UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

VULCAN MATERIALS CO., d/b/a/ CALMAT CO.,

Defendant.

CIV. NO. 00CV0779-B (NLS)

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY ADJUDICATION

I. INTRODUCTION

Defendant Vulcan Materials Co. moved for Summary Judgment, or in the Alternative, for Summary Adjudication. This Motion was originally set for hearing on May 14, 2001. Pursuant to the EEOC's request to file supplemental briefing to bring a new issue to the Court's attention, the Court moved the hearing to June 4, 2001. The EEOC ultimately decided not to submit supplemental briefing and the Court took Defendant's Motion under submission. For the reasons explained herein, Defendant's Motion for Summary Judgment is Denied, and Summary Adjudication is granted.

II. BACKGROUND

Plaintiff EEOC alleges that Ms. Adamo was not hired by Defendant Vulcan Materials

106

Co.[1] because of her sex, in violation of Title VII, as amended, 42 U.S.C. §§ 2000-e et seq. and the 1991 Civil Rights Act.

CalMat produces concrete and other construction materials. On June 25, 1996, Ms. Adamo visited CalMat's Mission Valley facility seeking employment as a truck driver. Def. Mem. for Summ. J. at 2. Ms. Adamo alleges that she applied for two truck driver positions: cement mixer driver and plant/pit driver (also called "production" driver). Ms. Adamo told the woman who greeted her, Christina Hall, that she was interested in the "production driver" position. Hall Decl.¶ 12. Ms. Hall told Ms. Adamo that no such a position was available, but there was a mixer driver position available and gave Ms. Adamo an employment application. Id.

Ms. Adamo filled out the application, then met with Benny White Sr., the manager of CalMat's Mission Valley Transportation Department. Adamo Dep. 61:11-63:3. Mr. White claims that Ms. Adamo refused the mixer driver position when he told her that the starting salary was $12.22/hour because Ms. Adamo was earning $19.50/hour at her current job. White Dep. 88:10-24; 89:10-16. Mr. White's contemporaneous notes say that Ms. Adamo rejected the position based on pay. White Dep. 101:2-7 and Ex. 14 thereto. In addition, