UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WALLACE ROBERTS, Plaintiff,	:	
V.	:	CASE NO. 99CV14(RNC)
JUDICIAL DEPARTMENT, THOMAS WHITE, Defendants.	:	

RULING AND ORDER

Plaintiff, a juvenile detention officer employed by the State of Connecticut Judicial Branch, brings this employment discrimination action under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and 42 U.S.C. § 1983 against the Judicial Branch and Thomas White, a Judicial Branch employee. Plaintiff claims that defendants have failed to promote him because of illegal discrimination based on race and age. He also claims that White has retaliated against him for filing a charge of discrimination. Defendants have moved for summary judgment on all claims on various grounds. For reasons that follow, the motion is granted.

I. Background

Unless otherwise identified, the following narrative is drawn from unopposed facts asserted in defendants' Local Rule (9)(c)(1) statement.[1]

[1] Plaintiff has responded to statements of fact in defendants' (continued...)

Plaintiff is a black male who was born on June 23, 1937. He has been a juvenile detention officer ("JDO") at the detention facility in New Haven since September 1994. He holds a B.A. in sociology with a minor in psychology from Queens College in New York. See Pl.'s Mem. Ex. 4 ("Pl.'s Dep I") at 9. For twenty years, until 1984, he worked in the New York City corrections system. He was an entry-level corrections officer for approximately 13 years. He was promoted to captain in 1976 and served in several facilities at that rank until late 1981, when he was appointed one of several Assistant Deputy Wardens at the Queens House of Detention. He held that position for approximately two years until he retired. See generally Pl.'s Dep I at 16-46.

Upon retirement, plaintiff moved to Connecticut and pursued various ventures from 1984 until 1994, none of which involved corrections-type work. During the last two years of that period, plaintiff worked at Long Lane School, first as a substitute teacher and then as a tutor and achievement tester. In 1994, he took his present position in New Haven. Since then, he has been denied each of the numerous promotions for which he has applied.

The following promotions are of particular relevance to the present motion. In 1995, plaintiff applied for and was denied a

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[1] (...continued)
(9)(c)(1) statement by stating that he has insufficient information to admit or deny them. Pursuant to Local Rule (9)(c)(1), those statements of fact are deemed admitted because they have not been controverted.

Shift Supervisor position, one step up the juvenile detention chain of command from his position.[2] In September 1996, he applied for the positions of Classification and Program Officer ("CPO") and Program Services Coordinator ("PSC") at the New Haven facility. These positions formed the mental health component of the facility's chain of command and reported to the Assistant Supervisor and Supervisor. In November 1997, plaintiff applied for the position of Supervisor of the New Haven facility; he was denied the promotion on March 15, 1998, when Dr. John Chapman was elevated from Assistant Supervisor/Acting Supervisor to Supervisor.

In April 1998, plaintiff filed a discrimination charge with the CHRO and the EEOC. His affidavit in support of the charge alleged that he had been passed over for promotion repeatedly during his tenure with the Judicial Branch, mentioning specifically the denial of his application for promotion to the Supervisor's position in 1998.

Shortly after plaintiff filed his EEOC charge, the Judicial Branch began a major reorganization. Juvenile Detention was merged with several other divisions to form the new Court Support Services Division ("CSSD").[3] Many new positions were created, several of

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[2] The chain of command within a juvenile detention facility consisted of the Supervisor, Assistant Supervisor, Shift Supervisors, and JDOs.

[3] CSSD comprises Juvenile Detention, Adult and Juvenile Probation, the Bail Commission, Alternative Sanctions, and Family Relations.

which plaintiff applied for and none of which he received. In November 1998, plaintiff applied to be Director of Operations of CSSD, one step below the division's Executive Director. The position was given to defendant White, who had been Director of Juvenile Detention before the reorganization.[4] In January 1999, plaintiff applied to be one of five "Deputy Directors of Regional Services" within CSSD. These positions reported directly to White, who was on the interview committee for the positions. At the same time, plaintiff applied to be one of thirteen Regional Managers, who reported to the Deputy Directors. The same panel, including White, interviewed the Regional Director applicants. Plaintiff received none of the new CSSD positions.

II. Discussion

Defendants' arguments in support of their motion for summary judgment run the gamut from jurisdictional challenges through failure to state a claim to failure to produce sufficient evidence to prevail at trial. They are addressed in that order.

A. ADEA Claim Against Judicial Branch

The amended complaint alleges that the Judicial Branch has violated the ADEA by denying plaintiff promotions due to his age. As defendants argue (and plaintiff reportedly concedes, see Defts.'

[4] This was not the first time defendant White and plaintiff competed for a job. In 1995, plaintiff applied for the then-new position of Director of Juvenile Detention. The position went to White, who held it until the 1998 reorganization.

Mem. [doc. 19] at 2 n.1), this claim is barred by the Judicial Branch's Eleventh Amendment sovereign immunity. See Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). Therefore, defendants' motion for summary judgment is granted as to plaintiff's ADEA claim.

B. Identifying Plaintiff's Remaining Claims

Because of a lack of specificity in plaintiff's papers, it is necessary to sort out what claims he brings against each defendant and what promotion denials are encompassed by the various claims.

Title VII Race Claim.

Plaintiff's amended complaint specifically identifies only one promotion denial -- the failure to promote him to the Supervisor position in March 1998. See Am. Compl. [doc. 9] ¶ 10. In countering defendants' arguments as to timeliness and exhaustion, plaintiff contends that his Title VII claim alleges a single, continuing violation, but he does not identify what is included in the claim. See Pl.'s Mem. [doc. 25] at 8. His papers in opposition to summary judgment refer to the 1998 Supervisor position, the 1996 CPO position, the 1996 PSC position, and the 1995 Shift Supervisor position. Accordingly, I will assume that plaintiff's Title VII race claim is based on the failure to promote him to those four positions.

Section 1983 Race & Age Claim.

The amended complaint alleges that defendant White failed to promote plaintiff to the Supervisor position in 1998 because of

racial and age animus.[5] Plaintiff argues in his memorandum that White also discriminated against him in connection with his applications for the 1996 positions, see Pl.'s Mem. at 13, but a memorandum of law cannot be used to amend the complaint, see Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996); Natale v. Town of Darien, No. 3:97CV 583 (AHN), 1998 WL 91073, at *4 n.2 (D. Conn. Feb. 26, 1988). Accordingly, plaintiff's section 1983 race and age claim is limited to the failure to promote him to the Supervisor position in 1998.

Section 1983 Retaliation Claim.

Plaintiff testified that his retaliation claim against defendant White is limited to actions taken by White after plaintiff filed his CHRO complaint in April 1998. See Pl.'s Dep. II at 135. In his memorandum, plaintiff identifies as the basis for this claim his unsuccessful applications for the positions of Deputy Director of Regional Services and Regional Manager, for which he applied in January 1999. See Pl.'s Mem. at 14-15. His retaliation claim is thus deemed to include those two positions.[6]

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[5] The amended complaint alleges that the failure to promote in March 1998 was also retaliatory, see Am. Compl. ¶ 12, but in his deposition plaintiff stated that his retaliation claim is based on actions that occurred after he filed his April 1998 EEOC charge. See Pl.'s Mem. Ex. 5 ("Pl.'s Dep. II") at 135. Moreover, he has not identified any complaints of discrimination he made before 1998. See Pl.'s Dep. I at 102.

[6] The amended complaint does not contain a Title VII retaliation claim against the Judicial Branch.

C. Title VII Claim: Timeliness & Exhaustion

Defendants argue that to the extent plaintiff's Title VII claim is based on promotion denials that preceded the denial of his application for the Supervisor position in 1998, his claim fails to comply with Title VII's administrative preconditions to suit. More specifically, defendants contend that earlier promotion denials (1) took place more than 300 days before the filing of plaintiff's EEOC charge and are therefore time-barred and (2) were not administratively exhausted because they were not included in the EEOC charge.[7] I agree with defendants' first argument.

When a person files a discrimination charge with a state equal employment opportunity agency, Title VII requires him to file a complaint with the EEOC within 300 days of the alleged act of discrimination. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 765 (2d Cir. 1998). "This requirement functions as a statute of limitations in that discriminatory incidents not timely charged before the EEOC will be time-barred upon the plaintiff's suit in district court." Id. (citations omitted). Because plaintiff filed

[7] Defendants argue that the failure to exhaust deprives the court of subject matter jurisdiction, relying on language in Butts v. City of New York Dep't of Hous. Preserv. & Dev., 990 F.2d 1397, 1401 (2d Cir. 1993). Since defendants filed their papers, the Second Circuit has clarified that failure to exhaust, like failure to meet the time limits imposed by Title VII, is not jurisdictional and thus is subject to waiver. Francis v. City of New York, 235 F.3d 763, 766-68 (2d Cir. 2000). While not a jurisdictional requirement, exhaustion is nevertheless an "essential element of Title VII's statutory scheme" and a necessary "precondition to bringing a Title VII claim in federal court;" failure to exhaust, if not waived, will bar the suit. Id.

his EEOC complaint on or about April 16, 1998, the 300-day period extends back to approximately June 20, 1997. Of the four promotion denials at issue on the Title VII claim, this period encompasses only the promotion denial in 1998. Accordingly, the earlier promotion denials are not actionable under Title VII unless saved by some exception to the 300-day limit.

