[Cite as *Hughes v. Youngstown State Univ.*, 2020-Ohio-611.]

JIMMY HUGHES Plaintiff v. YOUNGSTOWN STATE UNIVERSITY Defendant	Case No. 2017-00458JD Judge Patrick M. McGrath Magistrate Holly True Shaver DECISION

{¶1} On October 11, 2019, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). With leave of court, on December 4, 2019, plaintiff filed his response. On December 11, 2019, defendant filed a reply. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.,* 104 Ohio St.3d 660, 661, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327 (1977).

{¶4} Plaintiff, an African-American male, was the Chief of Police for the City of Youngstown from 2006-2011. (Plaintiff's deposition, p. 15.) Plaintiff has also been employed by defendant as an intermittent police officer since the mid-1980s. (Id., p. 7.)

Plaintiff received a telephone call informing him that the position of defendant's Chief of Police had been posted. (Id., p. 17-19.) Plaintiff applied for the position online on March 23, 2017. (Id., p. 22; Defendant's Exhibit 1.) Plaintiff asserts that although defendant accepted and acknowledged his online application, it did not consider him for the position because of his age and race. (Complaint, ¶ 7-9). Plaintiff further asserts that defendant did not advertise the job opening, and that defendant selected a Caucasian individual who was less qualified than he was for the position. (Id., ¶ 6.)

{¶5} Plaintiff asserts four counts in his complaint: 1) Race discrimination in violation of R.C. 4112; 2) 42 U.S.C. Section 1983 Equal Protection in Violation of the Fourteenth Amendment to the United States Constitution; 3) 42 U.S.C. Section 1983 Substantive Due Process; and, 4) Race Discrimination and Retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000, et. seq.[1]

{¶6} Initially, the court notes that Civ.R. 12(H)(3) states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The Court of Claims has no jurisdiction over constitutional claims or claims arising under 42 U.S.C. § 1983. *Bleicher v. Univ. of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 307, 604 N.E.2d 783 (10th Dist.1992); *White v. Chillicothe Correctional Inst.*, 10th Dist. Franklin No. 92AP-1230, 1992 Ohio App. LEXIS 6718 (December 29, 1992). Claims against the state under Section 1983, Title 42, U.S. Code may not be brought in the Court of Claims because the state is not a "person" within the meaning of Section 1983. *See, e.g.*, *Jett v. Dallas Indep. School Dist*., 491 U.S. 701 (1989); *Burkey v. Southern Ohio Correctional Facility*, 38 Ohio App.3d 170 (1988). Therefore, even construing the evidence most strongly in

[1]Although plaintiff states in paragraph 9 of his complaint that defendant's actions "are violative of both state and federal discrimination laws in that YSU's action [sic] were based on unlawful age and race discrimination," plaintiff does not assert age discrimination as a separate count of his complaint. Furthermore, plaintiff does not address age discrimination in his response to defendant's motion. Therefore, the court shall not address any claim for age discrimination.

favor of plaintiff, Counts 2 and 3 of his complaint must be dismissed for lack of jurisdiction.

{¶7} The court shall now address plaintiff's claims of race discrimination and retaliation under R.C. 4112 and federal law.

I. Race Discrimination

{¶8} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any other matter directly or indirectly related to employment." "'To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent' and may establish such intent through either direct or indirect methods of proof." *Dautartas v. Abbott Labs.,* 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 25, quoting *Ricker v. John Deere Ins.* Co., 133 Ohio App.3d 759, 766 (10th Dist.1998). In this case, plaintiff seeks to establish discriminatory intent through the indirect method, which is subject to the burden shifting analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See Nist v. Nexeo Solutions, LLC,* 10th Dist. Franklin No. 14AP-854, 2015-Ohio-3363, ¶ 31. "Under McDonnell Douglas, a plaintiff must first present evidence from which a reasonable [trier of fact] could conclude that there exists a prima facie case of discrimination." *Turner v. Shahed Ents.,* 10th Dist. Franklin No. 10AP-892, 2011-Ohio-4654, ¶11-12.

{¶9} "In order to establish a prima facie case, a plaintiff must demonstrate that he or she: (1) was a member of the statutorily protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside the protected class or that the employer treated a similarly situated, non-protected person more favorably." *Nelson v. Univ. of Cincinnati,* 10th Dist. Franklin No. 16AP-224, 2017-Ohio-514, ¶ 33. "If the plaintiff meets [his] initial burden, the burden

then shifts to the defendant to offer 'evidence of a legitimate, nondiscriminatory reason for' the adverse action. * * * If the defendant meets its burden, the burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination." *Turner, supra* at ¶ 14.

{¶10} Plaintiff has established that he is African-American, that he was not selected for the Chief of Police position, and his employment history is sufficient evidence to demonstrate that he was qualified for the position. Plaintiff also asserts that the individual who was selected for the position, Shawn Varso, is Caucasian. Therefore, construing the evidence most strongly in favor of plaintiff, the court finds that he has stated a prima facie case of race discrimination.

{¶11} The burden of production then shifts to defendant to demonstrate a legitimate, nondiscriminatory reason for not selecting plaintiff. Defendant asserts that any application for the position that was submitted after March 10, 2017, was not considered by the search committee. To support its contention, defendant filed the affidavit of Jennifer Lewis-Aey, an employee of defendant's Human Resources department, who avers, in relevant part, as follows:

{¶12} "4. In my current role, I oversaw the review of the job posting for the Chief of Police position in early 2017.

{¶13} "5. The Chief of Police opening was posted on both YSU's website and with the company HigherEdJobs on or about February 15, 2017. True and accurate copies of these job postings are attached as Defendant's Exhibits 2 and 5, respectively.

{¶14} "6. I confirmed that on the HigherEdJobs website alone, as of April 14, 2017, the Posting was searched over five thousand times and viewed over one-hundred and eighty times. A true and accurate copy of the email that I received from HigherEdJobs providing me with this information is attached as Defendant's Exhibit 6.

{¶15} "7. Postings for professional and administrative positions, such as the Chief of Police position, generally remain open until the position is filled in order to

afford the assigned search committee the option of further reviewing an applicant pool for qualified applicants in the event an initial review does not provide satisfactory qualified candidates or if a problem or other issue arises in the final stages of the hiring process. Whether a search committee decides to return to the applicant pool to find additional qualified applicants is within the committee's discretion.

{¶16} "8. The Search Committee members were able to access the submitted applications through a computer program known as PeopleAdmin. This computer program also logs the date and time of receipt of each application submitted.

{¶17} "9. My department's records indicate that *on March 10, 2017, the Search Committee completed an initial review of applications and selected four candidates for first round interviews.*

{¶18} "10. My department's records include an online applicant tracking system, which indicates that Mr. Hughes' application was received on March 23, 2017 at 11:06 p.m. A true and accurate copy of Mr. Hughes' application submission noting the date and time of receipt by the PeopleAdmin program is attached as Defendant's Exhibit 1.

{¶19} "11. On or around April 4, 2017, I became aware that Mr. Hughes had transmitted correspondence to 'YSU President/Officials.' A true and accurate copy of that letter is attached as Defendant's Exhibit 3." (Affidavit of Lewis-Aey, emphasis added.)

{¶20} Lewis-Aey sent plaintiff a letter, dated April 7, 2017, which states, in pertinent part:

{¶21} "This letter is in response to your April 4, 2017 communication to President Tressel regarding the search for the YSU Police Chief.

{¶22} "The University's on-line applicant tracking system noted receipt of your application materials on March 23, 2017, at 11:06 p.m. The search committee completed an initial review of applications and requested first round interviews on March 10, 2017. *A second round of interviews was held on March 23, 2017.*

{¶23} "Postings generally remain open in order to afford a search committee the option of further reviewing an applicant pool for qualified applicants in the event an initial review did not provide satisfactory qualified applicants. This is within the committee's discretion.

{¶24} "The timing of your application submission placed you outside of the initial applicant review. As previously stated, whether or not a search committee continues to evaluate application materials is discretionary and based upon the performance of those applicants selected for interview." (Defendant's Exhibit 4, emphasis added.)

{¶25} To clarify the statement in her letter, Lewis-Aey averred:

{¶26} "12. On April 7, 2017, I responded to Mr. Hughes on behalf of YSU. A true and accurate copy of my letter to Mr. Hughes is attached as Defendant's Exhibit 4. While I stated in the letter that a second round of interviews were held on March 23, 2017, this is incorrect. On March 23, 2017 the Search Committee Chair selected three applicants to proceed to the next step of the application process, which would have been the second round of interviews. True and accurate copies of my department's records showing the advancement of Jeffrey Scott, Stephen Van Winkle, and Shawn Varso to the next step of the application process are attached as Defendant's Exhibit 7." (Affidavit of Lewis-Aey, ¶ 12.)

{¶27} Defendant submitted the deposition of Shannon Tirone, who testified that she was the Associate Vice President of University Relations; that she was the hiring manager for the Chief of Police position, and that she had final authority on who would be chosen for the position. Tirone stated that the individuals on the search committee were chosen because their job responsibilities included having a working relationship with the university police department. According to Tirone, on March 10, 2017, the search committee chose candidates for first round interviews; on March 16, 2017, the committee conducted first round interviews; and, on April 4-26, 2017, second round interviews were conducted. Tirone admitted that the job posting did not have a closing

date. Tirone stated that many departments posted the job opening internally, and that it was posted on both the university website and the HigherEdJobs website in February 2017.

{¶28} Defendant also submitted the deposition of Jacquelyn LeVisseur, Director of Alumni and Events. According to LeVisseur, the search committee met on March 10, 2017, and decided to give final consideration of applications that day. However, LeVisseur also testified that as the search committee chair it was her responsibility to accept applications after March 10, 2017, in case an additional pool of applicants was needed. (LeVisseur deposition, p. 14-15). LeVisseur also testified that on March 10, 2017, the committee met, evaluated, and ranked each of the applicants; that the committee interviewed four applicants via Skype on March 16, 2017; and on March 23, 2017, three of those four candidates were scheduled for a second round of interviews on campus: Stephen Van Winkle, Shawn Varso, and Jeffrey Scott. (Id., p. 18-20.) LeVisseur also testified that no other candidates were given consideration after March 23, 2017. (Id., p. 20.)

{¶29} In addition, defendant submitted the affidavit of Cynthia Kravitz, Associate Vice President of Human Resources, who served as the Director of Equal Opportunity and Policy Development, Title IX Coordinator, from June 2013 to December 2018. Kravitz avers that Defendant's Exhibit 10[2] is a spreadsheet that was prepared by defendant's Human Resources staff which lists the applicants who applied for the Chief of Police position, the date the applications were submitted, the race of each applicant, and any action taken on their application. (Affidavit of Kravitz, ¶ 11.) Although Kravitz notes that the demographic information in the spreadsheet would not have been available to members of the Search Committee or the Hiring Manager in relation to any decisions made regarding the filling of the position, the data in the spreadsheet shows

[2]The court notes the last page of Exhibit 10 is missing from Kravitz's affidavit but can be found in Exhibit C to Tirone's deposition. See Bates Numbers YSU 438-440.

that any application submitted after March 10 states: "Applications arrived after interviewees were identified." See, applications of Brown (African-American male), Hank (white female), plaintiff (African-American male), Lour (white male), Machan (white male), Mercer (white female), Schialdone (white male), and Tyler (African-American male.) (Exhibit C to Tirone's deposition.)

{¶30} The court notes that the candidates who applied on or before March 10, 2017 include: two African-American females; two African-American males; eighteen white males; one Hispanic or Latino male; and three applicants of two or more races. (Id.)

{¶31} Based upon this evidence, the court finds that defendant has produced a legitimate, nondiscriminatory reason for not selecting plaintiff for the position: the search committee had determined by March 10, 2017, that the applicant pool had at least four qualified candidates, and it decided to move forward with the interview process before plaintiff had applied for the position.

{¶32} "If the employer meets its burden of production, '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.'" *Williams v. City of Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 14, quoting *Texas Dept. of* Comm. *Affairs v. Burdine,* 450 U.S. 248, 253 (1981). "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Dews v. A.B. Dick* Co., 231 F.3d 1016, 1021 (6th Cir.2000). Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him. *Johnson v. Kroger* Co., 319 F.3d 858, 866 (6th Cir.2003). A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and

that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993)." *Knepper v. Ohio State Univ.,* 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra,* at 253.

{¶33} In his response, plaintiff asserts that the procedure that defendant used to hire its Chief of Police was a "sham, devised to create the appearance of fairness but actually [was] an 'inside job' that discriminated against [plaintiff] and the other African American candidates." (Response, ¶ 2.) Plaintiff asserts that the following issues demonstrate that genuine issues of material fact exist regarding pretext: 1) Defendant failed to post the position on its website; 2) Defendant failed to notify applicants that March 10, 2017 was the closing date for applications, and the failure to post a closing date was arbitrary; 3) The search committee members were all Caucasian and do not possess law enforcement background or experience; 4) The three applicants chosen for on-campus interviews were all Caucasian; and, 5) Two African-American candidates who timely filed applications and met the minimum qualifications were not selected because they did not possess a master's degree, but Varso does not possess a master's degree.

{¶34} Plaintiff argues in his response that the search committee did not advertise the vacancy on the YSU website. Plaintiff cites his own deposition, p. 19 for his assertion. However, plaintiff admitted that the job posting he viewed was online, and he applied for the position through defendant's website. Thus, plaintiff's argument that the job opening was not advertised or posted is not supported by his own testimony.

{¶35} Defendant admits that it did not provide a closing date for the job posting. However, plaintiff points to no requirement of a closing date. Moreover, the evidence in the record shows that that any application submitted after March 10, 2017 was given the same treatment: specifically, those applications were not considered because they were

submitted after interviewees had been identified. (Exhibit C to Tirone's deposition.) Therefore, the fact that no closing date was posted is not sufficient evidence from which the trier of fact could reasonably reject defendant's explanation and infer that defendant intentionally discriminated against plaintiff because of his race.

{¶36} Plaintiff also asserts that the search committee's composition of four, Caucasian individuals who did not have law enforcement experience themselves is evidence of pretext. However, the racial composition of the search committee and their lack of law enforcement experience does not tend to show that the decision to not consider any applications submitted after March 10, 2017 has no basis in fact, did not actually motivate the decision, or was insufficient to warrant the decision. Plaintiff also asserts that the three applicants who were granted on-campus interviews were all Caucasian. However, this fact likewise does not tend to show that the decision to not consider any applications submitted after March 10, 2017 has no basis in fact, did not actually motivate the decision, or was insufficient to warrant the decision.

{¶37} Defendant's Exhibit 2 to Tirone's deposition is the job posting for the Chief of Police. The minimum qualifications are: "Bachelor's degree in Law Enforcement, minimum five (5) years full-time experience at a senior level within law enforcement." (Id.) Desired qualifications are: "Master's degree in Law Enforcement." (Id.) Plaintiff asserts that Varso was a "white candidate with inferior credentials, that is, less education or experience, who had already been serving as Interim Chief * * * was selected as Chief. None of the applicants considered for a second round of interviews was African American." Defendant's Exhibit 10 shows that Eddie Edwards, an African American male, who applied on February 24, 2017, was not selected for an interview "due to lack of preferred qualifications: *minimal higher ed and senior level experience*." Id. (Emphasis added.) John Pate, an African American male, applied on February 26, 2017, but was not selected for an interview "due to lack of preferred qualifications: *Minimal higher ed experience*." Id. (Emphasis added.) Although plaintiff argues that he

has a master's degree and Varso does not, the job posting itself shows that a master's degree was a desired qualification, not a minimum qualification. Moreover, plaintiff's allegation that two, African-American candidates were not selected because they did not possess master's degrees is not supported by the evidence.

{¶38} Construing the evidence most strongly in favor of plaintiff, the only reasonable conclusion is that plaintiff has failed to raise a genuine issue of material fact regarding pretext. Plaintiff has failed to present evidence which, construed in his favor, would lead a reasonable person to infer that the reason given for not considering his application had no basis in fact, did not actually motivate defendant's challenged conduct, or was insufficient to warrant the challenged conduct. Plaintiff relies on his own deposition testimony and the arguments in his response to the motion, which contain his own beliefs about why his application was not considered. However, discrimination plaintiffs must produce more proof than their own idle speculation. *See Higgins v. Newhouse*, 914 F.2d 256 (6th Cir.1990) at *4. Morever, "a non-movant's own self-serving assertions, whether made in an affidavit, deposition or interrogatory responses, cannot defeat a well-supported [motion for] summary judgment when not corroborated by outside evidence." *White v. Sears*, 10th Dist. Franklin No. 10AP-294, 2011-Ohio-204, ¶ 9. Accordingly, construing the evidence most strongly in favor of plaintiff, he has failed to demonstrate a genuine issue of material fact exists regarding pretext. Therefore, defendant's motion for summary judgment shall be granted on plaintiff's claims of race discrimination.

II. Retaliation

{¶39} R.C. 4112.02(I) states that it shall be an unlawful discriminatory practice: "For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07

of the Revised Code." An investigation contemplated under 4112.01 to 4112.07 of the Revised Code pertains to proceedings or hearings with the Ohio Civil Rights Commission (OCRC).

{¶40} In order to establish a prima facie case of retaliation, plaintiff is required to prove that: "'(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action.'" *Motley v. Ohio Civ. Rights Comm.,* 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶ 11, quoting *Zacchaeus v. Mt. Carmel Health Sys.,* 10th Dist. Franklin No. 01AP-683, 2002-Ohio-444. Protected activity involves either the "opposition clause," when an employee has opposed any unlawful discriminatory practice, or the "participation clause," when an employee has made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code. *See Motley, supra*, citing *Coch v. GEM Indus., Inc.*, Lucas App. No. L-04-1357, 2005-Ohio-3045, ¶ 29.

{¶41} To engage in a protected opposition activity, a plaintiff must "make an overt stand against suspected illegal discriminatory action." *Motley*, *supra*, quoting *Comiskey v. Auto. Indus. Action Grp.*, 40 F. Supp.2d 877, 898 (E.D. Mich. 1999). "Opposition" requires that that the employee communicate to [his] employer "a belief that the employer has engaged in * * * a form of employment discrimination." *Crawford v. Metro. Govt. of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276 (2009). For purposes of a retaliation claim, opposition to "demeaning and harassing conduct," without complaining of illegal discrimination or taking an overt stand against such suspected illegal discriminatory action, does not constitute a protected activity. *Murray v. Sears,* Case No. 1:09 CV 702, 2010 U.S. Dist. LEXIS 34256, 24 (N.D.Ohio April 7, 2010); *see also Fox v. Eagle Distrib. Co.,* 510 F.3d 587, 591-592 (6th Cir.2007). "[A] vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition

to an unlawful employment practice." *Booker v. Brown* & *Williamson Tobacco Co., Inc.,* 879 F.2d 1304, 1313 (6th Cir.1989).

{¶42} Plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission on May 25, 2017, in which he claimed that he was not hired for the Police Chief position because of his race. (Affidavit of Kravitz, ¶ 10.) However, the timing of his OCRC complaint defeats his claim of retaliation. Any protected activity that plaintiff engaged in occurred after he was notified, via a letter on April 7, 2017, that his application was not considered for the position. Thus, plaintiff cannot show a causal link existed between the protected activity (filing an OCRC charge) and the adverse employment action (not considering his application for the Chief of Police position.) Accordingly, the only reasonable conclusion is that plaintiff has failed to present evidence of a prima facie case of retaliation. In his deposition, plaintiff testified that he believed he was retaliated against "for being born black." (Plaintiff's depo., p. 51.) However, that assertion, standing alone, does not support a claim for retaliation. Thus, defendant's motion for summary judgment shall be granted as to plaintiff's claim for retaliation.

PATRICK M. MCGRATH
Judge

[Cite as *Hughes v. Youngstown State Univ.*, 2020-Ohio-611.]

JIMMY HUGHES Plaintiff v. YOUNGSTOWN STATE UNIVERSITY Defendant	Case No. 2017-00458JD Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶43} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED, as to Counts 1 and 4 of plaintiff's complaint, and judgment is rendered in favor of defendant. Counts 2 and 3 of plaintiff's complaint are DISMISSED. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

Filed January 3, 2020
Sent to S.C. Reporter 2/21/20