

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

Danielle Simms,)
Appellant,)
)
v.)
) Case Number: 13-HS-68 (CV)
Office of Congressman Raul Grijalva,)
Appellee.)
)
)

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by Danielle Simms (“Simms”) against the Office of Congressman Raul Grijalva (“Office”). Simms seeks review of the Hearing Officer’s September 25, 2014 Order, which granted the Office’s motion for summary judgment on Simms’ race discrimination complaint.

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings, and the record in these proceedings, the Board reverses the Hearing Officer’s finding of summary judgment and remands to the Hearing Officer.¹

I. Background

Staff Assistant Position

On December 19, 2012, Simms applied for a staff assistant position with the Office for its Washington, D.C. Congressional Office.² At that time, Simms was living in Arizona.

The Office interviewed Simms on two different occasions for the staff assistant position. First, the Office’s scheduler (race unknown)³, interviewed Simms, by telephone, on January 9, 2013.

¹ This case was before the Hearing Officer on remand from the Board’s July 30, 2014 Order, overturning the Hearing Officer’s March 10, 2014 Order, which had dismissed Simms’ complaint on the dual grounds of untimeliness and failure to proceed.

² The background facts are largely taken from Simms’ complaint.

³ At the time, the scheduler was a staff assistant who was transitioning to become the Office’s scheduler.

Then, on January 22, 2013, the scheduler and the chief of staff (race unknown), interviewed Simms, via Skype.

During the second interview, the scheduler and the chief of staff asked Simms if she could speak Spanish. Simms claims that she answered that she had taken Spanish classes in college and “[could] get by.” On January 23, 2013, the chief of staff offered Simms the staff assistant position. Simms accepted the position and began her employment in Washington D.C. on February 4, 2013.

Simms alleges that after she started working it became clear that the Office did not intend for her to remain a permanent employee. She states that she did not receive business cards, unlike the two other new staffers who had started the same day. She also asserts that she experienced delays in enrollment for commuter transit benefits as compared to the two other new staffers who were timely enrolled. She also claims that her paperwork for student loan assistance was delayed.

In addition, she maintains that the Office did not provide her with adequate training. She alleges that she was initially being trained to take over the duties of a legislative correspondent. Yet, Simms asserts that the training stopped without explanation, and that she was also forced to miss training courses for which she had already been registered. Specifically, she claims that she was prevented from attending three legislative correspondence trainings, a computer training class, and a program’s mandatory lecture. She also alleges that the scheduler did not train her on how to effectively interact with constituents and did not make Simms aware of dress code requirements.

Simms also asserts that on February 20, 2013, she met with the scheduler to discuss her first two and a half weeks of employment. Simms claims that the meeting went well. She maintains that they discussed various issues such as updating office emergency records and training related to constituent letter correspondence. Simms submits that there was no discussion about her Spanish-speaking skills.

Termination

Simms claims that on March 15, 2013, the chief of staff advised Simms that she was fired because her Spanish-speaking skills were insufficient for her position. Simms alleges that the chief of staff accused her of often handing the phone to other staff members when Spanish-speaking individuals called. She also claims that the chief of staff told her that a staff member (race unknown) from the Arizona District Office called Simms pretending to be a Spanish-speaking constituent and laughed at Simms because she allegedly could not speak Spanish. Simms’ tenure at the Office lasted six weeks.

Simms maintains that she was surprised by her removal because no employee had advised her that her Spanish-speaking skills were a concern or that speaking Spanish was important for her position. She claims that if speaking Spanish was an essential requirement for her position, then her Spanish-speaking skills should have been tested before she was hired and asked to move 2,300 miles to accept the position.

Simms also disputes the chief of staff's alleged accusations. Simms maintains that she only received two Spanish-speaking calls at the Office. She said that the first call came during her first week when an intern got a call from a Spanish-speaking caller and handed the phone to Simms. Simms claims that she was busy with an urgent task at the time and had asked the scheduler to take the call.

Simms states that the second call occurred on March 13, 2013 and was from the Arizona District Office staff member. With respect to that call, Simms claims that the staffer acted as a Spanish-speaking female constituent who wanted to discuss casework. Simms maintains that the caller asked detailed questions about immigration reform, the Dream Act, and healthcare. She asserts that the caller spoke very fast and ridiculed Simms in Spanish. Simms states that she was unable to understand the woman clearly because she spoke at a fast pace. Simms then claims that an hour later, the legislative director (race unknown), asked Simms to translate a "Back to Work" budget bill in Spanish. Simms did not believe she should have been asked to do the translation because she never indicated that she could do such translations and there were other people in the Office who routinely performed this task. Simms told the legislative director that she could translate the document, but she did not feel comfortable doing so. Simms believes that the request for translation and the "staged" phone call from the district staff member were made to set her up and claim that her Spanish was inadequate for her position. Simms argues that this was pretext for the real reason she was let go, which was because of her race.

Simms also claims that the Office highly exaggerated the need for someone in her position to speak Spanish because, of the approximately 30 calls received by the Office from constituents each week, there was only one Spanish-speaking-only caller every two weeks. Simms also claims that she was the only African-American employee in the Office. She submits that the Office most likely concluded that she was Hispanic during the Skype interview and did not learn that she was African-American until the Office staff met her in person.

Scheduler's Affidavit

In support of its motion for summary judgment, the Office submitted an affidavit from the scheduler who interviewed Simms. The scheduler attests that she received a copy of a press release issued by the House Democratic Whip's Office which announced the launch of an online resume bank for House Democratic offices. The scheduler states that she had been tasked with reviewing applicants for the new staff assistant position ultimately filled by Simms, determining

which candidates to interview, and conducting initial phone interviews. The scheduler thought that the resume bank would serve as a good resource for the Office in its upcoming search for a new staff assistant.

The scheduler attests that, upon receiving Simms' resume and cover letter, she searched the online resume bank to find more information on Simms. The scheduler asserts that she conducted the same search for other top candidates. She states that she learned from the resume bank that Simms had self-identified as African-American.

The scheduler also alleges that she told the chief of staff that Simms appeared to be well-qualified for the position because Simms represented that she could speak Spanish, that she had Arizona ties, and that she was African-American, which would help increase the diversity of the Office's staff. The scheduler does not explain in her affidavit why Simms was fired.

Chief of Staff's Affidavit

The Office also submitted an affidavit from the chief of staff. The chief of staff attests that Congressman Grijalva conveyed to her that he believed the resume bank was an important tool to improve staff diversity for House Democratic Offices.

The chief of staff states that on December 18, 2012, the Office advertised for a staff assistant position. According to the chief of staff, the Office did not have any African-American employees on staff and Congressman Grijalva had expressed that he would like to increase the Office's staff diversity. The scheduler was tasked with reviewing applicants for the position of staff assistant, determining which candidates to interview, and conducting initial phone interviews.

The chief of staff states that the scheduler told her that Simms had represented that she was conversational in Spanish, and that she had Arizona ties. The scheduler also told the chief of staff that Simms seemed to be well-qualified for the position, and that the scheduler had learned, by reviewing information on the resume bank, that Simms is African-American.

The chief of staff maintains that she advised Congressman Grijalva that Simms was a strong candidate for the position based on her representation that she could speak Spanish and her Arizona ties. The chief of staff also advised that Simms was African-American and that hiring her would help increase the diversity of the Office.

The chief of staff states that she and the scheduler then interviewed Simms, via Skype, on January 22, 2013. After the interview, the chief of staff recommended to Congressman Grijalva to extend Simms an offer of employment. He agreed and the chief of staff offered Simms the position. Simms accepted the offer and began working for the Office. The chief of staff asserts that she fired Simms on March 15, 2013. The chief of staff's affidavit does not state why she discharged Simms or provide any other information regarding Simms' removal.

II. Hearing Officer's Decision

The Hearing Officer granted the summary judgment motion filed by the Office.⁴ In so doing, the Hearing Officer concluded that no inference of race discrimination could be drawn in light of the uncontroverted affidavit testimony that the same Office staff members who had fired Simms had hired her only six weeks before, all with the knowledge that Simms was African-American. Citing *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553 (2d Cir. 1997) in support of the “same actor” inference, the Hearing Officer concluded: “some factors strongly suggest that invidious discrimination was unlikely. For example, where the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.” *Id.* at 560.

The Hearing Officer rejected Simms' position that the hiring officials had mistakenly believed that she was Hispanic and only realized their error when she reported to work. The Hearing Officer stated that the affidavits of the scheduler and the chief of staff refute Simms' theory. The Hearing Officer stated that their testimonies show that they knew Simms' race before conducting the Skype interview because Simms had self-identified as African-American on the on-line job bank. He credited the hiring officials' affidavit testimony that they found Simms' race to be a positive factor because it provided them an opportunity to increase the diversity of the Office. The Hearing Officer further noted that Simms did not deny that she had identified herself as African-American in the application she sent to the job bank.

The Hearing Officer found that the same actor inference or presumption of non-discrimination is invoked when the individual terminating the employee is the same person who hired the employee, and the hiring and firing occur within a relatively short time span. *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991). According to the Hearing Officer, even assuming as true Simms' allegations concerning delays in obtaining business cards, transit supports and paperwork for student loan assistance, as well as her “generalized complaints” of inadequate training, these facts constitute slim evidence that her superiors in the Office were on a mission to discharge her and they are insufficient to overcome the inference of non-discrimination. The Hearing Officer placed conclusive weight on the same actor inference reasoned in *Proud*, 945 F.2d at 797, and granted summary judgment to the Office.

III. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required

⁴ The Office had filed a motion to dismiss, or in the alternative, for summary judgment. Because the Office submitted evidence outside the pleadings in the form of two witness affidavits, the Hearing Officer properly treated the motion as one for summary judgment.

procedures; or (3) unsupported by substantial evidence. *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

IV. Analysis

To prevail on summary judgment, the moving party must establish that there are no genuine disputes of material fact and that it is entitled to judgment as a matter of law. *Celetox Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A material fact is disputed if, when resolved in the non-movant's favor, it has the potential to alter the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In evaluating a motion for summary judgment, the facts are interpreted in the light most favorable to the nonmoving party. *Id.* at 255.

The Board reverses the Hearing Officer's Order on summary judgment for three reasons. First, the same actor inference is not alone dispositive. Second, the Office failed to provide a legitimate, nondiscriminatory reason for terminating Simms. Finally, the Office has failed to introduce any evidence to refute Simms' allegations of pretext. The material facts are disputed and therefore summary judgment should not have been granted. The case is remanded to the Hearing Officer.

A. The Same Actor Inference Is Not Conclusive.

The Hearing Officer placed dispositive weight on the same actor inference of nondiscrimination, viewing it as presumptive on the motion for summary judgment. Courts have concluded, on the other hand, that although a court may infer an absence of discrimination where the same individual hired and fired the plaintiff, such an inference is not required. *See Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996) (“[w]hile evidence of [same actor] circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances.”); *see also Waldron v. SL Indus., Inc.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995) (noting that the same actor inference “is simply evidence like any other and should not be afforded presumptive value”); *see also Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011) (the fact that the alleged discriminatory official initially selected the plaintiff to be his assistant does not alone suffice for summary judgment, but it is probative evidence that the alleged discriminatory official did not discriminate against the plaintiff on account of her race or gender when he dismissed the plaintiff later that year).

Here, evaluating the same actor inference as non-dispositive is more consistent with the requirement that, in considering the Office's motion for summary judgment, the Board must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Although the

factfinder is permitted to draw the same actor inference, it is not a presumptive one, and it may be weakened by other evidence. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995) (describing how the length of time between hiring and firing an employee may weaken the same actor inference). Courts have held that where the factfinder decides to draw the same actor inference, it is insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of material fact. *See Wexler v. White's Wine Furniture, Inc.*, 317 F.3d 564, 573-74 (6th Cir. 2003). The Board finds that the same actor inference is not dispositive here and should be evaluated along with other evidence to determine whether there are disputed material facts that would preclude summary judgment against Simms.

B. The Office Failed to Provide a Legitimate, Non-Discriminatory Reason to Discharge Simms.

To establish a *prima facie* case of race discrimination, the complainant must show that he or she is (1) a member of a protected class; (2) suffered an adverse employment action; and (3) the action gives rise to an inference of discrimination. *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002). The plaintiff “must carry the initial burden ... of establishing a *prima facie* case of discrimination.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden to establish a *prima facie* case is not onerous. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the plaintiff meets this burden, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason” for its action. *McDonnell Douglas*, 411 U.S. at 802. If the employer succeeds, then the plaintiff must “be afforded a fair opportunity to show that [the employer’s] stated reason ... was in fact pretext” for unlawful discrimination. *Id.* at 804; *Iyoha v. The Office of the Architect of the Capitol*, Case Nos. 12-AC-30 (CV, DA, RP), 13-AC-03 (CV, RP), 2014 WL 3887569, (July 30, 2014). A plaintiff demonstrates pretext “by showing that the employer’s proffered explanation is unworthy of credence.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 256).

Simms meets the requirements of her *prima facie* case. She is a member of a protected class. Further, she suffered an adverse employment action when she was terminated. Also, she alleges that she was fired because of her race, by the Office, which had no African-American employees prior to her arrival. Simms also alleges that the Office subjected her to differential treatment based on her race (e.g., not receiving business cards or timely commuter transit benefits unlike her non-African-American co-workers who started work the same day).

Thus, the Office was required to provide a legitimate, nondiscriminatory reason for Simms’ firing. *McDonnell Douglas*, 411 U.S. at 802. The Office, however, did not do so. The affidavits provided by the Office in support of its summary judgment motion, including the affidavit of the chief of staff, who attests that she personally discharged Simms, do not explain why Simms was

discharged. Instead, the Office's Motion relies exclusively on the same actor inference, in light of its affidavit testimony that the Office was aware of Simms' race at the time of hiring.

The Office's failure to provide evidence as to a legitimate, nondiscriminatory reason for the firing should have resulted in the denial of summary judgment as material facts remain in dispute. *See Looby v. City of Hartford, et al.*, 152 F.Supp.2d 181, 186 (D. Conn. 2013) (although defendants may have evidence of the supervisor's legitimate, nondiscriminatory reason for not promoting plaintiff, no such proffer was made in support of the defendants' motion for summary judgment, and thus the motion for summary judgment must be denied); *see also Clegg v. The Sullivan Corp.*, 2003 WL 21254558, at *9 (S.D. Ind. Mar. 31, 2003) (defendant argued only that plaintiff was not discharged and, thus, advanced no explanation [legitimate, nondiscriminatory reason] for that discharge; therefore the court denied summary judgment on the plaintiff's race discrimination claim based on his alleged discharge).

C. The Office Did Not Address Simms' Allegations of Pretext.

Failing to articulate a legitimate non-discriminatory rationale is alone cause to deny the Office's Motion for Summary Judgment. However, even if we were to assume that the Office had met its burden to do so, it still has offered no admissible evidence to counter Simms' allegations of pretext. Therefore, her allegations of pretext are undisputed. Simms largely relies on three arguments to establish pretext: lack of African-American employees, differential treatment based on race, and exaggerated reliance on Spanish-speaking skills.

The Office did not address any of Simms' arguments or submit affidavit testimony to refute the assertion of pretext. For instance, the Office did not contest Simms' allegation of no African-American employees prior to Simms' arrival. *See William H. Gage v. Office of the Architect of the Capitol*, Case No. 00-AC-21 (CV), 2001 WL 36175210, (Nov. 14, 2001) (pretext evidence may include the employer's policy and practices regarding minority employment (including statistical data)). Also, the Office did not address Simms' assertions of differential treatment based on race. *See Mitchell v. Nat'l R.R. Passenger Corp.*, 407 F.Supp.2d 213, 235-237 (D.D.C. 2005) (summary judgment denied on African-American plaintiff's race and gender discrimination claims, in which the plaintiff alleged that she was set up to fail and unlawfully terminated because she was required to accomplish more customer training sessions than her white counterparts, to give away some of her responsibilities and duties to her white co-workers, and was not allowed to attend training sessions that her white colleagues were allowed to attend).

Moreover, the Office did not respond to Simms' allegation that speaking Spanish was not a requirement for her position. In fact, the Office did not produce any documentation created before Simms' discharge to establish that speaking Spanish was mandated for the position (i.e. job posting, job description) or that the Office found Simms' Spanish-speaking skills unacceptable before her discharge (i.e. documented discipline). A plaintiff demonstrates pretext

“by showing that the employer’s proffered explanation is unworthy of credence.” *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 256). Disputed material facts remain related to pretext.

The Board finds that the record is not sufficiently developed to properly assess the merits of the case. Summary judgment is reversed because the same actor inference is not dispositive⁵; the Office failed to present any evidence as to an alleged legitimate, nondiscriminatory reason to fire Simms; and the Office failed to refute Simms’ allegations of pretext. The case is remanded to the Hearing Officer.

ORDER

For the foregoing reasons, the Board reverses the Hearing Officer’s finding of summary judgment in favor of the Office and remands the case to the Hearing Officer.

It is so ORDERED.

Issued, Washington, DC on, March 3, 2015.

⁵ The same actor inference is still probative of the Office’s defense that it could not have fired Simms because of her race, when the Office had hired Simms six weeks prior (while knowing her race). This evidence should be considered along with any other evidence offered by the Office. *See, e.g., Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011) (the fact that the alleged discriminatory official initially selected the plaintiff to be his assistant does not alone suffice for summary judgment, but it is probative evidence that the alleged discriminatory official did not discriminate against the plaintiff on account of her race or gender when he dismissed the plaintiff later that year).