As noted, plaintiff argues that the earlier promotion denials are not time-barred because "his claim is a single, continuing violation." Pl.'s Mem. at 8. "The continuing-violation exception 'extends the limitations period for all claims of discriminatory acts committed *under an ongoing policy of discrimination* even if those acts, standing alone, would have been barred by the statute of limitations.'" Quinn, 159 F.3d at 765 (quoting Annis v. County of Westchester, 136 F.3d 239, 246 (2d Cir. 1998)) (emphasis added by Quinn).

"The continuing-violation exception applies where there is evidence of specific discriminatory practices, such as the repeated use of discriminatory seniority lists or employment tests." Lightfoot v. Union Carbide Corp., 110 F.3d 898, 907 (2d Cir. 1997). "'[M]ultiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation.'" Quinn, 159 F.3d at 765 (quoting Lambert v. Genesee Hosp., 10 F.3d 46, 53 (2d Cir. 1993)). Thus, a series of discriminatory actions makes out a continuing violation

only when "there is a relationship between the series and an invalid, underlying policy." Connecticut Light & Power Co. v. Secretary of United States Dep't of Labor, 85 F.3d 89, 96 (2d Cir. 1996).[8]

The four promotion denials at issue in this case constitute separate and distinct acts that are not continuing in nature. See Malarkey v. Texaco, 559 F. Supp. 117, 121 (S.D.N.Y. 1982) ("Completed acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing nature'"); see also Choi v. Chemical Bank, 939 F. Supp. 304, 311 (S.D.N.Y. 1996) (the continuing-violation exception does not apply to discrete incidents of nonpromotion). Accordingly, to avoid summary judgment, plaintiff must produce evidence that the promotion denials resulted from some

[8] Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir. 1994), which held that a continuing violation may be found when "specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice," did not greatly expand the continuing violation doctrine. Cornwell is the only case in which the Second Circuit has found a continuing violation under this somewhat broader definition, and this case is clearly distinguishable from Cornwell. In Cornwell, the district court, as trier-of-fact, found that defendant had personnel policies that discriminated on the basis of gender and that the plaintiff had suffered sexual discrimination at the hands of her supervisors and co-workers so severe and pervasive that it led to a three-year absence due to an illness precipitated by the harassment. It bears noting that each of the cases cited in the text were decided by the Second Circuit after Cornwell.

underlying policy or mechanism of discrimination. See Lightfoot, 110 F.3d at 907; Lambert, 10 F.3d at 53.

Plaintiff has not alleged or argued that the promotion denials are the product of a policy of discrimination. Nor has he offered evidence that reasonably would permit such an inference to be drawn. His Title VII claim is therefore time-barred with regard to the promotion denials that preceded the denial of his application for promotion in 1998.

D. Section 1983 Retaliation Claim

Plaintiff's equal protection claim against defendant White alleges that White failed to promote him because of his CHRO and EEOC complaints concerning the failure to promote him to the Supervisor position in 1998. There is no authority for a retaliation claim under the Fourteenth Amendment when the protected activity is a complaint of race or age discrimination. See Bernheim v. Litt, 79 F.3d 318, 323 (2d Cir. 1996) ("[W]e know of no court that has recognized a claim under the equal protection clause for retaliation following complaints of racial discrimination.") Accordingly, defendant White's motion for summary judgment on the section 1983 retaliation claim is granted.

E. Title VII and Section 1983 Claims on the Merits

After the foregoing analysis, the claims that remain to be addressed on the merits are plaintiff’s claim against the Judicial Branch under Title VII for race discrimination in connection with the failure to promote him to the Supervisor position in 1998 and

his claim against White under section 1983 for race and age discrimination in connection with the same promotion denial.[9] These claims are analyzed using the three-step, burden-shifting framework established in McDonnell Douglas, 411 U.S. 792, 802-04 (1973). See Sorlucco v. New York City Police Dep't, 888 F.2d 4, 6-7 (2d Cir. 1989). Plaintiff must first establish a prima facie case by showing (1) that he was member of a protected class, (2) that he was qualified for the position for which he applied, and (3) that he was denied the position (4) in circumstances giving rise to an inference

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[9] Defendants argue that plaintiff's entire section 1983 claim should be dismissed for failure to meet a heightened pleading requirement allegedly applicable to section 1983 claims against individuals who assert a qualified immunity defense. While I recognize that neither the Supreme Court nor the Second Circuit has ruled on the question directly, I am not persuaded that any such pleading requirement is viable in light of Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993). The Second Circuit has subsequently held that

> [s]ince qualified immunity is an affirmative defense that the defendants have the burden of raising in their answer and establishing at trial or on a motion for summary judgment, a plaintiff, in order to state a claim of constitutional violation, need not plead facts showing the absence of such a defense.

