United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 23, 2018*
Decided November 1, 2018

Before

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 18-1790

ROBERT E. YOUNG,
Plaintiff-Appellant,

v.

MEGAN J. BRENNAN,
Postmaster General,
United States Postal Service,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15 CV 10633

Charles R. Norgle,
Judge.

ORDER

Robert Young contends that the United States Postal Service discriminated against him based on his race, sex, and age by demoting him from a supervisor to a "part-time flexible" carrier. The district court granted the Postal Service's motion for summary judgment, determining that a reasonable factfinder could not conclude that Young's race, sex, or age motivated his demotion. We affirm.

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* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

Young, who is 53 years old and black, had worked as a supervisor for the Postal Service for about a decade until an incident arose with regard to his timekeeping of one subordinate employee. Management discovered in 2010 that, over the course of several months, Young had been improperly inputting hours on a subordinate employee's time card while that employee was absent from work without leave. As a supervisor, Young was responsible for maintaining accurate timekeeping records and approving them to authorize payment.

Management investigated the issue through three pre-disciplinary interviews with Young. During these meetings, Young admitted that he input entries for the subordinate employee without verifying the employee's attendance. He explained that he wanted to avoid system errors that occur when entries are missing on an employee's time sheet. When asked if he knew the Postal Service's procedure concerning employee time cards, Young acknowledged that he should have entered the employee's time on a Postal Service 1260 form ("PS-1260"). (This form logs the instances when a time-card entry is missing and an employee manually inputs the time into the timekeeping system instead of electronically through the employee's badge upon entry into the facility.)

After the investigation, management sent Young a "Notice of Proposed Adverse Action–Reduction in Grade and Pay," recommending a demotion from supervisor of distributions to part-time carrier with a corresponding reduction in pay. The notice outlined seven instances between December 2009 and April 2010 when Young manually input time-card entries for an employee—entering time for the employee's lunch break and the end of the employee's shift—when in fact the employee was absent without leave. The notice also charged Young with violating provisions of the employee handbook, notably those pertaining to a supervisor's responsibility to oversee employees' access to time cards and to ensure that employees clock in and out according to their assigned schedule.

After a failed attempt at mediation, management issued Young a "Letter of Decision," approving the demotion. Management pointed to multiple incidents in which Young approved payment for an employee who was absent without leave.

Young then filed a complaint with the Equal Employment Opportunity Commission, alleging discrimination based on age (because despite being over forty, he was "the youngest male supervisor") and sex (because the supervisors were more tolerant of female employees and gave them more "leeway"). But the EEOC closed his

complaint after an investigation determined that the evidence did not establish that Young had experienced the alleged discrimination.

Young later launched a "mixed case" appeal to the Merit Systems Protection Board, maintaining that he was demoted based on age and sex discrimination; he also asserted, for the first time, that race discrimination motivated his demotion. (A "mixed case" appeal occurs when a federal employee complains of a personnel action that is serious enough to appeal to the Merit Board and also alleges that the action was based on discrimination. *See* 29 C.F.R. § 1614.302(a)(2); *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012)). The Merit Board conducted a hearing on the merits and upheld the Postal Service's decision.

Young then proceeded to federal court. He argued that the Postal Service failed to prove that he violated its policies because he merely "input" entries in the employee's time card but did not "adjust" the entries, as he was charged with doing. And the Merit Board's decision was erroneous, he contended, because it relied on an employee manual that post-dated his demotion. On his discrimination claim, he maintained, relying on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that the Postal Service discriminated against him because other similarly situated supervisors also improperly entered time cards for employees but did not suffer an adverse employment action. He also brought new claims asserting wire fraud and violations of the Illinois Rules of Professional Responsibility (he charged the Postal Service's counsel with fraud and ethical misconduct for submitting, before the Merit Board, the incorrect employee manual).

The district court granted the Postal Service's motion for summary judgment. On Young's challenge to the Merit Board's ruling, the court concluded that the Merit Board had substantial evidence for its decision because Young improperly "adjusted" the time cards of a subordinate employee, altering the entries from ones that generated an attendance error to time cards that had no error. This conduct also violated specified provisions of the employee handbook—provisions that required supervisors to ensure accurate employee records—to substantiate any demotion. On his discrimination claim, the court determined that Young failed to present evidence to permit a reasonable factfinder to conclude that Young's protected status motivated his demotion. *See Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). Nor could he show that a similarly situated employee outside of his protected class was treated more favorably. Finally, the court concluded, without elaboration, that Young lacked standing for his

claims of wire fraud and violations of professional responsibility because the relevant statute and disciplinary rules provide no private right of action.

On appeal, Young first disputes the court's handling of his discrimination claims and insists that he provided sufficient evidence of similarly situated employees under the *McDonnell Douglas* framework. He argues that other similarly situated supervisors also manually input inaccurate entries for employees' time cards, often to correct lunch break inputs, but were not demoted.

As the district court explained, however, Young did not support his discrimination claims with sufficient evidence. First, Young cannot identify a comparator who input inaccurate information on a time sheet to allow an employee to get paid for an unauthorized absence, much less a comparator who did so on repeated occasions. To determine whether two employees have engaged in similar misconduct, the proper inquiry is whether their conduct is of "comparable seriousness." *Coleman v. Donahoe*, 667 F.3d 835, 850 (7th Cir. 2012). But of the supervisors whom Young identifies as similarly situated, only one input an entry to close out a subordinate employee's shift; this entry was to disallow unauthorized overtime, and not, as in Young's case, to authorize payment repeatedly for work the employee did not perform. *See Reed v. Freedom Mortg. Corp.*, 869 F.3d 543, 550 (7th Cir. 2017) (employee with single attendance violation not comparable to plaintiff with many documented violations).

Young next argues that the district court erred in determining that there was insufficient evidence to challenge the Merit Board's decision sustaining his demotion. He disputes the Postal Service's contention that he was required to submit to management a PS-1260 form whenever he manually input time-card entries. Further, he argues that the Merit Board's ruling is flawed because it relied on a new employee manual requiring supervisors to complete the PS-1260 form; this manual, he says, did not exist until years after he was demoted.

We review the Merit Board's decision to sustain Young's demotion for substantial evidence, *see* 5 U.S.C. § 7703; *Abrams v. Soc. Sec. Admin.*, 703 F.3d 538, 542 (Fed. Cir. 2012), and we agree with the district court that this standard has been met. The Board reached its decision after the Postal Service conducted a thorough investigation, carrying out three pre-disciplinary interviews with Young and giving him an opportunity to respond to the charge that his failure to enter accurate timekeeping entries for his employees violated company policies. The Postal Service appropriately justified its decision by explaining that Young's conduct violated specific provisions of

the employee handbook requiring that supervisors ensure that employees "complete their duties and clock out promptly" and verify that employees make accurate entries on their time cards.

Finally, Young challenges the court's dismissal—on standing grounds—of his claims of wire fraud and violations of professional responsibility. He maintains that he suffered a "distinct and palpable injury" that is "fairly traceable to the challenged conduct": essentially, that the Merit Board upheld his demotion based on the Postal Service's use of the wrong employee manual. Yet as the district court determined, Young lacks standing because neither claim provides a private right of action. *See Scheib v. Grant*, 22 F.3d 149, 156 (7th Cir. 1994) (professional responsibility); *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 386 (6th Cir. 1997) (wire fraud). In any event, as we have explained, the Postal Service's decision to demote him rested on his failure to properly monitor an absent employee and was not based on the erroneously submitted manual.

We have considered Young's remaining arguments, and none has merit.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT E. YOUNG, Plaintiff, v. MEGAN J. BRENNAN, Postmaster General, United States Postal Service, Defendant.	)	No. 15 CV 10633 Hon. Charles R. Norgle

OPINION AND ORDER

Pro se Plaintiff Robert E. Young ("Plaintiff") brings this action against Defendant Megan J. Brennan, Postmaster General, United States Postal Service ("Defendant" or "USPS"), alleging claims of employment discrimination under the Civil Rights Act of 1991, 42 U.S.C. § 1981 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; wire fraud under 18 U.S.C. § 1343; and violation of the Illinois Rules of Professional Responsibility. Plaintiff also seeks review of the Merit Systems Protection Board's ("MSPB") October 29, 2015 Final Order affirming his demotion, pursuant to 5 U.S.C. § 7703. For the following reasons, Plaintiff's motion is denied and Defendant's motion is granted.

I. BACKGROUND

Plaintiff is an African-American male, born on January 3, 1965. In March 1988, Plaintiff began working for the United Stated Postal Service ("USPS"). In 1999 he was promoted to Associate Supervisor, Distributions Operations, at the Irving Park Road Processing and Distribution Center ("IPR"). In 2003, he was promoted to Supervisor, Distributions Operator, at IPR—a position that he held until November 6, 2010.

Appendix B

On April 6, 2010, IPR management discovered that Plaintiff was inputting "clock rings"[1] for IPR full-time mail handler Dale Lewis ("Lewis") in the Time and Attendance Collection System ("TACS") while Lewis was absent from his assignment and outside of the building without authorization. IPR management conducted an investigation which revealed that on several occasions, between January and April 2010, Plaintiff manually input clock rings showing that Lewis worked a full eight hour tour, when in fact Lewis had not worked his entire tour, and Plaintiff had not verified the hours that Lewis actually worked. As a result of the manual clock rings input by Plaintiff, Lewis was paid for time that he did not work.

On April 16, 2010, USPS manager Donald Williams ("Williams") conducted a pre-disciplinary interview ("PDI") with Plaintiff. During the PDI, Williams asked Plaintiff to explain how Lewis "could be outside the building while on the clock on a daily basis without [Plaintiff] knowing?" Def.'s SOMF, Ex. 6. Plaintiff responded that he "generally [did not] pay too much attention to that end of the dock," and "[a]s long as the mail is loaded properly is what I look for." Id. On May 8, 2010, Williams conducted a second PDI with Plaintiff, during which Plaintiff admitted to manually inputting a clock ring for Lewis while he was unaware of whether Lewis was at work, but stated that he only did so in order to avoid "clock ring errors." Def.'s SOMF, Ex. 7 at 2. On May 12, 2010, Williams conducted a third and final PDI with Plaintiff, during which Plaintiff stated that he "should have had a 1260" when he manually input Lewis's clock rings—referring to Postal Service Form 1260 ("PS-1260"), a form used by USPS management when clock rings are manually entered into TACS.

On July 9, 2010, Williams issued Plaintiff a Notice of Proposed Action-Reduction in Grade and Pay ("NOPA"), charging Plaintiff with Improper Recording and Adjustment of an Employee's Time in TACS. The NOPA stated that between December 2009, and April 2010,

[1] The term "clock rings" refers to employee time card entries.

Plaintiff manually input clock rings for Lewis including Begin Tour ("BT"), Out Lunch ("OL"), In Lunch ("IL"), and End Tour ("ET") times and that Plaintiff input the ET clock rings after Lewis had left the IPR facility without authorization. The NOPA explained that Plaintiff had given Lewis eight hours of paid time without having evidence that Lewis actually worked a full eight hour shift. The NOPA listed seven dates on which Plaintiff manually input ET clock rings for Lewis that were inconsistent with the time that Lewis left the building: April 8, 2010; April 7, 2010; March 13, 2010; March 13, 2010; March 11, 2010; January 24, 2010; and January 23, 2010. The NOPA also advised Plaintiff that his conduct violated several sections of the USPS Employee and Labor Relations Manual[2] and the USPS Handbook[3]. Finally, the NOPA notified Plaintiff that the proposed adverse action would reduce him from his current supervisor position to Part-Time Flexible City Carrier, a reduction in both grade and pay. Plaintiff was also notified of his right to request mediation or respond to the NOPA, orally and/or in writing, to USPS Plant Manager Carl T. Jones ("Jones").

On August 20, 2010, the parties participated in mediation, which failed to produce an agreement. On August 27, 2010, Plaintiff submitted a written reply to Jones regarding the charges stated in the NOPA. In his reply, Plaintiff did not deny the conduct outlined in the NOPA, but rather asked for a lesser penalty than the proposed reduction in grade and pay. On September 22, 2010, Plaintiff was notified that Jones would no longer decide his case and that Plant Manager Melvin J. Anderson ("Anderson") would be taking over for Jones.

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[2] The NOPA stated that Plaintiff's conduct violated the following sections of the Employee and Labor Relations Manual: Loyalty, Obedience to Orders, Discharge of Duties, Behavior and Personal Habits, and Unauthorized Time. The ELM section addressing Unauthorized Time states that "[i]t is the duty of supervisors to exercise control over the working hours of their subordinates by making sure that employees complete their duties and clock out promptly at the completion of their tour if additional work is not desired or authorized." Def.'s SOMF, Ex. 9 at § 444.223.

[3] The NOPA stated that Plaintiff's conduct violated provisions of the USPS Handbook pertaining to Systems Integrity and Supervisor Responsibilities. The provision regarding Supervisor Responsibilities states that supervisors are responsible for "[m]aking certain the employees clock in and out according to their assigned schedule," "[a]pproving all daily clock rings," and "[c]ompleting supporting forms as required by established procedures." Def.'s SOMF, Ex. 10 at § 114.1(b), (c), (g).

