

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JOHNNY JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	No. 03-2432-V
)	
MEMPHIS CITY SCHOOLS,)	
)	
Defendant.)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Johnny Johnson, a sixty-six year old African-American male, sued ("Memphis City Schools") alleging retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2003).¹ The parties have consented to trial before the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). Now before the court is a motion filed by Memphis City Schools for summary judgment. For the reasons that follow, Memphis City Schools' motion for summary judgment is granted.

1. Although Johnson exhausted a claim pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (ADEA), he did not assert an ADEA claim in his complaint and the ninety-day period for bringing such a claim has expired. Accordingly, the only claim in this case is the Title VII retaliation claim.

UNDISPUTED FACTS

For the purposes of this motion, the court finds that the following facts are undisputed.² Beginning in 1991, Johnson began working as a substitute teacher for Memphis City Schools. In 1992, Johnson applied for full-time position as a research evaluator with Memphis City Schools, but Memphis City Schools declined to offer him the position (Pl.'s Dep. at 122-23.) He subsequently filed an Equal Employment Opportunity Complaint with the EEOC alleging that Memphis City Schools had discriminated against him by failing to hire him in violation of Title VII. (*Id.*) The EEOC determined that Johnson's claim was without merit and dismissed the charge. (Def.'s Mot. for Summ. J. at Ex. C.) Johnson then filed suit with the U.S. District Court, but the suit was dismissed on the merits.³

2. The court's task in discerning which facts are disputed by Johnson is made somewhat onerous by Johnson's failure to abide by the local rules of the district. Local Rule 7.2(d)(3) provides that the "opponent of a motion for summary judgment who disputes any of the material facts upon which the proponent has relied pursuant to subsection (2) above shall respond to the proponent's numbered designations, using the corresponding serial numbering, both in the response and by affixing to the response copies of the precise portions of the record relied upon to evidence the opponent's contention that the proponent's designated material facts are at issue." Here, the court is unable to find in Johnson's motion any numbered designations disputing any of the facts set forth by Memphis City Schools. As such, the court must assume that the facts set forth by Memphis City Schools in its motion are undisputed by Johnson.

3. It should be noted that Johnson has previously brought Title VII or ADEA suits against The University of Memphis (No. 03-2433-JDB/dkv (dismissed 7/13/04)), FedEx (02-2991-BBD (summary

(Pl.'s Dep. at 123.) During this time, Johnson continued to work as a substitute teacher.

On November 28, 1993 James Sandridge, the Assistant Principal at Raleigh Egypt High School, sent a letter to the Division of Personnel Services of Memphis City Schools stating that students had complained about the in-classroom conduct of Johnny Johnson. (Foster Aff., Def.'s Mot. for Summ. J. at Ex. B.) Several students stated that Johnson had told them that he had killed forty people as a "hit man" and that he had "voo-doo dolls and needles" to correct behavior. (*Id.*) A sixteen year old girl reported that Johnson asked her if he could father her children. (*Id.*) After this incident, Johnson was told not to accept further assignments as a substitute teacher until further notice was given to him by the personnel office. (*Id.*) Johnson denies that he ever made the

judgment for defendant granted June 15, 2004)), Midtown Mental Health (02-2990-DKV (summary judgment for defendant Feb. 20, 2004)), Carrier Corporation (No. 98-2194-Tu/A (summary judgment for defendant granted Apr. 5, 1999)), the University of Memphis (No. 95-2894-T/B (dismissed May 14, 1996)), Shelby State Community College (No. 94-2350-A (summary judgment for defendant granted Mar. 16, 1995)), Shelby County (No. 92-2470-A (judgment for defendant Oct. 14, 1993)), the Regional Medical Center (No. 92-2756-H/B (summary judgment for defendant granted July 16, 1993)), and the State Technical Institute (No. 91-2597-H/B (summary judgment for defendant granted Oct. 14, 1992)) in this district. Except for the case against Carrier Corporation, where the plaintiff was fired after engaging in a physical confrontation with another employee, each of the plaintiff's other discrimination claims involve failures to hire. Furthermore, Johnson currently has other employment discrimination lawsuits pending in federal court.

statements contained in the letter written by Sandridge and claims that the charges were never proven to be true. (Def.'s Mot. for Summ. J. ¶ 6.)

Despite Memphis City Schools' request that Johnson not accept future assignments, Johnson continued working as a substitute teacher until the middle of 1994 when he decided not to return to work because of fear for his safety. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at VII-VIII.) After voluntarily leaving his position, Johnson filed for unemployment benefits. These benefits were denied on August 31, 1994, because it was determined that there was work available despite Johnson's refusal to accept assignments. (Def.'s Mot. for Summ. J. at 3, n.3.) Although Memphis City Schools' records do not indicate that Johnson worked as a substitute in 1995 or 1996, Johnson claims to have resigned in 1996. (*Id.*)

On December 26, 2001, Johnson applied for re-employment as a substitute teacher with Memphis City Schools. (Foster Aff., Def.'s Mot. for Summ. J. at Ex. A.) His application was denied on January 18, 2002 by James Foster, the coordinator in the Division of Personnel Services. (Foster Aff., Def.'s Mot. for Summ. J. at ¶¶ 3-5.) Foster explained in a sworn affidavit that after reviewing Johnson's personnel file, which included the allegations in the letter sent to the personnel office by James Sandridge, he was not

willing to recommend Johnson as a substitute teacher for Memphis City Schools. (*Id.*) Foster also avows, and it is not disputed by Johnson, that when he made his decision, he "had no knowledge that Mr. Johnson had previously sued the Memphis City Schools." (*Id.*)

After receiving Foster's letter denying his application, Johnson filed a charge with the Equal Employment Opportunity Commission on April 9, 2003, alleging that Memphis City Schools had failed to hire him in retaliation for filing previous charges of discrimination in 1992, as well as the unemployment benefits lawsuit in 1996. (Dismissal and Notice of Rights, Compl.) the EEOC issued to Johnson a Dismissal and Notice of Rights to sue on May 29, 2003. (*Id.*) Thereafter, Johnson brought this suit against Memphis City Schools on June 9, 2003, in the U.S. District Court for the Western District of Tennessee. (*Id.*)

ANALYSIS

As grounds for summary judgment, Memphis City Schools first asserts that Johnson is unable to establish a prima facie case of retaliation under Title VII. Johnson concedes that he has no direct evidence of retaliation, stating in his deposition that he has "no hard facts, concrete evidence, other than what [he] perceive[s] to be the case." (Pl.'s Dep. at 130-31.) Thus, as Memphis City Schools argues, in order to prove unlawful retaliation, Johnson must establish a prima facie case under the

McDonnell-Douglas framework. Memphis City Schools claims that Johnson is unable to make out a prima facie case because there is no causal connection between Johnson's 1992 discrimination lawsuit and Memphis City Schools's 2002 employment action. Johnson, in response, contends that his previous EEOC filings against Memphis City Schools do provide a causal connection as to why he was not hired.

Even if Johnson is able to establish a prima facie case of retaliation, Memphis City Schools maintains that there was a legitimate nondiscriminatory reason for its actions. According to Memphis City Schools, James Foster reasonably relied on the information contained in Johnson's record in making his decision not to extend an offer to Johnson for a position as a substitute teacher. Johnson contends that the information in his personnel file was never found to be true and should not have been considered during the hiring process.

Finally, Memphis City Schools claims that Johnson cannot establish that Memphis City Schools's hiring decision was a mere pretext for purposeful discrimination. To support its contention, Memphis City Schools points out that Johnson has come forward with no evidence to suggest that Memphis City Schools' decision not to hire Johnson was based on anything more than an examination of Johnson's personnel file. Johnson again contends that the

information in his file was unsubstantiated.

Johnson argues that the motion for summary judgment should be denied for two reasons. He first argues that Memphis City Schools failed to comply with Local Rule 7.2 in filing its motion for summary judgment. Local Rule 7.2(d)(2) provides that the proponent of a motion for summary judgment "shall designate in the accompanying memorandum by serial numbering each material fact upon which the proponent relies in support of the motion and shall affix to the memorandum copies of the precise portion of the record relied upon as evidence of each material fact." On pages two, three, and four of Memphis City Schools' memorandum in support of its motion, Memphis City Schools lists fourteen (14) statements of material fact. Additionally, Memphis City Schools cites to an attached exhibit following each fact. This is clearly in compliance with local rule 7.2. Therefore, Johnson's argument that the motion should be denied because Memphis City Schools has not complied with Rule 7.2 is meritless.

Johnson's second argument is that Memphis City Schools has failed to comply with the Federal Rules of Civil Procedure regarding the use of depositions. This argument is not well taken either. It appears to the court that Johnson has misinterpreted the rules. Johnson claims that under Rules 32 and 30(a)(2)(C) a party may not use a deposition of a person who at the time of the

deposition was not represented by counsel in support of a motion for summary judgment. That is not what the Rules provide. Thus, Johnson's deposition will be considered when ruling on this motion for summary judgment.

A. Summary Judgment Standard

Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992)(per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[T]he mere

existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

In deciding a motion for summary judgment, "this court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993)(quoting *Anderson*, 477 U.S. at 251-53). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Adams v. Metiva*, 31 F.3d 375, 378 (6th Cir. 1994).

B. Prima Facie Case of Retaliation

_____To prevail on a retaliatory discharge claim under Title VII, a plaintiff must prove: (1) that the plaintiff engaged in an activity protected by Title VII; (2) that the defendant had knowledge of the plaintiff's exercise of protected rights; (3) that the defendant thereafter took an employment action adverse to the plaintiff; and (4) that a causal connection existed between the protected activity and the adverse employment action. *Nguyen v. City of Cleveland*, 229 F.3d 559 (6th Cir. 2000). Memphis City Schools argues that there is no causal connection between Johnson's 1992 discrimination suit and the denial of Johnson's 2002 application for a position as a substitute teacher.

As a preliminary matter, it is necessary to address whether Johnson's activities are protected by Title VII and thus relevant to this motion. 42 U.S.C. § 2000e-3 states that it shall be unlawful for an employer to discriminate against any "applicant[] for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Johnson claims that the unemployment benefit action that was filed in 1996 is relevant because there is a causal connection between the filing of that complaint and Memphis City Schools's reason for not hiring Johnson

in 2002. However, an unemployment benefit action is not an action arising under 42 U.S.C. § 2000e *et. seq.* Thus, by filing the 1996 lawsuit, Johnson was not engaged in a protected Title VII activity and it therefore cannot be considered in Johnson's claim for retaliation. There is no dispute that Johnson's 1992 discrimination suit is relevant. Thus, the 1992 lawsuit forms the only basis for his retaliation claim.

To validate its assertion that there is no causal connection between Johnson's 1992 discrimination suit and Memphis City Schools' refusal to hire Johnson in 2002, Memphis City Schools points out that there is not sufficient temporal proximity between the protected activity in 1992 and the hiring decision in 2002 to impute a retaliatory motive to Memphis City Schools. Memphis City Schools also relies on the fact that Johnson does not have a scintilla of evidence to suggest a causal connection between the two events.

To establish a causal connection between the 1992 discrimination suit and Memphis City Schools' hiring decision in 2002, Johnson "must produce sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not [undertaken the protected activity.]" *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). "Although no one factor is dispositive in establishing

a causal connection, evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Id.* When the proximity between the protected activity and the adverse employment action is "acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation to arise." *DiCarlo v. Potter*, 358 F.3d 408, 421 (6th Cir. 2004.)

Here, Johnson provides no direct evidence of a causal connection between the protected activity in 1992 and the events of 2002. At Johnson's own deposition regarding the matter of retaliation, Johnson stated, "I want to go on the record of saying, I have no hard facts, concrete evidence, other than what I perceive to be the case." (Pl.'s Dep. at 131.) Johnson's own perception is not sufficient evidence to raise an inference that Memphis City Schools failed to rehire Johnson in 2002 in retaliation for the discrimination suit filed by Johnson in 1992. In addition, Johnson has not attached any evidence to his response to Memphis City Schools's motion that supports his position. The items that Johnson has presented to the court merely set forth the undisputed facts and do nothing to raise an inference of retaliation.

Additionally, there is no temporal proximity between the two events that would suggest a causal connection. The two events are

separated by ten years. The Sixth Circuit has been unwilling to find a causal connection through temporal proximity in cases where there has been more than two months between the protected activity and the adverse employment action. *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999); *Cooper v. City of N. Olmstead*, 795 F.2d 1265 (6th Cir. 1986)(holding that a four month gap between the protected activity and the adverse employment action was insufficient to support an inference of retaliation). Accordingly, the court cannot find an inference of retaliation based on the length of time between the two events in this case.

Because Johnson lacks the evidence to support a causal connection between his 1992 discrimination suit and Memphis City Schools' decision not to rehire him, Johnson cannot establish an essential element of a prima facie case for a Title VII claim of retaliation. Consequently, summary judgment is proper on this basis alone.

