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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Reuben James Thompson,

Plaintiff,

v.

John M. McHugh, Secretary of the Army

Defendant.

No. CV-13-01342-PHX-NVW

ORDER

Before the Court are Defendant's Motion for Summary Judgment (Doc. 101), Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 103), Plaintiff's Response to Defendant's Statement of Facts to Discredit Defendant's Motion for Summary Judgment (Doc. 104) and Defendant's Reply (Doc. 112). For the reasons that follow, Defendant's Motion will be granted.

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment tests whether the opposing party has sufficient evidence to merit a trial. At its core it questions whether sufficient evidence exists from which a reasonable jury could find in favor of the party opposing the motion. Summary judgment should be granted if the evidence reveals no genuine dispute about any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

A material fact is one that might affect the outcome of the suit under the governing law, and a factual issue is genuine "if the evidence is such that a reasonable jury could return

a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must produce evidence to support its claim or defense by more than simply showing "there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court must view the evidence in the light most favorable to the nonmoving party, must not weigh the evidence or assess its credibility, and must draw all justifiable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 255. Where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587.

II. LEGAL ANALYSIS

A. Title VII

"In order to prevail in a Title VII case, the plaintiff must establish a prima facie case of discrimination." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). "If the plaintiff succeeds in doing so, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct." *Id.* "If the defendant provides such a reason, the burden shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination." *Id.* "The prima facie case may be based either on … more direct evidence of discriminatory intent" or on "a presumption arising from" a four-factor test established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): (1) the plaintiff belongs to a protected class, (2) he was qualified for the position, (3) he suffered an adverse employment action, and (4) "other employees with qualifications similar to [his] own were treated more favorably." *See Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998) (citations and internal quotation marks omitted). "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference

or presumption." *Vasquez*, 349 F.3d at 640 (alteration in original) (citation and internal quotation marks omitted).

Plaintiff has not adduced any direct evidence of discrimination regarding his termination. In his Amended Complaint, Plaintiff alleges several of his co-workers and supervisors made racially insensitive comments during the course of his employment, such as expressing surprise that a black employee "could have so much education and experience" and telling Plaintiff, on his first day, that "he sounds white over the phone." Doc. 26 at 2. But in opposing a motion for summary judgment, the "nonmoving party may not rely merely on the unsupported or conclusory allegations of [his] pleadings." *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987) (citing Fed. R. Civ. P. 56(e)). Rather, a "party asserting that a fact cannot be or is genuinely disputed must support the assertion" either by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). Plaintiff has done neither. Moreover, none of the comments Plaintiff alleges in his Amended Complaint was made by Troy Olson, the supervisor who recommended Plaintiff's termination, or Richard Fontanilla, who authored the Notice of Decision in Plaintiff's case. *See* Doc. 26 at 2; Doc. 102-1 at 6-8. If Plaintiff can make out a prima facie case of discrimination, then, it must be through reliance on the *McDonnell Douglas* factors.

Defendant concedes that Plaintiff satisfies the first three requirements of the *McDonnell Douglas* test. To satisfy the final requirement, Plaintiff must show that other employees, to whom he was "similarly situated … in all material respects," received more favorable treatment. *See Zeinali v. Raytheon Co.*, 636 F.3d 544, 554 (9th Cir. 2011) (citation omitted). If Plaintiff cannot make such a showing, his prima facie case fails, and summary judgment is appropriate. *Moran v. Selig*, 447 F.3d 748, 756-57 (9th Cir. 2006). Here, Plaintiff has brought forward no evidence from discovery that suggests—nor did he even allege in his Amended Complaint—that other of Defendant's employees, who were

similarly situated to Plaintiff, received more favorable treatment. Indeed, the record is completely devoid of accounts of other employees whom Defendant treated differently under analogous circumstances. Because Plaintiff has not shown his treatment differed in any way from Defendant's treatment of other employees, he has not established a prima facie case of discrimination.

