IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

SCOTT B. ALTIZER, et al.	)	
	)	**Civil Action No. 7:02cv00484**
Plaintiffs,	)	
	)	
v.	)	**Memorandum Opinion**
	)	
CITY OF ROANOKE, VIRGINIA,	)	
	)	**By: Samuel G. Wilson**
Defendant.	)	**Chief United States District Judge**
	)	

Plaintiffs, three white police officers, Scott B. Altizer, Susan Camper and J. R. Drewery bring this "reverse discrimination" suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), against the City of Roanoke ("the City"), alleging that the City promoted a less qualified African-American female to police sergeant ahead of them because of her race. Camper also alleges that the City discriminated against her on the basis of her sex.[1] The court finds that the plaintiffs are unable to marshal evidence that creates a genuine issue of triable fact, and grants the City's motion for summary judgment.

I.

A Roanoke City Police Department "operational directive" details the procedure for promotions from patrol officer to sergeant. (Operational Directive 2.3.3, Def.'s Attach. B to Ex. 3). According to that directive, the Chief of Police "will select the most qualified candidate" from a candidate list established by the Department of Human Resources. The Department of Human Resources administers a written examination. The twenty-four officers with the highest scores are then sent to an independent "assessment center." The assessment center conducts a

[1]Camper did not raise a retaliation claim in her complaint, although in her brief in opposition she complains of retaliation. She has never moved to amend her complaint to assert such a claim, and the discovery cut-off has long since passed.

single day of practical testing and interviews. A candidate's test results from the assessment center are "weighed as 100% of the candidate's total examination score." Human Resources then forwards the eligibility list to the chief of police "ranked in the order of their test scores," and this list remains "valid" for two years. The top six are "certified as eligible for promotion." The Chief of Police then selects "from those certified on the eligibility list" based on but "not limited to," the candidate's performance evaluations, job description, adaptability, experience, skills, job knowledge and on comments by staff. When the Chief of Police makes that selection, the next highest scored officer is placed on the certified eligibility list. (Operational Directive 2.3.3).

Altizer, a white male; Camper, a white female; and Drewery, a white male, are police officers for the Roanoke City Police Department ("the Department"). Each sought, but was not selected for, promotion from patrol officer to sergeant.

The plaintiffs appeared on the eligibility list released May 24, 2000. Camper ranked first, Drewery tied for second along with another white male, and Altizer ranked fourth. Gaskins, the Chief of Police, formed a command staff to assist in his decision. The command staff had four white senior officers, Reece Ross, Steven Wills, Bobby Lugar, and James Day. Each time that a sergeant's position opened, the command staff and Gaskins met and discussed the "pros and cons" of the candidates until they reached a consensus as to the most qualified person for the position. Lieutenants who supervised the candidate were also invited to provide written comments. Although Gaskins has the final say, he testified that he considers his role to be one of a decision maker who acts only if the command staff is unable to achieve unanimity. (Gaskins Dep. at 19-20).

During the period from May 2000 to June 13, 2001, the Department promoted a total of six officers to sergeant: five white male officers and one African-American female. (Def.'s Attach. A to Ex. 3). On June 13, 2001, the Department promoted Officer Cornelia McCoy, the African-American female, along with Eric P. Charles, a white male, to the position of sergeant. McCoy initially ranked eleventh on the list of eligible applicants; however, as Gaskins promoted the other officers, her rank eventually improved to sixth. The plaintiffs claim that Gaskins chose McCoy because of her race. Camper also claims that the Department discriminated against women because McCoy was the only woman promoted during that time. The members of the command staff recognized that the plaintiffs were suitable candidates for promotion, but they purportedly identified deficiencies they believed made plaintiffs less suitable for promotion than other candidates on the eligibility list. When the Department promoted the other candidates plaintiffs were not told why they were not selected. Plaintiffs filed charges with the Equal Employment Opportunity Commission, received right to sue letters, and then filed suit in this court.

Various members of the command staff testified in their depositions that after the Department received a report on the number of minority officers in its ranks, Gaskins and other officers discussed the need to recruit and prepare minorities for promotion and to increase diversity. (Wills Dep. at 32); (Ross Dep. at 16-17); (McCoy Dep. at 29). They denied, however, discussing the issue of minority recruitment and promotion during the promotional process or that they considered race in making actual promotions. (Wills Dep. at 32-33, 38); (Ross Dep. at 16-17).

