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United States District Court,
D. Maryland, Southern Division.

Chim S. SHEIKH, Plaintiff,
v.
7–ELEVEN, INC., Defendant.

No. Civ.A. AW–03–2270.
|
Dec. 17, 2004.

Attorneys and Law Firms

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MEMORANDUM OPINION

WILLIAMS, J.

***1** This action involves a Title VII employment discrimination suit brought by Chim S. Sheikh ("Sheikh" or "Plaintiff") against 7–Eleven, Inc. ("7–Eleven" or "Defendant"). Plaintiff alleges that, during his term of employment with 7–Eleven, he was discriminated against, demoted, subjected to a hostile work environment, and constructively discharged, all in violation of Title VII. Currently pending before the Court is Defendant's Motion for Summary Judgment [50] and Plaintiff's Cross–Motion for Summary Judgment [68]. The Court has reviewed the entire record, as well as the Pleadings with respect to the instant motion. No hearing is deemed necessary. *See* Local Rule 105.6 (D.Md.2004). For the reasons stated below, the Court will grant Defendant's Motion for Summary Judgment.

I. *FACTUAL & PROCEDURAL BACKGROUND*

In 1985, Sheikh, a male of South Asian descent, was hired by 7–Eleven as a Manger Trainee in Dallas, Texas. In 1988, Sheikh relocated to the Washington, D.C. area, and began working as a Supervisor in Montgomery County, Maryland. In 1992, Plaintiff held the position of Field Consultant in the Chesapeake Division.

7–Eleven owns, operates, and franchises food stores. 7–Eleven's stores are located throughout the United States and are divided into regional "Divisions." The 7–Eleven stores in the Washington, D.C. metro area fall within the "Chesapeake Division." At the head of the Chesapeake Division is a Division Manager. The Division Manager supervises the Market Managers, who are each responsible for approximately 70 stores. The Market Managers supervise the Field Consultants, each of whom has seven to nine stores under their control. Beneath the Field Consultants are the Store Mangers, who run the 7–Eleven stores on a daily basis.

In January 1999, 7–Eleven posted a vacancy for a Market Manager for Market 2543, located in the Chesapeake Division. At the time, the Division Manager of the Chesapeake Division was Joseph Strong ("Strong"). Strong interviewed four candidates for the Market Manager position: Sheikh, Sharon Trow, Paul Yanon, and Troy McWilliams ("McWilliams"). Strong selected McWilliams for the Market Manager position. At the time of the Market Manager interview, McWilliams was a Grade Level 25 Fresh Food Merchandiser. Plaintiff was a Grade Level 23 Field Consultant.

In January 2000, 7–Eleven posted a vacancy for a Market Manager for Market 2581, also located in the Chesapeake Division. Strong interviewed three candidates for the Market Manager position: Sheikh, Clyde Johnson, and Phil Rapson ("Rapson"). Strong selected Rapson for the Market Manager position. At the time of the interview, Rapson was a Grade Level 24 Retail Information Systems Manager. Sheikh was a Grade Level 23 Field Consultant.

In October 2000, Sheikh applied for an open Market Manager position for Chesapeake Market 2543. In January 2001, Sheikh was selected for the Market Manager position. Pursuant to company guidelines, Sheikh was promoted from a Grade Level 23 to a Grade Level 24 when he became a Market Manager, and one year later, was promoted to a Grade Level 25. Strong was Sheikh's direct supervisor during Sheikh's time as a Market Manager.

***2** In October 2002, Strong began contemplating a reorganization of the Chesapeake Division. In order

to maximize cost savings, Strong wanted to create larger markets, and install a developmental Senior Field Consultant under each Market Manager. 7–Eleven's guidelines require that a Market Manager must have ten or more Field Consultants in order for the Division Manager to hire a Senior Field Consultant for that market. In October 2002, the Chesapeake Division contained twelve markets, each run by a Market Manager. Most of these Market Managers had fewer than ten Field Consultants. Therefore, in order to qualify his markets to hire Senior Field Consultants, Strong needed to eliminate two markets and consolidate those markets with the remaining ten markets. Strong decided not to reorganize immediately, as a reorganization would require Strong to eliminate two Market Manager positions.

