

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 01-0173-CIV-MORENO
MAGISTRATE JUDGE GARBER

JOSE RAMIREZ,

Plaintiff,

v.

JOHN W. SNOW, Secretary
of the Treasury,¹

Defendant.

FILED
2003 FEB 03 23
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MAGISTRATE JUDGE GARBER

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment (D.E. #23). The Court held a hearing regarding this Motion, and has carefully reviewed the pertinent portions of the record and the relevant law. For the following reasons, it is respectfully recommended that the Court GRANT Defendant's Motion for Summary Judgment, and enter summary judgment in Defendant's favor.

STANDARD OF REVIEW

A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir.1999). The movant bears the initial responsibility of informing the Court of the basis for its motion and of identifying those materials which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*

¹ On February 3, 2003, Mr. Snow was sworn into office as Secretary of the Treasury.

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Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

In response to a properly supported motion for summary judgment, “the adverse party may not rest upon the mere allegations or denials of the adverse party’s pleadings, but . . . must set forth specific facts which show a genuine issue for trial.” Fed. R. Civ. P. 56(e). If the non-moving party fails to “make a sufficient showing on an essential element of her case with respect to which she has the burden of proof,” then the Court must enter summary judgment for the moving party. *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2552. The Court, however, must view the evidence and factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Maniccia*, 171 F.3d at 1367.

“By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact*.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986) (emphasis added). The Court may not resolve factual issues, but may only determine whether factual issues exist. A material fact is one which “might affect the outcome of the suit under the governing law. . . .” *Id.* at 248, 106 S. Ct. at 2510. The Court’s inquiry therefore is whether “there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Id.* at 250, 106 S. Ct. at 2511.

BACKGROUND

In this Title VII action, Plaintiff José Ramirez contends that Defendant retaliated against him by denying his request for reassignment because he had filed a discrimination complaint against one of his supervisors.

In 1979, Plaintiff began his employment with the United States Customs Service as a salary grade GS-7 inspector in Miami. By 1981, he was a GS-11 Supervisory Inspector, working mainly in the area of narcotics intervention. Beginning in the late 1980's, Plaintiff worked in various GS-12 Supervisory Inspector positions.

In 1990, Plaintiff received a five-day suspension for a 1988 incident in which he had been accused of drinking alcohol and using obscene language while on duty and in uniform. Plaintiff did not deny those allegations, and did not contest his suspension. That suspension is the only formal disciplinary action taken against Plaintiff that appears in his official personnel file.

From 1991-95, Plaintiff ran a Contraband Enforcement Team assigned to cruise ships at Port Everglades, Fort Lauderdale, Florida, and developed and ran a model program to detect drug smuggling by cruise ship passengers. In 1994, during a routine search of a cruise ship passenger's cabin, Plaintiff and the ship's security personnel found a bag containing two marijuana cigarettes in plain view on a table. Plaintiff placed the marijuana cigarettes in a small overnight bag that the passenger was using as carry-on luggage, and left the room. When the passenger disembarked with the carry-on bag, Plaintiff asked if he could inspect the bag, and pulled out of the bag the marijuana cigarettes that he had placed in it. Plaintiff contacted the United States Attorney's Office, which declined prosecution of the passenger, and instead issued the passenger a citation and a small fine.

Several days after the cruise ship incident, Plaintiff reported his own actions to the Customs Service's Office of Internal Affairs. The Office of Internal Affairs subsequently received an anonymous phone call regarding the incident, and an anonymous letter in which the author alleged that Plaintiff routinely planted drugs on cruise ship passengers.

Plaintiff's supervisor orally admonished him, told him not to employ such methods in the

future, and told him that if the situation arose again he should wait in the passenger's room, no matter how long it took for the passenger to return. The Office of Internal Affairs did not make any findings of improper conduct, and concluded in a report dated August 4, 1994: "No further action is anticipated by the Office of Internal Affairs, this case is closed with this report of investigation."

In 1996, Plaintiff's direct supervisor, Port Director Jayson Ahern, selected him to head the Miami Operations Analysis Staff office. Plaintiff's second-in-line supervisor, South Florida Customs Management Center Director D. Lynn Gordon, was aware of the 1994 cruise ship incident for which Plaintiff had been reprimanded, but nevertheless approved Plaintiff's promotion.

In Plaintiff's position in the Operations Analysis Staff office, he used computers to perform statistical analysis on different types of Customs data. That position was at salary grade GS-13. In 1997, Plaintiff was promoted to grade GS-14.

Sometime in 1998, Ramirez applied for a position as a GS-13 Supervisory Customs Inspector, but was not selected for that position. On approximately October 27, 1998, Plaintiff contacted Customs Equal Employment Opportunity ("EEO") Director Luz Padilla to inform her that he wanted to file an anonymous, informal complaint related to his non-selection for the GS-13 position, and to begin the EEO counseling process. In that informal complaint, Plaintiff alleged that in denying his application for that position, his second-in-line supervisor, D. Lynn Gordon, had discriminated against him on the basis of his national origin.

Also in October of 1998, Plaintiff told his direct supervisor, Jayson Ahern, that he wanted to be reassigned to a GS-12 Supervisory Customs Inspector position - the same position he had held

when he moved the cruise ship passenger's marijuana cigarettes in 1994.² Ahern told Plaintiff to submit a written request for the reassignment.

On approximately October 22, 1998, Plaintiff submitted to Ahern a written request for reassignment to the GS-12 position. On approximately November 5, 1998, Ahern and Gordon rejected that request because of the tone of the written request and certain comments it contained regarding Gordon.

On approximately November 16, 1998, Plaintiff submitted a revised letter in which he again requested reassignment to the GS-12 position. Ahern and Gordon approved that request, Compl. ¶ 17; Plaintiff's Statement of Facts in Opposition to Defendant's Motion for Summary Judgment (D.E. #33), at 4; Ramirez Dep. (Defendant's Exhibit 3 in support of Motion for Summary Judgment), at 133-34; Gordon Decl. (Defendant's Exhibit 4 in support of Motion for Summary Judgment), at 5; Ahern Decl. (Defendant's Exhibit 5 in support of Motion for Summary Judgment), at 2, and forwarded it for final approval to the Human Resources Management office at Customs Headquarters

² Although Plaintiff was requesting reassignment to a position that involved a two-grade salary decrease, Plaintiff asserts that the position would have provided him more desirable job responsibilities and the opportunity for overtime pay. Defendant does not dispute that for purposes of Plaintiff's retaliation claim, denial of the reassignment constituted an adverse employment action. *Meeks v. Computer Associates Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994) (to establish a *prima facie* case of retaliation, a plaintiff must demonstrate that he or she suffered an adverse employment action); see *Bass v. Board of County Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1118 (11th Cir. 2001) ("Bass was given no routine work assignments and was forced to perform custodial and clerical duties under the supervision of less senior personnel. The Division also denied him the opportunity to earn overtime pay, on-call pay, riding-out-of-classification pay, and adjunct teaching pay, which were available to other Training Instructors. . . . We conclude that the Division's actions which deprived Bass of compensation which he otherwise would have earned clearly constitute adverse employment actions for purposes of Title VII."); *McCabe v. Sharrett*, 12 F.3d 1558, 1564 (11th Cir.1994) (holding that an employee suffered an adverse employment action because in her new position she had fewer responsibilities, was made to perform more menial tasks, and had fewer opportunities for salary increases than in her previous position).

996 F.2d 1155, 1163 (11th Cir. 1993); *see, e.g., Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1307 (11th Cir. 2002) (“Appellant did not establish a prima facie case. Accordingly, the district court did not err in granting summary judgment in favor of Appellee.”), *cert. denied*, 123 S. Ct. 872 (2003); *Clover*, 176 F.3d at 1354-56 (finding that the plaintiff failed to prove its prima facie case, and reversing the district court’s denial of the defendant’s motion for judgment as a matter of law without considering proffered legitimate, non-discriminatory reasons or evidence of pretext).⁹

RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that the Court GRANT Defendant’s Motion for Summary Judgment (D.E. #23), and enter summary judgment in Defendant’s favor.

The parties have ten (10) days from the date of receipt of this Report and Recommendation to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. *See* 28 U.S.C. § 636. Failure to file timely objections may bar the parties from attacking on

⁹ Without question, Defendant could have relied on Plaintiff’s actions related to the 1994 cruise ship incident not only to deny Plaintiff’s reassignment request, but also to terminate Plaintiff’s employment. If, however, the Court considered the question of pretext, the Court would not have to determine whether Defendant *could have relied* on the 1988 and 1994 incidents to deny Plaintiff’s reassignment request, but instead whether Defendant *did rely* on those incidents to deny Plaintiff’s reassignment request. Regarding that issue, the parties have produced disturbing evidence, including the fact that in spite of Plaintiff’s conduct, Defendant has not only continued to employ him, but has repeatedly promoted him.

It appears unlikely, however, that Plaintiff would be able to prove that Defendant’s proffered non-discriminatory reason - that after the Kelly procedures were enacted, Tennant and Trotter reviewed Plaintiff’s history of misconduct, and concluded that he was unable to perform the duties of a Supervisory Customs Inspector - was pretextual.

appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this

11th day of June, 2003.


BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
United States District Judge Federico A. Moreno
Christopher C. Sharp, Esq.
Russell Koonin, Assistant United States Attorney