IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, MARLON HERRERA, Plaintiff-Intervenor, vs. IDAHO POWER COMPANY, Defendant.	Case No. CV02-409-S-EJL ORDER

Pending before the Court in the above-entitled action is Defendant's motion for summary judgment. Defendant Idaho Power Company ("Idaho Power") argues there are legitimate non-discriminatory reasons why Plaintiff-Intervenor Marlon Herrera ("Herrera") was not hired by Idaho Power, therefore, summary judgment is proper. Plaintiffs Equal Opportunity Employment Commission ("EEOC") and Marlon Herrera each contend there are genuine issues of material fact as to the reasons given by Defendant for not hiring Herrera and further, the reasons given are a pretext for race and age discrimination; with Herrera individually claiming discrimination on the basis of disability or that he was not hired because Idaho Power regarded him as a "union sympathizer."

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Having fully reviewed the record herein, the Court finds that the legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument.

SUMMARY OF FACTS

On October 17, 2001, Herrera filed a complaint against Idaho Power with the EEOC claiming race, age, and disability discrimination. The EEOC initiated an investigation and determined there was cause to bring an enforcement action on the claims of race and age discrimination under Title VII and the Age Discrimination in Employment Act ("ADEA"). Herrera intervened in the action to pursue the disability discrimination and state law right to work causes of action that the EEOC did not bring.

Herrera is a minority in his fifties who has suffered from back problems for the past several years. Herrera has twenty-two years experience as a meter reader working for the Cities of Lompoc, California and Burley, Idaho. He applied multiple times for a job with Idaho Power as a Meter Specialist. According to Idaho Power, Meter Specialists are not the same as meter readers because a Meter Specialist combines the positions of meter reader, collections specialist, and connect/disconnect specialist. (Docket No. 76, p. 3). Herrera disputes that Idaho Power's Meter Specialist is materially different than other meter reader positions he has previously held. (Docket No. 93, p. 13). The reasons given by Idaho Power for not hiring Herrera are generally that his communication skills, interpersonal skills, or teamwork skills were lacking which would negatively impact his ability to deal with customers. (Docket No. 76, pp. 7-14).

Plaintiffs both claim these reasons are a pretext for discrimination. Plaintiffs' complaint is that Idaho Power used subjective criteria to deny Herrera a position for which he was qualified because Herrera is Hispanic and Native American or because he is over the age of forty. On this basis, the EEOC claims race/national origin discrimination and age discrimination. Herrera joins the EEOC and additionally claims he was not hired because of disability discrimination and because

Idaho Power believed he was a "union seed." Idaho Power claims their undisputed, legitimate, non-discriminatory reasons for not hiring Herrera make summary judgment appropriate on all counts.

STANDARD OF REVIEW

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial. See, Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party fails to make such a showing on any essential element, "there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.[1]

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be both "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (quoting First Nat'l Bank v. Cities Serv. Co. Inc., 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. See, e.g., British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

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[1] See also, Rule 56(c) which provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

Of course, when applying the above standard, the court must view all of the evidence in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Hughes v. United States, 953 F.2d 531, 541 (9th Cir. 1992).

DISCUSSION

In an employment discrimination suit where there is no direct evidence of discrimination, the McDonnell Douglas burden of proof scheme is used. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this scheme the plaintiff bears the burden of setting forth facts sufficient to establish a *prima facie* case of discrimination. Once the plaintiff has established the *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action. If the defendant presents such a reason, the burden shifts back to the plaintiff to show by a preponderance of the evidence the defendant's given reason is a pretext for discrimination. Id.; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). It is important to note that while the McDonnell Douglas burden of proof is used, this does not heighten Plaintiffs' burden of proof at the summary judgment stage. All factual disputes are still viewed in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255; Hughes, 953 F.2d at 541.