In January 2003, Buddy Behringer ("Behringer"), the Market Manager for Prince William County, Virginia, announced his retirement. Based in large part on Behringer's decision to retire, Strong decided to downsize the Chesapeake Division from twelve markets to ten markets. As of March 1, 2003, there were eleven individuals employed as Market Managers in the Chesapeake Division. The tenure and the most recent performance evaluation of these individuals was as follows:

NAME	*Months in Market Manager Position*	*Performance Rating* [1]
Riaz Vaziralli	159	I
Arthur Temblay	134	I
Phillip Bradner	127	M
David Erbe	126	I
Patrick Siefert	104	M
Stephen Tusing	80	I
Larry Bullis	58	I/M
John Patrick	55	I
Troy McWilliams	50	M
Phillip Rapson	35	M
Chim Sheikh	26	M

7–Eleven states that it decided to eliminate Sheikh's Market Manager position based upon the fact that Sheikh was the least senior of all of the Market Managers. Strong told Sheikh that his position had been eliminated, and gave Sheikh the option to stay with the company as a Field Consultant or to accept a severance package. [2] Sheikh

declined these options and decided to leave the company. Sheikh left the company in February 2003; the effective date of his termination was March 6, 2003.

During the entire course of his employment with Defendant, Plaintiff was subjected to a hostile work environment based on his race. Plaintiff explains that several employees, and McWilliams in particular, would regularly make negative and racially derogatory comments regarding employees of foreign descent. Plaintiff points to four specific comments as evidence of this hostile work environment: (1) McWilliams stated that "these foreign borns are coming out of the woodworks [sic] to apply for franchise [sic] in my market"; (2) Brenda Duiguid, a Field Consultant, stated that "all my managers are foreign born and these foreign born managers do not accept me because in their culture or religion, a woman cannot take a position over a male"; (3) McWilliams stated that foreign-born employees come to the United States without any money and then turn around and demand an increased salary; (4) McWilliams made comments about the personal hygiene of foreign-born employees such as "this guy hasn't changed his turban or his shirt for a week and he stinks."

***3** On July 8, 2003, Plaintiff filed the instant suit, alleging four counts of employment discrimination. Specifically, Plaintiff's allegations are as follows: Count I —Race Discrimination; Count II—Retaliation; Count III —Hostile Work Environment; Count IV—Constructive Discharge. On March 12, 2004, Defendant filed a Motion for Summary Judgment. On May 25, 2004, Plaintiff filed a Cross–Motion for Summary Judgment.

II. *SUMMARY JUDGMENT STANDARD*

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.,* 6 F.3d 211, 214 (4th Cir.1993); *Etefia v. East Baltimore Comm. Corp.,* 2 F.Supp.2d 751, 756 (D.Md.1998). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1). The court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine,* 501 U.S. 496, 520 (1991) (internal citations omitted). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc.,* 152 F.3d 326, 330–31 (4th Cir.1998); *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir.1985).

III. *ANALYSIS*

A. *Count I—Race Discrimination*

Plaintiff argues that Defendant unlawfully discriminated against Plaintiff based on his race by (1) failing to promote Plaintiff to the position of Market Manager and (2) reorganizing the Chesapeake Division to eliminate Plaintiff's Market Manager position.

