

position as journeyman carpenter on October 24, 2001. Def.'s Mem. Supp. Mot. Summ. J. Ex. 2. At his request, the Union placed Plaintiff on its Out of Work List ("List") shortly after his discharge. Def.'s Mem. in Supp. of Mot. for Summ. J., p. 3; Compl. ¶ 10. List Rules and Procedures require that a potential employee be available by phone 8:00 a.m. to 4:00 p.m., Monday through Friday, in order to be referred for employment. Def.'s Mem. Supp. Mot. Summ. J. Ex. A at 3. If the potential employee is not available, the next name will be called. Id. The Union asserts that it unsuccessfully attempted to contact Plaintiff four times on two different days in November 2001, and thereafter went to the next name on the List. Def.'s Mem. Supp. Mot. Summ. J., Ex. 1 at 3. On May 6, 2002, Plaintiff's membership in the Union was suspended because his dues had been delinquent for over six months. Id. at 4. Upon payment of dues, Plaintiff's membership was reinstated on May 9, 2002, for the following six months. Pl.'s Rule 26(a)(1) Initial Disclosures., Ex. 3.2.

Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on May 10, 2002. Def.'s Mem. Supp. Mot. Summ. J. ¶ 2; Compl., Ex. 3. In the charge, Plaintiff alleged that the Union discriminated against him on the basis of race by referring employment first to members who were located below his name on the list. Compl. ¶ 10. He also alleged that the Union retaliated against him by suspending his membership once he filed his claim. Id.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment may be granted if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are those facts which are defined by substantive law and are necessary in order to apply the law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A

genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the non-moving party. Id.

In evaluating a motion for summary judgment, the evidence, facts, and any inferences must be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed.2d 538 (1986); Walbourn v. Erie County Care Facility, 150 F. 3d 584, 588 (6th Cir. 1998). Once a properly supported motion for summary judgment has been made, the “adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). Summary judgment is appropriate when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” Matsushita Elec. Indus. Co., 475 U.S. at 587.

III. ANALYSIS

Under Title VII, a labor union is prohibited from discriminating against any individual with regard to employment opportunities because of race, color, religion, sex, or national origin. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 284-85, 96 S.Ct. 2574, 2580-81, 49 L.Ed.2d 493 (1976). A plaintiff may establish a claim of discrimination by showing either a disparate impact or disparate treatment.

A. Disparate Impact

Upon review of the case record as a whole, the Court finds that Plaintiff has not created a genuine issue of material fact under the Title VII disparate impact discrimination analysis. A plaintiff proves disparate impact discrimination by showing first the adverse impact of an employment practice upon members of a minority group. Wards Cove Packing Co. v. Atonio,

490 U.S. 642, 646, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989). In the instant action, Plaintiff has not made an allegation that another member of a minority group was discriminated against, nor has he claimed that referral from the List leads to a pattern of impairing the employment of African-Americans. Next, the burden shifts to the defendant to produce evidence of a legitimate business justification for the action. Id. at 658. Finally, the plaintiff may rebut by showing either that the defendant's business justification does not significantly serve the legitimate employment goals of the employer, or by proving that there are alternative means for the employer to use without the undesired racial impact. Id. at 658-59. The Court need not analyze whether the Union had a legitimate business justification, because Plaintiff failed to establish an adverse impact. As to the retaliation claim, Plaintiff has not put forth any evidence that his membership was suspended after the filing of his EEOC claim, since his membership was reinstated May 9, 2002, *before* he filed his EEOC claim on May 10, 2002. Thus, Plaintiff has not met his initial burden of showing the adverse impact of an employment practice upon members of a minority group.

B. Disparate Treatment

Under disparate treatment analysis, a plaintiff must establish that he/she (1) is a member of a protected group, (2) was subject to an adverse employment action, (3) was qualified for the position sought or held, and (4) was replaced by a person outside the protected class.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 (6th Cir. 1994). The fourth element may also be satisfied by showing that "similarly situated" non-protected employees were treated more favorably. Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995). Clearly as an African-American,

Plaintiff is a member of a protected group, establishing the first prong. Plaintiff does not make a showing sufficient to establish the second prong. Plaintiff asserts that the Union skipped over his name in violation of the List rules, but he does not dispute that the Union attempted to refer him to employers two days in November 2001. See Pl.'s Resp. to Mot. for Summ. J. Plaintiff has not put forth enough evidence to create a genuine issue of material fact as to whether he was subject to an adverse employment action. Moreover, Plaintiff does not establish the fourth prong because he makes no assertion that those carpenters referred were of another race. See Compl.; Pl.'s Resp. Mot. Summ. J. All four elements of a prima facie case must be established by a preponderance of the evidence in a disparate treatment case. Plaintiff has failed to set forth specific facts showing that there is a genuine issue for trial that he was either subject to an adverse employment action or that similarly situated, non-protected individuals on the List were treated more favorably. Accordingly, Plaintiff has not made a prima facie case.

IV. CONCLUSION

For the reasons stated herein, the Court finds that Plaintiff failed to establish a prima facie case of race discrimination by a preponderance of the evidence. Accordingly, as no genuine issue of fact exists, the Court grants Defendant's motion for summary judgment.

IT IS SO ORDERED this _____ day of _____ 2003.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT