IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Major Smith, III,

Plaintiff,

-vs-

City of Toledo, et al.,

Defendants.

Case No. 3:18 CV 2948

ORDER GRANTING SUMMARY JUDGMENT

JUDGE JACK ZOUHARY

INTRODUCTION

In 2017, Defendant City of Toledo hired Plaintiff Major Smith as a firefighter recruit (Doc. 42-9 at 11, 16–17). To become full-fledged firefighters, recruits must graduate from an academy by passing several mental and physical tests (Doc. 42-10 at 50). Smith failed one of these tests -- nine times -- and the City fired him. But Smith, who is black, claims he was fired because of his race.

Smith brings this lawsuit against the City and three City officials (Docs. 1, 25). He asserts eight grounds for relief, including one under Title VII of the 1964 Civil Rights Act (Doc. 1 at 18–26). Defendants request summary judgment (Docs. 28, 44, 46). Smith opposes (Docs. 42, 45) and requests additional discovery (Doc. 50). This Court heard oral argument (Non-Doc. Entry 2/6/2020).

Defendants are entitled to summary judgment if the evidence "is so one-sided that [they] must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). This Court need consider only the record materials cited by the parties, and only if those materials could be presented in a form admissible at trial. Federal Civil Rule 56(c)(2)–(3).

BACKGROUND

Vertical Ventilation

The test Smith failed is called the vertical-ventilation test. To pass, firefighter recruits must climb a ladder onto a vacant home and, within ten minutes, cut a hole in the roof (Doc. 28-6 at 3). According to a City deputy fire chief, vertical ventilation "is a basic and essential firefighting technique that must be done in a quick and efficient manner when required at a fire scene. It is done to protect the lives of both the firefighters as well as anyone who might be inside the building" (Doc. 28-5 at ¶ 4). Recruits receive three opportunities to pass the test (Doc. 28-2 at ¶ 5; Doc. 28-10 at 19–21; Doc. 42-4 at 66; Doc. 42-10 at 27–28). *See* OHIO ADMIN. CODE 4765-20-06(A)(2)(e). Failure results in dismissal from the academy (Doc. 28-10 at 19–21; Doc. 42-4 at 66; Doc. 42-10 at 28–29). *See* OHIO ADMIN. CODE 4765-20-06(A)(2)(f).

The March Tests

Smith and at least six of his thirty classmates took the vertical-ventilation test in March 2018 (Doc. 42-9 at 20, 27, 48). They had trained together (Doc. 28-3 at ¶ 5), and they took the test on the same roof (Doc. 28-12 at 107–09). Smith failed on his first attempt (Doc. 28-6 at 3–4; Doc. 28-15 at 10; Doc. 42-9 at 91–92). So did a classmate (Doc. 28-3 at ¶ 11). The classmate passed on his second attempt, but Smith did not, at least in part because he hit the ladder with a running chainsaw (*id*. at ¶¶ 10, 11; Doc. 28-6 at 3–4). Smith also failed on the third attempt (Doc. 28-6 at 3–4; Doc. 42-9 at 139). The summary completed by Smith's evaluators explains that he "would not follow directions given by instructors for safety" and "repeatedly cut towards his body instead of standing out of the way as he was instructed to multiple times" (Doc. 28-6 at 4).

Consistent with City policy (Doc. 28-10 at 20), the person in charge of recruit training recommended that Smith be dismissed from the academy for failing the vertical-ventilation test three

times (Doc. 42-4 at 111; Doc. 42-10 at 15, 39). But Defendant Luis Santiago, then-chief of the fire department, gave Smith another chance (Doc. 42-4 at 71; Doc. 42-10 at 27). Defendants Wade Kapszukiewicz, the City's mayor, and Brian Byrd, the current fire chief, indicate Smith received special accommodation because City decisionmakers wanted a racially diverse fire department (Doc. 28-8 at ¶¶ 1, 6; Doc. 43-6 at 5). A second set of three attempts was scheduled for May, and Smith received eight hours of one-on-one training to prepare (Doc. 28-15 at 10–11). According to Smith's instructor, Smith committed unsafe acts during this training, including cutting toward his body with a chainsaw (Doc. 28-12 at 75).

The May Tests

Despite this extra practice, Smith failed his three attempts in May (Doc. 28-15 at 17). According to an evaluator, during one of the attempts, Smith broke a rafter under the roof, "struck the ladder twice with the [chain]saw, . . . and failed to finish the task in ten minutes" (*id.* at 14; Doc. 42-9 at 107–08). The person in charge of training again recommended that Chief Santiago dismiss Smith from the academy (Doc. 42-4 at 111; Doc. 42-10 at 31). But Santiago discovered an inconsistency: During Smith's March attempts, the ten-minute clock started when he reached the roof, after climbing the ladder (Doc. 42-9 at 101; Doc. 42-10 at 32). The May clock started earlier, when Smith began his ascent up the ladder (*id.*). Santiago gave Smith a third set of three attempts to pass (Doc. 42-4 at 70–71, 113).

The June Tests

Smith received more one-on-one training in June (Doc. 42-2 at 14). During this training, he again committed an unsafe act with a chainsaw (Doc. 28-11 at 21). A high-ranking firefighter who observed the training, David Hitt, testified that Smith's "body was in line with one of the cuts that he had begun to make, which is an immediate fail as far as we're concerned" (Doc. 42-2 at 15). But

when an instructor asked Smith if he wanted more practice, Smith declined, saying "let's get this over with" (Doc. 42-9 at 117). At his deposition, Smith explained that he "had already had three attempts at practicing, and [he] felt good about it" (*id.* at 118).

Later that same day, Smith failed his first of three June vertical-ventilation attempts (Doc. 28-11 at 21). An evaluator reported that Smith exceeded the ten-minute limit, failed to cut a hole of sufficient size, and "used the chainsaw in a way that could have caused serious harm to himself . . . the same act he had been instructed not to do on his second practice attempt that day" (*id.*). Observer Hitt testified that, in part because of Smith's obvious chainsaw struggles, he "knew [Smith] wasn't gonna pass" (Doc. 42-2 at 16–17). Smith returned the next day for another attempt and failed again due to unsafe chainsaw use (Doc. 28-11 at 22). When an evaluator told Smith what went wrong, Smith had a "meltdown" and "stormed off," according to Hitt and the evaluator (*id.*; Doc. 42-2 at 18). The evaluator later wrote, "Recruit Smith will harm himself if we continue this" (Doc. 28-11 at 22). But Smith tried again. This time, he struggled to start the chainsaw (*id.* at 23; Doc. 42-9 at 123–24). "Even with all the instruction and practice," noted the evaluator, "he acts as if it's the first time he has ever used [a chainsaw]" (Doc. 28-11 at 23). Smith failed because he exceeded the ten-minute limit, and he was terminated the next day (*id.*; Doc. 42-9 at 83, 124). No other recruit failed the vertical-ventilation test that year (Doc. 28-2 at ¶ 8).

TITLE VII

Title VII forbids racial discrimination in employment, including in municipal-government employment. 42 U.S.C. § 2000e-2(a)(1); *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 25 (2018). The analytical framework for a Title VII claim depends on the type of discrimination alleged and the type of evidence produced. Where an employee (1) alleges race was the sole motive for termination and (2) produces only indirect evidence of discrimination, courts apply the test articulated

in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012). That's the situation here. Smith cites no direct evidence of discrimination (Doc. 42 at 16–18). *See Tennial v. United Parcel Serv.*, 840 F.3d 292, 302 (6th Cir. 2016) (defining direct evidence). And he neither applies nor requests a mixed-motive analysis (Doc. 42 at 18, 21). His brief is organized around *McDonnell Douglas* (*id.*), and that is the framework this Court concludes is appropriate. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 390 n.4 (6th Cir. 2008) (declining to undertake a mixed-motive analysis because the plaintiff "presented his . . . claim as a single-motive discrimination claim").

The *McDonnell Douglas* test has three parts. First, Smith bears the burden to make a prima-facie case of discrimination. *Tennial*, 840 F.3d at 303. To meet this burden, he must satisfy four prongs. *Id.* Under one of the prongs, he must produce sufficient evidence to convince a reasonable jury that (1) he was replaced by a person of a different race or (2) he was treated less favorably than similarly situated non-black firefighter recruits. *See Laster v. City of Kalamazoo*, 746 F.3d 714, 727 (6th Cir. 2014); *Griffin*, 689 F.3d at 593 n.5. Smith does not argue someone of a different race replaced him. Therefore, his Title VII claim's viability depends on whether he can point to sufficient evidence of differential treatment (Doc. 42 at 20). Smith insists that evidence of differential treatment is "overwhelming" (*id.*). This Court disagrees.

First, Smith claims he was "the only recruit required to pass the ***State*** [vertical-ventilation] test on a roof" (*id.*) (emphasis in original). Not true. Undisputed evidence establishes that every recruit had to pass the vertical-ventilation test on a roof (Doc. 28-12 at 60; Doc. 44-3 at ¶ 1; Doc. 44-4 at ¶ 4; Doc. 44-5 at ¶ 4). After passing on a roof, recruits also had to pass on a simulator (Doc. 42-9 at 140; Doc. 44-5 at ¶¶ 3–4, 6). Some parts of the record refer to this simulator test as the "state" test

(Doc. 43-5 at 10; Doc. 44-5 at ¶¶ 3–7). But Smith never took this test, given that he never passed the test on a roof (Doc. 28-15 at 10; Doc. 44-5 at ¶¶ 3, 5).

Second, Smith argues he was tested on a roof that was steeper than the roof used to test other recruits (Doc. 42 at 20). But he and six classmates tested on the same roof in March. In May and June, Smith did test on a different roof (Doc. 28-11 at 21), which his evaluator chose because it was "almost identical" to the March roof (Doc. 28-12 at 59). Smith acknowledged before taking the tests, and photographs confirm, that the two roofs are similarly sloped (Doc. 28-3 at 2, 4–6; Doc. 42-2 at 15; Doc. 42-9 at 104; Doc. 52). The May-June roof also looks like a second roof used to test recruits in March (Doc. 44-3 at 2, 5; Doc. 52; *see also* Doc. 28-12 at 106; Doc. 42-10 at 87–88). But even if the May-June roof was steeper than others, its slope is not evidence of unfavorable treatment. Smith had three opportunities to pass on the uncontroversial March roof, just like his six classmates. Additional chances to pass, even on a slightly steeper roof, is an opportunity no one else received.

Third, Smith appears to rely on a report written by David Hitt, the high-ranking firefighter who observed Smith's June training and testing (Doc. 42 at 20). Hitt echoes Smith's complaint about the roof's slope, concluding it was "too challenging for a trainee" (Doc. 42-2 at 87). He also concludes that the June training was inadequate and that the chainsaw Smith used was faulty (*id.* at 86–87). But Hitt did not observe the vertical-ventilation testing or training of any other recruit in Smith's class (*id.* at 9–10; Non-Doc. Entry 2/6/2020). Consequently, his opinions are irrelevant to the critical question here: whether Defendants treated Smith less favorably than other recruits.

The answer to that question is no. Smith was treated at least as well as the other recruits -- he received the same training as his six classmates, who tested on the same roof in March. In fact, Defendants treated Smith better than their policies required. His three March failures could have been the end of his tenure with the fire department, but Defendants instead gave him six more chances,

along with hours of one-on-one help. No recruit had ever received more than three opportunities to pass the vertical-ventilation test (Doc. 28-2 at ¶ 8). Smith does not satisfy his prima-facie burden under *McDonnell Douglas* -- even though that burden is "not onerous," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) -- and his Title VII claim must be dismissed.

Even if he could make a prima-facie case of discrimination, his claim falls short. At the second step of the *McDonnell Douglas* test, Defendants must articulate a legitimate, nondiscriminatory reason for Smith's dismissal. *Tennial*, 840 F.3d at 303. No dispute here: the articulated reason is Smith's failure to pass the vertical-ventilation test. Next, Smith must "identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination." *Id.* (citation omitted). "A plaintiff will usually demonstrate pretext by showing that the employer's stated reason . . . either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action." *White*, 533 F.3d at 393.

Smith cannot demonstrate pretext under any of these three options. The explanation articulated by Defendants has basis in fact -- overwhelming evidence demonstrates Smith never passed the test. Smith's failure is sufficient to explain his termination -- Smith himself understood passing the test was an academy requirement (Doc. 42-9 at 69). And Smith provides no reason to believe that some other factor was the actual reason for his termination. For instance, he cannot point to a single concrete example of racial bias against him at the academy (*id.* at 55–56, 81–83, 129–38, 154). His briefs and accompanying materials are littered with vague, secondhand accounts -- many unsubstantiated -- of racial bias in the fire department (Doc. 42 at 12–13, 16; Doc. 42-2 at 45; Doc. 42-3 at ¶ 6), including at least one brazen misrepresentation of the record (*compare* Doc. 42 at 9–10 *with* Doc. 42-2 at 49–50). Such grasping is "wholly insufficient . . . to establish a claim of discrimination." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584–85 (6th Cir. 1992).

OTHER CLAIMS

Smith's other claims fare no better. The claims brought under 42 U.S.C. § 1981 and Ohio R.C. 4112.02 (Doc. 1 at 18, 24) are governed by the same legal standard that governs Title VII, so they hit the same roadblocks. *See Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012); *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir. 2008). The Section 1983 claim (Doc. 1 at 19) is also a clear loser. According to Smith, Defendants violated Section 1983 by falsely telling the media he was terminated for failure to meet state requirements (Doc. 42 at 23). He contends this alleged lie stamped him with a "badge of infamy" (*id.*). But Smith was in fact terminated for failing the vertical-ventilation test. Perhaps this test was an academy requirement, rather than a state requirement, but the difference hardly affects Smith's reputation. Intentional infliction of emotional distress (Doc. 1 at 25) is not supported on this record, either. Nor are claims related to alleged civil-rights conspiracies under 42 U.S.C. §§ 1985(3) and 1986 (*id.* at 20, 22); Smith has produced no evidence of such a conspiracy. Finally, the claim titled "Respondeat Superior -- City of Toledo" (*id.* at 26) is unclear and deserves little attention. The City cannot be liable under a respondeat-superior theory here because, among other reasons, no Defendant violated Smith's rights.

REQUEST FOR ADDITIONAL DISCOVERY

In addition to opposing the Motion for Summary Judgment on the merits, Smith asks this Court to delay adjudication so he can conduct further discovery (Doc. 50). He invokes Federal Civil Rule 56(d), which authorizes such a delay if a party "shows . . . that, for specified reasons, it cannot present facts essential to justify its opposition [to the motion under review]." The Sixth Circuit has encouraged district courts to apply a five-factor analysis to Rule 56(d) requests, but such requests may be denied based solely on a determination that "the discovery requested would be irrelevant to the underlying issue to be decided." *Doe v. City of Memphis*, 928 F.3d 481, 490–91 (6th Cir. 2019)

(citations omitted). *See also Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1197 (6th Cir. 1995) (affirming denial of Rule 56 motion for additional discovery where the requested discovery "would not have changed the ultimate result" of the case).

The additional discovery Smith seeks is not relevant to the dispositive issue in this case. Although his logic is difficult to follow, he essentially alleges that the City (1) told him throughout the litigation that he failed the state vertical-ventilation test and (2) asserts for the first time in the Reply that he in fact failed an academy vertical-ventilation test not required by the state (Doc. 50 at 2). Again, parts of the record refer to the roof test Smith failed as an "academy" test and the later, simulator test as the "state" test. The City maintains that both tests are state requirements (Non-Doc. Entry 2/6/2020). In any event, the dispute is irrelevant. What matters is that all recruits had to pass on a roof to graduate, Smith received more training and opportunities than anyone else, and he failed. That's why he can't win this lawsuit.

CONCLUSION

The City of Toledo bent over backwards to help Major Smith become a firefighter. He failed not because of racial discrimination, but because he was unable to perform a critical skill that firefighters need to protect their communities. Accordingly, Defendants' Motion for Summary Judgment (Doc. 28) is granted, Smith's request for additional discovery (Doc. 50) is denied, and the Complaint (Doc. 1) is dismissed.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U.S. DISTRICT JUDGE

April 16, 2020