C. Legitimate, Non-discriminatory Reason for Memphis City Schools's Decision

Assuming arguendo that Johnson is able to establish a prima facie case of retaliation, the burden of production shifts to Memphis City Schools to articulate a legitimate, non-discriminatory reason for its decision not to rehire Johnson. *McDonnall Douglas Corp. v. Green*, 411 U.S. 792 (1973). Memphis City Schools claims

that Johnson was not rehired because of the information contained in his personnel file relating to his misconduct while acting as a substitute teacher for Memphis City Schools in the early 1990's. Johnson has come forth with no evidence to rebut this claim. Accordingly, the court finds that Memphis City Schools has met its burden of articulating a legitimate, non-discriminatory reason for its employment decision. Thus, Memphis City Schools is entitled to summary judgment unless Johnson can show that this reason was a mere pretext for retaliation.

D. Memphis City Schools's Decision Was Not a Pretext for Discrimination

Because the court finds that Memphis City Schools can establish a legitimate, non-discriminatory reason for its decision not to rehire Johnson, the burden shifts back to Johnson to show by a preponderance of the evidence that Memphis City Schools's decision was a pretext for retaliation "by establishing that the proffered reason: 1)has no basis in fact; 2)did not actually motivate the adverse action; or 3)was insufficient to motivate the adverse action." *Abbott v. Crown Motor Company*, 348 F.3d 537, 542 (6th Cir. 2003). To meet this burden, Johnson claims that the information considered by Foster in his hiring decision was never proven to be true. He further claims that the accusations should have been taken off his record ten years ago and that the only

reason that it was left on his record was to prevent him from obtaining a future position with Memphis City Schools. The court finds this claim to be unsubstantiated as Johnson has presented nothing to the court, other than his own opinion, to suggest that Memphis City Schools improperly maintained Johnson's employment record in an attempt to discourage future employment. Furthermore, James Foster, the person who reviewed Johnson's file and was in charge of hiring decisions, asserted in a sworn affidavit that he had no knowledge that Johnson had previously sued Memphis City Schools.

Even if the accusations contained in Johnson's record were never proven to be true, James Foster and Memphis City Schools acted reasonably in relying on the information contained in Johnson's record. Johnson has not shown the court any evidence which suggests that Memphis City Schools was motivated by anything other than what was contained in Johnson's personnel file in reaching its decision not to rehire him. Again, Johnson only relies on what he perceives the case to be, which is simply not enough to prove by a preponderance of the evidence that the real reason for Memphis City Schools' decision was based on retaliation. Where no evidence is presented to the support Johnson's contrary position, reasonable jurors could not differ as to the proffered reason for Memphis City Schools' decision.

CONCLUSION

When viewing the evidence in a light most favorable to the plaintiff, this court finds that no genuine issues of material fact exist with respect to whether Johnson was not rehired in retaliation for filing a discrimination suit against Memphis City Schools some ten years before. Moreover, this court finds that Johnson has produced no evidence to support a claim for Title VII retaliation. Therefore, Memphis City Schools is entitled to a judgment as a matter of law. Accordingly, Memphis City Schools' motion for summary judgment is granted.

Another issue to be addressed is whether plaintiff should be allowed to appeal the court's detailed order granting the defendant summary judgment and closing the case *in forma pauperis*. Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The same considerations that lead the court to grant summary judgment and dismiss this case also compel the conclusion that an appeal would not be in good faith.

It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff is not taken in good

faith and plaintiff may not proceed on appeal *in forma pauperis*.

The Sixth Circuit Court of Appeals' decisions in *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997), and *Floyed v. United States Postal Service*, 105 F.3d 274 (6th Cir. 1997), apply to any appeal filed by the plaintiff in this case.

If plaintiff files a notice of appeal, he must pay the entire \$105 filing fee required by 28 U.S.C. §§ 1913 and 1917. The entire filing fee must be paid within thirty days of the filing of the notice of appeal. By filing a notice of appeal the plaintiff becomes liable for the full amount of the filing fee, regardless of the subsequent progress of the appeal. If the plaintiff fails to comply with the above assessment of the appellate filing fee within thirty days of the filing of the notice of appeal or the entry of this order, whichever occurred later, the district court will notify the Sixth Circuit, which will dismiss the appeal. If the appeal is dismissed, it will not be reinstated once the fee is paid. *McGore*, 114 F.3d at 610.

IT IS SO ORDERED this 1st day of December, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE