

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

THOMAS B. FORD, JR.,)	
Plaintiff,)	Civil Action No. 5:03CV00024
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
GENERAL ELECTRIC LIGHTING, LLC,)	By: Samuel G. Wilson
Defendant.)	Chief United States District Judge

General Electric Lighting, LLC (“GE”) fired, and later reinstated on identical conditions, both Thomas B. Ford, an African-American, and William Heller, a Caucasian, for fighting on company grounds. Despite GE’s similar treatment of the two employees, Ford filed an action in this court pursuant to 42 U.S.C. § 1981 alleging both discrimination and retaliation, and GE then moved for summary judgment.¹ Nothing in Ford’s evidence, however, supports the claim that race played a role in GE’s actions. Accordingly, the court grants GE’s motion.

I.

This action arises out of an altercation between two employees of GE on May 24, 2002. Although the facts of the altercation are in dispute, it is clear that Ford, an African-American, and Heller, a Caucasian, struck each other and that Ford intentionally punched Heller in the face. After the fight, Richard Calvaruso, the plant manager, fired both employees. Both employees then appealed their dismissal to a “peer review panel,” which recommended that GE reinstate both employees, strip them

¹ Ford also bases jurisdiction under Title VII. However, he does not assert that he received a right to sue letter or otherwise exhausted his administrative remedies. The court, therefore, assumes that Ford has abandoned his Title VII claims and relies solely on § 1981. In any event, the tests for racial discrimination and retaliation under Title VII are identical to the tests under § 1981.

of seniority, prohibit them from applying for promotions, suspend them, and give them letters of reprimand. Following the panel's recommendations, Calvaruso reinstated both Ford and Heller subject to the recommended conditions. However, because the employees lost seniority, GE laid off both Ford and Heller over a year later, along with approximately 30 other employees.

Ford then filed this action pursuant to 42 U.S.C. § 1981, alleging that GE discriminated and retaliated against him. He claims GE discriminated against him when it terminated his employment and imposed conditions on his reinstatement, and GE retaliated against him because he complained about racial slurs by fellow employees and GE's alleged failure to promote African-Americans. Ford, however, fails to establish a prima facie case of either discrimination or retaliation, and the court grants GE's summary judgment motion.

II.

A. RACIAL DISCRIMINATION CLAIM

Ford claims that GE discriminated against him by firing him and imposing conditions on his reinstatement, after it failed to act similarly when white employees violated the company's workplace rules. The court finds, however, that Ford has not shown that GE punished him more severely than white employees for substantially similar conduct, and the court grants GE's motion for summary judgment on the claim.

To establish a prima facie case of racial discrimination, Ford must show "(1) that he is a member of the class protected ..., (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against other employees." Cook

v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993) (establishing a prima facie case for a Title VII racial discrimination claim); see Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 n.1 (4th Cir. 2002) (“[T]he elements required to establish a prima facie case are the same under Title VII and Section 1981.”). Although the court compares other altercations, it must recognize that “the comparison will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstance.” Cook, 988 F.2d at 511; see Moore v. Charlotte, 754 F.2d 1100, 1101 (4th Cir. 1985); Manning v. Foodarama, Inc., 195 F.Supp. 2d 741, 745 (D.Md. 2002) (comparing the cause of altercations, the extent of physical contact, and the injuries suffered).² With those precepts in mind, Ford’s claim fails because the evidence does not show that GE punished him more severely than others engaged in similarly serious conduct.

Ford asserts that he presented enough evidence to survive summary judgment because he identified seven other employees outside his protected class who were involved in workplace altercations and not fired. None of the alleged altercations, however, were comparably serious, in either degree or threat of harm, to Ford’s altercation with Heller.³ It is undisputed that Ford punched

² In this case, the cause of the incident and culpability of Heller and Ford is greatly disputed. The record reflects that Heller, Ford and various witnesses gave GE wildly different accounts of who started the incident and whether Ford acted in self-defense. The record is clear, however, that Ford punched Heller in the face during the altercation. GE, in examining the altercation, concluded that both employees acted with a level of culpability warranting dismissal. Ford fails to raise a genuine issue of material fact that GE resolved any discrepancies in a discriminatory manner, and it is, therefore, entitled to rely on its conclusions and judgment. See DeJarnette v. Corning, Inc., 133 F.3d 293, 299 (4th Cir. 1998).

³ Heller identifies the following workplace altercations involving employees outside his protected class: (1) Tom Demayo pushed Guy Sager, who hit his head on a pipe, causing a cut a bruise; (2) Ellen Miller slapped a fellow employee; (3) Mike Pryor attempted to slap a fellow employee; (4) Bill Webster and Choung Ngo were involved in an incident that both employees and GE

Heller in the face, causing Heller to bleed. Simply put, Ford has identified no other substantially similar incident. Therefore, Ford fails to establish a prima facie case of race discrimination.

In sum, Ford fails to marshal evidence that racial animus motivated GE. In establishing a prima facie case, the plaintiff must present sufficient evidence, either direct or circumstantial, to support an inference of intentional discrimination. Robinson v. Montgomery Ward Co., 823 F.2d 793, 797 (4th Cir. 1987). In this case, both Ford and Heller exchanged punches, and Ford offers nothing to suggest that GE treated them differently. GE immediately fired both, and, after both appealed to the peer review panel, reinstated both on the same conditions. The fact that GE treated Ford and Heller the same is highly probative on the question of whether race motivated GE, and there is no countervailing evidence sufficient to support an inference of animus. Accordingly, the court will enter summary judgment for GE on the claim.

