IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DWAYNE JACKSON, Plaintiff, v. T & N VAN SERVICE, et al., Defendants.	:	CIVIL ACTION NO. 99-1267

MEMORANDUM

ROBERT F. KELLY, J. JUNE 20, 2000

Defendant Teamsters Union Local 676 ("Local 676" or "the Union"), has filed a motion for summary judgment in the above-captioned matter pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1] In this action, Plaintiff, an African-American employee of Defendant T & N Van Service ("T & N"), seeks redress after being the target of a mock lynching when a white co-employee, Defendant Joseph Larose, forced the loop of a hangman's noose over Plaintiff's head while they worked at a First Union facility in Philadelphia on November 4, 1998. Larose then hollered "skin him!" to two other T & N employees, Defendants Walter Felton and Christopher Felton, who smiled and laughed. Plaintiff was able to remove the noose and reported the incident to T & N supervisors and the police.

[1] This Court has already ruled on summary judgment motions filed by the other parties in this case. See Jackson v. T & N Van Serv., No. CIV. A. 99-1267, 2000 WL 562741 (E.D. Pa. May 9, 2000); Jackson v. T & N Van Serv., 86 F. Supp.2d 497 (E.D. Pa. 2000).

After an investigation by T & N, Larose, Felton and Larosa were all suspended with intent to discharge on November 11, 1998. Subsequently, these three employees requested the Union's assistance in gaining their reinstatement to employment.[2] The Union ultimately concluded that the conduct of the three employees did not warrant their discharge and, thus, brought their claims before the Joint Area Committee ("JAC"). The JAC upheld the grievances of Larosa and Felton and ordered their reinstatement without any back pay, but rejected the grievance of Larose and upheld his termination.

Plaintiff has alleged that Local 676 discriminated against Plaintiff's admission into the Union because of race, and, along with the other defendants in this case, violated 42 U.S.C. § 1981, 42 U.S.C. § 1985(3), and the New Jersey Law Against Discrimination ("NJLAD"), in its handling of Plaintiff's claim, its defense of its members, Larose, Felton and Larosa at the JAC hearing, and its willingness to tolerate an atmosphere of discrimination by and among its members.[3] (Second Am. Compl. at

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[2] The Union and T & N are parties to a collective bargaining agreement governing the terms and conditions of employment for all permanent drivers, helpers and warehousemen employed by T & N.

[3] In this Court's May 9, 2000 Memorandum Opinion, T & N Defendants' Motion for Summary Judgment on Plaintiff's conspiracy claim under 42 U.S.C. § 1985(3) was granted due to Plaintiff's failure to produce any evidence of an agreement or coordinated efforts on the part of any of the defendants to engage in the harassment at issue. See Jackson, 2000 WL 562741 at *6-7. Here,

¶ 48-54.) For the following reasons, the Union's Motion for Summary Judgment will be granted in part and denied in part.

STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). Initially, the moving party must demonstrate the absence of genuine issues of material fact. Nolen v. Paul Revere Life Insurance Co., 32 F. Supp.2d 211, 213 (E.D. Pa. 1998). Once the movant has met this burden, the non-moving party must go beyond the pleadings and make a showing sufficient to establish the existence of every element essential to his case based on the evidence of record. Id. (citations omitted).

Local 676 echoes T & N's position by asserting that the Union and T & N management did not enjoy a close relationship, as most of the collective bargaining between them was contentious, and that these parties did not confer to develop a joint strategy or plan concerning the racial composition of the workforce, the handling of the grievances of Larose, Felton and Larosa, or any other matters affecting the bargaining unit at T & N. With no evidence provided by Plaintiff to substantiate his allegations of a joint agreement between the Union and T & N to engage in the racial discrimination at issue, this Court will grant the Union's Motion for Summary Judgment on Plaintiff's § 1985(3) claim. See Armstrong v. School Dist. Of Philadelphia, 597 F. Supp. 1309 (E.D. Pa. 1984) (granting summary judgment based on plaintiff's inability to substantiate allegations of conspiracy and intentional discrimination).

