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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LESTER DECKER,
Plaintiff,

v.

BARRICK GOLDSTRIKE MINES, INC.,
Defendant.

3:12-cv-0287-LRH-WGC

ORDER

Before the court is defendant Barrick Goldstrike Mines, Inc.’s (“Barrick”) motion for summary judgment. Doc. #27.¹ Plaintiff Lester Decker (“Decker”) filed an opposition (Doc. #33) to which Barrick replied (Doc. #38).

I. Facts and Background

Defendant Barrick is a mining corporation that operates an open pit mine near Elko, Nevada. Plaintiff Decker, who identifies as Native American, is a former employee of Barrick and worked as an equipment operator and passenger bus driver since 1992.

On the early morning on September 11, 2010, Decker caused an accident while transporting himself and his fellow shift crew out of the mine in one of Barrick’s passenger buses. At the time of the accident, there were only two roads in and out of the mining area: the “Suzy” road and the “12th West” road. At a pre-shift meeting the night before, on September 10, 2010, the shift

¹ Refers to the court’s docket number.

1 supervisor advised all night shift crew, including Decker, that part of the 12th West road had been
2 reworked and blocked off for “haul traffic.” *See* Doc. #27, Exhibit 9, Decker Depo., p.177:21-22.

3 The next morning, at approximately 6.34 a.m., Decker logged into the bus’ monitoring
4 system to begin the drive out of the mine.² Prior to driving, Decker did not clean the bus
5 windshield. *See Id.* at p.182:25-183:10. Decker then took the 12th West road out of the mine despite
6 the prior night’s warning that part of the road had been reworked and closed. As he continued down
7 the 12th West road, Decker was blinded by the rising sun. *Id.* at p.189:13-190:10. Decker did not
8 stop, call for assistance, clean the windshield, or even use the bus’ sun visor. Instead, Decker
9 continued driving up the 12th West road. Operating sun-blinded, and unable to see a turn up ahead,
10 Decker drove the bus into a dig face barrier. Several of the employees Decker was transporting
11 suffered injuries including concussions, a fractured nose, lacerations, contusions, and sprains. Many
12 of the injured workers lost multiple days of work and one employee missed fifty-five (55) days of
13 work as a result of injuries sustained in the accident. Decker also caused roughly \$23,000 in
14 property damage to Barrick equipment. Doc. #27, Exhibit 33.

15 Barrick conducted an investigation into the accident which spanned several days. Barrick’s
16 investigation determined that Decker was responsible for the accident and had violated several
17 company policies for passenger bus operation.³ In particular, the Inthinc report generated during the
18 investigation registered driving speeds in excess of the twenty-five mile per hour limit at the mine.

20 ² All of Barrick’s vehicles and machine equipment are equipped with Inthinc, a monitoring system
21 which provides in-cab monitoring, GPS, speed recording, braking information, and other safety and recording
22 features.

23 ³ At the time of the accident, Barrick had in place a series of policies relating to the operation of
24 passenger buses entitled “Shift Change Procedures for Hot Change Buses.” Doc. #35, Exhibit 3. The policies
25 stated in pertinent part that (1) drivers will not operate any bus or vehicle with obstructed vision; (2) drivers
26 will clean windshields if vision is obstructed, before transporting personnel; (3) drivers will stop in a safe area
and clean windshields if vision becomes obstructed during operation; (4) drivers will not exceed posted speed
limits or drive faster than conditions permit; and (5) drivers will follow all traffic patterns correctly and will
obey all traffic control and warning signs. *Id.* The policies further provided that “[a]ny violation of the Standard
Operating Procedures may result in disciplinary action up to and including termination.” *Id.*

1 Doc. #27, Exhibit 31. Likewise, Decker drafted a post-incident statement in which he admitted that
2 he was unable to see in front of the bus while he was driving at the time of the accident. Doc. #27,
3 Exhibit 32. As a consequence of the accident and these infractions, Barrick terminated Decker
4 pursuant to its accelerated discipline policy.⁴