On October 1, 2010, Plaintiff met with Anderson to respond to the NOPA. During the meeting, Plaintiff admitted that he aware of the rules regarding entering clock rings in TACS because of his prior training. This is consistent with Plaintiff's training history; he was trained on attendance policies and/or TACS on at least two occasions, as recently as June 26, 2008.

On October 22, 2010, Anderson issued a Letter of Decision ("LOD") to Plaintiff which reduced Plaintiff's grade and pay from Supervisor, Distributions Operator, to Part-Time Flexible City Carrier. This demotion was consistent with the proposed adverse action specified in the NOPA. In the LOD, Anderson reviewed the evidence against Plaintiff and addressed Plaintiff's written and verbal responses. The LOD concluded that the evidence supported the charge of Improper Recording and Adjustment of an Employee's Time in TACS and therefore sustained the charge.

On February 28, 2011, Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that his demotion was the result of discrimination based on his age (over forty) and sex (male). Plaintiff filed an Equal Employment Opportunity ("EEO") Investigative Affidavit, in which he stated that he believed his age was a factor in his demotion because "even though [he is] over forty [he] was the youngest male supervisor at IPR." Def's SOMF, Ex. 22. Plaintiff also stated that USPS managers Anderson and Williams were more "tolerant" of and gave more "leeway" to female employees. Id. Plaintiff provided a list of USPS supervisors, or "comparators," who he alleged were treated more favorably. The list of comparators included Jessica Martin ("Martin"), female, born in 1959; Carol Long ("Long"), female, born in 1952; Gregory Clayton, male, born in 1951; and Paul Vinson, male, born in 1957. Plaintiff alleged that the cited comparators also improperly recorded or adjusted clock rings, but were not disciplined to the same extent as Plaintiff. On May 31, 2011, an EEO

investigator prepared an EEO Investigative Report in response to Plaintiff's complaint. The EEO Investigate Report concluded that none of the comparators cited by Plaintiff in his EEO Investigative Affidavit had recorded or adjusted clock rings for employees for work that was not performed.

On July 6, 2011, USPS issued a Final Agency Decision ("FAD"), with a finding of no discrimination. On August 8, 2013, Plaintiff filed his appeal of the FAD with the MSPB. Plaintiff's appeal challenged the merits of the USPS's decision to demote him and alleged that the punishment was too severe. He also sought review of his claims of age and sex discrimination. The MSPB initially denied his appeal as untimely, but later found the appeal timely and ordered adjudication of the case on the merits.

On November 6, 2014, Plaintiff appeared for a deposition, at which he maintained that he was demoted due to age and sex discrimination, but also claimed, for the first time, that race discrimination played a role in his demotion. On November 14, 2014, the MSPB held a hearing on the merits, during which Plaintiff stipulated to the seven instances of entering Lewis's clock rings as set forth in the NOPA and LOD, conceding that USPS's allegations regarding these instances were factually accurate.

On May 27, 2010, the MSPB issued its Initial Decision for Plaintiffs case, affirming USPS's decision to demote Plaintiff. The MSPB's Initial Decision found that there was no dispute that Plaintiff entered ET clock rings for Lewis on the seven dates referenced in the NOPA and LOD. The MSPB also found that there was no dispute that Plaintiff failed to file PS-1260's for the dates in question and that he otherwise failed to investigate whether Lewis had completed his shift. Thus, the MSPB concluded that Plaintiff's conduct resulted in Lewis being paid for time that he did not work.

Plaintiff argued to the MSPB that he only "inputted" clock rings for Lewis, but did not "adjust" Lewis's time as charged. In consideration of this argument, the MSPB stated in its Initial Decision that the plain meaning of "adjust" is "to change so as to match or fit, or cause to correspond" and that Plaintiff "adjusted or changed what would have resulted in an error in his TACS report and no pay for an employee who was not working, to an entry which resulted in what looked like an errorless TACS report and pay for an undeserving employee." Def.'s SOMF, Ex. 27 at 12. Additionally, the MSPB ascribed "no weight to [Plaintiff's] contention he only 'inputted' clock rings" based on the finding that Plaintiff's testimony was inconsistent with his previous statements and testimony, as well as the testimony of his own witnesses. Id. Further, in response to Plaintiff's assertion that PS-1260's were "not really that critical" for manually inputting clock rings in TACS, the MSPB concluded that this argument was "contradict[ed] by every other witness." Id. Finally, the MSPB found that Plaintiff's demotion was reasonable given his failure to meet USPS's basic requirements of "record[ing] accurate time and attendance information for subordinate employees, and comply[ing] with policies related to computer system access." Id. at 14-15.

The MSPB also rejected Plaintiff's claims of age, sex, and race discrimination. The MSPB found that "[o]ther than asserting his own beliefs and unsupported allegations," Plaintiff "presented no credible evidence in support of his claims" of discrimination. Id. at 17. In addressing Plaintiff's assertion that other USPS supervisors had engaged in similar conduct, but were not disciplined, the MSPB concluded that Plaintiff failed to identify any comparators who "repeatedly entered ETs for undeserving... employees." Id. The MSPB specifically addressed this point in regard to IPR supervisor Martin, stating that she was not a "similarly situated" comparator, as alleged by Plaintiff, because "the record evidence clearly establishes that the one

timekeeping entry made by Martin was to disallow unauthorized overtime Mr. Lewis did not earn." Id. at 15.

On July 2, 2015, Plaintiff filed a petition for review of the MSPB's Initial Decision. In the MSPB's October 29, 2015 Final Order (the "Final Order"), it affirmed the findings and conclusions in its Initial Decision. Now, Plaintiff seeks review of the MSPBS's Final Order on the merits and alleges claims of age, sex, and race discrimination; wire fraud under criminal statute 18 U.S.C. § 1343; and violation of the Illinois Rules of Professional Responsibility.

II. DISCUSSION

A. Standard of Review

"Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Northfield Ins. Co. v. City of Waukegan, 701 F.3d 1124, 1128 (7th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Wells v. Coker, 707 F.3d 756, 760 (7th Cir. 2013) (internal quotation marks and citation omitted). "On 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." Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). The Court must view "the record in the light most favorable to the nonmovant and [avoid] the temptation to decide which party's version of the facts is more likely true." Id.

Where parties file cross-motions for summary judgment, the standard of decision does not change. Selective Ins. Co. of S.C. v. Target Corp., 845 F.3d 263, 265 (7th Cir. 2016), as

amended (Jan. 25, 2017). The Court "take[s] the motions one at a time," Black Earth Meat Mkt., LLC v. Vill. of Black Earth, 834 F.3d 841, 847 (7th Cir. 2016), and "construe[s] all facts and inferences therefrom in favor of the party against whom the motion under consideration is made." Target Corp., 845 F.3d at 265 (internal quotation and citation omitted).

B. The MSPB Did Not Err in Affirming USPS's Charge Against Plaintiff

In support of his motion, Plaintiff claims that Defendant failed to prove by a preponderance of the evidence that he violated USPS policies. More specifically, Plaintiff re-raises the argument that he did not "adjust" Lewis's clock rings as charged, but rather that he merely "input" the clock rings. Further, Plaintiff contends that the MSPB's decision relied on a USPS policy which did not exist at the time of his charged conduct.

Defendant argues in favor of its motion that there is no dispute that on at least seven occasions Plaintiff manually entered Lewis's clock rings without any proof of the hours that he worked, therefore giving him credit for work not performed. Defendant also claims there is no dispute that Plaintiff's aforementioned conduct violated multiple USPS policies. Thus, according to Defendant, the MSPB did not err, as its decision was supported by substantial evidence. The Court will address the party's arguments in turn.

Generally, petitions to review the MSPB's final decisions must be filed in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(b)(1). However, "[a] federal employee who claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in [5 U.S.C. § 7702(a)(1)] should seek judicial review in district court, not in the Federal Circuit." Kloeckner v. Solis, 568 U.S. 41, 56 (2012). Here, Plaintiff alleges that his demotion violated 42 U.S.C. § 2000e-16—one of the statutes set forth in 5 U.S.C.

§ 7702(a)(1). Therefore, Plaintiff's petition for review of the MSPB's Final Order is properly before the Court.

In reviewing MSPB final decisions, the court must affirm the decision unless it is found to be "arbitrary, capricious, an abuse of discretion, not in accordance with law, obtained without proper procedures, or unsupported by substantial evidence." Delgado v. Merit Sys. Protec. Bd., 16-1313, 2018 WL 577714, at *2 (7th Cir. Jan. 29, 2018) (citing 5 U.S.C. § 7703(c)). Further, "[t]he choice of penalty is committed to the sound discretion of the employing agency and will not be overturned unless the agency's choice of penalty is wholly unwarranted in light of all the relevant factors." Guise v. Dep't of Justice, 330 F.3d 1376, 1382 (Fed. Cir. 2003).

In the instant case, Plaintiff's argument that he did not "adjust" Lewis's time in TACS is unconvincing for several reasons. First, the MSPB considered this argument and concluded that given the plain meaning of "adjust," Plaintiff "adjusted or changed what would have resulted in an error in his TACS report and no pay for an employee who was not working, to an entry which resulted in what looked like an errorless TACS report and pay for an undeserving employee." Def.'s SOMF, Ex. 27 at 12. The Court agrees with the MSPB on this point. There is no dispute that Plaintiff changed Lewis's clock rings in TACS by entering ET times for Lewis in order to avoid an error in TACS. In fact, Plaintiff even admitted during his his May 8, 2010 PDI that he manually entered clock rings for Lewis in order to avoid "clock ring errors." Def.'s SOMF, Ex. 7 at 2. Further, the full charge against Plaintiff was for Improper *Recording* and Adjustment of an Employee's Time in TACS, and there is no dispute that Plaintiff manually recorded or "inputted" clock rings for Lewis on numerous occasions. Thus, the Court rejects Plaintiff's semantic attack on the charge against him.

Next, Plaintiff argues that USPS and the MSPB erroneously relied upon an USPS policy document titled "Time is Money: Time and Attendance for Supervisors Facilitator's Guide" (the "TIM Document") in issuing and affirming his demotion. The TIM Document sets forth the policy that USPS supervisors must fill out and file a PS-1260 when manually entering clock rings. Plaintiff, however, contends that the TIM Document did not exist until 2014, four years after his charged conduct occurred, and that prior to the release of the TIM Document there was no policy in place which required the use of a PS-1260 when manually entering clock rings. Defendant does not dispute that the TIM Document did not exist at the time of Plaintiff's charged conduct. Nevertheless, the Court rejects Plaintiff's argument for the following reasons.

First, the record does not support that the charge against Plaintiff was based on a policy which required him to use a PS-1260 when entering Lewis's clock rings. The NOPA received by Plaintiff explained that his conduct violated a provision of the USPS Employee and Labor Relations Manual which provides that "[i]t is the duty of supervisors to exercise control over the working hours of their subordinates by making sure that employees complete their duties and clock out promptly at the completion of their tour if additional work is not desired or authorized." Def.'s SOMF, Ex. 9 at § 444.223. The NOPA also referenced a provision of the USPS Handbook which states that supervisors are responsible for "[m]aking certain the employees clock in and out according to their assigned schedule," "[a]pproving all daily clock rings," and "[c]ompleting supporting forms as required by established procedures." Def.'s SOMF, Ex. 10 at § 114.1(b), (c), (g). Plaintiff clearly violated these policies by entering ET clock rings for Lewis without verifying whether he had completed his shift. Thus, regardless of whether USPS policy expressly required the use of PS-1260s when manually entering clock rings, Defendant's charge against Plaintiff was based on his violation of multiple USPS policies.

Second, the record does not indicate that the MSPB relied on the TIM Document in affirming Defendant's charge against Plaintiff. There is no reference to the TIM Document in either the MSPB's May 27, 2010 Initial Decision or its October 29, 2015 Final Order. Instead, the MSPB considered testimony from three USPS supervisors—Williams, Anderson, and Martin—all of whom consistently testified to the practice of using PS-1260s when manually recording clock rings in TACS. The testimony of these witnesses supported that the use of PS-1260s was an established procedure, regardless of whether it was expressly required by any USPS policy. Further, Plaintiff's attempt to downplay the importance of using PS-1260s is belied by his own admission that he "should have had a 1260" when he manually input Lewis's clock rings. Thus, the Court rejects Plaintiff's argument that the MSPB erroneously relied on the TIM Document in affirming Defendant's charge against him.

In line with Defendant's argument, the record shows that the MSPB affirmed the charge against Plaintiff based on substantial evidence—namely the undisputed evidence that on at least seven occasions, Plaintiff improperly entered Lewis's ET clock rings, crediting him for time not worked, and that Plaintiff's conduct violated multiple USPS policies. Accordingly, the Court concludes that the MSPB did not err in affirming Defendant's charge against Plaintiff for Improper Recording and Adjustment of an Employee's Time in TACS.

C. Plaintiff has Failed to Present Sufficient Evidence of Age, Sex, or Race Discrimination

When hearing a case that was previously before the MSPB, a federal district court reviews discrimination claims *de novo*. 5 U.S.C. § 7703(c); Watson v. Potter, 07 C 413, 2009 WL 424467, at *9 (N.D. Ill. Feb. 19, 2009), aff'd, 351 Fed. Appx. 103 (7th Cir. 2009). Title VII forbids an employer "to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Under the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a plaintiff bringing a claim of employment discrimination may establish a *prima facie* case by proving that: (1) he is a member of a protected group; (2) he satisfied his employer's legitimate job expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees outside of the protected class were treated more favorably. Zayas v. Rockford Meml. Hosp., 740 F.3d 1154, 1157 (7th Cir. 2014) (citing Naficy v. Ill. Dep't of Human Servs., 697 F.3d 504, 511 (7th Cir.2012)). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a non-discriminatory reason for the employment action. Id. "On rebuttal, the plaintiff must provide evidence demonstrating that the defendant's stated reason is pretextual." Id.

The Court notes that Defendant references "direct" and "indirect" methods of proof in its argument against Plaintiff's claim of discrimination. The Seventh Circuit has held that in employment discrimination cases, district courts must not separate "direct" from "indirect" evidence and proceed as if they were subject to different legal standards. Ortiz v. Werner Enterprises, Inc., 834 F.3d 760, 765 (7th Cir. 2016). Rather, the ultimate standard for employment discrimination cases is whether the evidence as a whole "would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." Id. The court in Ortiz further clarified that its holding did not concern the McDonnell Douglas burden-shifting framework, but instead concerned only "the proposition that evidence must be sorted into different piles, labeled 'direct' and 'indirect,' that are evaluated differently." Id. at 766.

In the instant case, Plaintiff proceeds under the McDonnell Douglas burden-shifting framework and makes the same argument that he did before the EEOC and MSPB—that numerous other similarly situated USPS supervisors also improperly entered clock rings for Lewis, but received no adverse employment action. Regarding the McDonnell Douglas elements, there is no dispute that Plaintiff is a member of a protected group: Plaintiff is an African-American male and he was over forty years old when he was demoted. There is also no dispute that Plaintiff suffered an adverse employment action when he was demoted. Thus, only the second and fourth elements are in question. However, Plaintiff's failure to establish even one element of his *prima facie* case is enough to support a grant of summary judgment in favor of Defendant. Traylor v. Brown, 295 F.3d 783, 790 (7th Cir. 2002).

To meet the second element of a *prima facia* case, Plaintiff must show that he was performing his job to Defendant's legitimate expectations at the time of the adverse employment action. Peele v. Country Mut. Ins. Co., 288 F.3d 319, 328–29 (7th Cir.2002). As explained above, there is no dispute that Plaintiff repeatedly entered clock rings for Lewis without confirming that he worked the amount of time credited, resulting in Lewis being paid for time he did not work. Defendant argues that based on the undisputed facts, Plaintiff clearly failed to meet his employer's legitimate expectations. However, Plaintiff is claiming that he was disciplined more harshly than other employees who also improperly recorded or adjusted Lewis's clock rings. Therefore, "[i]t makes little sense in this context to discuss whether [he] was meeting [his] employer's reasonable expectations." Flores v. Preferred Tech. Group, 182 F.3d 512, 515 (7th Cir. 1999) (holding that the plaintiff/employee was not required to show that she was meeting her employer's legitimate expectations to establish a *prima facie* Title VII case, where the plaintiff admitted that she broke rules against work stoppage but claimed she was disciplined

more harshly than non-Hispanic employees that also broke rules against work stoppage). Accordingly, Plaintiff does not have to show he was meeting Defendant's legitimate expectations in order to establish a *prima facie* case. Id.

To meet the fourth element of a *prima facie* case, Plaintiff must show that a similarly situated employee outside of the protected class was treated more favorably. "A similarly situated employee is one who is 'comparable to plaintiff in all *material* respects.'" Perez v. Illinois, 488 F.3d 773, 776 (7th Cir. 2007) (quoting Crawford v. Ind. Harbor Belt RR. Co., 461 F.3d 844, 846 (7th Cir.2006) (emphasis in original)). "A similarly situated employee need not be 'identical,' but the plaintiff must show that the other employee 'dealt with the same supervisor, [was] subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish [his] conduct or the employer's treatment of [him].'" Amrhein v. Health Care Serv. Corp., 546 F.3d 854, 860 (7th Cir. 2008) (quoting Gates v. Caterpillar, Inc., 513 F.3d 680, 690 (7th Cir.2008)).