A plaintiff lacking direct evidence of race discrimination may utilize the three-part burden shifting test outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See Price v. Thompson,* 380 F.3d 209, 212 (4th Cir.2004). Under *McDonnell Douglas,* a plaintiff must first establish a *prima facie* case of discrimination, whereupon the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the action. *McDonnell Douglas,* 411 U.S. at 802. The plaintiff may then rebut the employer's proffer by proving by a preponderance of the evidence that the employer's legitimate non-discriminatory reason is actually a pretext for discrimination. *Id.* at 804. A plaintiff can prove pretext by showing that the employer's explanation is "unworthy of credence," or by offering other forms of circumstantial evidence sufficiently probative of retaliation. *Id.*

1. *Discriminatory Failure to Promote*

***4** In order to establish a *prima facie* case of race discrimination based on Defendant's failure to promote Plaintiff to the Market Manager position, Plaintiff must prove that: (1) Plaintiff is a member of a protected class; (2) there was an open Market Manager position for which Plaintiff applied; (3) Plaintiff was qualified for the position; and (4) Plaintiff was rejected under circumstances giving rise to an inference of unlawful

discrimination. *Amirmokri v. Baltimore Gas & Elec. Co.,* 60 F.3d 1126, 1129 (4th Cir.1995).

Defendant does not dispute that Sheikh can establish a *prima facie* case of discriminatory failure to promote. Therefore, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason as to why Sheikh was not promoted to the position of Market Manager. *McDonnell Douglas,* 411 U.S. at 802.

Defendant states that Sheikh was not promoted to the position of Market Manager because the persons who received the Market Manager positions were more qualified than Sheikh. Therefore, Defendant has articulated a legitimate nondiscriminatory basis for its decision. *Patterson v. McLean Credit Union,* 491 U.S. 164, 170 (1989); *Carter v. Ball,* 33 F.3d 450, 458 (4th Cir.1994)

The burden thus shifts back to Plaintiff to prove that Defendant's legitimate nondiscriminatory reason is a pretext for discrimination. To demonstrate pretext, Plaintiff must offer more than merely his substantiated belief that he was discriminated against. *See McCain v. Waste Mgmt., Inc.,* 115 F.Supp.2d 568, 574 (D.Md.2000) (stating that to survive summary judgment, a "plaintiff must present admissible evidence that is more than self-serving opinions or speculation"). Here, Plaintiff offers no evidence that Defendant's failure to hire Plaintiff as a Market Manager was the product of discriminatory intent. Indeed, the Court notes that, once Plaintiff gained more experience with the company, Plaintiff was subsequently hired as a Market Manager by Defendant. Plaintiff's subjective and unsupported belief that he was discriminated against is insufficient to overcome Defendant's legitimate, non-discriminatory rationale.

Additionally, Defendant presents ample evidence to support its argument that Sheikh was not the most qualified of the Market Manager applicants. Specifically, in 1999, Defendant hired McWilliams for the Market Manager position rather than Sheikh. McWilliams was a Grade Level 25 employee, and possessed relevant experience as a Fresh Food Merchandiser. Sheikh was a Grade Level 23 Field Consultant. Therefore, McWilliams was hired because, by virtue of his experience, he was more qualified for the position than was Sheikh. Similarly, in 2000, Defendant hired Rapson for the Market Manager position over Sheikh. Rapson had worked for the prior two years as a Grade Level 24 Retail Information Systems Manager. Sheikh, in contrast, was a Grade Level 23 Field Consultant. Again, Defendant chose to hire the applicant with the greater amount of experience. For these reasons, the Court finds that Plaintiff has failed to demonstrate that Defendant's legitimate non-discriminatory reason is actually a pretext for discrimination. Therefore, Plaintiff's claim of discriminatory failure to promote fails.

2. *Discriminatory Reorganization*

***5** In order to establish a *prima facie* case of race discrimination based on Defendant's elimination of Plaintiff's Market Manager position, Plaintiff must prove that: (1) Plaintiff is a member of a protected class; (2) Plaintiff was selected for discharge; (3) Plaintiff was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a lower level than that at which Plaintiff was performing. *Mitchell v. Data Gen. Corp.,* 12 F.3d 1310, 1315 (4th Cir.1993).