5 Decker challenged his termination under Barrick’s appeal policy. Barrick’s appeal process
6 permits an employee to challenge a termination to either a panel of his peers or directly to the
7 general manager. Doc. #27, Exhibit 36. Decker chose a panel review. Pursuant to Barrick’s appeal
8 policy “[t]he panel can recommend reversal or modification of the termination decision to the
9 General Manager,” but the general manager makes the final decision regarding termination. *Id.*
10 After reviewing the factual circumstances underlying the accident, the appeals panel recommended
11 against Decker’s termination and passed their recommendation on to the general manager.
12 Doc. #27, Exhibit 38. Randy Buffington (“Buffington”), Barrick’s general manager, considered the
13 panel’s recommendation but ultimately upheld Decker’s termination. In a post-review letter,
14 Buffington stated that Decker’s termination “was a result of [his] violation of the standards of
15 conduct policy, ‘*Safety violations that endanger life or limb, even if the action does not result in*
16 *injury.*’ Violation of our division’s standard operating procedures, ‘*The assigned driver will not*
17 *operate any bus or vehicle with obstructed vision.*’ As well as a fundamental breach of trust.”
18 Doc. #35, Exhibit 9.

19 In response to his termination, Decker filed a charge of discrimination with the Equal
20 Employment Opportunity Commission (“EEOC”) alleging discrimination based on his age, race,
21 color, and national origin. After receiving a right to sue letter, Decker filed an initial complaint on
22

23 ⁴ Barrick also had in place at the time of the accident an accelerated discipline policy. *See* Doc. #35,
24 Exhibit 2. That policy stated in pertinent part that: “[D]epending upon personnel and situational factors, a first
25 time violation may result in further discipline up to and including termination of employment” for violations
26 of company policy including “[u]nauthorized crossing of guards, berms, barriers, barricades, or roadblocks”
and “[d]riving in excess of the speed limit or at speeds inappropriate for conditions in a company vehicle on
or off site.” *Id.*

1 May 29, 2012. Doc. #1. Subsequently, on July 12, 2012, Decker filed an amended complaint
2 alleging two causes of action: (1) age discrimination in violation of the ADEA; and (2) race, color,
3 and national origin discrimination in violation of Title VII. Doc. #5. Thereafter, Barrick filed the
4 present motion for summary judgment on both claims. Doc. #27.

5 **II. Legal Standard**

6 Summary judgment is appropriate only when “the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
8 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
9 law.” Fed.R.Civ.P. 56(c). In assessing a motion for summary judgment, the evidence, together with
10 all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to
11 the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
12 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

13 The moving party bears the burden of informing the court of the basis for its motion, along
14 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
15 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
16 must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could
17 find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.
18 1986); *see also Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1141 (C.D.Cal. 2001).

19 To successfully rebut a motion for summary judgment, the non-moving party must point to
20 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson*
21 *Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might affect the
22 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
23 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is
24 not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material
25 fact is considered genuine “if the evidence is such that a reasonable jury could return a verdict for
26 the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of

1 evidence in support of the plaintiff's position will be insufficient to establish a genuine dispute;
2 there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

3 **III. Discussion**

4 **A. Age Discrimination**

5 The Age Discrimination in Employment Act ("ADEA") makes it unlawful for an employer
6 "to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1); *accord*
7 N.R.S. § 613.330(1)(a). To prove a *prima facie* case of age discrimination, a plaintiff must show
8 that: (1) he was at least forty years old; (2) he was performing his job satisfactorily; (3) he was
9 discharged; and (4) he was replaced by a substantially younger employee with equal or inferior
10 qualifications. *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008).

11 In its motion for summary judgment, Barrick concedes that Decker was over forty years of
12 age and that his employment was terminated. *See Doc. #27*. However, Barrick contends that Decker
13 has failed to provide any evidence that he was performing his job satisfactorily at the time of his
14 termination, and thus, he fails to state a *prima facie* case of age discrimination. The court agrees.

15 It is undisputed that at the time of his termination, Decker caused an accident which
16 resulted in a range of injuries to several employees as well as over \$23,000 in property damage. It is
17 further undisputed that Decker violated multiple Barrick safety policies including, but not limited
18 to: (1) driving with obstructed vision, (2) failing to clean the windshield before driving, and
19 (3) exceeding the speed limit for the roads. Moreover, Decker continued to drive with obstructed
20 vision even after confirming with the other passengers that they could also not see out of the bus.
21 *See Doc. #27*, Exhibit 9, Decker Depo., p.193:24-194:4. Therefore, the court finds that Decker has
22 failed to state a *prima facie* case of age discrimination as a matter of law. *See e.g., Guerrero v.*
23 *Beverly Hills Hotel*, 1994 U.S. Dist. LEXIS 21757 (C.D. Cal. 1994) (holding that a single failure to
24 follow established policy is sufficient to show that an employee was not meeting the employer's
25 legitimate expectations at the time of termination). Accordingly, the court shall grant Barrick's
26 motion as to Decker's age discrimination claim.

