

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

JERRARD VARRONE,

Plaintiff,

MEMORANDUM AND ORDER

96-CV-3132 (ILG)

v.

STATEN ISLAND UNIVERSITY HOSPITAL,

Defendant.

-----x

GLASSER, United States District Judge:

SUMMARY

After defendant Staten Island University Hospital ("SIUH") refused to hire plaintiff Jerrard Varrone ("Varrone") as a registered nurse, he brought this action alleging a violation of Title VII, 42 U.S.C. § 2000e, et seq. SIUH has now moved for summary judgment and, for the following reasons, that motion is granted.

FACTS¹

Varrone was a student nursing technician at SIUH from July 1992 until July 1993. Def. 56.1, ¶ 1. At the end of his tenure as a student nursing technician, he was hired by SIUH as a Graduate Nurse. Def. 56.1, ¶ 2. One of SIUH's requirements for continued employment as a Graduate Nurse is passage of the New York State licensing exam for registered nurses. In October 1993, Varrone was notified that he had failed the licensing exam and SIUH thereupon terminated his employment. Def. 56.1, ¶ 3.

In or about July, 1994 Varrone applied for a position as a nurses' aide (LPN) at SIUH but was not hired. Def. 56.1, ¶ 4. After learning that he had passed the licensing exam on a subsequent attempt, he contacted SIUH and asked that his application for a position as a nurses' aide be converted to one

¹ Plaintiff has not submitted a Statement of Material Facts and, in accordance with Local Civil Rule 56.1, those assertions contained in defendant's 56.1 statement are therefore deemed admitted. See Local Civil Rule 56.1 of the Local Rule of the United States District Courts for the Southern and Eastern Districts of New York ("All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.").

for a position as a registered nurse. Def. 56.1, ¶¶ 6-7.

Subsequently, on numerous occasions he contacted SIUH to check the status of his application but was told that SIUH had a policy of offering available positions to current SIUH employees first. Def. 56.1, ¶ 8. He was nevertheless interviewed for two nursing positions at SIUH in March 1995. However, both positions were filled with SIUH employees and Varrone was rejected. Def. 56.1, ¶¶ 10-12. On March 23, 1995 Varrone was again interviewed for a position at SIUH, but was told at the interview that the position may need to first be offered to a current SIUH employee. Indeed, the position was filled by an SIUH employee. Def. 56.1, ¶¶ 13-15.

Varrone thereupon brought this action, alleging (1) that he was terminated by SIUH in July 1993 because of his gender, (2) that SIUH refused to hire him in July 1994 because of his gender and (3) that SIUH refused to hire him shortly after November 1994 because of his gender and that these actions violated Title VII. See Def. 56.1, Ex. A.

By Memorandum and Order dated September 6, 1996, this Court dismissed the first two causes of action because the charge filed with the Equal Employment Opportunity Commission was

untimely as to those causes of action. See Def. 56.1, Ex. B.

DISCUSSION

I. Standard for Summary Judgment

Summary judgment under Rule 56 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 judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such motion. United States v. All Funds, 832 F. Supp. 542, 550-51 (E.D.N.Y. 1993).

If the summary judgment movant satisfies its initial burden of production, the burden of proof shifts to the nonmovant, who must demonstrate that a genuine issue of fact exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in its favor. Id. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rule 56(e) "requires the

nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Once the nonmovant has adduced evidence of a genuine issue of material fact, its "allegations [will be] taken as true, and [it] will receive the benefit of the doubt when [its] assertions conflict with those of the movant." Samuels v. J. Mockry, et al., 77 F.3d 34, 36 (2d Cir. 1996).

In employment discrimination cases, courts are particularly cautious about granting summary judgment where intent is at issue. See Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). However, even in these cases a "plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Id.

II. Title VII

The pertinent section of Title VII, 42 U.S.C. § 2000e-2, declares it to

be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

In a triad of decision, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the Supreme Court set forth the allocation of burdens and orders of presentation in a Title VII case. First, "the plaintiff has the burden of proving by a preponderance of evidence a *prima facie* case of discrimination." Burdine, 450 U.S. at 252-53. Second, "if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the [adverse employment decision]." Id. at 253. Third, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id.

To establish a *prima facie* case of discrimination, plaintiff is required to show that he (1) belongs to a protected class, (2) applied and was qualified for a job for which

defendant was seeking applicants and (3) was rejected under circumstances giving rise to an inference of discrimination. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). SIUH contends that because of its policy of offering available positions to current SIUH employees, Varrone cannot establish that SIUH was seeking applications (at least not from non-SIUH employees) or that his application was rejected under circumstances giving rise to an inference of discrimination. Def. Mem. at 7.

In response, plaintiff notes that he "testified that he was obviously excluded from any consideration of employment by Defendant as female applicants were considered by interview when he was not even afforded such luxury" and that he "was intentionally excluded from any interviews or considerations for employment, solely based upon his gender." Pl. Mem. at 10-11. In addition, plaintiff contends that defendant cannot "prove that all of the positions, of which Plaintiff was duly qualified for were given to only 'in-house' personnel." Id. at 11. Finally, plaintiff asserts - without any supporting affidavit or other materials - that

[i]n Defendant's own discovery disclosure and production their listing of male Registered Nurses hiring during the time period in

question is clearly unequal to the number of female nurses hired. As such, not even 20% of the employees hired during said time period were male. Accordingly, in further production Defendant's disclosed their employees hired between the time period of July 1, 1996 through June 30, 1997, and again, seemingly an unfair and discriminatory pattern the number of male nurses hired was significantly lower than female (sic). In this most recent document it appears that approximately four (4) out of fifty-two (52) newly hired nurses were male. That figure represents less than ten percent.

Id. at 11.

These contentions are without merit. It is clear that plaintiff was interviewed for available positions. Def. 56.1, ¶¶ 10-12. In addition, although defendant has not "proven" that all positions for which plaintiff is qualified have been filled by SIUH employees, it has averred that it has a policy of offering available positions to SIUH employees first.² See Masucci Aff.,

² Varrone also testified at deposition that he knew of one woman who was hired as a registered nurse even though she was not at the time an SIUH employee. See Pl. Mem. at 7; Def. 56.1, Ex. C (Varrone Dep.) at 104-105. No evidence has been submitted in support of this testimony and Varrone was uncertain when the woman applied for a position as a registered nurse. Def. 56.1, Ex. C (Varrone Dep.) at 108-109. Finally, it should be noted that Varrone appears to have been interviewed for specific openings on particular floors or units and not for a

¶ 3; Stroud Aff, ¶ 3 (Def. 56.1, Exs. D and E). Moreover, as defendant rightly points out, once it has offered a legitimate, nondiscriminatory legitimate, nondiscriminatory reason for its adverse employment decision, it is the *plaintiff* who must then have an opportunity to prove by a preponderance of the evidence that the proffered reason is a pretext for discrimination. Def. Rep. Mem. at 8. See Fisher v. Vassar College, 114 F.3d 1332, 1337 (2d Cir. 1997).

Finally, it is clear that the statistical "evidence" offered by plaintiff is insufficient to show that there is a genuine issue of fact for trial. See, e.g., Rubinberg v. Hydronic Fabrications, Inc., 775 F. Supp. 56, 63 (E.D.N.Y. 1991) ("unsupported assertions by counsel contained in a brief 'are not evidence of anything' on a motion for summary judgment.") (citing Ortiz v. Regan, 749 F. Supp. 1254, 1263 (S.D.N.Y. 1990)). Moreover, even were this Court to credit the statistical data introduced by plaintiff, it would not lead to a genuine issue of material fact. As defendant SIUH points out, the statistical data introduced by plaintiff does not concern the time period at issue in the third cause of action and, because it

general position as a registered nurse. See Masucci Aff., ¶ 2; Stroud Aff., ¶ 2.

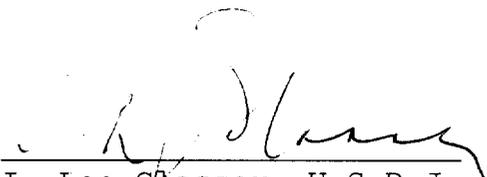
does not indicate the number of male applicants, does not in itself indicate a pattern of discrimination.

CONCLUSION

For the foregoing reasons, this Court is driven to conclude that Varrone has failed to establish a *prima facie* case or, in the alternative, has failed to rebut the legitimate, nondiscriminatory reasons advanced by SIUH. Defendant's motion is therefore granted.

SO ORDERED.

Dated: May 22, 1998
Brooklyn, New York


I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

George F. Brennla
Clifton, Budd & DeMaria LLP
420 Lexington Avenue, Suite 420
New York, New York 10170-0089

Thomas F. Bello
387 Forest Avenue
Staten Island, New York 10301