

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION**

CHARLES BRADFORD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. 1:03-CV-177
	)	
MAXWELL TREE EXPERT	)	
COMPANY, INC.,	)	
	)	
Defendant.	)	

**MEMORANDUM OF DECISION AND ORDER**

**I. INTRODUCTION**

This matter is before the Court on the Motion for Summary Judgment filed by the Defendant, Maxwell Tree Expert Company, Inc. (hereafter, “Maxwell” or “the Company”). The Plaintiff, Charles Bradford (“Bradford”), who is black, alleges that Maxwell discriminated against him because of his race in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 (“§ 1981”), first by terminating him and a white employee for suspected drug use during work hours and then by failing to rehire him after it rehired the white employee.<sup>1</sup> Because the record fails to establish a basis for Bradford’s claim, Maxwell’s motion will be GRANTED.<sup>2</sup>

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<sup>1</sup>Subject matter jurisdiction arises under 28 U.S.C. § 1331. Jurisdiction of the undersigned Magistrate Judge is based on 28 U.S.C. § 636(c), all parties consenting.

<sup>2</sup>Also pending is Maxwell’s Motion to Strike two exhibits attached to Bradford’s response brief. However, because Maxwell is entitled to summary judgment even when the disputed exhibits are considered, Defendant’s Motion is moot and will be DENIED.

## II. FACTS AND PROCEDURAL HISTORY<sup>3</sup>

Except as may be highlighted later, the material facts are not significantly in dispute and can be succinctly recounted. Maxwell initially hired Bradford as a landscape laborer on April 4, 1996; Bradford later quit in November 1997, but Maxwell rehired him in April 1998. (Gina Maxwell Aff. at ¶ 5.) Sometime in November 1999, Maxwell employee Mark Burton informed Greg Maxwell (“Greg”), President and Owner of the Company, that Bradford had been arrested, in part, for marijuana possession. (Supp’l Aff. of Greg Maxwell ¶ 4; Mark Burton Aff. ¶ 6.) Greg understood that the arrest for possession of marijuana occurred on Bradford’s personal time, and that Bradford pled guilty to the charge. (Supp’l Aff. of Greg Maxwell ¶ 4.) Maxwell took no employment action.

Bradford’s employment with Maxwell was otherwise uneventful until his termination on November 5, 2001. On that day, Bradford and Jeff Feasel (“Feasel”), landscapers, along with Greg, were working on a landscape job. (Bradford Dep. at 43-44.) After lunch, Greg opened the company van to retrieve some equipment, and upon doing so, smelled marijuana. (Bradford Dep. at 44; Greg Maxwell Aff. ¶ 5.) Greg took no immediate action, but later that afternoon confronted both Feasel, a white employee, and Bradford. (*Id.*) Although Feasel offered no explanation, Bradford denied knowing anything about the marijuana. (Feasel Aff. ¶¶ 5, 6; Bradford Dep. at 44; Greg Maxwell Aff. ¶ 5.) Since he knew that either Bradford, Feasel, or perhaps both had smoked marijuana in the company van, and since neither would admit it or implicate the other, Greg opted for a simple, even-handed approach, firing both for violating a

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<sup>3</sup>For summary judgment purposes, the facts are recited in the light most favorable to Bradford, the nonmoving party. *Hall v. Bennett*, – F.3d –, available at 2004 U.S. App. WL 1795087, at \*1 (7<sup>th</sup> Cir. Aug. 12, 2004).

company policy prohibiting illegal drug use during work hours. (*Id.*)

Three days later, Feasel returned to the Company to pick up some personal items and ran into Gina Maxwell (“Gina”), the Company’s business manager. (Feasel Aff. ¶ 2; Gina Maxwell Aff. ¶ 2.) Feasel took the opportunity to proclaim his innocence of the marijuana accusation, and Gina suggested that he contact Greg, which he did later that day. (*Id.*) Feasel explained to Greg that he had not been smoking marijuana. (Feasel Aff. ¶ 8; Greg Maxwell Aff. ¶ 12.) After further discussion, they agreed that if Feasel passed a drug test, he could return to the Company. (Feasel Aff. ¶ 9.) Feasel passed the test and resumed his employment with the Company on November 13, 2001. (Feasel Aff. ¶¶ 10, 11.)