1) RACE AND AGE DISCRIMINATION[2]

Under the McDonnell Douglas burden of proof scheme Plaintiffs must present a *prima facie* case for race and age discrimination, showing: 1) Plaintiff is a member of the protected class, 2) who is qualified for the position, 3) suffered an adverse personnel action, and 4) the position was

[2]Plaintiffs and Defendant offer the same analysis for both the age discrimination claim and the race discrimination claim; therefore, the Court will also address these issues together.

filled by a member of an unprotected class with equal or inferior qualifications. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2002); McDonnell Douglas, 411 U.S. at 802.

Herrera is over the age of forty and a minority, making him a member of the protected class for both age and race discrimination. Coleman, 232 F.3d at 1281; McDonnell Douglas, 411 U.S. at 802. The parties dispute whether Herrera was qualified for the position. Plaintiffs both contend that with over twenty years experience and being found by Idaho Power to be at least minimally qualified, having been granted multiple interviews, Herrera was at least as qualified for the positions as the applicants hired. Idaho Power argues Plaintiffs cannot make out a *prima facie* case because they cannot show that Herrera was the best candidate for the job because, while Herrera has many years of experience, it is only related experience because a Meter Specialist is different from a meter reader. (Docket No. 142, pp. 10-14). To make a *prima facie* case Plaintiffs, however, do not have to show that Herrera was the best candidate for the job, they need only show he was equally qualified for the job, which Plaintiffs have done here. McDonnell Douglas, 411 U.S. at 802. It is undisputed that Herrera suffered an adverse personnel action by not being hired. (Docket No. 76, p. 17). Finally, it appears that many positions were given to individuals with fewer years experience, who were younger than Hererra, and not minorities.[3] Because "making a prima facie showing of employment discrimination is not an onerous burden," and in viewing the evidence in the light most favorable to Plaintiffs, the Court finds Plaintiffs have established a *prima facie* case sufficient to withstand summary jdugment. Snead v. Metropolitan Property & Casualty Insurance Co., 237 F.3d 1080, 1091 (9th Cir. 2001).

The burden now shifts to Idaho Power to give a legitimate, non-discriminatory reason for its decision not to hire Herrera. To meet this burden, Idaho Power has produced affidavits from its employees who sat on the interview board and made the hiring decisions. The reason most commonly articulated was that Herrera did not have the communication or team work skills Idaho

[3]Idaho Power states one successful applicant disclosed that his race was Native American and another stated his race was Hispanic. (Docket No. 76, p. 22).

Power wanted from a Meter Specialist and there were other, more qualified applicants.[4] (Docket No. 76, pp. 7-14). Plaintiffs counter argue that these reasons are a pretext for discrimination.

The pretext must be shown by a preponderance of the evidence. McDonnell-Douglas, 411 U.S. at 792. To support this contention, Plaintiffs point to internal irregularities in the way Herrera's first application was handled, including Idaho Power consulting with its counsel when it received Herrera's application, and that the job announcement primarily focuses on technical requirements but Idaho Power now claims subjective communication skills are more important. (Docket No. 76, pp. 3-4). Further, Plaintiffs both claim each person hired had substantially less experience, was younger than Herrera, and not a minority. Plaintiffs also claim discovery documents filed under seal give statistical evidence to support their claim the reasons articulated by Idaho Power are a pretext for discrimination.

In this instance, the parties agree on the applicable law. The only issues appear to be factual disputes, which must be decided by a jury. In fact, the voluminous filings only further make clear the factual disputes in this case. Accordingly, in viewing the evidence in light most favorable to the non-moving party, summary judgment on the claims of race/national origin discrimination and age discrimination are denied.

2) DISABILITY DISCRIMINATION

Herrera intervened to raise the issue of disability discrimination pursuant to the ADA and Idaho state law.[5] The same burden of proof applies to claims of disability discrimination as applies to other employment discrimination causes of action. See McDonnell-Douglas, 411 U.S. at 792.

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[4]Both parties focus individually on each application made by Herrera. An example is Job Opening No. 2132-7431-Mountain Home. Herrera was one of eight out of sixty-eight applicants selected for an interview. The interview team expressed concerns about Herrera's "deficient communication skills and his lack of skills in the area of teamwork." (Docket No. 76, p. 11). Idaho Power then selected thirty-three year old Wesley Lucas for the job because he was found to be the most qualified individual. Plaintiffs claim two months earlier when Mr. Lucas had interviewed the interview team found he should not be hired because of his "lack of practical experience." (Docket No. 103, p. 5). Plaintiffs claim Mr. Lucas has less experience, a total of seven months experience, and not hiring Herrera, who has more practical experience, is a pretext for discrimination. (Id.). Herrera claims the only difference in Mr. Lucas' application from a previous position is that Mr. Lucas listed camping as a personal interest and included an ATV certification. (Docket No. 93, p. 11).

[5]The Court will analyze the federal and state law claims together because the Idaho state claim is patterned after the federal law, allowing state courts to look to federal law for guidance. See Stansbury v. Blue Cross of Idaho Health Service, 918 P.2d 266, 269 (Idaho 1996).

The *prima facie* case for an ADA action requires the plaintiff to show "(1) he is a disabled person within the meaning of the statue; (2) he is a qualified individual with a disability; and (3) he suffered an adverse employment action because of his disability." Hutton v. Elf Atochem North America, Inc., 273 F.3d 884,891 (9th Cir. 2001).

In order to meet the first part of the *prima facie* case for disability discrimination, Herrera must show that he is disabled or that Idaho Power regarded him as having a disability. 42 U.S.C. § 12102(2) (2003). Herrera asserts Idaho Power regarded him as being disabled due to the disclosure of Herrera's previous back injury, as evidenced by the fact he was denied interviews because of time gaps in his resume when he was not employed which he explains with his back injury. (Docket No. 76, pp.22-23). Plaintiffs further contend discrimination is shown by an Idaho Power internal memo which specified Herrera could not be denied an interview because of his back injury and that another reason, such as his communication skills, must be given for denying Herrera a job. (Docket No. 93, p. 6). Plaintiff also points to a conversation between Herrera and an Idaho Power Human Resources Specialist where Herrera claims the Human Resources Specialist talked him out of even accepting an interview for a job in Hailey by detailing all the physical requirements and questioning whether Herrera would be able to "use snow shoes and dig out electrical meters in the snow."[6] (Id., p. 7). In viewing the evidence in the light most favorable to the non-moving party, a question of fact exists as to whether Herrera may have been denied an interview or job with Idaho Power due to his back injury.

As to the second and third elements, in viewing the evidence in the light most favorable to the Plaintiff, Herrera appears to be at least minimally qualified for the position and suffered an adverse employment action when he was not hired. Applying the McDonnell Douglas burden of proof, Idaho Power must articulate a non-discriminatory reason for their hiring decision. Idaho Power makes the same argument as above, that their were other, more qualified applicants. Herrera maintains this is a pretext based on the same evidence previously used to show Idaho Power

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[6]The Court recognizes there is an evidentiary dispute as to whether evidence of the Hailey job posting is admissible due to the 300 day time limit on how far back the EEOC may investigate. (See Docket No. 46, pp. 8-11).

regarded Herrera as disabled. See Snead, 237 F.3d at 1094 (To survive summary judgment, plaintiff "does not necessarily have to introduce additional, independent evidence of discrimination," beyond that used to establish the *prima facie* case). Based on the foregoing, the Court finds there is a genuine issue of material fact as to whether Idaho Power unlawfully discriminated against Herrera because of his back injury, making summary judgment inappropriate at this time.

3) STATE LAW RIGHT TO WORK

Idaho Power argues Idaho's right to work law is preempted by federal law through the National Labor Relations Act ("NLRA"). State right to work laws, however, are not preempted by the NLRA. See Oil Chemical and Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corp., 426 U.S. 407, 409 (1976); Retail Clerks Int'l Assoc., Local 1625, AFL-CIO v. Schermerhorn, 375 U.S. 96, 98 (1963). Section 14(b) of the NLRA allows individual states to exempt themselves from section 8(a)(3), allowing unions and employers to create union shops which require all employees to be members of the union. Id. Through such an exemption states may enact right to work laws, as Idaho has done. See Idaho Code § 44-2001 *et seq.* (2003).

While Idaho's right to work law is not preempted by the NLRA, its scope is narrow. Right to work laws prohibit an employer from making union membership or non-membership a condition of employment. Laborers' Int'l Union of North America, Local No. 107 v. Kunco, Inc., 472 F.2d 456, 548 (8th Cir. 1973). Idaho's right to work law prohibits employers from requiring their employees to join or not join a union in order to maintain their employment. Idaho Code § 44-2003. Herrera's claim that Idaho Power did not hire him for fear he was involved with a union does not raise a right to work claim. In Mobil Oil, the Supreme Court said, "these safeguards and the agency- or union-shop agreements to which they apply are not focused on the hiring process. Rather, they are directed at conditions that must be fulfilled by an employee only after he is already hired." 426 U.S. at 415. Based on the foregoing, the Court finds Herrera's claim in this case does not raise a right to work claim, where the alleged discrimination occurred in the hiring process. Therefore, Herrera's state law claim based on Idaho's right to work law is dismissed.

4) AFTER-ACQUIRED EVIDENCE

Defendant requests the Court grant partial summary judgment to limit damages, arguing Herrera provided false information on an employment application which would have resulted in termination had he been hired. The doctrine of after-acquired evidence allows damages to be limited when during the course of discovery an employer learns of information that, had it known at the time of the wrongful termination, would have given the employer a legitimate, non-discriminatory reason to fire the employee. McKennon v. Nashville Banner Publishing Company, 513 U.S. 352,356 (1995). "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Id. at 362-63.

Idaho Power claims had they hired Herrera and then discovered Herrera's employment and subsequent termination from Walmart, Idaho Power would have terminated his employment for misrepresenting his employment history on his job application. Plaintiffs argue other applicants hired by Idaho Power had been terminated by previous employers and are still employed by Idaho Power. (Docket No. 103, p. 25). In viewing the evidence in the light most favorable to Plaintiffs, the Court finds that genuine issues of material fact exist as to whether information regarding Herrera's employment and subsequent discharge from Walmart would have resulted in him being terminated. Therefore, summary judgment is inappropriate.

5) MOTIONS TO STRIKE

Both Plaintiffs and Defendant have filed motions to strike portions of affidavits. "It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." Beyene v. Coleman Security Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988). Plaintiffs seek to strike portions of the affidavit of Linda Perkins arguing it contains conclusory allegations and unauthenticated supporting documents. (Docket No. 77, p.2). The Court did not rely on the affidavit of Linda Perkins in determining whether summary judgment was appropriate. Therefore, Plaintiff-Intervenor's motion to strike is moot.

Defendant's motion to strike contends that Herrera's affidavit includes irrelevant and opinion statements that should be stricken because they would not be admissible testimony pursuant to the Federal Rules of Evidence. (Docket No. 144). Defendant's arguments appear to raise evidentiary objections or arguments more properly addressed at trial as an objection or as cross-examination. For the purpose of summary judgment, the Court finds Herrera's statements are rationally based on his perceptions as allowed by Rule 701(a).[7] Therefore, Defendant's motion to strike is denied.

ORDER

Based on the foregoing and being fully advised in the premises, Defendant's motion for summary judgment (Docket No. 76) is **DENIED IN PART** and **GRANTED IN PART**. On the state law Right to Work claim, summary judgment is granted in Defendant's favor. All other claims survive summary judgment. Plaintiff-Intervenor's motion to strike (Docket No. 77) is **MOOT**. Defendant's motion for leave to file rebuttal brief in response to Plaintiff-Intervenor's supplemental reply (Docket No. 107) is **MOOT**. Defendant's motion to strike (Docket No. 143) is **DENIED**. Plaintiffs' motion to file second supplemental response (Docket No. 147) is **DENIED**.

SO ORDERED this 15th day of March, 2004.

EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

[7] FRE 701 states in part "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness . . . ."

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United States District Court
for the
District of Idaho
March 15, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:02-cv-00409

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