

EEOC v. Target Corp. 2006 U.S. App. LEXIS 21483 (7th Cir.)

OPINION BY CIRCUIT JUDGE CUDAHY:

*** The EEOC charged that Target violated Title VII of the Civil Rights Act of 1964 by engaging in race discrimination against African-American applicants for managerial positions. The EEOC also alleged that Target violated the Act when it failed to make and preserve records relevant to the determination whether unlawful employment practices had been, or were being, committed. *** [T]he district court . . . dismissed the action. The EEOC now appeals. We reverse and remand for further proceedings.

Target Corporation is headquartered in Minneapolis, Minnesota. One of its retail divisions is Target, a discount chain of more than 1,100 stores nationwide. *** This case involves District 110 [which] is made up of . . . stores in the Madison, Milwaukee, and Wauke-sha, Wisconsin metropolitan areas. Each district is managed by a District Team Leader, and each store is managed by a Store Team Leader (STL), who is as-sisted by Executive Team Leaders (ETLs). Each ETL is responsible for a different area of store operation. ***

This case involves a group of individuals who claim that they were not hired in Target's ETL hiring process because of their race. *** The claims of Kalisha White, Ralpheal Edgeston and Cherise Brown-Easley involve their contact with STL Matthew Armiger. Before February of 2001, District 110 had a district recruiter. When the district recruiter position was eliminated, STL Richard Walters, who was temporarily assigned recruiting duties, asked fellow STL Armiger for help with those duties. At that time, Armiger was managing a newly-opened and short-staffed Target store in New Berlin, Wisconsin. Walters and Armiger initially shared the recruiting duties equally, but later Armiger's duties were scaled back. Armiger testified that he believed his recruiting duties were secondary to his management of the store.

1. Kalisha White

Kalisha White, an African-American who attended Marquette University, emailed Target her resume for an ETL position on February 20, 2001, while she was still a student at Marquette. White's resume indicated that she was a member of Alpha Kappa Alpha, an African-American sorority. Armiger e-mailed White and asked

her to call to set up an interview. White called at least twice, but each time she spoke with Armiger he said he was too busy to schedule an interview.

White became suspicious of Armiger and decided to conduct an experiment to determine if he had discriminated against her because of her race. Thus, on May 9, 2001, she submitted a resume to Armiger under a fictitious name, "Sarah Brucker." White used her own telephone number, and gave Brucker a Brookfield, Wisconsin, address. She believed the address was located in a predominantly Caucasian neighborhood. Armiger testified that White had a stronger resume than Brucker because White was pursuing an MBA degree, while Brucker was not. On May 10, 2001, Armiger emailed and called Brucker, asking her to return his call. White had a Caucasian acquaintance call Armiger and pretend to be Sarah Brucker. Armiger scheduled an interview with Brucker during their conversation. White testified that she called Armiger soon after Brucker's conversation with him, but he said that he was too busy to schedule an interview with her.

2. Ralpheal Edgeston

Ralpheal Edgeston received an email from Armiger on March 2, 2001, in which Armiger asked her to call and schedule an interview. Edgeston, an African-American student at Marquette University, had submitted her resume to Target for an ETL position at a multicultural job fair held at the University of Wisconsin-Milwaukee in the previous month. Edgeston's resume indicated that one of her college majors was African-American studies and, like Kalisha White's resume, that she was a member of the Alpha Kappa Alpha sorority, which Armiger testified to knowing was an African-American sorority. Additionally, her resume listed that she was a member of the National Association for the Advancement of Colored People (NAACP). Edgeston called Armiger and scheduled a phone interview for March 4, 2001; however, Armiger did not call Edgeston at the appointed time and did not return her calls after that date. Target never scheduled another interview with Edgeston.

3. Cherise Brown-Easley

Class member Cherise Brown-Easley, an African-American, also submitted her resume to Target at the

University of Wisconsin–Milwaukee multicultural job fair in February 2001. Brown-Easley’s resume indicated that she was a member of the “Metropolitan Alliance of Black School Educators.” Brown-Easley received an email from Armiger requesting that she call Armiger to schedule an interview. She called Armiger and scheduled an interview for March 4, 2001. Armiger did not contact Brown-Easley at the appointed time. Instead, Brown-Easley called Armiger a half hour after the interview time, and after being informed that he had left for the day, she left a message for him. The following day, she left another message for Armiger, but she never heard back from him.

During the week that Armiger failed to contact Edgeston and Brown-Easley, he was scheduled to interview nine ETL applicants. In addition to Edgeston and Brown-Easley, Armiger also failed to contact two Caucasian applicants. However, Target later interviewed at least one of the two Caucasian applicants, but Edgeston and Brown-Easley were never interviewed. Armiger testified that he did not know the race of White, Edgeston, or Brown-Easley during the recruiting process. Armiger could not recall reviewing White or Brown-Easley’s resumes. He also claimed he did not study Edgeston’s resume closely enough to determine her race.

D. Target’s Record Retention

Also at issue in this appeal is Target’s practice of employment record retention. * * * Armiger admitted to throwing out the resumes of applicants he deemed unqualified, including those of White, Edgeston and Brown-Easley, rather than retaining them as required by law and by Target’s document retention policy. Armiger claims he threw out the resumes to protect the applicants’ privacy.

In an effort to comply with the EEOC’s document retention requirement, Target currently uses Brass Ring, a nationwide employment recruitment website, to store applicant documents, including: copies of applicants’ resumes, applicants’ . . . test results and completed . . . interview forms. Target recruiters who receive the resumes submit them to Brass Ring and make copies of the resumes of the candidates they plan to interview. * * * Target also has several policies to ensure that job applications and related documents are retained for the required time. Target uses its corporate intranet and email messages to share its record retention policies with STLs. The human resource managers meet biannually to audit each Target store, to conduct

training and to remind employees of the record retention policy. The human resource managers instruct on-campus recruiters to retain all resumes, applications and interview guides and notes, and to route the documents to the national headquarters. Finally, the ETL for Team Relations is responsible for ensuring that the record keeping policy is being followed at each Target store.

The success of Target’s record retention program through Brass Ring has been disputed. There is some indication that all employees are not following the program. As discussed above, STL Armiger threw out resumes that he should have retained. Additionally, . . . [an] administrative assistant testified in June of 2003 that she does not send applicant documents to Brass Ring, but instead she retains them herself for the required time. * * * While Target’s policy does not include a provision to ensure that relevant documents are retained from the time a discrimination charge is filed until that case is fully concluded, Target claims to address this requirement on a case by case basis, notifying employees to retain documents when a charge arises. * * *

A. Record Retention

Under Title VII, employers are required to “make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed.” The EEOC’s record keeping regulations require that employers retain applications and other documents related to hiring for one year. Additionally, if a charge of discrimination has been filed, an employer is required to retain all relevant personnel records until the final disposition of the charge. * * *

While we agree that Target has put forth evidence that it has revised its record retention policies in an effort to comply with Title VII, we do not agree that such changes ensure “on [their] face” that Target will not commit further violations. The reforms chosen do not address the particular problems that allowed violations to occur. Individual recruiters and administrative personnel destroyed records that were supposed to be retained because they did not know that they must retain them. * * *

Nothing in Target’s new record keeping policy clearly prevents bad faith destruction of resumes or other employment application documents. Target’s new policy involves reiterating its procedures for retaining documents to its store managers and recruiters and outsourcing the physical storage of employment

documents. Similar to Target's document retention policies prior to 2001, Target depends greatly on the diligence of the company's recruiters and its managerial personnel to ensure that resumes, applications and interview guides are retained because these personnel must forward the original documents to Brass Ring. Target has not claimed that it has adopted a system of penalties for failure to forward documents or in any other way provided new incentives to ensure compliance with the EEOC's record keeping requirements.

Because these genuine issues of fact bear on whether Target's new record retention policy is sufficient to prevent future violations of federal law, Target's motion for summary judgment on this issue should not have been granted. * * *

B. Title VII Disparate Treatment Claims

* * * The parties do not dispute that the EEOC established a prima facie case of disparate treatment. . . . * * * [T]he district court [found] that Target presented a legitimate, nondiscriminatory reason to explain why White, Edgeston and Brown-Easley were not interviewed for ETL positions. Store Team Leader Matthew Armiger's burdensome workload . . . caused him to fail in several of his recruitment duties, including failure to conduct interviews when they were scheduled. The EEOC did not contest this finding; therefore step two of the *McDonnell Douglas* test is satisfied and the burden shifts back to the EEOC.

In step three of the *McDonnell Douglas* test, a plaintiff must show that the defendant's nondiscriminatory reason for rejecting the applicant is a pretext meant to hide a discriminatory motive. * * * [W]e find that the EEOC did present sufficient evidence to establish a genuine issue of material fact as to whether Target's reason for not interviewing White, Edgeston and Brown-Easley was a pretext for race discrimination. First, Target argued that Armiger could not have discriminated against White, Edgeston and Brown-Easley because he did not know their race. However, * * * [t]he EEOC showed that each applicant's resume contained information that suggested she might be African-American. White's resume indicated that she was a member of Alpha Kappa Alpha sorority, and Armiger testified that he knew this to be an African-American sorority. Edgeston's resume showed that she also was a member of Alpha Kappa Alpha sorority, that she majored in African-American studies, that she wrote a paper titled *The African-American Response to School Choice in Milwaukee* and that she was a member of

the NAACP. Finally, Brown-Easley's resume indicated that she was a member of the "Metropolitan Alliance of Black School Educators." Armiger testified that he typically looked at sorority involvement and extracurricular activities when he reviewed resumes, and that he reviewed White and Edgeston's resumes. In addition, Armiger was in charge of recruiting at University of Wisconsin-Milwaukee, and Edgeston and Brown-Easley's resumes were collected from a multicultural career fair at that school.

Additionally, Armiger claims that he failed to interview White because he was "too busy" with his management duties when she called. He claims that he often told applicants that he was too busy to speak to them if they called while he was on the sales floor, and that he did not keep a record of who called. However, fifteen minutes after White called Armiger, Armiger took a call from the fictitious Caucasian applicant, "Sarah Brucker," and scheduled an interview with her. "Brucker" was less qualified than White because White was pursuing an MBA degree but "Brucker" was not, and Armiger recalled seeing in White's resume that she was pursuing this MBA. These facts support a reasonable inference that Armiger's busy schedule was (a) not his actual motivation; or (b) an insufficient reason for failing to interview White, Edgeston and Brown-Easley. * * *

Target claims that Armiger would not have had White's resume in front of him when she called to set up an interview and he said he was too busy to do so, and he therefore would not have known her race. However, the EEOC presented expert testimony indicating that some people can determine a speaker's race based on his or her voice or name. Dr. Thomas Purnell, a linguistics professor, researched racially affiliated dialects and telephone filtered speech. Purnell had White, Edgeston and Brown-Easley read statements to him over the telephone that were similar to those they made to Armiger. He testified that the three women were discernible as African American. Dr. Marianne Bertrand, an economics professor, testified that some corporate recruiters can identify a person's race based on his or her name. Bertrand's study compared job applicants with Caucasian names, such as Sarah, versus applicants with African American names, such as Lakisha. Bertrand noted that White's first name, Kalisha, is very similar to the name Lakisha that was used in her study. The expert testimony of Purnell and Bertrand might persuade a reasonable fact finder that, at the time of the phone calls, Armiger at least suspected that

White was African American and that “Brucker” was Caucasian. * * *

This expert evidence likewise could lead a fact finder to conclude that Armiger knew Edgeston and Brown-Easley’s race because each of these applicants left at least one message for Armiger after he failed to call at their scheduled interview time. Armiger had set up interviews for March 4 and 6, 2001. He was supposed to interview nine ETL candidates over those two days, including Edgeston and Brown-Easley. * * * The Caucasian candidate was interviewed later by another Target official. Edgeston and Brown-Easley were never interviewed. * * * [A] reasonable fact finder could conclude that contrary to Target’s assertion and Armiger’s testimony, Armiger did know the race of the applicants at the time he chose not to interview them.

Finally, Target also argues that if Armiger had intended to discriminate against Edgeston and Brown-Easley he would not have contacted them to set up an interview, and that because Armiger did set up the interview it makes sense to assume that he would not miss it for a discriminatory reason. The EEOC claims that Armiger did not choose to interview Edgeston and Brown-Easley, but instead only followed up on the recommendations of his predecessor and of career fair recruiters. This Court need not address the contours of each side’s logic on this point any further than to conclude that there is a dispute over when and with how

much care Armiger reviewed Edgeston and Brown-Easley’s resumes and who actually decided to interview the individuals. * * * [T]he EEOC has presented a genuine issue of fact as to whether Armiger was truly the decision maker that elected to interview Edgeston and Brown-Easley.

[W]e conclude that there is a genuine issue of material fact as to whether Target’s proffered reason that Armiger was too busy to interview White, Edgeston and Brown-Easley was a pretext for discriminatory action based on race. Therefore, summary judgment was improper for these applicants’ individual claims. * * *

CASE QUESTIONS

1. What were the legal issues in this case? What did the appeals court decide?
2. What are the obligations of employers regarding the retention of records related to recruiting? What problems does the court identify with Target’s record-retention practices?
3. What is the evidence that the store team leader Armiger was aware of the race of the applicants? That race was a factor in the applicants not receiving interviews?
4. What changes would you recommend to Target’s recruiting and hiring practices? What should the role of store managers be?

Clippings

The EEOC is suing a Chick-fil-A franchise in North Carolina for pregnancy discrimination. The suit is on behalf of Heather Morrison, who was six months pregnant in November 2012 when she interviewed for a team member position. During the interview, the franchise’s owner asked numerous questions related to Ms. Morrison’s pregnancy, including how many months she had been pregnant, when she expected to deliver, what her child-care plans were, and how much maternity leave she intended to take. Ms. Morrison felt that these questions were inappropriate but answered them because she needed the job. A few days later, the owner called to inform Ms. Morrison that she would not be hired. He suggested that she call back after she delivered her baby and had child-care arrangements in place. Commenting on the case, EEOC Supervisory Trial Attorney Tina Burnside stated, “Pregnant women must be treated in the same manner as other applicants, and employers should not make inquiries related to pregnancy or deny a woman a job based on pregnancy.”

SOURCE: U.S. Equal Employment Opportunity Commission. “Chick-Fil-A Franchise at Concord Commons Sued by EEOC for Pregnancy Discrimination.” *Press Release* (July 2, 2013) viewed July 9, 2013 (<http://www1.eeoc.gov/>).