Even if Plaintiff could make a prima facie showing, his Title VII claim still would not survive summary judgment. Defendant has "articulate[d] a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct," *Vasquez*, 349 F.3d at 640, namely Plaintiff's arrest for marijuana possession in February 2011 and his prior suspension for public intoxication in Afghanistan. Possession of marijuana is illegal under federal law, *see* 21 U.S.C. § 844(a), and Plaintiff does not dispute that, on numerous occasions between December 2010 and April 2011, he possessed the drug while driving a government vehicle, Doc. 102-2 at 91-92. It is irrelevant that Plaintiff claims to need marijuana for medical reasons. Under the Supremacy Clause, federal law, which prohibits possession of marijuana without making any exception for medicinal use, trumps any state laws permitting a patient to possess marijuana when prescribed by a doctor. *See United States v. $186,416.00 in United States Currency*, 590 F.3d 942, 945 (9th Cir. 2010) ("The federal government has not recognized a legitimate medical use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act." (citations omitted)). Therefore neither Plaintiff's California medical-marijuana card, nor his Arizona card—for which the requisite doctor's recommendation was issued *after* his February 2011 arrest, Doc. 102-1 at 20—renders illegitimate Defendant's proffered explanation for Plaintiff's adverse employment action.

Defendant having offered a nondiscriminatory reason for its termination of Plaintiff, the burden shifts back to Plaintiff to show that Defendant's explanation is a "pretext for discrimination." *Vasquez*, 349 F.3d at 640. "[A] plaintiff can prove pretext in two ways: (1) *indirectly*, by showing that the employer's proffered explanation is

'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) *directly*, by showing that unlawful discrimination more likely motivated the employer." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1170 (9th Cir. 2007) (alteration and emphasis in original) (citations and internal quotation marks omitted). Plaintiff has not carried his burden. He has produced no direct evidence that Defendant acted out of discriminatory motive and has not shown that Defendant's proffered explanation is "internally inconsistent or otherwise not believable." As a result, Defendant is entitled to summary judgment on Plaintiff's Title VII claim.

B. Disability Discrimination

Plaintiff also seeks damages under the Americans with Disabilities Act, which does not cover employees of federal agencies. *See Daniels v. Chertoff*, No. CV 06-2891-PHX-JAT, 2007 U.S. Dist. LEXIS 28750, at *8-9 (D. Ariz. Apr. 17, 2007) ("[F]ederal courts have concluded that the ADA provides no remedy to federal employees." (citing 42 U.S.C. § 12111(5)(B)(i))). Plaintiff's disability discrimination claim will therefore be treated as one arising under the Rehabilitation Act, which is "the exclusive remedy for handicap discrimination claims by federal employees." *Miller v. Olesiuk*, No. C-13-01856 EDL, 2013 U.S. Dist. LEXIS 121222, at *22 (N.D. Cal. Aug. 26, 2013) (internal quotation marks omitted) (citing *Johnston v. Horne*, 875 F.2d 1415, 1420 (9th Cir. 1989)). The nature of Plaintiff's discrimination claim is unclear from the Amended Complaint. Because the Amended Complaint at no point suggests that Defendant failed to provide a requested reasonable accommodation, the Court construes Plaintiff's claim to "allege discrimination based on discriminatory intent." *Smith v. Barton*, 914 F.2d 1330, 1339 (9th Cir. 1990). To survive summary judgment in such a case, the plaintiff must make a prima facie showing that he suffered an adverse employment action "under circumstances indicating discrimination on the basis of an impermissible factor." *See id.* at 1340 (citation and internal quotation marks omitted). "Thereafter, the burden shifts to the defendant to rebut the presumption of discrimination by coming forward with

evidence that the plaintiff [suffered the adverse employment action] for a legitimate, nondiscriminatory reason." *Id.* "If the defendant does so, the burden then shifts back to the plaintiffs to demonstrate the proffered reason was not the true reason for the decision or that it encompassed unjustified consideration of the handicap itself, i.e., that the articulated reason is a pretext." *Id.* (citation omitted).

Assuming without deciding that Plaintiff is disabled within the meaning of the Rehabilitation Act, and that he can make out a prima facie case of discrimination, Defendant has nevertheless produced evidence that Plaintiff was terminated for a "legitimate, nondiscriminatory reason," i.e., his possession of illegal narcotics and previous discipline in Afghanistan. Plaintiff has not carried his burden of demonstrating that Defendant's stated reason is pretextual. Indeed, nothing in the record, or even in Plaintiff's pleadings, suggests Defendant engaged in "discriminatory treatment caused by overt prejudices." *Id.* at 1339.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Doc. 101) is granted.

IT IS FURTHER ORDERED that the Clerk shall enter judgment in favor of Defendants and that Plaintiff take nothing.

Dated this 17th day of October, 2014.

Neil V. Wake
United States District Judge