Here, Plaintiff claims that four USPS supervisors—Williams, Long, Martin, and an "unknown management employee"—are comparators who also improperly entered clock rings for Lewis, but suffered no adverse employment action. The record shows that the cited comparators manually entered "In Lunch" and "Out Lunch" clock rings for Lewis on various dates. The manual entry of "In Lunch" and "Out Lunch" clock rings, however, is substantially different than the conduct for which Plaintiff was charged. Most notably, the comparators' conduct did not pay Lewis for work he never performed. Further, the record indicates that only one supervisor, Martin, entered an ET clock ring for Lewis; but as noted by the MSPB, "the record evidence clearly establishes that the one timekeeping entry made by Martin was to *disallow* unauthorized overtime [Lewis] did not earn." Def.'s SOMF, Ex. 27 at 15 (emphasis

added). Thus, Plaintiff has failed to present evidence of a similarly situated employee who engaged in the same or similar conduct. Accordingly, Plaintiff is unable to prove a *prima facie* case under the McDonnell Douglas burden-shifting framework.

Moreover, Plaintiff fails to present any evidence that would permit a reasonable factfinder to conclude that his race, sex, or age caused his demotion. His claim hangs entirely on his argument that other USPS supervisors engaged in the same or similar conduct, but did not suffer any adverse employment action. However, as explained above, this argument is unsupported by the record. Accordingly, the Court grants summary judgment in favor of Defendant on Plaintiff's claim of employment discrimination.

D. Plaintiff Lacks Standing to Bring Wire Fraud and Professional Responsibility Claims

In his motion, Plaintiff accuses Defendant of wire fraud under criminal statute 18 U.S.C. § 1343, and of violating the Illinois Rules of Professional Responsibility. Plaintiff asserts that both claims stem from Defendant's improper use of the TIM Document in the MSPB proceedings, since the TIM Document was created four years after Plaintiff's charged conduct occurred. Plaintiff even goes so far as calling the TIM Document a "fraudulent document." Pl.'s Mot. for Summ. J. at 99.

Both of Plaintiff's aforementioned claims share a common defect—Plaintiff lacks standing to bring them. Under 18 U.S.C. § 1343, wire fraud is a *criminal* offense that does not give rise to a private right of action. Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 386 (6th Cir.1997); Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir.1974); Bajorat v. Columbia–Breckenridge Dev. Corp., 944 F.Supp. 1371, 1377–78 (N.D. Ill. 1996). Similarly, the Illinois Rules of Professional Responsibility do not create a private right of action. Hofmann v. Fermilab Nal/Ura, 205 F. Supp. 2d 900, 904 (N.D. Ill. 2002).

Accordingly, the Court grants summary judgment in favor of Defendant on Plaintiff's claims of wire fraud and violation of the Illinois Rules of Professional Responsibility.

III. CONCLUSION

In sum, the MSPB did not err in affirming Defendant's charge against Plaintiff. Further, Plaintiff has failed to present sufficient evidence in support of his claims of age, sex, and race discrimination. Finally, Plaintiff lacks standing to bring his claims of wire fraud and violation of the Illinois Rules of Professional Responsibility. Accordingly, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

ENTER:

Charles Norgle

CHARLES RONALD NORGLE, Judge
United States District Court

DATE: February 15, 2018

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT E. YOUNG,	)	
	)	
Plaintiff,	)	
	)	No. 15 CV 10633
v.	)	
	)	Hon. Charles R. Norgle
MEGAN J. BRENNAN, Postmaster General, United States Postal Service,	)	
	)	
	)	
Defendant.	)	

ORDER

In light of the Court's February 15, 2018 Opinion and Order, Plaintiff's Motion for Summary Judgment [21] is denied and Defendant's Motion for Summary Judgment [22] is granted. The Clerk shall enter judgment in favor of Defendant pursuant to Federal Rule of Civil Procedure 58. Civil case terminated.

ENTER:

Charles Norgle

CHARLES RONALD NORGLE, Judge
United States District Court

DATE: February 15, 2018

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 4, 2019

Before

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 18-1790

ROBERT E. YOUNG,
Plaintiff-Appellant,

v.

MEGAN J. BRENNAN,
Postmaster General,
United States Postal Service,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:15-CV-10633

Charles R. Norgle,
Judge.

ORDER

Plaintiff-Appellant filed a petition for panel rehearing and rehearing en banc on December 14, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing.

Accordingly, **IT IS ORDERED** that the petition for panel rehearing is **DENIED**.

Appendix C