In the light most favorable to the plaintiffs, it appears from deposition testimony and affidavits that Gaskins and McCoy are friends and that Gaskins has made statements to the effect

that he would promote McCoy if she simply took the test. (Gaskins Dep. at 56-57); (Palmer Aff. ¶2); (Sharp Aff. ¶2).

The City has moved for summary judgment on the ground that plaintiffs' evidence is insufficient to raise an inference of either race or sex discrimination. The court agrees and now addresses each claim in turn.

II.

A Title VII plaintiff can establish a triable issue of fact either through direct and indirect evidence of sufficient evidentiary force to prove intentional discrimination or through the proof scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973). The court now reviews plaintiffs' claims through those respective prisms.

A. Plaintiffs' Race Discrimination Claims

The court assumes without deciding that plaintiffs have proven a *prima facie* case of reverse discrimination under McDonnell Douglas. Instead, the court focuses on the final stage of that proof scheme and concludes that plaintiffs' evidence raises no inference of pretext.

"To prove a *prima facie* case of discriminatory refusal to promote under McDonnell Douglas [citation omitted], plaintiff must prove that '(1) plaintiff is a member of a protected group; (2) plaintiff applied for the position in question; (3) plaintiff was qualified for the position; and (4) plaintiff was rejected for the position under circumstances giving rise to an inference of unlawful discrimination.'" Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994) (quoting McNairn v. Sullivan, 929 F.2d 974, 977 (4th Cir. 1991)). If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for its action. McDonnell Douglas, 411 U.S. at 802. Plaintiff then has the burden to show that the stated reason is a mere pretext. Id. at 804. Plaintiff "may

succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The process of making promotions to jobs that, for obvious reasons, require considerable judgment and suitable temperament necessarily involves subjectivity. Although an employer cannot prevent the court from scrutinizing its employment decisions by cloaking them in subjectivity, Title VII is not a vehicle for judging the wisdom of those decisions. In the present case, there is a common thread that runs through the Department's failure to promote each of the plaintiffs: the perception of various members of the command staff that the attitude of each plaintiff was not quite as good as the other officers selected for promotion.[2] Of course, this perception is very subjective and is quite capable of masking intentional discrimination. Under different circumstances it would likely raise an issue of pretext. There is a compelling reason why it does not raise an issue of pretext in this case, however: the Department has repeatedly skipped over the plaintiffs, promoting white officers who like McCoy scored substantially lower than plaintiffs on the one-day assessment center examination. Camper was first on the eligibility list, Drewery tied for second, and Altizer was fourth. Yet, the Department promoted the white

[2] Plaintiffs deposed the four white members of the command staff and Gaskins. Plaintiffs' counsel asked each member to recollect their discussions at the command staff meetings of the plaintiffs' "pros and cons." "The biggest negative" Officer Ross recalled about Camper was her "very negative" attitude. (Ross Dep. at 11). "[O]ne of the big negatives he recalled about Drewery was Drewery's "self-serving," "selfish" attitude. (Ross Dep. at 12). A "negative" he recalled about Altizer was the perception that Altizer sometimes seemed to lack an appropriately serious attitude. He was known for "joking [and] clowning around." (Ross Dep. at 13). Wills, Camper's friend who is no longer with the Department and who favored her promotion, confirmed that other members of the command staff thought Camper was "negative towards the department." (Wills Dep. at 25). Officers Lugar and Day had similar recollections about discussions concerning the plaintiffs. (Lugar Dep. at 21, 24); (Day Dep. at 24, 26-28.) In contrast, Day thought McCoy – who was also a sergeant in the United States Army Reserves – had a "superior attitude." (Day Dep. at 19).

officer who tied Drewery for second, the white officer who was fifth, the white officer who was sixth, the two white officers who tied for seventh, the white officer who was ninth, and the white officer who was tenth. Obviously, something quite apart from race was involved in these decisions. Certainly, nothing is to be garnered from the fact that the Department picked the officer who was eleventh–next on the eligibility list–and who happens to be an African-American.

Plaintiffs argue that the Department simply promoted the other white police officers as part of a scheme to advance McCoy to the certified eligibility list in order to promote her. That suggestion, however, is highly speculative and makes little sense. It is highly speculative because there is no evidence to support it. It makes little sense because if the Department, in fact, considered plaintiffs to be the most qualified as evidenced by their scores on the assessment center examination, it would have promoted them before the other white officers.

Plaintiffs also argue that they have direct and circumstantial evidence that the Department promoted McCoy on account of her race. Plaintiffs point to evidence that Gaskins was concerned about the lack of diversity in the Department's ranks, thought it important to recruit and prepare minorities for promotion, was close friends with McCoy, and had purportedly stated he would promote her if she took the examination. This evidence, however, is not sufficient to raise an inference that the Department promoted McCoy because she is an African-American.

Gaskins' concern about the lack of diversity in the Department's ranks is not evidence of discriminatory animus. Nor is the fact that Gaskins thought it important to recruit and prepare minorities for promotion. That evidence says nothing about Gaskins willingness to promote a candidate *because* that candidate is an African-American. In fact, the expression of those

concerns may have the salutary effect of an announcement that a predominantly white, male institution will conduct itself as an equal opportunity employer. Finally, evidence that Gaskins and McCoy are friends and that he wanted to promote her cuts against the notion that he intended to promote her because she was African-American. It proves that friendship, not race, motivated Gaskins and, therefore, these facts "better suit a disparate impact case than a disparate treatment case." See Autrey v. North Carolina Dep't of Human Resources, 820 F.2d 1384, 1385 (4th Cir. 1987).

Plaintiffs contend that they have raised issues of fact for trial in accordance with Lucas v. Dole, 835 F.2d 532 (4th Cir. 1987). In that case, which is clearly distinguishable, plaintiff Julia Lucas, an employee of the Federal Aeronautics Administration (FAA), applied along with eighteen others for promotion to the position of Quality Assurance and Training Specialist, a job requiring a Pilot Weather Briefing Certificate. Two local managers interviewed the candidates, asked them each five questions, and recommended the top four based upon their answers. The selecting official chose an African-American female although she did not have the required certificate. Lucas brought a reverse discrimination suit under Title VII, the district court heard Lucas' evidence, found she had failed to establish a *prima facie* case, and dismissed her suit. In reversing the district court, the Court of Appeals looked to the employer's use of subjective criteria, the promotion of an "underqualified black," irregular acts of favoritism towards the black employee, and the opinion testimony of other employees that race was a factor in concluding that Lucas had established a *prima facie* case. Lucas at 534-535.

The case before the court is clearly distinguishable from Lucas. McCoy, unlike Lucas who did not have the necessary certificate for the promotion, is not "underqualified." More importantly, the procedural posture in Lucas is quite different from the procedural posture here.

The District Court in Lucas dismissed Lucas' suit because it found that she had failed to establish a *prima facie* case. It never proceeded to the next analytical stage under McDonnell Douglas and, therefore, did not consider the evidence bearing on the question of pretext. Here, the court has examined the evidence of pretext, found no material issue of fact for trial, and grants the City's motion for summary judgment.

B. Camper's Sex Discrimination Claim

Camper's sex discrimination claim fails on substantially the same grounds as her race discrimination claim. The fact that, based only upon a single day of testing**,** Camper received a higher score from the assessment center than the males who were promoted, under the circumstances, does not give rise to an inference of sex discrimination. The Department skipped over Altizer and Drewery just as it skipped over her. Moreover, as the court stated earlier, members of the command staff thought she had a "negative" attitude. Even her friend, officer Wills, who wanted to promote her, testified that it was a concern during the command staff's review. The correctness of the perception is not the issue. The issue remains whether the City discriminated against her on account of her sex, not the correctness of the command staff's perceptions. Finally, it seems incongruous to the court that Camper complains, on the one hand, in her reverse race discrimination claim about the Department's desire for diversity, and on the other hand, asks the court to infer that the Department has intentionally discriminated against her because she is a female.

III.

No where has the City maintained that these three plaintiffs are not capable police officers. Frequently, however, employers must make thin line distinctions in choosing from marginally different candidates for promotion. Although an employer cannot cloak

discrimination in subjectivity, an employee suing for disparate treatment must show sufficient evidence from which the finder of fact reasonably could conclude that the employer based its decision on a factor Title VII forbids. On that score, plaintiffs' evidence fails. Accordingly, the court will enter summary judgment for the City.

ENTER this March _____ , 2003.

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CHIEF UNITED STATES DISTRICT JUDGE

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	)	**By: Samuel G. Wilson**
Defendant.	)	**Chief United States District Judge**
	)	

For the reasons stated in the accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that defendant's motion for summary judgment is **GRANTED**. This action is stricken from the active docket of the court.

ENTER this March _____, 2003.

_____
CHIEF UNITED STATES DISTRICT JUDGE