B. RETALIATION CLAIM

Ford also alleges that GE retaliated against him on two occasions. He first claims that his termination was retaliatory and, second, that after he was reinstated, GE again retaliated against him by closely scrutinizing his work. Ford, however, fails to raise a genuine issue of material fact that GE terminated him because he engaged in protected activity or that the close supervision Ford alleges constituted adverse employment action. Consequently, the court grants GE's motion for summary judgment on the claim.

classified as "horseplay" and Ford offers insufficient evidence to indicate otherwise; and (5) Charlie Colliflower put Bill Webster in a "bear hug" and Webster shoved Colliflower. Ford, however, fails to show that any of these incidents are comparably serious to his altercation with Heller, in which he punched Heller in the face and caused bleeding.

In order to establish a prima facie case of retaliation, a plaintiff must show (1) he engaged in a protected activity, (2) the employer took an adverse employment action against him, and (3) the protected activity is causally related to the adverse action. Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 543 (4th Cir. 2003) (identifying the test for discriminatory retaliation under both Title VII and § 1981). Although Ford alleges that he engaged in protected activity, an allegation not challenged by GE,⁴ Ford fails to show that GE terminated him because of the protected activity rather than for fighting.

Ford first claims that GE retaliated against him by firing him after his fight with Heller and by imposing conditions on his reinstatement, such as a loss of seniority. However, nearly all of Ford's protected activities, or his alleged complaints to management, occurred more than three years before his termination. See Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998) ("A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two."); Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) (holding that a thirteen month interval between an EEO charge and termination is too long to establish causation absent other evidence of retaliation). Although Ford claims he complained to a GE manager, Russell Gallimore, two months before the fight about GE's failure to promote, Calvaruso has sworn under oath that he did not know of Ford's complaints to Gallimore before he fired Ford. Ford offers nothing to the contrary. See

⁴ Ford alleges that he engaged in protected activity by complaining that Heller's conduct was racially motivated, that GE failed to promote African-Americans, and that some employees routinely made racial jokes and slurs.

Causey, 162 F.3d at 803 (holding that the plaintiff failed to establish causation when he presented no evidence that the decision-maker knew of plaintiff's EEO charge, noting that "[k]nowledge of the charge is essential to a retaliation claim"). Moreover, even if Calvaruso had known, evidence of causation would be virtually non-existent in light of the intervening fight. Therefore, Ford's allegation that GE retaliated against him by firing him fails because Ford fails to raise a genuine issue of material fact that GE's actions were causally related to his protected activity.

Second, Ford complains that GE retaliated against him by adversely affecting his employment after his reinstatement. In order to show an adverse action, Ford must show that a retaliatory act affected the terms, conditions, or benefits of employment. Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001). Here, Ford alleges that GE solicited complaints about Ford from one of its employees and placed a letter in Ford's file asserting that Ford failed to follow a supervisor's instructions.⁵ However, even assuming that these allegations are true and Ford supports them with admissible evidence, they simply do not constitute adverse employment actions. Ford does not allege that GE actually received a solicited complaint, that it fabricated the assertions in the letter, or that it took any action against him following a complaint. Ford, therefore, fails to raise a genuine issue of material fact that any of the alleged retaliatory acts affected a term, condition or benefit of employment.⁶

⁵ Ford also complains that upon his reinstatement, he had a less desirable shift assignment. This claim, however, is frivolous. Both Heller and Ford were stripped of their seniority, a condition of employment that dictated their job assignments on reinstatement. Although Ford did receive a less desirable shift as a result of his loss of seniority, he retained his same job as a fork-lift operator and actually received a higher rate of pay for the shift change. Heller, however, was demoted and returned to a less desirable job without any increase in pay.

⁶ Even if Ford were able to establish a prima facie case of either racial discrimination or retaliation, his claim would fail because GE fired him for a non-pretextual, legitimate, nondiscriminatory

III.

Two employees of GE, one African-American and one Caucasian, fought on company property, and GE fired both. Both employees were later reinstated on nearly identical grounds, but one of the employees then filed this suit against GE alleging discrimination and retaliation. In short, however, there is nothing before this court to support the conclusion that race or an intent to retaliate in anyway played a role in Ford's treatment. Accordingly, the court grants GE's motion for summary judgment.

ENTER: This ____ day of February, 2004.

Chief United States District Judge

reason – fighting. Although Ford cites past racial slurs, two anonymous complaint letters, and an EEOC consent decree as evidence of pretext, he fails to raise a genuine issue of material fact that either Calvaruso, a peer review panel member, or even Heller ever tolerated or even uttered a racially derogatory remark, and he fails to show how any of the past incidents is even relevant to the actions GE took against him. See Brinkley v. Harbour Recreation Club, 180 F.3d 598, 608 (4th Cir. 1999) (“[T]o prove discriminatory animus, the derogatory remark cannot be stray or isolated and unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination.”) (internal quotation omitted). Therefore, since GE articulated a legitimate, nondiscriminatory reason for taking action against Ford, and Ford failed to show that the reason was pretextual, Ford's claims fail.

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Defendant.)	Chief United States District Judge

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that General Electric Lighting, LLC's motion for summary judgment is **GRANTED** and Thomas B. Ford's claims are **DENIED**. All other outstanding motions are **DENIED** as moot. This case is **STRICKEN** from the active docket of the court.

The Clerk of the Court is directed to send certified copies of this Order and the accompanying Memorandum Opinion to the counsel of record for the plaintiff and defendant.

ENTER: This ____ day of February, 2004.

Chief United States District Judge