

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN I. DIMAS,

Plaintiff,

v.

Case No. 4:02-CV-178

MICHIGAN DEPARTMENT
OF CIVIL RIGHTS,

HON. GORDON J. QUIST

Defendant.

ORDER

In accordance with the Opinion filed this date,

IT IS HEREBY ORDERED that Defendant's Motion For Summary Judgment Or, In the
Alternative, Motion To Dismiss (docket no. 36) is **GRANTED**.

This case is **concluded**.

Dated: March 19, 2004

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

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Defendant.

OPINION

Plaintiff, John I. Dimas ("Dimas"), has sued his former employer, the Michigan Department of Civil Rights (the "MDCR"), alleging that the MDCR discriminated against him on the basis of his national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17, and his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 to 634.¹ Dimas also alleges a claim for constructive discharge. Now before the Court is MDCR's motion for summary judgment.

I. Facts

Dimas was employed by the MDCR for approximately 25 years, during most of which time he held the position of Civil Rights Representative/Investigator ("CRR"). Dimas' duties in that position included identification, investigation, and resolution of discrimination claims. Dimas worked out of the MDCR's Benton Harbor office until 1994, when the office was closed and Dimas'

¹The Court dismissed Dimas' claim for damages under the ADEA by Order dated July 18, 2003.

work location was moved to the Kalamazoo office. Dimas continued to work out of the Kalamazoo office until he retired from the MDCR in October 2002.

Dimas' immediate supervisor at the Kalamazoo office was Team Coordinator Pat Fischer ("Fischer"). The Team Coordinator was the highest position in the Kalamazoo office. Fischer also supervised Renee Kenyon ("Kenyon"), a white female who was younger than Dimas and had fewer years of experience with the MDCR. Kenyon had been trained by Mary Hogan ("Hogan"), who at the time held a position equivalent to that of Team Coordinator. (Fischer Dep. at 123-25, Pl.'s Ex. A.) At some point, Kenyon moved from the Battle Creek office to the Kalamazoo office. Fischer later became Kenyon's supervisor, and Hogan was promoted to Process Manager. Kenyon, like Dimas, was also a Civil Rights Representative/Investigator. In approximately 2000, Kenyon was promoted to a CRR level 12 and was relocated to Battle Creek to open that office, although she still reported to Fischer. As part of her supervision responsibilities, Fischer prepared regular quarterly performance evaluations of both Dimas and Kenyon. Fischer testified that she was accurate and truthful in her evaluations and attempted to provide constructive criticism to representatives in areas where she identified a need for improvement. (Id. at 123-25.)

In 2000, the MDCR decided to reopen its Benton Harbor office as a single person office. Prior to selecting an employee to fill the position in the Benton Harbor office, representatives of the MDCR, including Fischer, MDCR Director Nanette Reynolds, an MDCR commissioner, and others, met with the president and other representatives of the Benton Harbor chapter of the NAACP. (Id. at 73-74.) During the meeting, Mattie Roddy, the NAACP president, stated that she did not want Dimas to fill the Benton Harbor position because he would not adequately represent the interests of blacks. (Id. at 74-75.) Fischer understood that Roddy's opposition to Dimas stemmed from Dimas'

handling of two complaints Roddy had filed several years earlier in which Dimas found no probable cause for discrimination. (Id. at 75.) Although the Director did not indicate that Dimas would not be chosen to fill the position, Evelyn Crane, a commissioner, said that Dimas would not be selected if Roddy did not want Dimas in that position. (Id. at 76.) Dimas did not apply for the position, even though Fischer was on the three-person interview panel. Ultimately, a white female was hired for the position.

In April 2001, Dimas, Kenyon, and another employee applied for the Team Coordinator position in the Kalamazoo office, a level 13 position, which became vacant when Fischer was transferred to the Grand Rapids office. At that time, Dimas was a CRR level 11 and Kenyon was a CRR level 12. Fischer, as Dimas' and Kenyon's immediate supervisor, recommended both of them as equally qualified for the position. (Id. at 83, 112.) The interview panel consisted of three members: Beverly Beasley-Knight, the MDCR's Chief Deputy Director; Joseph Collins, the MDCR's Human Resources Director; and Hogan. The selection process was based upon an oral interview and a writing sample. Following the interview, the candidates were evaluated using four selection criteria with different assigned weights: (1) "50% Ability and knowledge to facilitate teams and processes as it relates to all Civil Rights services; complaint resolution, information, referral, and outreach and education. This work is tracked through a computerized system."; (2) "30% Ability to facilitate and assist teams in meeting their goals."; (3) "15% Ability to coach and coordinate team members."; and (4) "5% Ability to serve on a team to handle non-routine assignments." (Candidate Comparison Form, Def.'s Br. Supp. Mot. Ex. 5.) The interview panel rated Kenyon "Very Good" on the first, third, and fourth criteria, and "Excellent" on the second criterion; rated Dimas "Average" on all criteria; and rated the third candidate "Very Good" on all criteria. (Id.) Based upon their

evaluation of the selection criteria, the interview panel selected Kenyon, who was then 35 years old, for the position. One of the panel's concerns with Dimas was his lack of familiarity with and ability to use the Contact Management System ("CMS"), a computer system through which CMS tracked all information relating to contacts and complaints made to the MDCR. (Hogan Aff. ¶¶ 16, 18, Def.'s Br. Supp. Ex. 4.) This concern was especially important because a Team Coordinator must be proficient at using the CMS not only for his or her own use but also in order to assist subordinates. (Id. ¶ 17; Beasley-Johnson Aff. ¶ 7, Def.'s Br. Supp. Ex. 6; Garcia Aff. ¶ 4, Def.'s Br. Supp. Ex. 15.)

In June 2001, the Benton Harbor position opened up because the original candidate was transferred to the Kalamazoo office. Dimas applied and interviewed for the position but was not selected. The three-member interview panel consisted of Kenyon, a "Hispanic lady," and a third person. (Dimas Dep. at 138-39, Def.'s Br. Supp. Ex. 1.) Dimas remained with the MDCR until October 31, 2002, when Dimas took voluntary early retirement pursuant to the MDCR's voluntary early retirement program.

II. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are facts which are defined by substantive law and are necessary to apply the law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A dispute is genuine if a reasonable jury could return judgment for the non-moving party. Id.

The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to

find for the non-moving party." Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

III. Discussion

Dimas alleges that the MDCR denied him a promotion to the Team Coordinator position because of his national origin and age. In addition, Dimas alleges that he was constructively discharged from his employment and was compelled to accept the early retirement package. The MDCR contends that it is entitled to summary judgment on all of Dimas' claims. With regard to Dimas' discrimination claims, the MDCR asserts that summary judgment is proper because Dimas cannot establish a prima facie case of discrimination and because Dimas cannot show that the MDCR's legitimate, nondiscriminatory reason for not selecting Dimas for the Team Coordinator position, i.e., Kenyon was the most qualified candidate, is pretext. Alternatively, the MDCR asserts that Dimas' complaint was filed more than 300 days beyond the date of the alleged discriminatory practice and is therefore barred by the statute of limitations. With regard to Dimas' constructive discharge claim, the MDCR asserts that summary judgment is proper because Dimas cannot show that the MDCR acted with discriminatory intent and because a reasonable person in Dimas' position would not have felt compelled to resign.

A. Discrimination Claims

1. Statute of Limitations

"A person who claims to have been discriminated against in violation of Title VII may not seek relief in federal court unless administrative remedies have first been exhausted." Haithcock v. Frank, 958 F.2d 671, 675 (6th Cir. 1992). Claims under the ADEA are subject to the same

exhaustion requirements. 29 U.S.C. § 626(d). In order to properly exhaust a claim under either Title VII or the ADEA, a plaintiff in a deferral state such as Michigan must file a claim with the EEOC within 300 days of the alleged discriminatory practice. Janikowski v. Bendix Corp., 823 F.2d 945, 947 (6th Cir. 1987) (noting that the 300-day limitations period set forth in 29 U.S.C. § 626(d)(2) applies to claims by plaintiffs in Michigan because the state has adopted its own law forbidding age discrimination); 42 U.S.C. 2000e-5(e). "[T]he 300-day time period begins to run in a discrimination case when the individual involved became aware of the discriminatory act and not when the consequences are felt." Sawchik v. DuPont DeNemours & Co., 783 F.2d 635, 638 (6th Cir. 1986). The 300-day filing requirement is not a jurisdictional prerequisite to filing suit, but is subject to waiver, estoppel, and equitable tolling. Zipes v. TWA, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132 (1982).

In support of its claim that Dimas' claim is untimely, the MDCR has presented Dimas' Charge of Discrimination, which was filed with the EEOC on February 19, 2002. (Charge of Discrimination, Def.'s Br. Supp. Ex. 19.) Dimas alleged in his charge that he was denied a promotion due to his age and national origin on April 23, 2001. These dates show that Dimas filed his claim with the EEOC more than 300 days after the alleged discriminatory act. Dimas does not argue that waiver, estoppel, or equitable tolling provide a basis for extending the 300-day period, and the Court finds no basis in the record for applying those doctrines in this case. Dimas argues, however, that his case was timely based upon an EEOC Intake Questionnaire dated January 30, 2002. (Pl.'s Ex. F.)

Charges of discrimination are addressed in 42 U.S.C. § 2000e-5. The only specific requirement set forth in the statute is: "Charges shall be in writing under oath or affirmation and shall

contain such information and be in such form as the Commission requires." The actual requirements for a charge of discrimination are set forth in an EEOC regulation, and include: (1) the full name, address, and telephone number of the person making the charge; (2) the full name and address of the person against whom the charge is made; (3) a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices; (4) if known, the approximate number of employees of the respondent employer; and (5) a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a state or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement. 29 C.F.R. § 1601.12(a)(1)-(5). In addition, the regulation states: "A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein." 29 C.F.R. § 1601.12(b). The Supreme Court upheld this regulation allowing for amendment in Edelman v. Lynchburg College, 535 U.S. 106, 122 S. Ct. 1145 (2002). The Intake Questionnaire in this case shows that it requested all of the information set forth in the regulation and also required the complainant to swear under penalty of perjury that the facts were true and correct.

Whether an intake questionnaire can suffice as a charge of discrimination is a question that has produced varied results. Some courts have held that an intake questionnaire is not a charge of discrimination under Title VII. See, e.g., Schlueter v. Anheuser-Busch, Inc., 132 F.3d 455, 458 (8th Cir. 1998) (finding the plaintiff's argument "well taken" but noting that the Eighth Circuit holds that intake questionnaires do not satisfy the statutory requirements for a charge because they are not verified); Persik v. Manpower, Inc., No. 03-1116, 2003 WL 23098617, at *3-4 (10th Cir. Dec. 31, 2003) (concluding that an untimely charge did not relate back to the filing of an intake form because

the form failed to meet the requirements of a charge; the form warned the complainant in two places in capital letters that completion of the form did not constitute the filing of a charge and the plaintiff's correspondence with the EEOC indicated that the plaintiff did not believe that the questionnaire he had previously completed was intended to operate as a charge); Jones v. Roadway Express, Inc., No. CIV. A. 99-2198-GTV, 2000 WL 1114968, at *3-4 (D. Kan. July 17, 2000) (concluding that the intake questionnaire was so limited in information that it could not be considered a substitute for a charge; there was no description whatsoever of the alleged unlawful action or practice). In Pijnenburg v. West Georgia Health System, Inc., 255 F.3d 1304 (11th Cir. 2001), the Eleventh Circuit held that an intake questionnaire did not satisfy the requirements of an administrative charge. The court stated:

Unlike the filing of answers to the interview questions in this case, a charge, in addition to triggering the running of the statute of limitations, serves two significant functions: (1) notification to the employer that a discrimination charge has been lodged with the EEOC; and (2) initiation of the agency's investigation of the complaint. Neither of these two functions is satisfied by the filing of an Intake Questionnaire. To randomly treat this questionnaire as a charge would thwart these two objectives, and thereby render arbitrary what the agency has attempted to make uniform.

Id. at 1306-07. However, the court tempered its decision, stating that it was not deciding "whether a questionnaire that otherwise contains the necessary information and the requirements for a valid charge could never be considered a charge for timeliness purposes," but only that "the questionnaire filed here did not meet the requirements for a validly filed charge." Id. at 1307.

In contrast, other courts have held that an intake form can suffice as a valid charge. See, e.g., Price v. Southwestern Bell Tel. Co., 687 F.2d 74, 78 (5th Cir. 1982) (stating that "[w]hile neither signed nor sworn, the form completed . . . in the conference between [the complainant and the EEOC

representative] informed the EEOC of the identity of the parties and described the alleged discriminatory conduct in enough detail to enable it to issue an official notice of charge to [the employer], thus setting the administrative machinery in motion."'). In Downes v. Volkswagen of America, Inc., 41 F.3d 1132 (7th Cir. 1994), the court of appeals concluded that the district court properly denied the defendant's motion for summary judgment because the intake questionnaire contained sufficient information to constitute a charge. The court stated:

In order to constitute a charge, notice to the EEOC must be of a kind that would convince a reasonable person that the plaintiff manifested an intent to activate the Act's machinery. In assessing whether the plaintiff manifested such intent, the district court may consider, *inter alia*, whether the questionnaire is precise enough to identify the parties and generally describe the complained-of practices and whether the information in the questionnaire was subsequently used to complete the formal charge. Further, while it is relevant that the EEOC *treated* the questionnaire as a charge, we have also held that inaction by the EEOC should not, for time limit purposes, bar an ADEA suit.

Id. at 1138 (citations omitted). In spite of the facts that the EEOC failed to assign a charge number to the plaintiff's case, process his charge, investigate his allegations, or notify the employer, and that the intake officer made a notation that the plaintiff would return to file a charge if the employer refused the employee's counter-proposal, the court held that the intake questionnaire constituted a charge because the plaintiff testified that he believed that he had done everything possible to commence an action against the employer, the information on the intake questionnaire sufficiently identified the plaintiff, the employer, and the acts of alleged discrimination, and the information in the intake questionnaire was substantially the same information included in the charge. Id. at 1139.

The Court concludes, based upon the information in the intake questionnaire and the facts surrounding Dimas' completion of it, that the intake questionnaire suffices as a charge. First, the intake questionnaire contains all of the information required to be set forth in a charge. That

information included Dimas' name and address, the MDCR's name and address, the basis of the alleged discrimination, and a statement of facts describing the allegedly discriminatory act. The questionnaire also contained a line for a verified signature, although it is unclear whether Dimas actually signed the questionnaire. However, because the pertinent regulations allow a complainant to cure technical defects in a previously-filed charge, Dimas' formal charge cured any defects in the questionnaire. Also pertinent to the Court's analysis are the facts (as shown by the case log submitted as one of Dimas' exhibits) that the EEOC assigned a case number based upon Dimas' questionnaire; the EEOC sent a package of documents to the MDCR before Dimas filed the formal charge; and the EEOC indicated in its letter to Dimas that a charge had been filed. Therefore, Dimas filed a charge within the 300-day limitation period.

2. Evidence of Discrimination

A plaintiff may establish a prima facie case of discrimination by introducing either credible, direct evidence of discriminatory intent or by circumstantial evidence through the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). See Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 862-63 (7th Cir. 1997); Huguley v. General Motors Corp., 52 F.3d 1364, 1371 (6th Cir. 1995). In this case, Dimas seeks to rely upon circumstantial proof of discrimination.

To establish a prima facie case under McDonnell Douglas based upon a failure to promote, a plaintiff must show that: (i) he is a member of a protected class; (ii) he applied for and was qualified for the Team Coordinator position; (iii) he was considered for and denied the promotion; and (iv) an employee of similar qualifications who was not a member of the protected class received the job. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Anthony v. BTR Auto. Sealing

Sys., Inc., 339 F.3d 506, 515 (6th Cir. 2003) (citing Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1166 (6th Cir. 1996)). To establish a prima facie case of age discrimination, a plaintiff must show: (i) that he was at least 40 years of age at the time of the alleged discrimination; (ii) he was subjected to adverse employment action; (iii) he was otherwise qualified for the position; and (iv) the successful applicant was substantially younger than the plaintiff. Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 341 (6th Cir. 1998). If the plaintiff establishes a prima facie case, a presumption of intentional discrimination arises, and the burden then shifts to the defendant to set forth "'a legitimate, nondiscriminatory reason' . . . for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747 (1993)(emphasis in original)(citations omitted)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981)). If the defendant meets its burden of production, the plaintiff must then prove by a preponderance of the evidence that the defendant's conduct was motivated by unlawful discrimination rather than by the reasons articulated by the defendant. See Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 883 (6th Cir. 1996)(citing Burdine, 450 U.S. at 252-53, 101 S. Ct. at 1093-94). It is well-established that an employer "has discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria." Burdine, 450 U.S. at 259, 101 S. Ct. at 1097.

The Court concludes that Dimas has presented sufficient evidence to establish a prima facie case of discrimination on the basis of both age and national origin. However, the MDCR has presented a legitimate, non-discriminatory reason for its decision to promote Kenyon instead of Dimas. That is, the MDCR has offered evidence showing that it selected Kenyon for the position

because it determined that Kenyon was more qualified than Dimas. Moreover, as discussed below, Dimas has failed to present any evidence to show that the MDCR's explanation was pretext.

In addition to showing that the interview panel gave Kenyon higher marks than Dimas as to each of the four criteria, the MDCR has presented Fischer's performance evaluations for Kenyon and Dimas. Between December 1997 and March 1999, Fischer evaluated Dimas' and Kenyon's performance based upon the following six factors: (1) quality of work; (2) analytical ability; (3) initiative; (4) teamwork; (5) relationship with others; and (6) attendance/timeliness. In the five evaluations Fischer prepared during that time, Fischer always found that Kenyon exceeded objectives with regard to quality of work, analytical ability, and initiative. (Kenyon Evaluations, Def.'s Br. Supp. Ex. 12.) Fischer also consistently noted either that Kenyon's "[w]ork never needs correction" or that Kenyon's quality of work was "excellent." (Id.) In contrast, Fisher always found that Dimas' quality of work only achieved objectives and found that Dimas' analytical ability and initiative exceeded objectives only twice and once, respectively. (Dimas Evaluations, Def.'s Br. Supp. Ex. 13.) Moreover, Fischer never described Dimas' work quality as "excellent." In evaluations conducted for the period of April 1, 1999, to June 30, 2000, Fischer always found that Kenyon had "an excellent grasp" of or "correctly assesses" customer needs; "her work product exceeds department standards"; she "works well with both internal and external customers"; and she "displays great self-reliance" or is "very resourceful and self-reliant." In contrast, on several occasions, Fischer noted that Dimas' "work product is acceptable" but that he "continues to work on improving his record keeping which must be more thorough" and that he "is self reliant, but does require some oversight." The evaluations, which generally show that Fischer rated Kenyon's work product as "excellent" and rarely identified any areas of improvement for Kenyon, and that Fischer rated Dimas' work as adequate and

often identified at least one area of improvement, such as record keeping, are consistent with the interview panel's assessment of Kenyon and Dimas on the four selection criteria.

Dimas relies heavily upon Fischer's testimony that she recommended Kenyon and Dimas both as equally qualified. Dimas also contends that Fischer testified that her performance evaluations provide no basis for supporting the conclusion that Dimas was less qualified for the promotion than Kenyon. The Court notes that Fischer did testify that she recommended Kenyon and Dimas as both equally qualified and that she pointed out each candidate's strong points to Hogan. (Fischer Dep. at 83, 138.) In addition, Fischer testified that none of the information in the performance evaluations affected her opinion that Dimas and Kenyon were equally qualified for the position. (Id. at 138.) However, Fischer's evaluations speak for themselves, and from an objective point of view without considering any *post hoc* interpretation by Dimas, the MDCR, or Fischer, show that Kenyon consistently received better evaluations than Dimas. Moreover, Fischer confirmed that her evaluations were accurate and truthful and, when asked to describe Kenyon, Fischer stated: "If I had one word to describe her, I would say a go-getter, but she's very smart and quick – quick learner." (Id. at 83.) Fischer continued:

I had not known Renee' before I went to the Kalamazoo office. I had never talked to her or communicated with her. And I thought she did good work, and I like to congratulate my reps and tell them what good work they did – do. And I had told her that because of her seniority that her work – she might need some help, but she seemed to grasp everything pretty quickly.

(Id. at 84.) Fischer did not make similar observations about Dimas, although Fischer said that one of Dimas' strengths was his ability to get to the heart of the issue. (Id. at 137-38.) However, Fischer also noted that Kenyon had the ability to get to the "heart" of the issues and "does excellent screening of claimant situations." (Kenyon 3/28/98, 9/14/98, Evaluations.)

The MDCR's evidence also shows that Kenyon was more proficient than Dimas in using CMS and that knowledge of CMS is an important aspect of the Team Coordinator position. Familiarity with CMS is essential because all case activity is tracked through CMS. (Dimas Dep. at 60-61.) It is undisputed that during the interview Dimas admitted that he still needs a lot of help in using CMS and that his comments raised a significant concern for the interviewers because Team Coordinators must not only know how to use the system but must also be able to help subordinates use it. (Dimas Interview Notes, Pl.'s Ex. I; Hogan Aff. ¶¶ 16-18; Beasley-Johnson Aff. ¶ 7, Def.'s Br. Supp. Ex. 6; Collins Aff. ¶ 18, Def.'s Br. Supp. Ex. 2.) Dimas attempts to downplay the significance of his lack of CMS proficiency and the importance of this factor in the candidate selection process. Dimas notes that Fischer testified that CMS was difficult to learn and that Dimas had no more trouble with it than many employees and in fact did eventually learn the system. Dimas also contends that this factor was only part of a 10% factor in the job description and was given limited importance on the interview guide. These arguments must be rejected, because they do not refute the evidence showing that Kenyon was more proficient than Dimas in CMS and they fail to address the fact that 50% of the selection criteria was based upon work logged and tracked through CMS.

In sum, Dimas has failed to present any evidence tending to show that the interview panel's assessment of Kenyon as the more qualified candidate was pretext for unlawful discrimination. Dimas' only real contention is that he had more seniority than Kenyon. However, seniority was not a requirement for the position. See Ellison v. First Citizens Bank & Trust Co., No. 97-1623, 1998 WL 276273, at *2 (4th Cir. May 29, 1998). Dimas has presented other evidence which he contends establishes the MDCR's anti-Hispanic animus. For the reasons discussed below, this evidence, considered either alone or in its totality, fails to establish a bias against Hispanics.

a. Dimas Denied Transfer Because of NAACP

Dimas contends that evidence that the MDCR representatives acceded to the NAACP's request to not select Dimas for the Benton Harbor opening in 2000 shows an anti-Hispanic animus. The evidence fails to support Dimas' argument for several reasons. First, Fischer's testimony was that the NAACP representative was concerned about Dimas, specifically, based upon her prior experience with Dimas, rather than about an Hispanic rights representative in general. Second, rather than awarding the position to a black applicant, as might be expected under Dimas' scenario, the MDCR hired a white woman for the position. Finally, Dimas did not apply for the position, and there is no evidence that anyone of Hispanic origin applied for the position.

b. Unfair Discipline

Dimas cites two instances in which he contends that he received unfair discipline as evidence of clear anti-Hispanic bias. The first instance arose out of complaints about Dimas' treatment of claimants in two cases. The claimants apparently sent letters to the MDCR's headquarters in Lansing, and those letters were forwarded to Fischer's boss, Greg Petty. Fischer testified that although she was familiar with at least one of the cases and told Petty that she did not think Dimas deserved to be disciplined, Petty instructed Fischer to discipline Dimas. The second incident arose out of a letter the attorney for the Lincoln Charter Township Police Department sent to the Director of the MDCR regarding Dimas' investigation into an incident of alleged racial profiling by the police against Hispanics. The Director referred the letter to Petty, who in turn contacted Fischer. Fischer testified that although no formal complaint of discrimination had been filed, she had encouraged Dimas to seek an informal resolution with the police. Fischer further stated that she relayed this information to Petty and informed him that she believed that the investigation was consistent with

MDCR policy. In spite of Fischer's information, Dimas was issued a written reprimand for improperly representing that the MDCR was conducting an official investigation when no formal complaint had been filed. Dimas contends that this second incident is even more troubling and shows a bias against Hispanics because at the same time, Petty was involved in overseeing a broad civil rights investigation into profiling of black drivers in the Detroit area.

Even if the evidence shows that Dimas was unfairly disciplined, it fails to support an inference that Dimas' national origin influenced the decision to impose discipline because Dimas has not shown that he was treated differently from any other similarly situated employee outside of the protected class. Warfield v. Lebanon Corr. Inst., 181 F.3d 723, 728-29 (6th Cir. 1999). Without such comparative evidence there is no basis to conclude that Hispanics were treated differently than other non-Hispanic employees. Although Dimas attempts to draw a comparison between the Detroit racial profiling investigation and his own investigation, there are critical differences that eliminate any inference of bias. The Detroit area investigation was apparently based upon one or more actual complaints being filed and was sanctioned by higher ranking officials. The Lincoln Township investigation was not based upon a formal complaint and therefore was not consistent with MDCR policy and procedures, at least according to Petty and Collins, who issued the discipline. In addition, there is no indication that the MDCR received a written complaint in the Detroit investigation.

