dist. LEXIS 145900 at *7 (W.D. Mo. 2012). First, an employee must prove "by a preponderance of the evidence a *prima facie* case of discrimination." *Id.* Second, if the employee meets his burden, the "burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge." *Id.* at *8. And third, so long as the employer satisfies its burden, "the burden shifts back to the employee to establish by a preponderance of the evidence that the reason given by the employer was not the true reason but rather was a pretext for discrimination." *Id.*

A. Plaintiff Has No Evidence Supporting a *Prima Facie* Case of Race Discrimination.

Under the *McDonnell Douglas* framework, Plaintiff must first make a *prima facie* case of discrimination. "The employee meets this burden, under Title VII, by establishing (1) she is within the class sought to be protected by the statute; (2) she was qualified for her position and performed her duties adequately; (3) she was discharged or suffered an adverse employment action; and (4) there is some evidence from which the court can infer unlawful discrimination is involved in the adverse action." *Id.* at *8. *See also Sallis v. Univ. of Minn.*, 408 F.3d 470, 476 (8th Cir. 2005).

Plaintiff satisfies element (1), part of element (2) and element (3)—he is a member of a protected class (African-Americans) who suffered an adverse employment action (termination). With regard to element (2), Defendant does not dispute that Plaintiff was qualified to work as a security guard. Plaintiff did, however, have attendance-related performance issues in the weeks leading up to his termination. These issues led to a meeting between Plaintiff, his supervisor and a fellow security guard on September 13th, at which Plaintiff became very disgruntled and threatening. Further, on the day before his termination, Plaintiff again failed to comply with Defendant's Attendance Policy when he failed to provide adequate notice of his need for time off

work the following day. In addition, Mr. Hemingway heard Plaintiff state that he would "shoot this place up" on September 27, 2011. Based on this evidence, Plaintiff did not perform his duties adequately. *Valdepena*, 2012 U.S. Dist. LEXIS at *8.

Furthermore, with regard to factor (4), Plaintiff has no "evidence from which the court can infer unlawful discrimination is involved in the adverse action." *Id.* Plaintiff made an untimely request for time off. His request was denied by Mr. Hemingway because alternate security coverage could not be coordinated on such short notice. Plaintiff became angry. Shortly thereafter, as he was leaving the building, Mr. Hemingway heard Plaintiff threaten to "shoot this place up." Mr. Hemingway immediately notified Mary Kogut, who was present at the facility, and asked her to assess Plaintiff's state of mind. Mr. Hemingway also notified Cathy Williams, Defendant's Vice-President of Human Resources. In the following hours, Mr. Hemingway coordinated security coverage for the next morning and, when Plaintiff would not answer the security desk phone, arranged for Ms. Gee, to inform Plaintiff not to report for his shift on September 28th. Plaintiff subsequently lied to Ms. Kogut when he spoke with her and denied being informed (by Ms. Gee) that arrangements had been made to cover his shift. At that point, following his threat of violence, as well as his dishonesty, Defendant decided to terminate Plaintiff's employment.

Plaintiff's sole allegation of race discrimination is that Defendant believed Mr. Hemingway's version of events without any investigation and Mr. Hemingway is white. But the evidence tells a different tale. Mr. Hemingway hired Plaintiff, as well as other African-American security guards, and certainly was involved in Plaintiff's termination. These facts undermine any inference of discrimination by Mr. Hemingway or Defendant. Several Circuit Courts of Appeal, including the Eighth Circuit, have recognized a "same actor" inference which

holds that if the same individual hired and fired the employee in question, and that individual's protected trait is non-changing (such as race), that weighs against a finding of discrimination. *See, e.g. Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir.); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995); *Rand v. CF Indus., Inc.*, 42, F.3d 1139, 1147 (7th Cir. 1994); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993).

Furthermore, Defendant did not have to rely on just Mr. Hemingway's report of the threat to conclude Plaintiff's denial was a lie. Several other employees were involved in the events of September 27th. Each prepared a memorandum of what occurred. These memos support Mr. Hemingway's version of events and reflect that Plaintiff also lied when he denied Ms. Gee told him not to report for work on September 28th. Defendant was fully entitled to believe the statements made by multiple employees and to take action regarding a threat of violence in the workplace. Plaintiff's disagreement with that decision is not evidence of race discrimination.

These facts do not support an inference that Plaintiff's race was a motivating factor in his termination. To the contrary, the evidence establishes that Plaintiff, an at-will employee, was fired because he violated Defendant's Workplace Violence Policy and then lied about communications with his co-workers. Such facts do not support a *prima facie* case of race discrimination.