Several days after being fired, Bradford also returned to the Company to collect his belongings and while there, asked Charlene Morgan (“Morgan”), the receptionist, if Gina was available so he could talk to her. (Bradford Dep. at 51.) Apparently Bradford wanted to talk about both his 401(k) and his dismissal, but he did not tell this to Morgan. (Bradford Dep. at 56-57.) In any event, Gina was unavailable to speak with Bradford at the time, as well as when he visited again, which apparently was days or weeks later. (Bradford Dep. at 106-107.) Bradford also called the Maxwell office at least four or five times, and perhaps as many as ten times, again always speaking with Morgan. He still wanted to talk to Gina about such things as his insurance and 401(k), but never revealed to Morgan that his call had anything to do with possible reinstatement, so Morgan, understandably, never passed such a message on to Gina. (Morgan Aff. ¶ 8.) The upshot of these failed attempts is that Bradford never did speak to either Gina or Greg about getting his job back, and in fact, never even told Morgan that was the reason for a requested audience. (Bradford Dep. at 102-03; Morgan Aff. ¶¶ 5, 8.)

Bradford now claims that throughout his employment, Greg made several derogatory comments about blacks. (Bradford Dep. at 77-79.) Specifically, on the day Bradford was terminated, Greg made a comment about “the size of black [men’s] penis areas.” (Bradford Dep. at 77.) Bradford could not specifically recall any other alleged racial comments, but he interpreted them as racial slurs, and thought that one of Greg’s comments suggested that black people “are dumb.” (Bradford Dep. at 78-79.) Finally, Bradford complains about one incident where Greg reprimanded him for returning with an unclean truck, and told him to clean it before leaving for the day, while a white co-worker was allowed to leave without cleaning the truck he was driving. (Bradford Dep. at 86-87.)

On May 16, 2003, Bradford filed his Complaint, which he amended several months later, to allege a violation of both Title VII and § 1981.<sup>4</sup> In essence, Bradford argues that he was discriminated against because Maxwell rehired Feasel, but not him.<sup>5</sup> Maxwell claims that it is entitled to summary judgment because Bradford has failed to make a *prima facie* case of

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<sup>4</sup>Bradford’s amended complaint also alleges, but his brief does not advance, the claim that he was paid a lower wage than similarly-situated white employees. (First Amended Compl. ¶ 4.) In its Motion for Summary Judgment, Maxwell designated pay records and other evidence indicating that this claim is without any factual foundation. Bradford fails to challenge this record and thus concedes Maxwell’s version of the facts. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 921-922 (7<sup>th</sup> Cir. 1994). Therefore, left with nothing more than the record provided by Maxwell, summary judgment on this claim will be granted. Local Rule 56.1(b); *Whitman v. Nesic*, 368 F.3d 931, 933-34 (7<sup>th</sup> Cir. 2004).

<sup>5</sup>Bradford’s amended complaint seems to allege a claim for illegal termination; however, since both he and Feasel were fired for allegedly committing the same offense, his claim is more properly viewed as one for failure to rehire. Indeed, Bradford’s present arguments do not advance any claim concerning a discriminatory firing, a wise concession given that Greg was not obligated to believe Bradford’s protestations of innocence, just as he was not required to infer innocence from Feasel’s silence. After all, Greg knew one, and perhaps both, had been smoking marijuana, and while he could have perhaps launched a more thorough and discerning investigation, this Court cannot second-guess such a decision. *See Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 561 (7<sup>th</sup> Cir. 2004) (noting that courts do not sit as “super personnel” departments that re-examine a business entity’s decisions). Therefore, because Bradford does not accuse Greg of fabricating the marijuana story, and while Greg’s even-handed solution may have been shop floor rough justice, no jury could infer it to be racially discriminatory. *See Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 772 (7<sup>th</sup> Cir. 2002) (“pretext requires more than a showing that the business decision was ‘mistaken, ill considered or foolish,’ and ... so long as the employer ‘honestly believed’ the reason given for the action, pretext has not been shown”).

discrimination and because even if he can make such a showing, no reasonable jury could possibly find or infer that Maxwell's reason for failing to rehire him was pretextual.

### **III. STANDARD OF REVIEW**

Summary judgment may be granted only if there are no disputed genuine issues of material fact. *Payne v. Pauley*, 337 F.3d 767, 770 (7<sup>th</sup> Cir. 2003). When ruling on a motion for summary judgment, a court “may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder.” *Id.* The only task in ruling on a motion for summary judgment is “to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.” *Waldridge*, 24 F.3d at 920. If the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmoving party, summary judgment may not be granted. *Payne*, 337 F.3d at 770. A court must construe the record in the light most favorable to the nonmoving party and avoid “the temptation to decide which party’s version of the facts is more likely true[,]” as “summary judgment cannot be used to resolve swearing contests between litigants.” *Id.* However, “a party opposing summary judgment may not rest on the pleadings, but must affirmatively demonstrate that there is a genuine issue of material fact for trial.” *Id.* at 771.

### **IV. DISCUSSION**

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). In addition, because discrimination claims under §1981 are evaluated under the same rubric as Title VII claims, they will be analyzed in the same manner.

*Williams v. Waste Management of Illinois*, 361 F.3d 1021, 1028 (7<sup>th</sup> Cir. 2004); *Patton v. Indianapolis Pub. Sch. Bd.*, 276 F.3d 334, 338 (7<sup>th</sup> Cir. 2002).

A plaintiff may prove employment discrimination under Title VII and § 1981 using either the “direct method” or “indirect method.” *Cerutti v. BASF Corp.*, 349 F.3d 1055 (7<sup>th</sup> Cir. 2003). Regardless of which method a plaintiff uses, the ultimate standard is the same: the plaintiff must demonstrate that the employer would not have made the adverse decision but for his membership in a protected class. *Id.* at 1061-62 (citing *Patton*, 276 F.3d at 339).

**1. Bradford’s claim fails under the direct method of proof.**

“Under the direct method of proof, a plaintiff may show, by way of direct or circumstantial evidence, that his employer’s decision to take an adverse job action against him was motivated by an impermissible purpose, such as race. . . .” *Cerutti*, 349 F.3d at 1061.

The Seventh Circuit has instructed that direct evidence essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus. *Id.* This type of evidence is exemplified by a statement such as “I fired you because of your race.” *See, e.g., Robin v. Espo Eng’g Corp.*, 200 F.3d 1081, 1088 (7<sup>th</sup> Cir. 2000) (explaining the same proposition with the statement “I fired you because of your age”). Bradford offers no such evidence of discrimination.

Nevertheless, under the direct method, a plaintiff may also show enough circumstantial evidence that a jury would be entitled to infer intentional discrimination. *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7<sup>th</sup> Cir. 2003). This type of evidence may consist of “ambiguous statements, suspicious timing, discrimination against other employees, and . . . evidence non-conclusive in itself but together composing a convincing mosaic of discrimination.” *Troupe v.*

*May Dep't Stores Co.*, 20 F.3d 734, 737 (7<sup>th</sup> Cir. 1994). Importantly, however, this evidence must point "directly to a discriminatory reason for the employer's action." *Davis v. Con-Way Transp. Central Express, Inc.*, 368 F.3d 776, 783 (7<sup>th</sup> Cir.2004); *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7<sup>th</sup> Cir. 2003).

Bradford attempts this route by offering a collection of mostly non-specific, race-based comments by Greg, as well as the complaint that on one occasion he had to clean a truck (when a white employee did not), all to raise the inference that Maxwell's ultimate failure to rehire him was based on race. The supposed racial slurs are non-specific because the only one Bradford really remembers in any detail is Greg's comment about the size of black men's penises that was supposedly voiced on the same day Bradford was fired. This comment, if it was made at all, was apparently uttered before the actual termination occurred, and perhaps even before Greg became aware of a basis for termination.

In a Title VII case, statements revealing discriminatory intent must come from the decision-maker, an apt description of Greg in this instance. *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391 (7<sup>th</sup> Cir. 1997). However, when evaluating direct evidence in support of a plaintiff's position, the Court must look at the context in which a statement was made.

*Mateu-Anderegg v. School Dist. of Whitefish Bay*, 304 F.3d 618, 625 (7<sup>th</sup> Cir. 2002). Therefore, to be probative of discrimination, "isolated comments must be contemporaneous with the [employment decision] or causally related to the . . . decision making process." *Geier v. Medtronic, Inc.*, 99 F.3d 238, 242 (7<sup>th</sup> Cir. 1996). If no connection is established, the remarks are insufficient by themselves to give rise to an inference of discrimination "even when uttered by the ultimate decisionmaker." *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1403 (7<sup>th</sup>

Cir. 1996).

Clearly, Bradford's circumstantial evidence is far too remote and insubstantial to permit a rational trier of fact to find direct discrimination. Even if one believes, consistent with Bradford's account, that Greg made the alleged comments, they were not made contemporaneously with or in reference to either the termination or Maxwell's alleged failure to rehire Bradford some days later. At most, Bradford has raised the inference that Greg may be bigoted, but this alone is insufficient as a matter of law. *See Gorence v. Eagle Food Ctrs.*, 242 F.3d 759, 762 (7th Cir. 2001) ("[B]igotry, *per se*, is not actionable. It is actionable only if it results in injury to a plaintiff; there must be a real link between the bigotry and an adverse employment action."); *see also Pafford v. Herman*, 148 F.3d 658, 666 (7th Cir. 1998) (concluding that plaintiff's circumstantial evidence was not sufficient enough to raise an inference of discrimination). Even this inference is in doubt given that Greg had twice previously hired Bradford, the last time in 1998, before firing him over the marijuana issue some three years later. *See Chiaramonte*, 129 F.3d at 399 (noting rebuttable presumption of no age discrimination where the plaintiff is hired and fired by the same decision-maker in a relatively short time span); *EEOC v. Our Lady of the Resurrection Medical Center*, 77 F.3d 145, 152 (7th Cir. 1996) (applies to race claim). *But cf. Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 747 (7th Cir. 2002) (cautioning that "common actor presumption" is not really a "presumption" at all, but merely another factor for the trier of fact to consider).

The only other evidence to which Bradford points is Greg's allegedly more favorable treatment of the white employee who failed to clean a truck. This allegation might be relevant if Greg had cited Bradford's truck maintenance as the reason for his termination, but he did not.

*See, e.g., Jones v. Union Pacific R.R. Co.*, 302 F.3d 735, 745 (7th Cir. 2002) (rejecting a similar "unusable comparison"). Rather, Bradford was fired for allegedly smoking marijuana on the job, and he was not rehired because, unlike Feasel, he never asked for reinstatement.

Therefore, because Bradford is unable to proceed on his race discrimination claim under the direct method, we will proceed to examine whether he can do so under the indirect method.

**2. Bradford fails to make a *prima facie* case or show pretext under the indirect method of proof.**

Because Bradford cannot prevail under the direct method, he must proceed under the indirect method, *i.e.*, the familiar *McDonnell Douglas* framework. *Cerutti*, 349 F.3d at 1061. Under this analysis, Bradford must establish these elements: 1) he belongs to a protected class; 2) his performance met Maxwell's legitimate expectations; 3) he suffered an adverse employment action; and 4) similarly situated employees not in his protected class received more favorable treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Brummett v. Lee Enterprises, Inc.*, 284 F.3d 742, 744 (7<sup>th</sup> Cir. 2002). If Bradford establishes this *prima facie* case of discrimination, the burden shifts to Maxwell to produce a legitimate, nondiscriminatory reason for the adverse employment decision. *Cerutti*, 349 F.3d. at 1061.

Should Maxwell offer such a legitimate, nondiscriminatory reason, Bradford must present evidence that the proffered explanation is pretextual. *Id.* Pretext can be shown by presenting evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation, or were insufficient to motivate the employer's action. *Nawrot v. CPC Int'l*, 277 F.3d 896, 906 (7th Cir. 2002). Even if an employer's decision was mistaken, ill-considered or foolish, so long as the employer honestly believed the reasons for the decision, pretext has not been shown. *Franzoni*, 300 F.3d at 772; *Essex v. United Parcel*

*Service, Inc.*, 111 F.3d 1304, 1310 (7<sup>th</sup> Cir. 1997) (holding that the employer basing its decision on mistake, bad policy, or just plain stupidity does not establish pretext).

The parties do not dispute that Bradford meets the first three prongs of the *prima facie* case. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 11; Pl.'s Resp. and Answer Br. in Opp'n to Def.'s Mot. For Summ. J. at 6.) What they contest is whether Bradford and Feasel are similarly situated, and to meet his burden, Bradford must show that Feasel is directly comparable to him in all material respects. *Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 561 (7<sup>th</sup> Cir. 2004). This inquiry requires that within the context of the case we look at all relevant factors, *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7<sup>th</sup> Cir. 2000), including whether the employees dealt with the same supervisor and were subject to the same standards, *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7<sup>th</sup> Cir. 2002). Moreover, employees are not similarly situated if they are subject to differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them. *Radue*, 219 F.3d at 618.

Limiting this case to what we understand Bradford to be arguing, the failure of Maxwell to rehire him, it is apparent that Feasel and Bradford were not similarly situated, at least when it came to rehiring. Unlike Bradford, Feasel had the good fortune to run into Gina when he returned to the shop to collect his belongings. After proclaiming his innocence to her, he followed her advice and spoke to Greg, apparently convincing him that he could establish his innocence, at least to Greg's satisfaction, by passing a drug test.

Bradford says that he too protested his innocence (albeit at his discharge), and that when Gina ignored his visits and calls, it led to Feasel getting to take a drug test while he did not. This ignores the fact that Bradford never told Morgan, let alone Gina or Greg, that he was interested

in reinstatement, and although he suggests that Gina's failure to return his calls masks something sinister, perhaps smoldering racial animus, ultimately this amounts to nothing more than speculation.

Indeed, it is quite a leap from Morgan telling Gina that Bradford wanted to talk about insurance and his 401(k), to what Bradford must establish: she was dodging him lest he ask for his job back. *See Adams*, 324 F.3d at 939 (refusing to accept plaintiff's speculation that her employer's conduct was motivated by racial animus).

In short, what this record reveals is that Feasel asked to be rehired, agreed to take a drug test, passed it, and thus was rehired. At the most fundamental level, Bradford's claim falters because he cannot show that he ever asked for his job back. Moreover, he does not argue that he could have passed a drug test in November 2001, and at this late date a jury would have to speculate whether he could have done so. As a result, Bradford cannot show that he was similarly situated to Feasel as a matter of law, and therefore his effort to establish a *prima facie* case fails. *Hudson*, 375 F.3d at 561.

Nevertheless, in order to complete the record we will assume, *arguendo*, that Bradford has met his burden on the *prima facie* case and will proceed to discuss whether Maxwell's reasons for failing to rehire him were pretextual.

On that score, we know that the proffered reason why Feasel was rehired, in contrast to Bradford, is that he requested it and passed a drug test. This puts the burden on Bradford to show that this reason is either factually baseless, was not the actual motivation, or was insufficient to motivate Maxwell. *Nawrot*, 277 F.3d at 906.

Bradford argues that a jury could infer that this reason did not actually motivate Maxwell

because Greg submitted two allegedly inconsistent affidavits in support of Maxwell's Motion for Summary Judgment. In the first Affidavit, Greg stated that "had [Bradford] initiated contact with me, protested his termination, and declared that he had not smoked marijuana in or about the Company van on November 5, 2001, I would have given him the same opportunity to prove his 'innocence' as I gave Jeff Feasel." (Greg Maxwell Aff. ¶ 19.) In the second Affidavit, attached to Maxwell's Supplemental Memorandum, Greg explained that after Feasel tested negative, he naturally concluded (a conclusion no doubt bolstered by his knowledge of Bradford's prior marijuana conviction), that Bradford had been the one who smoked marijuana in the company van. (Supp'l Aff. of Greg Maxwell ¶ 6).

In short, because Greg's statements speak to two different time periods (one, before Feasel's test; the other, after) we do not see the two affidavits as inconsistent, or otherwise giving rise to any permissible inference that the real reason Bradford was not rehired was because of his race. Certainly once Feasel passed the drug test, Greg was entitled to the natural conclusion, "the honestly held belief" that it was Bradford who had violated Maxwell's drug policy and therefore, was both legitimately fired and ineligible for rehire. (Supp'l Aff. of Greg Maxwell ¶ 8.) *See also Essex*, 111 F.3d at 1311 (stating that the important question is the honesty, not the accuracy, of the employer's belief).

Moreover, it invites speculation to suggest, as Bradford seemingly does, that once Greg offered the drug test option to Feasel, he likewise should have sought out Bradford and given him the same opportunity. *See id.* at 1312 (noting that merely shifting blame to employer does not establish pretext). Perhaps Bradford's highest speculative hurdle is that no one knows (and at this point never will know) if he would have passed such a test. *See Grube v. Lau Indus.*, 257

F.3d 723, 730 (7<sup>th</sup> Cir. 2001) (refusing to accept plaintiff's "speculation" to establish evidence of employer's pretext). Notably, Bradford does not help much on this score because he does not allege he would have done so.

Of course, there is one final and practical explanation for why only Feasel was offered the test: at that point, no one at Maxwell had any idea Bradford was interested in being rehired.

Consequently, Bradford has failed to show that a violation of Maxwell's drug policy was not the honestly held reason for his discharge, or that it (along with the events following Feasel's fortuitous encounter with Gina) was not the real reason for his failing to be rehired. Even more importantly, Bradford has failed to raise the inference that the true reason was race. *Jones*, 302 F.3d at 745.

Therefore, because Bradford's claim fails under both the direct and indirect methods of proof, Maxwell is entitled to summary judgment as a matter of law.

#### **IV. CONCLUSION**

For the above reasons, Maxwell's Motion for Summary Judgment is GRANTED. The Clerk is directed to enter judgment in favor of the Defendant and against the Plaintiff.

Enter for this 24<sup>th</sup> of August, 2004.

s/ Roger B. Cosby  
Roger B. Cosby,  
United States Magistrate Judge