1 **B. Race, Color, and National Origin Discrimination**

2 Title VII prohibits discrimination against an employee or an applicant for employment on
3 the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a). To prevail on a
4 Title VII discrimination claim, a plaintiff must establish a *prima facie* case of discrimination by
5 presenting evidence that “gives rise to an inference of unlawful discrimination.” *Cordova v. State*
6 *Farm Ins. Co.*, 124 F.3d 1145, 1148 (9th Cir. 1997); *see also McDonnell Douglas Corp. v. Green*,
7 411 U.S. 792, 802 (1973). A plaintiff can establish a *prima facie* case of discrimination through the
8 burden shifting framework set forth in *McDonnell Douglas. Metoyer v. Chassman*, 504 F.3d 919,
9 931 (9th Cir. 2007).

10 Under the *McDonnell Douglas* framework, the plaintiff carries the initial burden of
11 establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. To
12 establish a *prima facie* case, the plaintiff must show that (1) he belongs to a protected class; (2) he
13 was qualified for his position and was performing his job satisfactorily; (3) he suffered an adverse
14 employment action; and (4) similarly situated individuals outside his protected class were treated
15 more favorably. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (citing *Chuang v.*
16 *Univ. of Cal. Davis*, 225 F.3d 1115, 1126 (9th Cir. 2000)); *see also, Bodett v. Coxcom, Inc.*, 366
17 F.3d 726, 743 (9th Cir. 2004); *Orr v. Univ. Med. Ctr.*, 51 Fed. Appx. 277 (“An implicit part of the
18 “qualification” requirement is that the plaintiff was performing her job satisfactorily).

19 If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant
20 to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct.
21 *McDonnell Douglas*, 411 U.S. at 802. If the defendant provides such a justification, the burden
22 shifts back to the plaintiff to show that the defendant’s justification is a mere pretext for
23 discrimination. *Id.* at 804.

24 In its motion, Barrick once again concedes that Decker, as a Native American, was a
25 member of a protected class and that he was terminated from his employment. *See* Doc. #27.
26 However, Barrick contends that Decker has failed to establish that he was performing his job

1 satisfactorily at the time of his termination or that similarly situated non-Native Americans were
2 treated more favorably than he was, after similar accidents. The court agrees.

3 As addressed above, Decker has failed to establish that he was performing his job
4 satisfactorily at the time of his termination. Further, Decker has failed to establish that non-Native
5 American employees who engaged in similar conduct - causing accidents that involved injuries to
6 other employees or significant property damage - were treated more favorably.

7 Only two non-Native American employees, Mark Smith ("Smith") and Rex Goff ("Goff"),
8 have been identified as having similar accidents. The evidence before the court establishes that
9 neither Smith nor Goff were treated more favorably than Decker. In fact, both employees had their
10 employment end as a result of their accidents; Smith was forced to resign after running an empty
11 passenger bus into a dozer and Goff was terminated after entering an active mine area and
12 bypassing a barricade which resulted in his and another employee's hospitalization. Thus, the
13 evidence before the court establishes that non-Native American employees were not treated more
14 favorably than Decker. Therefore the court finds that Decker has failed to establish a *prima facie*
15 Title VII race, color, or national origin discrimination claim against Barrick. Accordingly, the court
16 shall grant Barrick's motion for summary judgment.

17 IT IS THEREFORE ORDERED that defendant's motion for summary judgment (Doc. #27)
18 is GRANTED. The clerk of court shall enter JUDGMENT in this action in favor of defendant
19 Barrick Goldstrike Mines, Inc. and against plaintiff Lester Decker.

20 IT IS SO ORDERED.

21 DATED this 19th day of December, 2013.

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24 
25 LARRY R. HICKS
26 UNITED STATES DISTRICT JUDGE