B. Defendant Terminated Plaintiff's Employment Because He Violated a Zero Tolerance Workplace Violence Policy and Lied About Subsequent Communications From Defendant.

Moreover, the evidence shows that Defendant terminated Plaintiff's employment for a legitimate, nondiscriminatory reason: his threat of violence in the workplace and dishonesty. The law is well-settled that threats of violence are grounds for termination: "Both actual violence against fellow employees and threats of violence are legitimate reasons for terminating an

employee." *Clark v. Runyon*, 218 F.3d 915, 919 (8th Cir. 2000). *See also Merheb v. Ill. State Toll Highway Authority*, 267 F.3d 710, 713-714 (7th Cir. 2001); *Anderson v. Avon Prods., Inc., et al.*, 2008 U.S. Dist. LEXIS 57741 at *32-33 (S.D. Ohio). There is no dispute that a threat to "shoot this place up" violates Defendant's Workplace Violence Policy. The Employee Manual expressly states that the Policy is zero tolerance. The Manual plainly explains in at least two places that violating the Policy will result in disciplinary action, up to and including termination. Defendant's Workplace Violence Policy is race neutral—its terms and potential punishments are applicable to employees, patients and clients, regardless of race. Plaintiff received the Employee Manual and acknowledged his responsibility to abide by its policies. He was, therefore, aware of the Zero Tolerance Workplace Violence Policy and the ramifications of violating that Policy.

Defendant takes security issues very seriously, and its Workplace Violence Policy demonstrates this seriousness by treating violations as severe disciplinary infractions warranting termination. Defendant's decision to fire Plaintiff was motivated entirely by a desire to strictly enforce that Policy. It had nothing to do with Plaintiff's race. Defendant has, therefore, met its burden of providing a legitimate, nondiscriminatory reason for terminating Plaintiff's employment.

C. Defendant's Reason for Terminating Plaintiff's Employment Was Not a Pretext for Discrimination.

Because the evidence shows that Defendant fired Plaintiff for a non-discriminatory reason, it is his responsibility to prove by a preponderance of the evidence this reason is a pretext. "This burden will not be met by simply showing that the reason advanced by the employer was false; rather [Plaintiff] must demonstrate that a discriminatory animus lies behind the defendants' neutral explanations." *Roxas v. Presentation Coll., et al.*, 90 F.3d 310, 316 (8th Cir. 1996). "Under well-settled principles of employment law, this Court does not sit as a super-

personnel department over employers scrutinizing and second-guessing every decision they make." *Brown v. Shineski*, 2012 U.S. Dist. LEXIS 140665 at *51 (N.D. Ill.) (internal quotations omitted). As such, "[c]ourts are not concerned with whether or not the employer's actions were mistaken, ill considered, or foolish, so long as the employer honestly believed those reasons." *Id.* (internal quotations omitted).

Plaintiff has produced no evidence that Defendant's decision-making was influenced by race. There is no fact, no document and no other information supporting an argument that race played any role in Defendant's reasoning. Plaintiff violated Defendant's Workplace Violence Policy when he threatened to "shoot this place up." It is well-settled that threats of violence are grounds for termination and Defendant was well-within its rights to enforce its Workplace Violence Policy and terminate Plaintiff's employment. Plaintiff may disagree with Defendant's decision, but disagreement does not establish race discrimination. Such an accusation is all the more unjustified considering that Defendant has employed nine African-American security guards in the past seven years, including Plaintiff, its current security staff is comprised entirely of African-American guards and Mr. Hemingway, the individual who heard Plaintiff's threat, has responsibility for hiring and supervising the security guards.

Under the law, it is not enough for Plaintiff to show that Defendant's decision to fire Plaintiff was mistaken or ill-considered. To the contrary, Plaintiff "must demonstrate that a discriminatory animus lies behind the defendants' neutral explanations." *Roxas*, 90 F.3d at 316 (emphasis added). *See also Brown*, 2012 U.S. Dist. LEXIS 140665 at *51. In this case, Plaintiff has not—and cannot—meet this burden. Accordingly, Defendant is not liable under Title VII.

CONCLUSION

Plaintiff cannot establish a *prima facie* case of racial discrimination. Even if he could, Defendant had a legitimate, nondiscriminatory reason to terminate his employment, and there is no evidence that Defendant's explanation is a mere pretext. Thus, under the framework established in *McDonnell Douglas*, Plaintiff cannot prove his claim of race discrimination under Title VII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of March, 2013, the foregoing was served upon the following *pro se* party by first-class U.S. Mail, postage prepaid:

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