Vermont Superior Court
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Franklin Unit

VERMONT SUPERIOR COURT
Franklin Unit
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CIVIL DIVISION
Case No. 22-CV-02147

Michael Mallory v. Hannaford Bros. Co., LLC

DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Michael Mallory was hired by Defendant Hannaford Brothers Company, LLC ("Hannaford") on August 10, 2020, and terminated less than a month later. He filed this suit, alleging disparate treatment and racial discrimination in violation of the Vermont Fair Employment Practices Act ("FEPA"), and intentional infliction of emotional distress. Hannaford moves for summary judgment on all but one of these claims. The court grants the motion.

BACKGROUND

¶ 1. Ordinarily, the standards applicable to a motion for summary judgment are so familiar as not to bear repetition. Here, however—perhaps because he misapprehends the basis for his termination and hence the gravamen of Hannaford's arguments on this motion—Mr. Mallory has failed to meet his burden. Thus, at the risk of belaboring the obvious, the court sets forth the standards.

¶ 2. Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(6); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party . . . must come forward with admissible evidence to raise a dispute regarding the facts."). The court must give the non-moving party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Thus, "[i]n determining the existence of genuine issues of material fact, courts must accept as true the

Vermont Superior Court
Filed 09/05/24
Franklin Unit

allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gates v. Mack Molding Co.*, 2022 VT 24, ¶ 13, 216 Vt. 379 (quotation omitted).

¶ 3. In this case, application of the Rule 56 burden-shifting regime is informed by the pertinent substantive framework. Counts I and II of the Complaint arise under FEPA. The Vermont Supreme Court has made clear that the frameworks set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) apply to such claims. *Robertson v. Mylan Lab'ys, Inc.,* 2004 VT 15, ¶ 18, 176 Vt. 356. The former applies in cases where the plaintiff presents direct evidence of discrimination; the latter, in cases where the only evidence of discrimination is circumstantial. *Id.* In his opposition, Mr. Mallory concedes that the *McDonnell Douglas* framework applies here.

¶ 4. Under that framework, the employee must first establish a "prima facia case" of discrimination. *Id.*, ¶ 24. To carry this burden, the employee must show: "(1) [he] was a member of a protected group, (2) [he] was qualified for the position, (3) [he] suffered an adverse employment action, and (4) the circumstances surrounding this adverse employment action permit an inference of discrimination." *Id.*, ¶ 25. This initial burden is "relatively light." *Id.*, ¶ 24. If the employee carries this burden, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the employment action. *Id.*, ¶ 26. Importantly, "[t]he employer's burden at this second stage is solely one of production, not persuasion." *Id.* When the employer meets its burden, "the burden then shifts back to the plaintiff to prove that the employer's justification is a mere pretext for discrimination." *Id.*, ¶ 27.

¶ 5. In its motion papers, Hannaford fairly challenged Mr. Mallory's ability to meet both his initial burden of proving a prima facie case of discrimination and his subsequent burden of proving pretext. Its Statement of Undisputed Material Facts set forth and properly supported the following narrative. On August 10, 2020, Mr. Mallory commenced employment with Hannaford as a part-time Overnight Stock Crew Associate. There is no competent evidence that he ever applied for any other position. In the hiring process, he signed a form acknowledging his responsibility to read, understand, and abide by Hannaford's "Human Resource Policies." Among those policies is a Drug and Alcohol Free Workplace Policy, which prohibits the possession and use of alcohol, controlled substances, or illicit drugs on Hannaford premises. Also included is a Speak Up Policy, which requires employees who become aware of a situation that may involve a violation of Hannaford's policies or external laws or regulations to report that situation. Finally, and most importantly for present purposes, Hannaford's

Vermont Superior Court
Filed 09/05/24
Franklin Unit

Personal Behavior Policy makes clear that failure to cooperate in an investigation and dishonesty "generally lead to discipline and termination of employment."

¶ 6. On August 21, 2020, Hannaford received reports from two employees regarding Mr. Mallory's suspicious behavior and possession of a clear bag containing an unknown cloudy-white substance during their shift earlier that morning. One of the employees also reported that on his first day of work, Mr. Mallory asked her if she knew anyone who sold cocaine. On the basis of these reports, Hannaford initiated an investigation. During the course of that investigation, Hannaford obtained written statements from the two employees and video camera footage from the places and times where the employees reported seeing Mr. Mallory with the suspicious-looking bag. It also attempted to interview Mr. Mallory. In that process, Mr. Mallory denied possessing the bag. He also twice refused to provide a written statement. The second meeting ended when Mr. Mallory stated, "this is a waste of my time," and abruptly walked out. Two days later, Hannaford terminated Mr. Murphy for failure to cooperate with the investigation and dishonesty during the investigation.

¶ 7. Hannaford's Statement of Undisputed Material Facts also properly demonstrates evidence of record that, while challenged, nevertheless helps satisfy the burden of production under the second *McDonnell Douglas* step. Specifically, Hannaford produced evidence that is at least sufficient to allow a jury to conclude that Hannaford's investigation was justified, that there was a legitimate basis for the co-employees' reports, and that Mr. Mallory was at least less than forthright, if not deliberately dishonest, in his response to the investigation. In short, Hannaford fairly challenged Mr. Mallory to come forward with evidence of pretext.

¶ 8. In response to this showing, Mr. Mallory substantially whiffed. Perhaps because he was more focused on disputing the merits of an accusation that he possessed drugs at the workplace—which accusation ultimately was not the basis for termination—Mr. Mallory failed properly to dispute any of the facts set forth in paragraphs 5 and 6 above. Thus, for example, Mr. Mallory argued that the co-employees' reports are inadmissible as hearsay—as they might be if offered for proof of possession. Here, however, they are offered not for proof of suspicious behavior, but instead to explain the basis for Hannaford's investigation. *Cf. Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 26, 175 Vt. 413 (assertions about resignations and office problems not offered to prove the truth of the matters asserted, but instead "for the limited purpose of showing why [defendant] decided to relieve plaintiff of her branch manager responsibilities"). In numerous other instances, Mr. Mallory's responses failed fairly to meet the substance of Hannaford's assertion, and so to demonstrate a genuine dispute as to the

Vermont Superior Court
Filed 09/05/24
Franklin Unit

assertion.[1] As a consequence, the court deems the facts set forth in paragraphs 5 and 6 above undisputed. *See* V.R.C.P. 56(e)(2).[2]

ANALYSIS

¶ 9. On these facts, Mr. Mallory's FEPA claims fail at both the first and third steps of the *McDonnell Douglas* inquiry.[3] As noted above, Mr. Mallory clearly has no direct evidence of discrimination in any of Hannaford's actions. Thus, to establish a prima facie case, Mr. Mallory must establish, at a minimum, that the various actions of which he complains were motivated by discriminatory animus. *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579–80 (1978) ("*McDonnell Douglas* prima facie showing . . . is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations"). Here, there simply is no such proof.

¶ 10. In Count I, Mr. Mallory asserts four claims of disparate treatment in violation of 21 V.S.A. § 495: (1) being initially denied a position as a lead stocker, (2) being denied a promotion to lead stocker, (3) being targeted, followed, and surveilled, and (4) being falsely accused of stealing food. In opposition to Hannaford's motion, however, he appears to abandon all but the first of these.

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[1] By way of example only, as the instances are too numerous to catalog, paragraph 35 of Hannaford's Statement of Undisputed Material Facts states: "In response to the witnesses' reports, on or around August 23, 2020, Hannaford initiated an investigation and obtained written statements from the witnesses and the relevant video camera footage where the witnesses reported seeing Plaintiff with the Bag." Mr. Mallory's response does not even attempt to meet the substance of this assertion; instead, it offers a lengthy discourse disputing the contents of the statements and what is shown on the video camera footage.

Similarly, paragraph 58 of Hannaford's Statement of Undisputed Material Facts states: "On September 8, 2020, pursuant to Company policy (of which Plaintiff was fully aware), Hannaford terminated Plaintiff's employment for failure to cooperate with the investigation and for dishonesty." Mr. Mallory responded: "This is an argument based on opinion and not an established fact. Plaintiff is not aware of any 'company policy' that would allow Hannaford to determine he failed to cooperate with an investigation or was dishonest." This response not only fails to meet the essential assertion—the reason for Hannaford's decision to terminate—but flies in the face of Mr. Mallory's earlier admission of Hannaford's Personal Behavior Policy (Exhibit 11), which expressly provides that "Interference with or failure to cooperate in an investigation" and "Dishonesty" "generally lead to . . . termination of employment." Bluntly, this is not the stuff of "genuine disputes."

[2] Mr. Mallory also objected to two declarations offered to prove Hannaford's policies and practices applicable to Mr. Mallory's hiring and termination, and the fact that he never applied for any position other than the one for which he was hired; he asserts that they should be precluded as a result of Hannaford's failure to disclose the facts and witnesses in discovery. The interrogatory on which he rests this assertion, however, plainly sought to obtain the thoughts and mental impressions of Hannaford's counsel, and was properly objected to as such. As Mr. Mallory points to no other discovery request that could properly have required Hannaford to identify this information, there is no basis for his requested sanction. Betting his entire stake on this objection, Mr. Mallory offered no evidence to dispute any of the facts set forth in the paragraphs of the Statement of Undisputed Facts that rely on these declarations. Thus, those paragraphs are deemed undisputed.

[3] The court notes that Hannaford has not (yet) challenged the failure to hire claim asserted in Count I (Disparate Treatment); it challenges all other aspects of that count and Count II (Discriminatory Racial Profiling and Stereotyping).

Vermont Superior Court
Filed 09/05/24
Franklin Unit

See Pl.'s Opp. to Def. Hannaford Bros. Co., LLC's Partial Motion for Summ. J., 17-19.[4] As noted above, Hannaford has not moved for summary judgment on that claim. On the remaining claims in Count I, Mr. Mallory makes no attempt to demonstrate even a prima facie case. Thus, the court deems him to have waived those claims.

¶ 11. In Count II, Mr. Mallory asserts a claim that Hannaford engaged in "discriminatory racial profiling and stereotyping . . . resulting in termination." *Id.*, 6. On this claim, he asserts that he "completes his 'relatively light' burden of establishing a prima facie case because he was the only Black employee at the Swanton Hannaford and was accused by the Store Manager of possessing a bag full of drugs that looked like a 'white powder' and 'white substance.' " *Id.*, 7. He continues:

> Plaintiff did not bring a bag of drugs to work, nor did he bring in a bag with a white substance or powder. The Store Manager took the word of white employees over his, despite Plaintiff complaining to the Manager about these employees surveilling him during his brief employment and lying about what they saw and heard. The Manager then determined Plaintiff possessed drugs based on his "assumption" that what Plaintiff was seen holding on security footage was drugs. The Store Manager's assumption was rooted in racial stereotypes involving African Americans and drugs . . . .

Id. Stripped to its bare essentials, this argument posits the following syllogism: I was falsely accused; the accusation was based on the word of co-workers, whose word the accuser took over mine; the co-workers are White and I am Black; therefore it is more likely than not that the accusation was based on my race.

¶ 12. This is far from compelling logic. Any number of possible differences between Mr. Mallory and his co-workers, all supported by the record, could just as easily explain his accuser's willingness to credit their word over his: they were longer-term employees; he admitted to being a twice-convicted felon; he was an out-of-stater; the list goes on. Even giving Mr. Mallory the benefit of all "*reasonable* doubts and inferences," this is insufficient evidence of discriminatory intent. In this inquiry, the court

> must also carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture. This undertaking is not one of guesswork or theorization. After all, "[a]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]."

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[4] This may be intentional. Proof of a disparate treatment claim requires evidence that an employee was treated differently than other similarly situated employees. *See Hammond v. University of Vermont Medical Center*, 2023 VT 31, ¶ 27. Here, except for the assertion, discussed below, that the Store Manager credited the word of other employees over his, Mr. Mallory makes no effort to show that he suffered adverse employment consequences where others did not.

Vermont Superior Court
Filed 09/05/24
Franklin Unit

Bickerstaff v. Vassar College, 196 F.3d 435, 448 (2d Cir. 1999) (quoting 1 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 6.01, instr. 6–1 (1997)).

¶ 13. Even if the evidence offered were enough to permit a reasonable inference of discrimination at the first step of the *McDonnell Douglas* inquiry, it is undisputed that Hannaford had a legitimate, non-discriminatory reason for terminating Mr. Mallory. In paragraph 58 of its Statement of Undisputed Material Facts, Hannaford asserted and properly supported the following statement: "On September 8, 2020, pursuant to Company policy (of which Plaintiff was fully aware), Hannaford terminated Plaintiff's employment for failure to cooperate with the investigation and for dishonesty." As noted in note 1 above, Mr. Mallory failed completely to meet his burden under V.R.C.P. 56(c)(2) with respect to this assertion; thus it is deemed admitted. *See* V.R.C.P. 56(e)(2).

¶ 14. Were this not enough to meet its burden at the second step of the *McDonnell Douglas* inquiry, Hannaford supports its claim of dishonesty with undisputed evidence that Mallory repeatedly denied that he had anything in his hand or took anything with him into the bathroom at the relevant time on the morning of August 21, 2020. In his deposition, however, when confronted with the video evidence, Mallory admitted that he had something in his hand at those times, and that it was white; he later admitted to having a plastic bag in his hand. It is also undisputed that he refused at least twice to provide a written statement and abruptly walked out of the second interview. This is more than enough to shift the burden back to Mr. Mallory to demonstrate that Hannaford's reason for terminating him (which, again, he has admitted) was pretextual.

¶ 15. In his effort to meet this burden, Mr. Mallory again misses the mark, principally because he aimed at the wrong target. Mr. Mallory devotes his efforts in this regard almost exclusively to Hannaford's suspicions concerning his possession of drugs in the workplace. He makes no effort to undermine Hannaford's rationale in initiating an investigation in that regard, focusing instead on what he believes to be inadequacies in the investigation itself. And he has not properly disputed the assertion that he was not fully cooperative, and not completely honest, during the investigation. Certainly, had Hannaford asserted that it terminated Mr. Mallory because of its suspicions of possession, Mr. Mallory's litany of supposed inadequacies might be sufficient to "demontrat[e] weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, [nondiscriminatory] reasons for its action." *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 22, 200 Vt. 125. But his failure even to address the proof of lack of cooperation and dishonesty dooms his effort to demonstrate pretext in the legitimate, nondiscriminatory reason that was actually offered here.

Vermont Superior Court
Filed 09/05/24
Franklin Unit

¶ 16. The observations above are sufficient also to defeat any claim for intentional infliction of emotional distress. To prevail on this claim, Mr. Mallory must show that (1) Hannaford engaged in outrageous conduct, (2) done intentionally or with reckless disregard of the probability of causing emotional distress, (3) resulting in the suffering of extreme emotional distress, (4) actually or proximately caused by the outrageous conduct. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 955 Vt. 1082. To show that Hannaford's conduct was outrageous, Mr. Mallory must show that its conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community." *Denton v. Chittenden Bank*, 163 Vt. 62, 66 (1994) (internal citations omitted); *see Demag v. American Ins. Cos.*, 146 Vt. 608, 611 (1986) (plaintiff has a "heavy burden to make out a case of outrageous conduct.").

¶ 17. Mr. Mallory's Complaint makes clear that his allegations in this regard rest entirely on the same evidence that underlies his discrimination claims. If his evidence is sufficient to carry the "relatively light" burden of demonstrating discriminatory intent, it is, *a fortiori*, insufficient to carry the "heavy burden" to demonstrate outrage. Equally, if he does not have enough evidence to demonstrate pretext, he can demonstrate neither outrage nor *mens rea*. In short, Mr. Mallory's IIED claims fail for the same reasons as defeat his discrimination claims.

ORDER

The court grants the motion. Hannaford is entitled to judgment as a matter of law on Counts II and III, and on those parts of Count I that allege disparate treatment in any respect other than the failure to hire Mr. Mallory as a "lead stocker." That claim alone remains for trial. The discovery schedule currently in place, per the court's October 18, 2023 Judge's Entry Order, suggests that discovery should now be complete and the case ready for mediation on the claim that remains. The parties shall confer and submit a stipulated schedule for the completion of mediation and preparedness for trial.

Electronically signed pursuant to V.R.E.F. 9(d): 8/29/2024 4:33 PM

Samuel Hoar, Jr.
Superior Court Judge