DISCUSSION

"Section 1981 affords a federal remedy against intentional racial discrimination in making and enforcing contracts and in securing `equal benefit of all laws and proceedings.'" Blair v. Philadelphia Housing Auth., 609 F. Supp. 276, 279 (E.D. Pa. 1985). Accordingly, "[t]o prove liability under Section 1981, a plaintiff must show a racially discriminatory purpose in the defendant's actions." Gordon v. National R.R. Passenger Corp., 564 F. Supp. 199, 205 (E.D. Pa. 1983).

Here, Plaintiff alleges that the Union's conduct, under the guise of enforcing a collective bargaining agreement, aided racially discriminatory practices and, thus, gives rise to a cause of action under § 1981.[4] However, Local 676 contends that because Plaintiff has no evidence that the Union's motive or purpose behind the challenged actions was invidious racial discrimination, Plaintiff's § 1981 claims should be dismissed.

In arguing that its handling of the grievances of Larosa, Felton, and Larose was proper and lawful, the Union submits that its role is not to act as an agent of the employer,

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[4] It is worth noting that cases like this one, in which a non-union member is attempting to hold a union liable for alleged discriminatory conduct, are unique. See EEOC v. General Motors Corp., 11 F. Supp.2d 1077, 1081 (E.D. Mo. 1998) (finding that Title's VII's language did not limit union's responsibility for discrimination to actions against its membership).

to perform acts the employer requires, but to be the representative of its members. (Union's Summ. J. Mot. at 10)(citing United Steelworkers of America v. Lorain, 616 F.2d 919 (6th Cir. 1980), cert. denied, 451 U.S. 983 (1981)). The Union explains that it cannot be found to have supported the attack on Mr. Jackson or to have contributed to an atmosphere of racial discrimination simply by supporting the discharged employees in their grievances. Furthermore, the Union points out that its decision was based on the Union's belief that its members had not engaged in any racial attack on Mr. Jackson, but were instead guilty of horseplay. Local 676 adds that damages may not be awarded where a union performs its normal functions. (Union's Summ. J. Mot. at 12) (citing cases).

Plaintiff responds that the Union is liable for failing to properly investigate racism in the workplace, for improperly grieving discipline of racist conduct, and for its failure to rectify racism in the workplace. (Pl.'s Resp. at 3). In support of these allegations, Plaintiff cites Goodman v. Lukens Steel Co., 580 F. Supp. 1114 (E.D. Pa. 1984), aff'd in part, rev'd in part, 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987), for the proposition that "union passivity in the face of employer discrimination renders unions liable under Title VII . . ., and if racial animus is inferable from direct or indirect evidence, under 42 U.S.C.A. § 1981 as well." Id. As shown below, however,

the standard set forth in Goodman requires that a union play a "far more than mere passivity" role before liability under § 1981 attaches.

In Barnes v. SEPTA, No. 93-3644, 1996 WL 92098 (E.D. Pa. Feb. 28, 1996), aff'd, 106 F.3d 384 (3d Cir. 1996), the plaintiffs, Bruce Barnes and Muhammad Mustafaa, were discharged from their employment as subway cashiers with SEPTA for allegedly violating SEPTA regulations.[5] In each case, the Union filed grievances on behalf of the plaintiffs under the collective bargaining agreement between the Union and SEPTA. After the plaintiffs were unsuccessful through the first three levels of the grievance proceedings with SEPTA, the Union demanded arbitration. No arbitration had taken place with respect to the Barnes' discharge; however, Mustafaa was reinstated prior to his arbitration regarding his 1991 discharge. Plaintiffs filed their lawsuit alleging that SEPTA and several of its employees along with the Union, its president and several of its employees (1) discriminated against plaintiffs on the basis of their race, and (2) acted in concert so as to render the grievance proceedings at issue in the case "a sham," in violation of the plaintiffs' equal protection and due process rights under 42 U.S.C. § 1983.