Defendant argues that Plaintiff cannot demonstrate the fourth element of a *prima facie* case of discrimination —that the process of selection produced a residual work force that contained persons who were performing at a lower level than was Plaintiff. At the time of the elimination of Plaintiff's Market Manager position, Plaintiff's most recent performance evaluation was an "M," denoting "meets requirements." All of the Market Managers who remained after Plaintiff's position was eliminated received either a "M" or an "I," denoting "improves business," in their performance evaluations. As such, Defendant argues that none of the remaining Market Managers were performing at a lower level than Plaintiff at the time that his position was eliminated.

Plaintiff presents allegorical evidence of positive reviews and feedback he received in the past concerning his job performances throughout his tenure with Defendant. Plaintiff also expresses his personal opinion that he was performing at a higher level than others of the remaining Market Managers.

The Fourth Circuit has emphasized that, in assessing the qualifications of job applicants, a plaintiff's own opinions and conclusory allegations do not have sufficient probative force to reflect a genuine issue of material fact. *Goldberg v. B. Green & Co., Inc.,* 836 F.2d 845, 848 (4th

Cir.1988). Rather, "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Evans v. Tech. Applications & Serv. Co.,* 80 F.3d 954, 960–61 (4th Cir.1996). Here, Plaintiff presents no evidence that, at the time of the reorganization, Defendant perceived Plaintiff to be performing at a higher level than any of the other Market Managers.

The Court also notes that the circumstances attending the elimination of Plaintiff's position suggest that discrimination was not in play. Specifically, the Fourth Circuit has stated that, where an employee was hired and fired by the same person within a relatively short time span, a strong inference is raised that the employer's reasons for acting against the employee are not pretextual. *Jiminez v. Mary Washington College,* 57 F.3d 369, 378 (4th Cir.1995). In this case, from January 2001 until March 2003, Strong hired Plaintiff as a Market Manager, twice increased Plaintiff's pay, and then eliminated his position citing reasonable business concerns. The probability of discrimination under this scenario is thus reduced.

***6** For all of these reasons, the Court finds that Plaintiff cannot demonstrate that Defendant's process of selection produced a residual work force of persons any of whom were performing at a lower level than that at which Plaintiff was performing. As such, Plaintiff has not established a *prima facie* case of discriminatory reorganization.

B. *Count II—Retaliation*

Plaintiff alleges that Defendant unlawfully eliminated his Market Manager position in retaliation for Plaintiff's advocacy of employees of foreign descent. To sustain a *prima facie* case of retaliatory discrimination, Plaintiff must demonstrate that: (1) Plaintiff engaged in a protected activity; (2) Defendant took adverse employment action against Plaintiff; and (3) a causal connection existed between the protected activity and the adverse employment action. *Causey v. Balog,* 162 F.3d 795, 803 (4th Cir.1998).

Plaintiff points to two different incidents as "protected activity": (1) in March 2000, Plaintiff complained to Strong that Plaintiff was denied a promotion to the Market Manager position because of discrimination; and (2) in early 2003, Plaintiff advocated on behalf of several employees of foreign descent.

The Fourth Circuit has held that, for purposes of demonstrating a *prima facie* case of retaliation, a causal connection exists where the employer takes adverse employment action against an employee "shortly after learning of the protected activity." *Price v. Thompson,* 380 F.3d 209, 213 (4th Cir.2004). In general, "the passage of time ... tends to negate the inference of discrimination." *Id.; Downe v. Total Action Against Poverty in Roanoke Valley,* 145 F.3d 653, 657 (4th Cir.1998) ("A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action ... negates any inference that a causal connection exists between the two."). Moreover, where temporal proximity is the only evidence of causality, the temporal proximity must be "very close." *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268 (2001) (citing with approval a Tenth Circuit case finding three-month period insufficient to establish a causal connection).

