

DOB 7/12

cc. E. Welter ✓

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**  
Senior District Judge Richard P. Matsch

Civil Action No. 02-M-2218 (PAC)

ALEMAYEHU GETACHEW,

Plaintiff,

v.

7-ELEVEN,

Defendant.

**FILED**  
UNITED STATES DISTRICT COURT  
DENVER, CO  
NOV 11 2004  
GREGORY C. LANGHAM  
CLERK

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**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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The plaintiff, Alemayehu Getachew, filed this civil action under Title VII of the Civil Rights Act of 1964, as amended, against his former employer, defendant 7-Eleven, alleging that he was subjected to harassment and discrimination, and was constructively discharged, because of his national origin, Ethiopian. 7-Eleven moved for summary judgment of dismissal of all claims. Oral argument was held on November 9, 2004 and Mr. Getachew was granted leave to supplement his arguments in writing. After reviewing the papers filed, and considering the oral arguments, there is some evidentiary support for the following statement of facts.

Mr. Getachew was hired by 7-Eleven as a store manager trainee in January 2001. In March 2001, he trained at a store on East Colfax with manager Liz Agosto. Thereafter, he trained at another store with manager Ruth Tsehaye.

Kevin Grim was a 7-Eleven field consultant who supervised a group of seven or eight stores. While Mr. Getachew was training in Ms. Agostos' store, a store manager position at the

Quebec Street store opened up which Mr. Grim assigned to Vivian Noe. She had been a shift manager for a few years, had previously been a shift manager at that store, and knew the employees and had a good relationship with them.

Mr. Grim interviewed Mr. Getachew about taking over as manager of a 7-Eleven at 595 Havana Street, Aurora. During this interview, Mr. Grim mentioned to Mr. Getachew that there were several people in that store that were from his country. This was the only time that Mr. Grim made any comment about Mr. Getachew's national origin, and Mr. Getachew states Mr. Grim is the only person at 7-Eleven who discriminated against him.

Mr. Getachew became the manager of the Havana store around June 3, 2001, and Mr. Grim became his supervisor. As a store manager, Mr. Getachew had many responsibilities, including counseling employees on performance issues, preparing performance appraisals, assigning job duties to employees and ensuring they are completed, scheduling employees, merchandising, dealing with vendors, and making sure robbery prevention procedures are followed. There is a dispute concerning the extent of Mr. Getachew's responsibility for controlling shortages.

Over half of the stores supervised by Mr. Grimm were short-staffed. Mr. Getachew received some help and had to work many days and long hours. Mr. Getachew was a new store manager and Mr. Grim visited the Havana store frequently. Mr. Getachew was initially doing pretty well but after about three or four weeks, he stopped doing his controls on a regular basis, he was missing orders so there were out of stock issues, and the store was not performing well.

In July, Mr. Grim told Mr. Getachew there were concerns that he was not using all of his control tools. Mr. Getachew admitted that he did not follow the company's procedures

completely but stated it was not his fault as he was not properly staffed.

On August 10, Mr. Grim had a meeting with Mr. Getachew and two other store managers about shortage problems. In a memo dated August 20, Mr. Grim set forth several of Mr. Getachew's performance problems. Although Mr. Getachew disputes some of the problems identified, he admitted that one of his employees had six times more drive-offs than anyone else; that he had no conversation with the employee about this problem and that he discussed with Mr. Grim the need to do the milk and bread order after 11:00 a.m. daily as this was not always done.

On August 28, Mr. Grim visited Mr. Getachew's store and, after finding problems with the shortage controls and that the store was suffering from shortages, Mr. Grim spoke with his supervisor, Girish Bhargava, about the plaintiff's performance. A decision was made to demote Mr. Getachew. When Mr. Getachew arrived at the Havana store, Mr. Grim told him that he was being demoted to shift manager at another store because he could not control shortages and that Mr. Getachew could pick up some additional training at that store. Mr. Getachew testified, "And I told him [Mr. Grim] this is good for both of us. I was over pressure and he is not satisfied, so that's the solution." Although there is a factual dispute over whether Mr. Getachew gave Mr. Grim his store keys on August 28 and walked out, or whether Mr. Getachew went to the other store the next day and turned in his keys, it is not material to resolving 7-Eleven's motion.

Mr. Grim also demoted or terminated other store managers who had problems similar to Mr. Getachew's. These managers were men, women, white and Hispanic.

During Mr. Getachew's employment with 7-Eleven he never complained to anyone that he thought Mr. Grim was discriminating against him.

An employee bears the burden of presenting a prima facie case of employment

discrimination. If the employee establishes a prima facie case, the burden shifts to the employer to produce some legitimate, nondiscriminatory reason for its behavior. If the employer satisfies its burden, the employee must show that the reasons offered by the employer are pretextual.

*Sandoval v. Boulder Regional Communications Center*, 388 F.3d 1312,1321 (10<sup>th</sup> Cir. 2004).

7-Eleven argues that it had legitimate, nondiscriminatory reasons for taking the actions complained of by Mr. Getachew, and that he cannot show such actions are a pretext for national origin discrimination. 7-Eleven has presented legitimate reasons why Ms. Noe was promoted to the Quebec store rather than Mr. Getachew. Mr. Getachew was still in training at that time and Ms. Noe had more experience and knew that store and its employees. 7-Eleven has also shown that Mr. Getachew was not using shortage controls in the Havana store, it had concerns about Mr. Getachew's performance as a store manager, the Havana store was not the only store understaffed, and Mr. Grim also demoted or terminated other store managers. Although Mr. Getachew disputes some of 7-Eleven's complaints about Mr. Getachew's performance, 7-Eleven has presented legitimate reasons for its actions, but Mr. Getachew has not shown that the reasons given are a pretext for discrimination. "It is the manager's perception of the employee's performance that is relevant." *Jones v. Denver Post Corp.*, 203 F.3d 748, 754 (10<sup>th</sup> Cir. 2000). The courts are not free to second-guess the business judgment of an employer. *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 n.14 (10<sup>th</sup> Cir. 1999), *overruled on other grounds by National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

To survive summary judgment on his hostile work environment claim, Mr. Getachew must show that, under the totality of circumstances, he suffered harassment based on his national origin that was sufficiently severe or pervasive to alter the conditions of his employment and

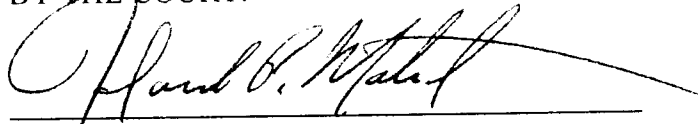
create an abusive working environment. *Sandoval v. Boulder Regional Communications Center, supra* at 1326-1327. The claimed harassment consisted of being required to work long hours, being criticized, and talked to in a disrespectful way. Viewing the evidence in a light most favorable to Mr. Getachew, a reasonable jury could not find that Mr. Getachew was subjected to pervasive or severe harassment, or that the conduct complained of was motivated by bias against Mr. Getachew based on his national origin.

Mr. Getachew must present sufficient evidence to raise a genuine issue that he was constructively discharged. An employee's resignation is judged under an objective standard, whether his working conditions were so intolerable that a reasonable employee would have no choice but to quit. *Sandoval v. Boulder Regional Communications Center, supra* at 1325; *Sanchez v. Denver Public Schools*, 164 F.3d 527, 534 (10<sup>th</sup> Cir. 1998). The working conditions complained of by Mr. Getachew could not lead a rational juror to conclude that a reasonable person would have felt compelled to quit. It is therefore

ORDERED that the defendant's motion for summary judgment of dismissal is hereby granted and this action is dismissed with prejudice.

DATED: December 14<sup>th</sup>, 2004.

BY THE COURT:

  
Richard P. Matsch, Senior District Judge

Civil Action No. 02-M-2218 (PAC)

I certify that I mailed a copy of the attached Order entered by Judge Richard P. Matsch on December 14, 2004, to the following:

Magistrate Judge Coan

Alemayehu Getachew  
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Theodore A. Olsen  
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Dated: December 15, 2004

JAMES R. MANSPEAKER, CLERK

By: Glenna Drake  
Glenna Drake, Secretary