After concluding that the plaintiffs failed to provide

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[5] Barnes was discharged in September of 1991. Mustafaa was discharged in April 1991 and, after being reinstated, again in October 1992.

evidence sufficient to support their claims against SEPTA, the court in Barnes ruled that "the Union could not be found to have been a `willful participant' with SEPTA in any wrongdoing." Id. at *7. In doing so, the court examined Goodman, which was cited by the plaintiffs for the same basic proposition that Mr. Jackson asserts in the instant action -- that a union is guilty of discrimination itself if it is aware of discrimination by an employer and refuses to fight such discrimination. In Barnes, however, Judge Robreno determined that Goodman did not help the plaintiffs' cause:

> Goodman was a race discrimination case in the form of a class action brought under Title VII and § 1981. Before the Supreme Court, the unions argued that the judgment against them was based on the erroneous legal premise that "mere union passivity in the face of employer discrimination renders the union liable under Title VII and, if racial animus is properly inferable, under § 1981 as well." Id. at 665. The Supreme Court found no need to discuss "this rather abstract observation" because the evidence "prove[d] `far more' than mere passivity." Id. at 665-66. The facts in the record below, as stated by the District Court and the Court of Appeals indicated that the employer was discriminating against blacks in discharging probationary employees and that the unions were aware of this discrimination, but intentionally and knowingly refused to file grievances or otherwise take action to prevent such discrimination; that the unions had ignored grievances based on racial harassment; and that the unions had regularly refused to include assertions of racial discrimination in grievances which also alleged other collective-bargaining contract violations. Id. at 666-67.

Barnes, 1996 WL 92098 at *7 n.8. In distinguishing Goodman, the Barnes court noted the lack of evidence to support a finding that the defendant union's actions added up to the "far more than mere passivity" role of the union at issue in the Goodman case.[6] Id.

In the case at hand, Plaintiff argues that the investigation conducted by Local 676 regarding the noose incident was improper in that it did not include an interview with Plaintiff. Plaintiff also points out that the Union exercised its discretion to grieve the termination of Joseph Larose to the JAC. While Plaintiff asserts that, given the nature of the act committed against him, these facts alone are sufficient to defeat the Union's Motion for Summary Judgment, Plaintiff further argues that an ongoing pattern of racism existed at T & N which the Union failed to address. In this regard, Plaintiff describes incidents of racial harassment of a former T & N employee, Dan Gainey, by a member of T & N management, a familial relationship between a shop steward and the owners of T & N, the Union's

[6] Judge Robreno acknowledged that "[t]he only evidence plaintiffs offer[ed] that the Union was aware of alleged racial discrimination against African Americans by SEPTA and failed to do anything to remedy it consist[ed] of (1) an admission by defendant Harry Lombardo, the Union's President, that he was aware of a newspaper article regarding unfair targeting of African Americans in revenue inspections by SEPTA, and (2) the largely conclusory allegations regarding the Union's poor handling of plaintiffs claims rejected previously by this Court." Barnes, 1996 WL 92098 at *7 n.8 (citations omitted). Based on the above, Judge Robreno concluded that the Union's actions did meet the standard recognized by the Supreme Court in Goodman.

alleged failure to properly defend another T & N employee, Bob Crist, who was allegedly fired for intervening on Gainey's behalf, and the processing of a complaint lodged by Gainey after he was no longer an employee of T & N. According to Plaintiff, the above incidents show that Local 676 ignored pervasive racism at T & N.

Despite Plaintiff's contentions, the Union is correct in that the evidence of record does not demonstrate a "far more than mere passivity role," as set forth in Goodman. First, the fact that Local 676 aided the perpetrators of the noose incident in presenting their grievances cannot be used as evidence of intent to support racial discrimination, "considering that federal law imposes on unions certain duties as representatives of their employees." See Lorain, 616 F.2d at 923 (citing Vaca v. Sipes, 386 U.S. 171 (1967)). Indeed, Local 676 had the fiduciary duty to fairly represent Larose, Felton and Larosa in their grievances with T & N. See McConney v. Great Atl. & Pac. Tea Co., 455 F. Supp. 1143, 1147 (E.D. Pa. 1978). Although Local 676 admits that it has no obligation to take every grievance to arbitration, see id., "[j]ust as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes." Humphrey v. Moore, 375 U.S. 335, 349 (1964); see also Olsen v. United Parcel Serv., 892 F.2d 1290,

1296 (7th Cir. 1990) ("[U]nions always retain the authority to exercise an independent judgment on the merits of each petition, subject only to the requirements of `complete good faith and honesty.'"). Thus, Defendant's conduct in filing a grievance on behalf of Mr. Larose is legally insufficient to support an inference of intent to discriminate against Dwayne Jackson.

Second, the Union's decision not to interview Plaintiff regarding the noose incident does not demonstrate intentional discrimination. Cf. Olsen, 892 F.2d at 1295-96 (finding that union's failure to investigate falls short of intentional misconduct standard). In this regard, Local 676 explains that Robert Wolfe, the Union business agent assigned to this bargaining unit, decided not to interview Dwayne Jackson as part of the investigation because Mr. Jackson's accusations were self-evident, providing the basis of the Company's disciplinary actions against the grievants. See Armstrong v. Chrysler Corp., 972 F. Supp. 1085, 1089-90 (E.D. Mich. 1997) (recognizing that union was under no obligation to personally interview every witness to incident and that further investigation was unlikely to result in different outcome).

As for Plaintiff's other evidence of racial discrimination, including the incidents concerning T & N's treatment of Dan Gainey and Bob Crist, the Union correctly replies that these incidents, even if true, fail to provide a

foundation for an inference that Local 676 intentionally discriminated against Plaintiff.[7] Rather, these incidents are evidence of discrimination by T & N, not the Union. See Marshall v. Ormet Corp., 736 F. Supp. 1462, 1471-72 (S.D. Ohio 1990) (rejecting notice of Company's discriminatory conduct against employee as evidence of pattern of discrimination practiced by union), aff'd, 940 F.2d 661 (6th Cir. 1991).

With respect to Mr. Jackson's claim that the Union excluded him from membership, Local 676 contends that during the course of his deposition Plaintiff abandoned such allegations, admitting that he was not eligible under the contract to become part of the bargaining unit:

> Q. My question was, are you claiming you should have been a member of the union and you weren't?
>
> A. I thought I had enough time. That's all I can answer.
>
> Q. So is it a guess on your part that you should have been a member of the union or do you believe you were entitled to be a member of the union based on the

[7] According to the Union, Mr. Gainey did not approach Local 676 until well after he had left his employment at T & N and, after investigation, the Union determined that his complaints were not shared by other African Americans employed by the Company. And in response to Plaintiff's allegations that Mr. Crist, a white employee who was twice terminated and twice reinstated with the aid of the Union, was terminated on a third occasion in retaliation for speaking on Mr. Gaines behalf, the Union contends that Mr. Crist testified that he never had any conversation with Mr. Wolfe or with any Union officials about Dan Gaines or racial problems at T & N. (Union's Reply at 4.)

contract?

MS. FALCAO: Are you asking if he's read the contract?

MR. MASTERS: No.

Q. Based on the eligibility for union membership do you believe –

A. I thought I had enough time in. I come to find out that I didn't. And I only had my assumption that I had enough time. I wasn't sitting at home keeping track of the time I had in. I just know the length of time I was at the job.

Q. Right now you believe you didn't have enough time to be a member of the union, is that what you're saying?

A. I know I didn't. Previous for the deposition when Russ clarified the rules for being in the union, I thought I did.

(Deposition of Dwayne Jackson, dated 11/19/99, at 71-72.)

Based on the above testimony, Local 676 contends that there can no longer be a dispute that Mr. Jackson was never entitled to membership in the bargaining unit under the terms of the parties' collective bargaining agreement. The Union adds that Plaintiff's work record compiled by Russ Taddei, the general manager of T & N, shows that at the time of his separation Mr. Jackson had only accumulated 77 days at T & N, which did not make him eligible for membership in the bargaining unit.[8] (Union's

[8] The terms of the collective bargaining agreement provide that an individual begins their employment at T & N as a casual employee. To be eligible for union membership, a casual employee must work 90 days within a consecutive 180 day time

Summ. J. Mot., Ex. 1.) Because Plaintiff never became eligible for membership in the bargaining unit, Local 676 contends that his claim that the union improperly excluded him from membership should be rejected.

In response, Plaintiff concedes that the evidence produced in discovery does provide support for the Union's contention that Mr. Jackson was ineligible for union membership at the time of the noose incident, when he discontinued working; however, Plaintiff contends that a genuine issue of material fact exists with reference to Dan Gainey's exclusion. (Pl.'s Mem. at 15 n.25.) In doing so, Plaintiff has admitted that no injury in fact has occurred which would give him standing to sue Local 676 based on discrimination in the admission of members. See Jones v. United Gas Improvement Corp., 383 F. Supp. 420, 432-34 (E.D. Pa. 1975) ("Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others.").

Finally, in Count IV of Plaintiff's Second Amended Complaint, Mr. Jackson has alleged that the Union discriminated against him on the basis of his race, in violation of the NJLAD. "The New Jersey Supreme Court has consistently followed the established Title VII standards when confronted with allegations

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period. The employee is then placed on probationary status for the next 30 days. On the thirty-first day of probationary status the individual becomes a regular member of the bargaining unit.

of discrimination under the NJLAD." Glover v. Canada Dry Bottling Co., CIV. A. No. 89-2846, 1990 WL 43739, *2 n.2 (D.N.J. April 10, 1990). In cases where a plaintiff attempts to satisfy his required burden of proof of intentional discrimination by the use of indirect rather than direct evidence, he must rely on the "shifting burdens" test as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Id. at *3; see also Ditzel v. University of Med. & Dentistry, 962 F. Supp. 595, 602-03 (D.N.J. 1997). However, to discredit a defendant's proffered legitimate nondiscriminatory reason for the challenged conduct, Plaintiff must demonstrate that the Union had the specific intent to discriminate against him because of his race when it engaged in such conduct. As already shown above, Mr. Jackson has failed to provide evidence to this effect.

Plaintiff also has alleged that the Union aided and abetted the other defendants in violating, or attempting to violate, the NJLAD. (Second Am. Compl. at ¶ 75.) An employee aids and abets a violation of the NJLAD when he knowingly gives substantial assistance or encouragement to the unlawful conduct of his employer.[9] Failla v. City of Passaic, 146 F.3d 149, 158

[9] Six factors may be examined to determine whether a defendant provided "substantial assistance": (1) the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other, his state of mind, and the duration of the assistance provided. Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 127 n.27 (3d Cir. 1999)(citations omitted), cert.

(3d Cir. 1998) (following the Restatement (Second) of Torts § 876(b)). Liability for aiding and abetting may also be based on inaction if it rises to the level of providing substantial assistance or encouragement. Id. at 158 n.11. However, the Third Circuit has emphasized the application of a "heightened standard" for aiding and abetting liability. Id. at 159.

Here, Local 676, in restricting its argument to lack of intent to discriminate, has neglected to address Plaintiff's allegations of aiding and abetting under the NJLAD. Unlike the "far more than mere passivity" standard that applies to Plaintiff's § 1981's claims, the conduct which Plaintiff has alleged, if attributable to Local 676, could permit a trier of fact to find that the Union implicitly gave substantial assistance or encouragement to the creation of a racially hostile work environment at T & N. See, e.g., Baliko v. Stecker, 645 A.2d 1218, 1222-23 (N.J. Super. Ct. App. Div. 1994) (concluding that a jury could find that union aided and abetted creation of hostile work environment in violation of NJLAD). As a result, Plaintiff's allegations of aiding and abetting under the NJLAD shall survive the Union's Motion for Summary Judgment.

For all of the above reasons, the Union's Motion for Summary Judgment is granted in part and denied in part. An appropriate Order follows.

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denied, ___ U.S. ___, 120 S. Ct. 786 (2000).

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ORDER

AND NOW, this 20th day of June, 2000, upon consideration of Defendant Teamsters Local 676's Motion for Summary Judgment, and all responses thereto, the following is hereby ORDERED:

1. Defendant’s Motion for Summary Judgment on Plaintiff’s claims under 42 U.S.C. § 1981 (Count I), 42 U.S.C. § 1985(3) (Count II), and for discrimination under the New Jersey Law Against Discrimination (Count IV) is GRANTED; and

2. Defendant’s Motion for Summary Judgment on Plaintiff’s claim of aiding and abetting discrimination in

violation of the New Jersey Law Against Discrimination (Count IV) is DENIED.

BY THE COURT:

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ROBERT F. KELLY, J.