c. Other Events

Dimas also cites another incident of alleged unfair discipline imposed against another Hispanic employee, Armando Garcia, a Civil Rights Representative/Investigator who was also under Fischer's supervision in the Kalamazoo office. Prior to the opening of the Battle Creek office, to which Kenyon was transferred after her promotion, Garcia failed to attend a public meeting at which

the Director was in attendance. Fischer testified that Garcia failed to tell her that he would not be attending the meeting and she was unable to assign another representative to attend. Fischer explained, "Since he didn't, he did not show up, it was a bit of a problem, because the director was at that meeting, and when no one from our office showed up . . . she was not a happy camper." (Fischer Dep. at 91.) Hogan instructed Fischer to issue a written warning to Garcia, although Fischer believed that a formal counseling or a verbal warning may have been more appropriate. Fischer testified that the discipline would have made Garcia ineligible to apply for the Battle Creek position.

This evidence fails to support Dimas' claim of anti-Hispanic animus. Fischer testified that discipline was appropriate, (id. at 94), and although Fischer believed that a formal counseling or verbal warning would have been appropriate, there is no such thing as a verbal warning, as a written warning is the first step in the disciplinary process. (Collins Dep. at 20, Def.'s Reply Br. Ex. 21.) In addition, Fischer testified that she did not know whether Garcia was even going to apply for the Battle Creek position. (Fischer Dep. at 90, 93.) Finally, as with the evidence of unfair discipline against Dimas, because Dimas has failed to show that Garcia was treated differently than another similarly situated non-Hispanic employee, the evidence fails to support an inference of bias against Hispanics.

d. Kenyon's Special Privileges

Dimas also contends that Kenyon was granted special privileges which were not extended to Dimas. First, Dimas contends that Kenyon was favored and advanced "artificially" by Hogan. The evidence does not support this conclusion. Fischer testified that Hogan trained and thought highly of Kenyon, and Kenyon looked to Hogan as a mentor. (Id. at 84.) Fischer also noted that Hogan was familiar with Kenyon's work and, like Fischer, thought that Kenyon did good work. (Id.

at 107-09.) Fischer also said that Hogan was not familiar with Dimas' or the other applicant's work. Hogan's account of her relationship with Kenyon is consistent with Fischer's testimony. That is, Hogan states that she trained Kenyon and believes that Kenyon does excellent work. (Hogan Aff. ¶¶ 7, 8.) Hogan also states that she has never been personal friends or socialized with Kenyon, nor has she taken Kenyon to special functions and meetings. (Id. ¶¶ 9, 11.) Thus, the only advantage Kenyon had over Dimas was that Kenyon did excellent work and Hogan was aware of this fact.

Second, Dimas contends that Hogan showed special favoritism to Kenyon by granting Kenyon the authority to close her own files in the Kalamazoo office without requiring Kenyon to go through any open competition for this privilege. Fischer testified that at a certain point in time the MDCR was attempting to reduce its backlog of cases, and to help the process along, a few Civil Rights Representatives, including Kenyon, were granted authority to close their cases without Team Coordinator review. Even assuming that Hogan made the decision to select Kenyon as one of the few representatives "empowered" to close cases without Team Coordinator review, this evidence provides no basis to conclude that Hogan's decision was based upon favoritism or any unlawful considerations. As discussed above, Hogan was familiar with Kenyon's work and possessed Fischer's evaluations of Kenyon, which stated that Kenyon's "[w]ork never needs correction" and was "excellent" and that Kenyon was "self-reliant." In contrast, Hogan was not familiar with Dimas' work but would have known from Fischer's evaluations that his work product was "acceptable," that he was continuing to work on his record keeping, and that he required "some oversight." Moreover, Dimas has not shown that any rule or department policy required an "open competition" for granting such authority.

Finally, Dimas points to the circumstances surrounding Kenyon's promotion to the Battle Creek position. Dimas claims that Kenyon's application for the Kalamazoo position was contrary

to an MDCR rule, which prevents an employee from applying for a promotion within one year of having received a promotion. However, Fischer was equivocal about whether the MDCR actually has such a policy, (*id.* at 85), and the MDCR has shown that the collective bargaining agreement grants the MDCR *discretion* not to consider a bargaining unit member's *transfer request* if the member was transferred within the preceding twelve months. (Collins Aff. ¶ 31.)

e. The Interview

Dimas contends that the interview was unfair because of the makeup of the panel and because Collins raised the Lincoln Township issue even though that incident was "off limits" under the collective bargaining agreement. With regard to the makeup of the panel, Fischer testified that Hogan's "position as process manager puts her in a position where she almost has to be on [the panel]." (*Id.* at 109.) Fischer also stated that she was not surprised that Collins was on the panel because he often did the interviews for higher positions. (*Id.* at 109-10.) Thus, while Dimas may not have liked the makeup of the panel, there was nothing irregular or surprising about it. As for the Lincoln Township issue, although Collins may have violated the collective bargaining agreement by raising the issue (if Dimas' testimony is believed), that violation does not support an inference of discrimination.

f. Rejection for the Benton Harbor Position in June 2001

Dimas also cites his rejection for the Benton Harbor position in June 2001 as evidence of bias against Hispanics. Dimas does not raise his rejection for this position as a separate incident of discrimination and did not file an administrative complaint with the EEOC identifying his rejection as a separate incident of discrimination. Moreover, the Benton Harbor position is irrelevant to this case and fails to support an inference of discrimination with respect to the employment action at issue.

g. Statistics

Dimas also contends that his claim of discrimination against Hispanics is supported by the MDCR's own employment figures, which show that between February 1, 1999, and November 25, 2002, four Hispanics applied for promotions to the Grade 13 position of Team Coordinator (Rights Rep. Manager 13) but were not selected for the position. However, during that same period, 34 non-Hispanics also applied and were rejected for promotions to that position. (Cohen Aff. ¶ 8, Def.'s Reply Br. Ex. 21.) Malcolm Cohen, the MDCR's expert in statistics and economics, states that his analyses show that the failure to select an Hispanic for promotion during the relevant period is not statistically significant. (Id. ¶ 8.) Cohen states that he performed separate statistical tests for Grade 13 and Grades 14-20 combined using a Fishers Exact Test and a test for all grades combined using Cochran's test and the Mantel-Haenszel Test and found that none of the tests produced a statistically significant result. (Id. ¶ 9.) Despite having ample opportunity to do so, Dimas has failed to provide any evidence rebutting Cohen's conclusion that the statistics are insufficient to be probative of discrimination.

For the reasons stated above, the Court will grant summary judgment on Dimas' discrimination claims.²

B. Constructive Discharge

Dimas has also failed to present sufficient evidence to support a constructive discharge claim. Such a claim requires that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Kocsis v. Multi-

²The Court notes that the MDCR has identified various alleged statements that Dimas has indicated support his discrimination claims. Those statements are either hearsay or are too remote in time (one of which was made almost ten years prior to the date of the alleged discrimination) to be probative of discrimination as to the employment decision at issue. The Sixth Circuit has stated that such comments are too abstract, irrelevant, and prejudicial to support a discrimination claim. Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121, 1129 (6th Cir. 1998).

Care Mgmt., Inc., 97 F.3d 876, 887 (6th Cir. 1996) (quoting Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)). A plaintiff must show that: (1) the employer deliberately created intolerable working conditions as perceived by a reasonable person; and (2) the employer acted with the intent of forcing the employee to quit. Moore v. KUKA Welding Sys. & Robot Welding Corp., 171 F.3d 1073, 1080 (6th Cir. 1999). The analysis thus "requires an inquiry into both the objective feelings of the employee, and the intent of the employer." Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987). Intent may be shown by demonstrating that it was foreseeable that the employee would quit as a result of the employer's actions. Moore, 171 F.3d at 1080.

Dimas has failed to demonstrate that the MDCR deliberately created intolerable working conditions because, for the reasons set forth above, there is no evidence that the MDCR acted with discriminatory intent. Furthermore, Dimas has failed to show that his working conditions were objectively unreasonable, such that a reasonable person would have been compelled to quit. Accordingly, the MDCR is also entitled to summary judgment on this claim.

IV. Conclusion

For the foregoing reasons, the Court will grant the MDCR's motion for summary judgment.

An Order consistent with this Opinion will be entered.

Dated: March 19, 2004

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE