UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No.03-3296(DSD/JSM)

Equal Employment Opportunity Commission,

Plaintiff,

Glenda Robertson,

Intervenor Plaintiff,

v. **ORDER**

Coca-Cola Enterprises, Inc.,

Defendant.

This matter is before the court upon defendant's motion for summary judgment. Based upon a review of the file, record and proceedings herein, and for the reasons stated, the court grants defendant's motion.

BACKGROUND

This is an employment discrimination action under the Minnesota Human Rights Act ("MHRA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 2000e et seq. Defendant Coca-Cola Enterprises, Inc. ("CCE") employs bulk merchandisers to distribute and place products for sale in large grocery stores. Plaintiff Glenda Robertson is a black woman who applied to CCE for a merchandiser position in October 2001, but CCE decided not to

hire her. Plaintiff claims that defendant's failure to hire her was the result of gender and race discrimination.

A merchandiser must drive to different stores, lift heavy objects repeatedly, communicate well, possess good customer service skills and be able to work ten or more hours per day. Plaintiff has worked as a merchandiser for various employers since May 2000. In October 2001, she applied for a merchandiser position at defendant's facility in Eagan, Minnesota. Plaintiff then attended defendant's "Open House" on October 23, 2001, where multiple applicants complete the entire application and interview process in a single day. At an Open House, two different employees of defendant separately interview and rate each applicant according to characteristics such as energy, teamwork and collaboration, communication and work standards. The second interviewer may make the hiring decision if both interviewers rated a candidate similarly. Otherwise, the second interviewer must consult with the first interviewer. A hiring decision may also be based upon the number of available positions and the comparative ratings of other applicants.

At the October 23 Open House, twelve employees of defendant interviewed sixty-five applicants including plaintiff. Plaintiff's first interviewer gave her a less than acceptable rating in the energy category. The second interviewer gave her less than acceptable ratings in the teamwork and collaboration, energy and work standards categories. In all other categories, the

interviewers gave plaintiff acceptable ratings. The second interviewer decided not to hire plaintiff. Defendant hired twelve of the sixty-five applicants at the Open House, all of whom received higher overall interview scores than plaintiff.

The Equal Employment Opportunity Commission brought a Title VII action against defendant on May 30, 2003, but stipulated to a dismissal of its claim in June 2004. Plaintiff intervened on July 2, 2003, alleging that defendant's failure to hire her violated the MHRA, Title VII and section 1981. Defendant now moves for summary judgment on all claims.

DISCUSSION

I. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate "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." In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)**(quoting Fed. R. Civ. P. 56(c)).** A fact is material only when its resolution affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

(1986). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. See id. at 252.

On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. See id. at 255. The nonmoving party, however, may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex, 477 U.S. at 324. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. Id. at 322-23.

II. Discrimination Claims

Plaintiff alleges that defendant discriminated against her based on race and gender, in violation of Title VII, Section 1981 and the MHRA. Title VII prohibits the failure to hire any individual because of such individual's race, color or sex. 42 U.S.C. § 2000e-2(a)(1). Section 1981 grants all persons the right to make and enforce contracts and to have "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981. The MHRA makes it unlawful for an employer to discriminate on the basis of gender or race against a person with respect to hiring. Minn. Stat. § 363A.08, subd. 2(c).

A. Section 1981

Defendant argues that plaintiff's section 1981 claim must be dismissed because that statute applies only to claims of race discrimination. See 42 U.S.C. § 1981. Plaintiff has not responded to defendant's argument or attempted to show that defendant discriminated against her based on race alone. Nor does plaintiff argue that section 1981 protects against the combined characteristics of race and gender. See Manning v. Metro. Life Ins. Co., 127 F.3d 686, 689 n. 1 (8th Cir. 1997) (claims of gender or sex are not cognizable under section 1981). Therefore, summary judgment in favor of defendant on plaintiff's section 1981 claim is granted.

B. Protected Subclass

Defendant alleges that plaintiff also cannot maintain her Title VII and MHRA discrimination claims based solely upon the combined characteristics of both race and gender. It is true that the Eighth Circuit has not explicitly recognized "black women" as a protected subclass in employment discrimination actions. See DeGraffenreid v. Gen. Motors, 558 F.2d 480, 484 (8th Cir. 1977) (declining to address district court's rejection of protected subclass based on race and gender). However, the court need not decide the subclass issue because plaintiff's claims do not survive summary judgment for the reasons outlined below.

C. Title VII and MHRA

Title VII and MHRA discrimination claims are analyzed under the "burden shifting" framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).[1] See Cronquist v. City of Minneapolis, 237 F.3d 920, 926 (8th Cir. 2001). The initial burden lies with the plaintiff to establish a prima facie showing of discrimination. McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 510 (8th Cir. 1995). To establish a prima facie case of discriminatory failure to hire, plaintiff must show (1) that she is a member of a protected class, (2) that she was qualified for the available position to which she applied, (3) that she was rejected, and (4) that applicants with the same qualifications, not part of the protected group, were hired instead. See Kenney v. Swift Transp., Inc., 347 F.3d 1041, 1044 (8th Cir. 2003).

1. Employer Justification

Defendant agrees that plaintiff has established a prima facie case of discriminatory failure to hire. It therefore becomes defendant's burden to articulate a legitimate, non-discriminatory reason for the failure to hire plaintiff. See Chambers v. Metro. Prop. & Cas. Ins. Co., 351 F.3d 848, 856 (8th Cir. 2003) (citing

[1] Plaintiff cites the United States Supreme Court decision of Desert Palace v. Costa as providing the analytical framework for discrimination claims. See 539 U.S. 90 (2003). However, the Eighth Circuit recently affirmed the applicability of the McDonnell Douglas analysis and concluded that "*Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions." Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (emphasis in original).

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000)). "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" Reeves, 530 U.S. at 142 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)).

Citing interview results from the Open House on October 23, 2001, defendant argues that plaintiff was not hired because she received unacceptable ratings from her interviewers. A lower interview score than the selected candidates is a legitimate, non-discriminatory reason not to hire. See Chock v. Northwest Airlines, Inc., 113 F.3d 861, 863 (8th Cir. 1997). In particular, defendant states that plaintiff received less than acceptable ratings from her interviewers in the teamwork and collaboration, energy and work standards categories. Further, both interviewers were concerned about her complaints that her current employer did not give her enough overtime. Based on this evidence, defendant has articulated a legitimate reason for not hiring plaintiff.

2. Pretext

Accordingly, the burden shifts back to plaintiff to demonstrate that defendant's reason was a pretext to disguise an impermissible motive. See McDonnell Douglas, 411 U.S. at 802; McLaughlin, 50 F.3d at 510. To show pretext, a plaintiff must present evidence that (1) creates a fact issue as to whether the employer's proffered reason is pretextual and (2) creates a reasonable inference that race and gender were the determinative factors in failing to hire plaintiff. See Hicks, 509 U.S. at 515;

McCullough v. Real Foods, Inc., 140 F.3d 1123, 1127 (8th Cir. 1998).

Plaintiff argues that defendant's proffered justification is pretextual for many reasons. First, plaintiff argues that she is obviously qualified for the bulk merchandiser position. It is true that when an employer asserts that the selected candidates were "'more qualified . . . than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is reason to disbelieve the employer's proffered reason for its employment decision.'" Chambers, 351 F.3d at 857 (quoting Chock, 113 F.3d at 864). However, even when an employee possesses "the experience and some of the qualities essential for success in the position, this does not suffice to raise an inference that [the employer's] stated rationale for giving the position to another is pretextual." Lidge-Myrtil v. Deere & Co., 49 F.3d 1308, 1311 (8th Cir. 1995).

Plaintiff primarily argues that defendant should have hired her based on her prior experience. It remains undisputed, however, that the merchandiser position is entry-level and often filled by otherwise inexperienced candidates. As to plaintiff's other qualifications, she received low ratings from both interviewers in the "Energy" category, and her complaints that her current employer did not give her enough overtime caused concern. Defendant asserts that energy is an important quality for bulk merchandisers because the position involves long hours of physical activity. Plaintiff's

second interviewer also gave her less than acceptable ratings in the "Teamwork and Collaboration" and "Work Standards" categories.[2] In contrast, all twelve candidates hired received higher overall interview scores than plaintiff. Only one of those candidates received a less than acceptable rating in one category, whereas plaintiff received a total of four such ratings. Based on this comparison of qualifications, plaintiff has offered no evidence to create an issue of fact as to whether defendant's proffered reasons for not hiring her were mere pretext.

Second, plaintiff argues that defendant's inconsistent explanations for the hiring process demonstrates pretext. However, she has provided no evidence of actual inconsistencies in defendant's hiring process.[3] Even if the interviewers should have consulted before deciding whether to hire plaintiff, for example, such an inconsistency does not alone demonstrate that the

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[2] These categories appear to be justified by the undisputed evidence that a bulk merchandiser must be able to get along well with supervisors and managers and be conscientious about the appearance of displays. (See Def.'s Mem. Supp. Summ. J. at 3.) Based on the evidence, defendant has offered a legitimate business consideration to justify the use of subjective criteria. See Chambers, 351 F.3d at 858.

[3] For example, plaintiff argues that because the interviewers did not rate plaintiff identically, their failure to discuss plaintiff's scores before refusing to hire her demonstrates a deviation from the normal decisionmaking process. However, plaintiff has not shown and the record does not support the claim that defendant's interviewers typically discussed any results that were differing. Rather, the record shows that only significant discrepancies regularly warranted a discussion. Therefore, plaintiff's allegation is without merit.

interviewers were untruthful in their ratings of plaintiff. See Brooks v. Ameren UE, 345 F.3d 986, 988 (8th Cir. 2003) (no pretext shown where inconsistent explanations by interviewers do not demonstrate dishonesty).

Finally, plaintiff argues that defendant's pattern of refusing to hire black women shows that its proffered justification for not hiring her is pretextual. Plaintiff offers statistical evidence that defendant hired no black women for the position of bulk merchandiser between January 2000 and October 2003, although at least eleven black women applied for the position during that time period. (Pl.'s Mem. Opp'n at 5.) However, the Eighth Circuit has held that employment statistics alone do not meet a plaintiff's burden to show pretext. See Bogren v. Minnesota, 236 F.3d 399, 406 (8th Cir. 2000). Furthermore, plaintiff fails to address the fact that defendant received almost 1,000 applications for the merchandiser position in Eagan in the year 2001 alone. If only eleven black women applied between 2000 and 2003, then defendant's failure to hire one of them among thousands of applicants does not show unlawful discrimination. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 933 (1988) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.") Even if plaintiff could show statistical significance, the evidence taken as a whole does not create a reasonable inference that race and gender were the determinative

factors in failing to hire plaintiff. Therefore, summary judgment in favor of defendant on plaintiff's discrimination claims is granted.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion for summary judgment [Docket No. 61] is **granted.**

2. Plaintiff's appeal of the magistrate judge's order of December 16, 2004, [Docket No. 76] is **denied as moot.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 27, 2005

s/ David S. Doty
David S. Doty, Judge
United States District Court