Defendant concedes that Plaintiff's March 2000 complaint to Strong is protected activity. Nevertheless, Defendant argues that there is no causal connection between the complaint and the adverse employment action taken against Plaintiff. The Court agrees. Defendant eliminated Plaintiff's Market Manager position in March 2004. As such, lacking any other evidence suggesting a connection, Plaintiff's March 2000 complaint is too remote in time from the March 2004 reorganization for Plaintiff to establish a causal connection between the two events. *See Causey v. Balog,* 162 F.3d 795, 803 (4th Cir.1998) (thirteen month interval too long to establish causal connection).

Plaintiff's other protected activity occurred in early 2003, approximately one year prior to the elimination of Plaintiff's Market Manager position.[3] The Court doubts the causal connection between this protected activity and the adverse employment action, given the relatively long time period between the two incidents as well as the lack of additional evidence indicating a relationship between the two events. Moreover, Plaintiff offers no evidence that Defendant's legitimate reason for eliminating Plaintiff's position was pretext for retaliation. As discussed previously, Defendant presents evidence that the decision to eliminate a Market Manager position was a reasonable business decision. Additionally, Plaintiff's position was selected for elimination because Plaintiff had the least tenure of any of the Market Managers, and was not performing at a level above the remaining Market Managers. Plaintiff presents no evidence beyond his own

opinions that Defendant's true motivation was one of retaliation. For all of these reasons, Plaintiff's claim of discriminatory retaliation fails.

C. *Count III—Hostile Work Environment*

***7** In order to establish a *prima facie* case of hostile work environment based on race, Plaintiff must prove that the harassment was: (1) unwelcome; (2) based on Plaintiff's race; (3) sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive work environment; and (4) imputable to Defendant. *Ocheltree v. Scollon Prods., Inc.,* 335 F.3d 325, 331 (4th Cir.2003) (en banc); *Causey v. Balog,* 162 F.3d 795, 801 (4th Cir.1998). In considering the severity and pervasiveness of the harassment, courts should consider the following factors: (1) the frequency of the harassment; (2) the severity of the harassment; (3) whether the harassment was physically threatening or merely offensive utterances; and (4) whether the harassment unreasonably interferes with the employee's work performance. *Smith v. First Union Nat'l. Bank,* 202 F.3d 234, 242 (4th Cir.2000).

Employers may avoid strict liability for a supervisor's harassment where no adverse employment action was taken against the employee and the employer can demonstrate that (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998).

Plaintiff's allegations of hostile work environment can be divided into two categories: his allegations concerning the time period 1985 until 2001 and his allegations concerning the time period January 2001 until March 2003, when Plaintiff served as a Market Manager.

With regard to Plaintiff's pre–2001 allegations, Defendant argues that the affirmative defense articulated in *Faragher* shields Defendant from liability. The Fourth Circuit has found that distribution of an anti-harassment policy provides "compelling proof" that an employer exercised reasonable care to prevent and correct promptly any harassing behavior. *Barrett v. Applied Radiant Energy Corp.,* 240 F.3d 262, 266 (4th Cir.2001). Here, Defendant has an anti-harassment policy, the substance of which Defendant distributed to its employees. Additionally, Plaintiff made no complaints concerning any harassing behavior by other employees prior to January 2001, and in doing so unreasonably failed to take advantage of Defendant's clearly articulated anti-discrimination policy. Therefore, the Court finds that the *Faragher* affirmative defense is applicable to Plaintiff's pre–2001 harassment allegations.

Considering Plaintiff's post–2001 harassment allegations,[4] Plaintiff fails to demonstrate a *prima facie* case of hostile work environment. The bulk of Plaintiff's harassment allegations concern comments made by McWilliams regarding foreign-born employees .[5] Plaintiff argues that McWilliams routinely insulted and mocked foreign-born employees. Specifically, Plaintiff alleges that the following derogatory comments were made: (1) McWilliams stated that "these foreign borns are coming out of the woodworks [sic] to apply for franchise [sic] in my market"; (2) Brenda Duiguid, a Field Consultant, stated that "all my managers are foreign born and these foreign born managers do not accept me because in their culture or religion, a woman cannot take a position over a male"; (3) McWilliams stated that foreign-born employees come to the United States without any money and then turn around and demand an increased salary; (4) McWilliams made comments about the personal hygiene of foreign-born employees such as "this guy hasn't changed his turban or his shirt for a week and he stinks." Plaintiff alleges that these statements were characteristic of the types of derogatory statements McWilliams would often make regarding foreign-born employees.

***8** The Court finds that the harassment by McWilliams was not sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive work environment. First, Plaintiff admits that the harassment did not interfere with his work performance. Second, McWilliams' comments, while offensive and insulting, never came close to being physically threatening. Third, and perhaps most important, the comments occurred on a less than regular basis. Over the several year period that Plaintiff identifies as when the harassment by McWilliams occurred, Plaintiff can point to only a handful of specific discriminatory comments. Indeed, Van Lear testified that McWilliams made derogatory comments about foreign-born employees approximately once a month. Such sporadic insults fall far short of the standard of frequent and pervasive harassment.

While the Court sympathizes with the plight of any employee forced to endure racially derogatory comments made by a fellow employee or supervisor, Title VII was not designed to remedy every instance of verbal harassment in the workplace. *Lissau v. Southern Food Serv., Inc.,* 159 F.3d 177, 183 (4th Cir.1998); *see Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998) ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' "). Moreover, when such comments are infrequent, non-threatening, do not interfere with the employee's work performance, and largely go unreported by the employee, they do not amount to a hostile work environment within the meaning of Title VII. For these reasons, Plaintiff's claims of hostile work environment fail.

D. *Count IV—Constructive Discharge*

In order to establish a claim for constructive discharge, Plaintiff must show that: (1) Plaintiff is a member of a protected class; (2) Plaintiff was qualified for his job and performed his job satisfactorily; (3) in spite of Plaintiff's qualifications and performance, Plaintiff was discharged, either actually or constructively; and (4) Plaintiff's position remained open to similarly qualified applicants after Plaintiff's dismissal. *Carter v. Ball,* 33 F.3d 450, 458–59 (4th Cir.1994).

Defendant argues that Plaintiff cannot demonstrate that he was constructively discharged. A constructive discharge occurs when an employer creates intolerable working conditions in a deliberate effort to force the employee to resign. *Id.* at 459; *Martin v. Cavalier Hotel Corp.,* 48 F.3d 1343, 1350 (4th Cir.1995). The law does not support a finding of constructive discharge merely because an employee has been subject to a demotion. *Rankin v. Greater Media, Inc.,* 28 F.Supp.2d 331, 342 (D.Md.1997). However, a demotion can constitute constructive discharge "where the demotion is essentially a career-ending action or a harbinger of dismissal." *Carter,* 33 F.3d at 459. In order to demonstrate constructive discharge, Plaintiff must prove both the deliberateness of Defendant's actions and the intolerability of Plaintiff's working conditions. *Id.*

***9** "Intolerability" is not established by merely showing that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign. *Blistein v. St. John's College,* 74 F.3d 1459, 1468 (4th Cir.1996). Rather, an employee's working conditions are intolerable only where a reasonable person in the employee's position would have had no choice but to resign. *Id.* Here, Plaintiff argues that he felt compelled to resign rather than accept a demotion from Market Manager to Field Consultant because of the "stigma" such a demotion has in his culture. The Court finds that the stigma of a demotion is insufficient to establish intolerability. *See Rosado v.. Garcia Santiago,* 562 F.2d 114, 119–20 (1st Cir.1977) (loss of prestige insufficient to support a finding of constructive discharge).

Plaintiff also asserts that the demotion from Grade Level 25 to Grade Level 22 constituted a 50% reduction in pay and a severe loss of supervisory duties. As an initial matter, Plaintiff's salary was to be reduced by 28%—not the 50% alleged by Plaintiff. Second, such a loss in pay would not compel a reasonable person to resign his position. It is undisputed that Defendant offered Plaintiff the next highest position available at the time of the reorganization, and indicated that Plaintiff would have almost immediately been eligible for a promotion to the newly-created position of Senior Field Consultant. Moreover, because Plaintiff was not demoted based on his inability to perform the duties of a Market Manager, but rather due to the downsizing of his specific role, a reasonable person would believe that Plaintiff would be highly competitive for promotion when a Market Manager position became available, particularly given the emphasis Defendant placed when interviewing for a promotion on prior relevant experience.

For these reasons, a reasonable person would view Plaintiff's demotion was not a career-ending action or a harbinger of dismissal, but rather as a temporary setback. Indeed, Plaintiff had previously endured a similar reorganization in 1992; he was briefly demoted, but was soon promoted and, over time, saw his career progress. As such, because a reasonable person in Plaintiff's position would not have been compelled to resign. Plaintiff cannot demonstrate constructive discharge.

IV. *CONCLUSION*

For all of the aforementioned reasons, Plaintiff has failed to demonstrate that he was subjected to racial discrimination, retaliatory harassment, a hostile work environment, or was constructively discharged, within the

meaning of Title VII. As such, the Court will GRANT Defendant's Motion for Summary Judgment [50] and DENY Plaintiff's Cross–Motion for Summary Judgment [68]. An Order consistent with this Opinion will follow.

ORDER

Currently pending before the Court is Defendant's Motion for Summary Judgment [50] and Plaintiff's Cross–Motion for Summary Judgment [68]. For the reasons stated in the Court's December 17, 2004 Memorandum Opinion, IT IS this 17th day of December, 2004, in the United States District Court for the District of Maryland ORDERED:

***10** 1. That Defendant's Motion for Summary Judgment [50] BE, and hereby IS, GRANTED;

2. That Plaintiff's Cross–Motion for Summary Judgment [68] BE, and hereby IS, DENIED;

3. That the Clerk of the Court CLOSE this case; AND

4. That the Clerk of the Court transmit a copy of this Order to all counsel and parties of record.

All Citations

Not Reported in F.Supp.2d, 2004 WL 3584088

Footnotes

1 An “I” stands for “improves business,” and is the highest rating. An “M” stands for “meets requirements.” An “N” stands for “needs improvement,” and is the lowest rating.

2 Defendant notes that the position of Senior Field Consultant was not yet available, but that Sheikh would have been eligible to apply for the position of Senior Field Consultant on March 26, 2003, when the first vacancy for a Senior Field Consultant position was posted.

3 There is some dispute between the parties as to whether the alleged mistreatment of foreign-born employees involved allegations of intentional discrimination. *See Peters v. Jenney,* 327 F.3d 307, 320–21 (4th Cir.2003). Reading Plaintiff's affidavit in the light most favorable to Plaintiff, the Court finds that Plaintiff's raising issues of “fairness” is the equivalent of his raising issues of discrimination.

4 Although the majority of Plaintiff's allegations concerning harassment by McWilliams seem to have occurred in 2001, Plaintiff is not always clear on this point. Therefore, the Court will take the allegations in the light most favorable to Plaintiff and assume that all of the allegations made by Plaintiff concerning McWilliams occurred post–2001.

5 The Court notes that Plaintiff also makes a host of other allegations concerning hostile work environment, including allegations that foreign-born employees were bombarded with derogatory remarks, “required to be slaves and perform servant, menial, demeaning and humiliating personal tasks for 7–Eleven managers and their families during the work and off duty hours without pay,” and made to perform sexual acts for 7–Eleven managers. The these allegations, based primarily on the testimony of Deborah Van Lear (“Van Lear”), are either irrelevant to this case as they do not directly concern Plaintiff or are not detailed with any specificity. *See Carter,* 33 F.3d at 461–62 (“[G]eneral allegations do not suffice to establish an actionable claim of harassment.”). The Court will thus consider only those allegations of harassment that actually affected Plaintiff.