Black v. Coughlin, 76 F.3d 72, 75 (2d Cir. 1996). More recently, the Supreme Court has suggested methods of addressing the question of qualified immunity that do not involve a heightened pleading requirement. See Crawford-El v. Britton, 523 U.S. 574, 597-600 (1998). Accordingly, I do not rely on defendants' heightened pleading argument in limiting the section 1983 claim.

It bears noting that even if the heightened pleading requirement applied, the section 1983 claim would look the same at this point. The denial of the 1998 Supervisor position is quite specifically pleaded, see Am. Compl. ¶ 10, and the earlier discussion eliminated prior incidents not because they are vaguely plead against defendant White but because they are not plead at all.

of discrimination. See Brown v. Coach Stores, 163 F.3d 706, 709-10 (2d Cir. 1998); Austin v. Ford Models, Inc., 149 F.3d 148, 152 (2d Cir. 1998). Defendants must then articulate "a legitimate, nondiscriminatory reason" for giving the position to Dr. Chapman. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000). If such a reason is provided, plaintiff bears the ultimate burden of proving that it is a pretext for illegal discrimination. See id.

Defendants, who apparently concede that plaintiff has established a prima facie case, state that they chose Dr. Chapman because of his superior employment and educational qualifications and his performance in the interview. See Defts.' Mem Ex. D ("White Aff.") at ¶ 41; Defts.' Mem Ex. F ("Cunningham Aff.") at ¶ 19. The burden thus shifts to plaintiff to offer evidence that this explanation is a pretext for discrimination.

Plaintiff has not sustained this burden. In arguing that defendants' explanation is a pretext, he does not dispute the facts set forth in defendants' memorandum regarding Chapman's superior qualifications and experience. See Defts. Mem. at 27-29, Pl.'s Mem. at 11-12. Moreover, the arguments plaintiff presents are either contrary to or unsupported by evidence in the record. For example, he argues that he was the superior candidate because of his "experience within the facility, the grass roots support he engendered with his peers, and the type of integrated management which could have been achieved if they chose to promote [him]." Id.

However, the record establishes that Dr. Chapman had been the Assistant Supervisor of the New Haven facility since 1990, that he had been Acting Supervisor since August 1997, and that plaintiff was not hired until 1994, at which time he was given the JDO position, at least two levels below Chapman in the chain of command. Plaintiff presents no evidence of "grassroots support" from his peers, Dr. Chapman's alleged "passivity" as Assistant Supervisor, or how he would be a better manager than Chapman.[10]

Because plaintiff provides no evidence to support a finding that defendants' explanation is a pretext for discrimination, defendants' motion is granted as to the Title VII claim and the section 1983 claim to the extent it is based on race and age.[11]

Conclusion

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[10] Plaintiff does not dispute that Chapman scored higher in the interview and appears to concede that during the interview he expressed reservations about working with female officers on the male side of the detention facility. He presents no evidence to support his claim that a cultural misunderstanding may have contributed to defendants' perception that he had a negative attitude toward women, and his deposition testimony reveals no difficulties in communication.

[11] While it is well settled that evidence supporting a prima facie case should be considered at the final stage of the burden-shifting analysis, see Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000), and it is possible that in some cases such evidence alone can be sufficient to support an ultimate inference of discrimination, see Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203 (2d Cir. 1995), plaintiff's prima facie case consists only of the facts that the person appointed was white and younger. That evidence would be insufficient to sustain plaintiff's burden at trial.

To summarize, defendants have shown that they are entitled to summary judgment on all the claims in the amended complaint. Plaintiff's ADEA claim is barred by sovereign immunity. His Title VII claim is time-barred insofar as it is based on promotion denials that preceded the denial of his application for promotion to the Supervisor position in 1998. His Title VII claim based on the 1998 promotion denial fails to withstand the motion for summary judgment because on the record now before the court no reasonable jury could find that defendants' explanation for choosing Dr. Chapman is a pretext for racial discrimination. Plaintiff fails to state a section 1983 claim against defendant White for retaliation in violation of the Equal Protection Clause, and fails to present sufficient evidence to support a finding that White intentionally discriminated against him on the basis of race or age.[12]

Accordingly, the motion for summary judgment is hereby granted. The Clerk may close the file.

So ordered.

Dated at Hartford, Connecticut this 28th day of March 2001.

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Robert N. Chatigny
United States District Judge

[12] Because plaintiff has failed to raise a triable issue as to whether his constitutional rights have been violated, there is no need to address the question whether defendant White is entitled to qualified immunity.