IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KERRY W. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 99-153 GMS
v.	)	
	)	
DIAMOND STATE PORT CORPORATION,	)	
	)	
	)	
Defendant.	)	

M E M OR A N D U M AND O R D E R

On March 12, 1999, Kerry W. Johnson ("Johnson") filed a complaint with the court pursuant to Title VII of the Civil Rights Act of 1964. In his complaint, Johnson alleged that Diamond State Port Corporation ("DSPC") discriminated against him on the basis of his race. On April 23, 2001, DSPC moved for summary judgment. Because Johnson has failed to establish a prima facie case of discrimination under Title VII, the court will grant DSPC's motion for summary judgment.

I. Standard of Review

"Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) when the moving party establishes that there is no genuine issue of material fact that can be resolved at trial and that the moving party is entitled to judgment as a matter of law." *House v. New Castle County*, 824 F. Supp. 477, 481 (D. Del. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). "In this inquiry, [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* (internal quotations omitted). "When considering a motion for summary judgment, the court must view all facts and inferences in the light most favorable to the party opposing the motion." *Id.*

Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to prove that there is more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Jacobs v. Arvonio*, No. CIV. A. 91-2473, 1993 WL 285854, at *2 (D.N.J. July 27, 1993). Summary judgment shall be granted if in opposition, the non-moving party rests solely "upon mere allegations, general denials, or . . . vague statements." *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991); *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990) ("unsupported allegations in a [non-moving party's] memorandum and pleadings are insufficient to repel summary judgment").

II. Background

In August of 1972, Kerry Johnson ("Johnson"), who is African-American, began working as a crane operator at the Port of Wilmington ("the Port"). During that time, the Port was owned and operated by the City of Wilmington. In August of 1995, the Port was sold to the DSPC.

On July 31, 1995, Johnson was injured in an automobile accident unrelated to his employment at DSPC. Johnson's physician, Dr. Moore, determined that Johnson was unable to work due to the injuries he sustained in the accident.[1] On February 8, 1996, Johnson's physician stated that Johnson could return to work, but that should be restricted to light duty work. In working light duty, Johnson was to be restricted from heavy lifting, pulling, or pushing. DSPC advised Johnson that no light duty work was available. Therefore, Johnson remained out of work until August of 1996.

On August 19, 1996, after Johnson sufficiently recovered, Dr. Moore cleared Johnson's return to

[1]On November 6, 1995, Dr. Moore did permit Johnson to return to full duty work. A few weeks later, however, Dr. Moore again concluded that Johnson was unable to work. D.I. 22, Exhibit A. It is not clear from the record how long Johnson actually worked in November of 1995.

work without restrictions. As a result, Johnson resumed work as a full-time crane operator.

After his return to work, Johnson alleges that he witnessed a pattern of reassignments to light duty for Caucasian DSPC's employees who had physical injuries or physician-prescribed restrictions. Specifically, Johnson noticed that on April 14, 1997, a white DSPC employee, Ken Swann ("Swann"), was given a light duty work assignment after he injured his foot. DSPC does not dispute this. It explains, however, that this situation was unique because DSPC needed someone with mechanic's skills to help transfer the mechanic's storeroom to a computerized inventory system. DSPC further explained that Swann possessed the requisite skills and was available to fill this one-time position. Once the transfer was completed, Swann returned to his normal position. In October of 1997, Swann was again restricted to light duty, however, this time he was laid off because of DSPC's lack of light duty work.

Johnson also alleges[2] that he witnessed several other Caucasian employees receive light duty work. Specifically, he alleges that 1) as a result of a back injury, Andrew Markow, a crane operator like Johnson, was allowed to work on cranes with restrictions on heavy lifting, pulling, or pushing from May 19, 1997 to May 23, 1997; 2) Donald Zimmerman was given light duty as a result of a back injury; 3) Arthur Walls was assigned to his regular position, but was exempted from lifting as a result of an arm injury; 4) Joseph Cathcart, another crane operator, was assigned to light maintenance as a result of a neck injury; 5) Charles Hill, a forklift operator, was reassigned to a floating position as a result of a hand injury from a saw; 6) James Peltz was reassigned to an office position from the warehouse as a result of a broken foot; 7) John Reese was allowed to work as a port engineer, despite having to wear a surgical shoe as a result of foot

[2]All of the information concerning Johnson's allegations of preferential treatment of white employees comes from his own affidavit, which he submitted in support of his answering brief on the motion.

surgery; and 8) Malcolm Cutler worked full time, despite having a pin in his thumb.[3]

In response to the Johnson's charges of discrimination, the DSPC claims that Johnson's allegations are inaccurate. In affidavits submitted in support of their motion, five of the seven white employees identified by Johnson as receiving preferential treatment stated that they had never received light duty work. DSPC's director of Human Resources, Philip J. Immediato, stated in his affidavit that two of the remaining seven had never received light duty work. The sole remaining employee stated that he had received light duty work while at the Port, however, it was in 1985 when the Port was owned and operated by the City of Wilmington and not by DSPC.

As a result of being denied light duty, but allegedly witnessing his Caucasian co-workers receive such assignments, Johnson filed a charge of discrimination with the EEOC on November 18, 1997. In his EEOC complaint, Johnson alleged that DSPC did not assign him light duty because of his race. Specifically, Johnson alleged that he was treated differently than Ken Swann and Andrew Markow who were white. On February 24, 1998, DSPC responded to Johnson's allegations. In their response, DSPC denied Johnson's claims as inaccurate. On December 11, 1998, the EEOC closed the case without a finding of discrimination and issued a right to sue letter.

III. Discussion

In their motion for summary judgment, the DSPC contends that it is entitled to judgment as a matter of law because Johnson cannot establish a prima facie case of discrimination.

In order to establish a *prima facie* case of discrimination, Johnson must prove:

---

[3]The court notes that, according to Johnson's allegations, it appears that Reese and Cutler were neither assigned light duty, nor permitted to perform their regular duties with restriction, but rather, allowed to work with a medical condition.

(1) that he belongs to a protected class;
(2) that he was qualified for the job benefit;
(3) that he was denied the benefit;
(4) and that similarly situated employees outside the protected class received the benefit.

McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); *Pivirotto v. Innovation Systems, Inc.*, 191 F.3d 344, 351 (3d Cir. 1999); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 522 (3d Cir. 1992); *Turgeon v. Marriott Hotel Services, Inc.*, No. CIV. A. 99-4401, 2000 WL 1887532, at *5 (E.D. Pa. Dec. 27, 2000).

In this case, the parties' agree that Johnson has satisfied the first three prongs; Johnson is a member of a protected class, was qualified for light duty work,[4] and he was denied light duty. The parties' disagree, however, as to whether Johnson's claim that white employees in comparable situations were given "light duty," and that he was denied that opportunity because of his race. In particular, DSPC claims that none of the white employees, with the exception of Swann, named by Johnson actually received light duty assignments. As to Swann, DSPC claims that while it is true that Swann was given a light duty assignment, Johnson was not similarly situated to him. The court will address both of these contentions in turn.

Despite Johnson's allegations to the contrary, DSPC has established, with the exception of Swann, through testimonial evidence that each individual alleged to have received light duty assignments, in fact, did not. Specifically, six of the eight employees identified by Johnson as receiving light duty testified that they had never received light duty work while DSPC's Director of Human Resources testified that the remaining two were never assigned light duty. There is nothing in the record to dispute this evidence.

Although Johnson has submitted an affidavit claiming that these employees were reassigned to light

[4]Because of Johnson's medical restriction to only preform light duty work, Johnson would have qualified for the benefit.

duty, this affidavit does not create a genuine issue of material fact because it rests upon mere allegations and not specific facts.[5] In order to withstand a motion for summary judgment, Johnson must produce "specific tangible evidence showing a disparity in the treatment of similarly situated employees." *Lowry v. Powerscreen USB, Inc.*, 72 F. Supp. 2d 1061, 1071 (E.D. Mo. 1999) (internal quotations omitted) (holding that plaintiff's "sheer conjecture" and "guessing" in her deposition could not establish that she was treated differently than any similarly situated employee who was not a member of her protected class); *Matthews v. City of Gulfport*, 72 F. Supp. 2d 1328, 1337 (M.D. Fla. 1999) (holding that plaintiff who "[did] not provide any evidence to support her contention, other than her own opinion that it was on the basis of her gender," could not establish prima facie case). In other words, Johnson "must set forth specific facts showing a genuine issue for trial and may not rest upon mere allegations, general denials, or such vague statements." *Quiroga v. Hasbro, Inc.*, 934 F.2d at 500; *see also* Fed. R. Civ. P. 56(e). Thus, in light Johnson's failure to raise a genuine issue of material fact, the court concludes that he cannot establish a prima facie case of discrimination.

The court finds also that Johnson has failed to establish a prima facie case as to Ken Swann because Johnson was not similarly situated to Swann. Johnson has not disputed DSPC's claim that Swann had specialized knowledge that made it possible for him to work light duty. *See Ross v. GTE Directories Corp.*, 73 F. Supp. 2d 1342, 1350 (M.D. Fla. 1999) (holding that African-American plaintiff claiming discrimination where Caucasian employee allegedly received light duty work, but he was denied such assignments because of race, failed to establish a prima facie case where it was shown that he was not

[5]The court notes that there is nothing in Johnson's affidavit which establishes that he is competent to testify with respect to other employees' medical histories and restrictions imposed by their respective doctors.

similarly situated with Caucasian employee). In this case, undisputed evidence in the record demonstrates that the position offered to Swann was a unique, one-time position that resulted from DSPC transferring the mechanic's storeroom to a computer inventory system. Moreover, DSPC has shown that Swann is not similarly situated to Johnson in that Swann had intimate knowledge of the mechanic's storeroom from being a mechanic which Johnson, a crane operator, lacked. Therefore, the court concludes, that Johnson's prima facie case cannot succeed.

IV. Conclusion

After reviewing the record and the submissions of the parties, the court concludes that Johnson has failed to demonstrate that similarly situated Caucasian employees received a benefit he was denied because of his race. As a result, he has failed to establish a prima facie case of discrimination. Therefore, the court will grant DSPC's motion for summary judgment.

For these reasons, IT IS HEREBY ORDERED that:

1. The Defendant DSPC's Motion for Summary Judgment (D.I. 20) is GRANTED;

2. Summary Judgment be and hereby is ENTERED in favor of DEFENDANT and against plaintiff on all claims in the complaint.

Date: August 2, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE