

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

ROBERT ZACKROFF,)
)
 Plaintiff,)
)
 v.)
)
 BRYANT COLLEGE, WILLIAM) C.A. No. 92-602L.
 TRUEHART, Individually and)
 in his capacity as President)
 of Bryant College, and MICHAEL)
 PATTERSON, Individually and)
 in his capacity as Dean)
 of Faculty at Bryant College,)
)
 Defendants.)

MEMORANDUM AND ORDER

Ronald R. Lagueux, Chief Judge.

This matter is before the Court on defendants' motion for summary judgment. Plaintiff Robert Zackroff filed a five-count complaint against Bryant College, its President, William Truehart ("Truehart"), and its Dean of Faculty, Michael Patterson ("Patterson"), alleging that he was the victim of "reverse" racial discrimination during the application process for a tenured professorship. Defendants' motion seeks summary judgment as to each count. For the following reasons, defendants' motion is granted in part and denied in part.

I. Background

Dr. Robert Zackroff ("Zackroff"), a White male, was hired as a non-tenured Assistant Professor in the Science Department at Bryant College in September, 1990. During the 1990 - 91 school year, Zackroff sought to change his non-tenured status by

applying for a newly-created tenure-track position within the Science Department. That position was to be filled by someone who would commence work in September, 1991.

The search process to fill the tenure-track position was initially conducted by Professor Gaytha Langlois ("Langlois"), the Science Department Chair at the College. Langlois was responsible for overseeing the recruitment for the position. In June, 1991, after information about the position had been published but before the search process was complete, Langlois was replaced as Department Chair by Professor Douglas Levin ("Levin"). As newly-appointed Department Chair, Levin completed the selection process in conjunction with the Dean of the Faculty, Patterson.

It was Levin's duty to review the materials submitted by all of the applicants for the tenure-track position. Eventually, he divided them into three groups, denoted by the letters "A," "B," and "C." A list of candidates from the "A" group was to be submitted to Patterson so that they could be invited to campus for interviews and teaching demonstrations.

At some point, Patterson requested that Levin examine the "B" group to determine whether or not there were minority applicants who could be moved to the "A" group. In conducting his review, Levin determined that Gransville Wrensford ("Wrensford"), a candidate in the "B" group, should be moved to the "A" group and invited for an interview. Wrensford is a Black male.

From the newly constituted "A" group, three candidates were

invited for interviews and teaching demonstrations. The three candidates were Paul Strother ("Strother"), Zackroff, and Wrensford. After the interview and teaching demonstrations were completed, Levin ranked the candidates as follows: Zackroff first, Strother second, and Wrensford third.

Patterson ranked the candidates differently. He ranked Wrensford first, Strother second, and Zackroff third. Since Patterson, as Dean of Faculty, had the authority to select the candidate, it was his ranking that carried the day. Wrensford was hired.

The position offered to Wrensford was not tenure-track, however. Due to concerns that Levin expressed about Wrensford's teaching, Patterson only offered to Wrensford a one-year, visiting professor appointment. After one year, if Wrensford's teaching comported with Patterson's expectations, then Wrensford would be offered the tenure-track position. Meanwhile, Zackroff was re-hired by the College for the 1991 - 92 school year in a non-tenured position.

Patterson states that Wrensford's minority status was a favorable factor in his decision to hire him over Zackroff. Patterson also states that he considered Wrensford to be qualified for the position and that Wrensford's professional achievements and personal references suited the requirements of the tenure-track professorship. Zackroff disputes this characterization, alleging that Wrensford's race was the only factor that caused him to be hired over Zackroff. Zackroff also contends that Wrensford was less qualified and, therefore, less

deserving of the position.

Patterson asserts that he relied on the Affirmative Action Plan ("AAP") adopted by Bryant College in 1971 in the selection process. The AAP has a Statement of Intent, which reads "[t]hat the Equal Opportunity Employment portion of the program is designed to increase materially the utilization of minority group persons and women at all levels and in all segments of the College's work force, and the work forces of those with whom it contracts." The AAP requires that those responsible with its administration to regularly compile and submit "[s]tatistical reports designed to establish and maintain a flow of accurate information about recruiting and employment in general and of minority persons in particular." The "Equal Opportunity Employment Policy Statement" of the AAP states that "Bryant College will provide equal opportunity for all qualified and qualifiable persons, and will promote the full realization of equal opportunity through positive, continuing programs in every Department." The Statement also provides that "[a]ppointments will be monitored to insure that we are constantly and significantly moving toward the goals of increased employment for women and minorities." Specifically with respect to "Academic and Professional Personnel," the AAP states that

[t]he College's goal is to achieve a diverse, multi-racial faculty and professional staff capable of providing excellence in the education of its students and for the enrichment of the College community. In seeking to fill openings, every effort will be made to recruit in such a way that women and individuals from minority groups will have an equal opportunity to be considered

and appointed to staff positions. It is the policy of the College that no appointments will be made to faculty or professional positions until minority-group candidates have been sought out and, if qualified candidates are identified, are encouraged to apply.

After Wrensford was hired, Zackroff complained through the administrative channels at the College that he had been the victim of racial discrimination. His complaint ultimately came to the President of Bryant College, Truehart, who met with Zackroff on October 15, 1991. In that meeting, plaintiff complained that he believed himself to be the top candidate for the tenure-track Science Department position, that Wrensford had been selected not for his qualifications but for his race, and that plaintiff had therefore been the target of discrimination. Zackroff also alleged that Truehart had issued a directive not to hire anyone in that Science Department position that was not Black. In response to plaintiff's administrative complaint, Truehart reviewed the selection process conducted by the Science Department and Patterson.

Defendants contend that Truehart's investigation revealed that Levin had felt pressured to select a minority candidate, though neither Patterson, Truehart, nor anyone else from the administration had given Levin such a directive. Defendants also contend that Truehart eventually concluded that it would not be fair to any candidate to make a permanent appointment based upon the 1991 search and that the search process to fill the tenure-track position should begin anew in the Spring of 1992. Both

Zackroff and Wrensford reapplied for the position, but neither was selected to fill it.

When Zackroff's non-tenured one-year appointment for the 1991 - 92 school year was about to end, and while he was still a candidate for the tenure-track vacancy in 1992, Zackroff was informed that he was not to be re-hired in a non-tenured position for the 1992 - 93 school year. Shortly thereafter, Zackroff brought a grievance under the faculty collective bargaining agreement, alleging that the College's decision not to renew his one-year contract violated the agreement's provision on "retrenchment." Zackroff's grievance was processed by the faculty union in accordance with the terms of the grievance policy. However, after the first phase of the grievance procedure, the College dismissed Zackroff's grievance as meritless. Thereafter, the faculty union declined to take the claim to arbitration, on the ground that the union did not believe that there had been a contract violation. These actions exhausted the administrative remedies available to Zackroff under the collective bargaining agreement.

Zackroff then filed a complaint with both the Equal Employment Opportunity Commission and the Rhode Island Human Rights Commission. When both agencies did not provide the remedies that he sought, Zackroff filed a five-count complaint in this Court. Count I of the complaint avers that Bryant College has denied plaintiff equal protection of the law through racial discrimination. Count II alleges that Bryant College has violated Title VII of the Civil Rights Act of 1964 by denying

plaintiff an equal opportunity for employment because of his race. Count III asserts that Bryant College, Truehart, and Patterson denied plaintiff his rights as guaranteed by 42 U.S.C. § 1981. Count IV contends that Bryant College, Truehart, and Patterson have violated the Rhode Island Civil Rights Act of 1990, R.I. Gen. Laws §§ 42-112-1 to -2 ("RICRA"). Finally, Count V alleges that Bryant College breached the collective bargaining agreement between the College and the faculty union. Defendants deny plaintiff's claims of discrimination and have further responded with this motion for summary judgment. The motion is now in order for decision.

II. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on a summary judgment motion:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In determining whether summary judgment is appropriate, the court must view the facts on the record and all inferences therefrom in the light most favorable to the nonmoving party. Continental Casualty Co. v. Canadian Universal Ins. Co., 924 F.2d 370, 373 (1st Cir. 1991). Additionally, the moving party bears the burden of showing that no evidence supports the nonmoving party's position. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Thus, in order for

defendants to prevail on their motion, they must show that no genuine issue of material fact exists which would support plaintiff's case. If that showing is made, the motion can then be granted if, as a matter of law, defendants are entitled to judgment in their favor.

III. Analysis

A. Count I

Count I of plaintiff's complaint alleges a violation of Equal Protection.¹ Essentially, plaintiff claims that Bryant College and its agents denied him equal protection in failing to choose him for the tenure-track position because of his race. However, even if that factual assertion proved to be true, plaintiffs' equal protection claim necessarily fails.

It is a fundamental principle of equal protection law that the defendant must be a "state actor" or act "under color of state law." 42 U.S.C. § 1983. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 935, 102 S. Ct. 2744, 2752, 73 L.Ed.2d 482, 494 (1982). Bryant College, the only defendant named in this Count, does not fit that role. Bryant College is a private institution of higher education. Although the College does

The Court assumes that Count I is based on a theory of equal protection. Confusion abounds because Count I is written to implicate both the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. However, these two causes of action are entirely distinct; they should be pleaded in separate counts. Since Count II clearly proceeds under Title VII, Count I was probably meant to set forth an equal protection claim. Presumably, plaintiff attempts to seek redress for the alleged constitutional violation through 42 U.S.C. § 1983, although that section is nowhere mentioned in the complaint.

receive funds from the United States, the receipt of federal funds, without more, does not transform it into a state actor or person acting under color of state law. Rendell-Baker v. Kohn, 457 U.S. 830, 840, 102 S. Ct. 2764, 2771, 73 L.Ed.2d 418 (1982). The conduct of the College is not chargeable to the state.

Since the Equal Protection Clause is inapplicable to Bryant College, that defendant's motion for summary judgment as to Count I is granted.

B. Counts II, III and IV

Counts II, III and IV of plaintiff's complaint are based on the same set of facts and circumstances. Count II proceeds under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e et seq. (1981). Count III proceeds under 42 U.S.C. § 1981.² Count IV proceeds under RICRA, R.I. Gen. Laws §§ 42-112-1 to -2. Since RICRA confers upon "[a]ll persons within the state, regardless of race . . . , the same rights to make and enforce contracts . . . ," R.I. Gen. Laws § 42-112-1(a), it is the state law analogue to 42 U.S.C. § 1981. In other words, those statutes overlap substantively. See Rivers v. Roadway Express, Inc., ___ U.S. ___,

²The text of 42 U.S.C. § 1981(a) is:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

114 S. Ct. 1510, 128 L.Ed.2d 274 (1994). In addition, where a plaintiff alleges a refusal to contract because of racial discrimination, Title VII and 42 U.S.C. § 1981 overlap. See Patterson v. McLean Credit Union, 491 U.S. 164, 182, 109 S. Ct. 2363, 2375, 105 L.Ed.2d 132 (1989) ("Of course, some overlap will remain between [Title VII and 42 U.S.C. § 1981]: specifically, a refusal to enter into an employment contract on the basis of race."). As a result, these three counts will be considered together, since, for purposes of this case, their liability sections are substantively identical.

Plaintiff relies on the same set of facts to support each of these counts. Plaintiff contends that the College failed to hire and contract with him for the tenure-track position in the Science Department during the summer of 1991 because of his race. Plaintiff also states that Gransville Wrensford, the minority applicant chosen for the position, was unqualified, and that defendants chose Wrensford solely because of his race. Plaintiff also characterizes defendants' purported reliance on the AAP as a pretext for discrimination. Defendants have moved for summary judgment on these Counts, alleging that their reliance on the AAP in hiring Wrensford shifts the burden to plaintiff to produce evidence of either the AAP's invalidity or of defendants' invidious discrimination. Defendants further contend that plaintiff has failed to produce any relevant evidence to meet this burden. Defendants finally argue that Wrensford was chosen over plaintiff because he was the best candidate for the position. It is clear that several issues of fact have been

raised by these counter-contentions.

Plaintiff has not produced any direct evidence of pretext, but inferences may be drawn from some of the facts in this case that defendants' reliance on the AAP was pretextual. Principally, there are two genuine questions of material fact in this case which must be resolved by the triers of fact. The first question is whether Gransville Wrensford was a qualified applicant for the tenure-track position in the first place. His credentials must be examined, and that is a fact-bound inquiry. Whether or not Wrensford was qualified for the position will prove to be probative of a variety of issues, including whether or not defendants' claimed reliance on the AAP was pretextual. When the disputed facts are viewed in the light most favorable to plaintiff, in combination with the undisputed fact that Wrensford was not actually awarded a tenure-track but rather a non-tenured position because of skepticism regarding his teaching qualifications, it is obvious that plaintiff's case must be submitted to the factfinder.

The second question is whether the College's AAP is valid. This Court will not consider this question at this time. Although plaintiff has been remiss in providing information to the Court to prove that the plan does not comport with the standards articulated in Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987) and United Steel Workers v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480 (1979), the complex nature of this question renders it one more appropriately decided at trial. In any

event, there is no need to straight-jacket the case at this point by attempting to make findings of fact. The unresolved question regarding Wrensford's qualifications alone prevents defendants' motion from being granted.

Since there are material questions of fact that cannot be resolved at this point, defendants' motion for summary judgment as to Counts II, III and IV is denied.

C. Count V

Count V of plaintiff's Complaint makes a claim for breach of the collective bargaining agreement. This Count is based upon Bryant College's failure to rehire Zackroff in a non-tenured position for the 1992 - 93 school year. Zackroff claims that the failure to rehire him constituted a breach of contract that should have been brought to arbitration by the union. Defendant Bryant College (the only defendant in this Count) has moved for summary judgment, contending that plaintiff's claim fails as a matter of law.

Article X of the collective bargaining agreement between the faculty union and the College sets forth a multi-level procedure for the resolution of disputes under the contract, culminating in "final and binding" arbitration. Under the agreement, only the College or the union may invoke arbitration. After Zackroff had filed his grievance with the faculty union and lost, the union declined to bring his case to arbitration, because it concluded that there had been no violation of the contract. Zackroff really asserts this claim in order to seek redress for the union's failure to bring the grievance to arbitration, but he has

not made the union a defendant.

This Court will not tarry long with plaintiff's contentions in this regard. While it is true that an individual may bring suit against his employer for breach of a collective bargaining agreement, the employee is required to attempt to exhaust any grievance or arbitration remedies provided for in the collective bargaining agreement. Paulo v. Cooley, 686 F. Supp. 377, 380 (D.R.I. 1988) (citing DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S. Ct. 2281, 76 L.Ed.2d 476 (1983)). The employee is bound by the finality of those proceedings, if the collective bargaining agreement so provides. Id. (citations omitted). This rule applies even when only the union, and not the employee, can invoke arbitration. In some cases, the finality of the grievance or other remedial proceeding can be overcome where the union representing the employee acts in such a "discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." Id. (citing Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967)). In such a case, the employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. To prevail in that lawsuit, the employee "must not only show that [his or her] termination was contrary to the contract but must also carry the burden of demonstrating breach of the duty by the [u]nion." Id. (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 - 71, 96 S. Ct. 1048, 1059, 47 L.Ed.2d 231 (1976)).

In this case, plaintiff fails to point to any evidence

whatsoever to prove that the union acted in a discriminatory, dishonest, arbitrary or perfunctory fashion. Plaintiff has simply reasserted the same claim in this Court that he made to the union, i.e. that the failure to rehire him was a breach of the collective bargaining agreement. However, that claim has already been determined to be meritless by the union, and that is the end of the matter. Therefore, Bryant College's motion for summary judgment as to Count V of the complaint is granted.

IV. Conclusion

For the foregoing reasons, defendants' motion for summary judgment is granted as to Counts I and V of plaintiff's complaint. Defendants' motion for summary judgment is denied as to Counts II, III, and IV of plaintiff's complaint. It is so ordered.

Ronald R. Lagueux
Chief Judge
July 11, 1995