

**THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

EMANUEL GRAHAM,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2009 CA 006426 B
)	Judge Zeldon
CVS, INC.,)	
)	
Defendant.)	

ORDER

The Court has reviewed the Motion for Summary Judgment filed by Defendant CVS, Inc. (“CVS”) and the Opposition of Plaintiff Emanuel Graham. Mr. Graham’s Complaint asserts claims of defamation and discrimination in a place of public accommodation under the District of Columbia Human Rights Act (“DCHRA”). CVS defends the conduct of its employees by arguing that their actions were nondiscriminatory and warranted under the circumstances. The Court will deny the Motion for Summary Judgment for the reasons given below.

I. Standard for Summary Judgment

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in his favor. *Herbin v. Hoeffel*, 806 A.2d 186, 191 (D.C. 2002).

To successfully defeat a motion for summary judgment, “the opposing party need only show that there is ‘sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties’ differing versions of the truth at trial.’” *Franklin Inv. Co. v.*

Huffman, 393 A.2d 119, 121 (D.C. 1978) (citation omitted). Any doubt regarding the existence, or lack thereof, of disputed facts is resolved in favor of the non-moving party, *Young v. Delaney*, 647 A.2d 784, 788 (D.C. 1994), and summary judgment “should be sparingly granted in cases involving motive or intent.” *Hollins v. Fannie Mae*, 760 A.2d 563 (D.C. 2000).

II. Factual Background

Viewing the evidence in the light most favorable to Mr. Graham, the relevant facts are as follows. In the afternoon hours of September 22, 2008, Mr. Graham, an African American in his mid-fifties, entered Defendant’s retail pharmacy, located at 1990 K Street, N.W., Washington, D.C., to fill a prescription and purchase heat pads. *See* Graham Dep. 22:6–21. Holding a newspaper, Mr. Graham was dressed in what he describes as “urban wear,” which included jeans, a t-shirt, a baseball cap, and a backpack that he carried on one shoulder. Mr. Graham neither proceeded directly to the pharmacy nor immediately purchased any retail items upon entering Defendant’s store, and within several minutes was approached by Store Manager Monir Hossain, who was soon after joined by Assistant Manager William Brown. There is a dispute about whether Mr. Hossain and Mr. Brown positioned themselves in a manner that restricted Mr. Graham’s free movement and either directly or indirectly accused him of theft.

Mr. Graham’s conduct upon entering the store is disputed by the parties. According to Mr. Graham, he spent several moments unsuccessfully attempting to locate the merchandise he intended to purchase, before proceeding to the pharmacy to request assistance. *See* Graham Dep. 58:9–18. Defendant’s employees describe Mr. Graham’s behavior during that time as suspicious, *i.e.*, as if he were stealing or preparing to steal CVS merchandise. *See* Hossain Dep. 30:21–32:8; Thorne Dep. 17:3–17:19.

At the request of Mr. Hossain, Mr. Graham revealed the contents of his pockets and opened his newspaper for inspection by the two CVS employees. The search of Mr. Graham's pockets and newspaper uncovered no stolen CVS merchandise, and Mr. Hossain then asked Plaintiff to disclose the contents of his backpack. Mr. Graham denied Mr. Hossain's request, called the police to report the incident, and refused to leave the premises despite Mr. Hossain's repeated demands.¹

Officer Christopher Downs arrived at Defendant's store some thirty minutes after receiving calls from both Mr. Graham and Mr. Brown. In Officer Downs' presence, Mr. Graham exited Defendant's store and submitted to a search of his belongings, including his backpack, which again revealed no unpaid CVS merchandise. Upon Mr. Hossain's insistence, and over Mr. Graham's objection, Officer Downs then issued a notice barring Mr. Graham from entering Defendant's store in the future. Mr. Graham neither filled his prescription nor purchased other CVS merchandise.

III. Analysis

In Counts I and II of his Complaint, Plaintiff claims that CVS denied him full and equal enjoyment of public goods and services motivated by his race and personal appearance. In Count III he alleges that Defendant's employees defamed him by wrongfully accusing him of theft in the presence of others. CVS has moved for summary judgment on all three counts, and the Court addresses each in turn.

¹ The interaction between Mr. Graham and Defendant's employees during the nearly thirty-minute period between the time the police were called and their arrival is largely disputed by the parties. According to CVS, Mr. Graham became boisterous and violent following Mr. Hossain's request to search his backpack, *see* Mot. Summ. J. at 9–10, and Mr. Graham acknowledges that he raised his voice to make it clear that he was refusing Mr. Hossain's request. *See* Graham Dep. 62:3–63:10. The parties agree, however, that Mr. Hossain asked Mr. Graham to exit Defendant's store after the police had been called. *Compare* Mot. Summ. J. at 10–11, *with* Opp. 18–21.

A. DCHRA Discrimination Claims (Counts I and II)

Mr. Graham's discrimination claims arise under D.C. Code § 2-1402.31(a)(1), which bars unlawful discrimination in places of public accommodations.² A claim under § 2-1402.31(a)(1) ultimately requires proof that (1) the plaintiff belonged to a protected class; (2) the defendant denied the plaintiff "goods, services, facilities, privileges, advantages, [or] accommodations of any place of public accommodations"; and (3) the defendant did so "wholly or partially for a discriminatory reason." CVS contends that because Mr. Hossain and Mr. Brown never physically detained Mr. Graham or prevented him from leaving the store on September 22, 2008, he was free to enjoy the goods and services ordinarily provided by CVS until a barring notice was issued by the police. However, the barring notice issued by Officer Downs at the request of Defendant's employees was unquestionably a "direct" denial of services under the meaning of §2-1402.31(a)(1). Beyond this, a reasonable person could infer that the treatment accorded to Mr. Graham prior to the issuance of the barring notice amounted to an "indirect" denial of services, which is also proscribed by the unambiguous language of the §2-1402.31(a)(1). The remaining issue for resolution is whether CVS acted "wholly or partially for a discriminatory reason."³

² § 2-1402.31(a)(1) states:

(a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:

- (1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations.

³ For the purpose of this motion, CVS concedes that Mr. Graham's "urban wear" is a "style of dress" within the definition of "personal appearance" in § 2-1401.02(22). Moreover, the Court is unconvinced by CVS's argument contesting Mr. Graham's characterization of his race as African American on the grounds that he self-identifies as

In determining whether a defendant acted for a “discriminatory reason” under the meaning of the DCHRA, courts routinely apply the legal standard for intentional discrimination under Title VII and Section 1981. *See McFarland v. George Wash. Univ.*, 935 A.2d 337 (D.C. 2007); *Fox v. Giaccia*, 424 F. Supp. 2d 1, 7 (D.D.C. 2006). Therefore, a plaintiff suing under the DCHRA may demonstrate intentional discrimination by either direct or indirect evidence. *See, e.g., Hollins*, 760 A.2d at 575–76.

“Direct evidence of discrimination is evidence that, if believed by the fact finder, proves the particular fact in question *without any need for inference*. . . . Such evidence includes any statement or written document showing a discriminatory motive *on its face*.” *Lemmons v. Georgetown Univ. Hosp.*, 431 F. Supp. 2d 76, 86 (D.D.C. 2006) (citation omitted) (emphasis in original). Direct evidence of intentional discrimination, without more, is sufficient to defeat a motion for summary judgment. *See Hollins*, 760 A.2d at 576. However, “a plaintiff claiming direct evidence of discrimination has a heavy burden, for not every comment reflecting discriminatory attitudes will support an inference that it was a factor motivating the adverse [treatment]. . . . [In fact, to support such an inference] there must be a causal link between the statements and the conduct about which the complaint is made.” *Jung v. Geo. Wash. Univ.*, 875 A.2d 95, 111 (D.C. 2005).

Where a plaintiff has proffered no direct evidence of intentional discrimination, discrimination claims under the DCHRA are evaluated under “the same three-part, burden-shifting test articulated by the Supreme Court for Title VII cases in [*McDonnell Douglas Corp. v. Green*].” *Hollins*, 760 A.2d at 571 (citation omitted). Under *McDonnell Douglas*, in order to survive a motion for summary judgment, a plaintiff bears the initial burden of establishing a

Moorish American. The DCHRA forbids discrimination based on either “actual” or “perceived” race, and by CVS’s own admission, Moorish American is an objectively indistinct cultural and religious subclass of African American.

prima facie case of discrimination by a preponderance of the evidence. *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 803 (D.C. 2003). Once the plaintiff proves his *prima facie* case, a presumption of unlawful discrimination is raised, and a burden of production rests on the defendant to articulate some nondiscriminatory reason for the alleged adverse treatment accorded to the plaintiff. *Id.* In order to satisfy its burden, the defendant need only produce “admissible evidence from which the trier of fact could rationally conclude that the [adverse treatment] had not been motivated by discriminatory animus.” *Atl. Richfield Co. v. District of Columbia Commission on Human Rights*, 515 A.2d 1095, 1100 (D.C. 1986).

Once the defendant has proffered a legitimate nondiscriminatory justification for its actions, the burden shifts back to the plaintiff to demonstrate, again by a preponderance of the evidence, that the defendant’s stated justification was pretextual. *Futrell*, 816 A.2d at 803. Because “[t]his burden merges with the ultimate burden of persuasion on the question of intentional discrimination,” *Atlantic Richfield*, 515 A.2d at 1100, “to survive summary judgment the plaintiff must show that a reasonable jury could conclude from all of the evidence that the adverse [treatment] was [the result of] a discriminatory reason,” *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). Of course, summary judgment is also appropriate if the plaintiff fails to produce any evidence of pretext. *Hollins*, 760 A.2d at 573–75 (upholding summary judgment where plaintiff presented no evidence of pretext). With these principles in mind, the Court addresses Mr. Graham’s separate claims of race and personal appearance discrimination under D.C. Code § 2-1402.31(a)(1).

1. Count I: Race Discrimination

In support of his race discrimination claim, Mr. Graham has proffered his own deposition testimony, in which he states that Mr. Hossain justified his apprehension of Mr. Graham by stating, “Black people always coming in and steal [sic].” Graham Dep. 42:12–15. On that evidence alone, CVS’s Motion for Summary Judgment must be denied as to Count I of Mr. Graham’s Complaint. Mr. Hossain’s alleged statement, on its face, reflects a racial motivation for his conduct and has a manifest relationship to the adverse treatment accorded to Mr. Graham.

2. Count II: Personal Appearance Discrimination

Viewing the evidence in the light most favorable to Mr. Graham, the following facts support an inference of personal appearance discrimination by CVS. According to Mr. Graham’s deposition testimony, at the time he entered Defendant’s store on September 22, 2008, he was the only individual dressed in “urban wear.” *See* Graham Dep. 38:20–39:22. Although no CVS employee witnessed Mr. Graham select and conceal CVS merchandise, *see* Thorne Dep. 16:21–17:2; Hossain Dep. 22:1–4, he was approached on suspicion of shoplifting by Store Manager Mr. Hossain within three minutes of entering the store, *see* Opp. at 10–14. According to Mr. Hossain’s deposition testimony, he was aware of CVS’s policy concerning shoplifting at the time of the incident, and knowingly breached that policy with regard to Mr. Graham. *See* Hossain Dep. 32:9–34:7. The fact that Mr. Hossain’s supervisor, Timothy Riederer, subsequently reprimanded him for his actions reinforces the conclusion that Mr. Hossain’s treatment of Mr. Graham was outside of CVS’s accepted business practices. *See* Riederer Dep. 77:10–78:19. Furthermore, following a police search of Mr. Graham’s belongings that uncovered no stolen CVS merchandise, Mr. Hossain insisted that Mr. Graham be barred from

entering CVS in the future. Mr. Hossain's persistence in assuring that Mr. Graham not enjoy CVS goods and services, after realizing that Mr. Graham had not taken any items, supports the inference of discriminatory intent sufficient to satisfy the third element of his *prima facie* case.

Because Mr. Graham has met his initial burden, the Court must determine whether CVS has articulated a legitimate nondiscriminatory reason for its conduct, and if so, whether Mr. Graham has proved by a preponderance of the evidence that CVS's stated justification is pretextual. After considering the parties submissions, the Court is persuaded that genuine issues of material fact prevent resolution of those questions on summary judgment.

CVS justifies Mr. Hossain's conduct by explaining that it was motivated not by Mr. Graham's appearance, but by "[Mr.] Graham's behavior (where and how he was looking about the store and peeking around . . .), what [Mr.] Hossain believed he saw [Mr.] Graham do (remove an item from a shelf but not put it back), and what he saw when approaching [Mr.] Graham (bulging pockets)." Mot. Summ. J. at 21. To support its nondiscriminatory explanation, CVS has proffered the testimony of Mr. Hossain and CVS Pharmacy Technician Rachel Thorne, who also observed Mr. Graham on September 22, 2008. Although both stated that after Mr. Graham entered Defendant's store his conduct was "suspicious," their separate accounts differ in significant material respects, including, *e.g.*, the period of time Mr. Graham was in Defendant's store before he was apprehended and the nature of his conduct during that time. *Compare* Thorne Dep. 16:21–18:10 *with* Hossain Dep. 22:1–20, 30:21–32:8, 44:1–5. The evidence CVS proffers in support of its nondiscriminatory justification is also at odds with Mr. Graham's own explanation of his behavior, *see* Graham Dep. 58:9–18, as well as his timeline of the relevant events taken from the video recording at Defendant's store on September 22, 2008, *see* Opp. at 10–14. The Court is satisfied that genuine issues of material fact exist with respect to Count II

that are sufficient to preclude summary judgment. Accordingly, summary judgment is inappropriate on Count II of Mr. Graham's Complaint.

B. Count III. Defamation

Count III of Mr. Graham's Complaint alleges that Mr. Hossain's wrongful accusation of theft, which was overheard by Ms. Thorne, amounted to actionable defamation under District of Columbia law. Arguing for summary judgment as to Count III, CVS first contends that Mr. Graham cannot meet his burden of proof on his claim of defamation. In the alternative, CVS maintains that Mr. Hossain's allegedly defamatory remarks were privileged. The Court addresses each argument in turn.

In order to establish a claim of defamation, a plaintiff must prove: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 312–13 (D.C. 2006) (citation omitted). CVS challenges only the second element of Mr. Graham's defamation claim, and the Court assumes that, for the purpose of this motion, the others are sufficiently satisfied.

Conceding that Ms. Thorne overheard Mr. Hossain's accusation of Mr. Graham, CVS nevertheless argues that Mr. Graham has not demonstrated evidence of publication to a third party because, according to Ms. Thorne's deposition testimony, she recalls a linguistically different but substantively similar statement than that which is alleged in Mr. Graham's Complaint. To be sure, Mr. Graham maintains that Mr. Hossain's allegedly defamatory remark

was, “What did you put in your pocket. [sic] I saw you steal.” Compl. at 8. And, according to Ms. Thorne’s account, Mr. Hossain’s accusation was, “whatever you put in your pocket, please remove.” Thorne Dep. 29:7–12. Again, this dispute cannot be resolved by summary judgment.

Wherefore, it is, this 8th day of November, 2010, hereby

ORDERED, that CVS’s Motion for Summary Judgment is **DENIED**.

Joan Zeldon



Joan Zeldon
Associate Judge
(Signed in Chambers)

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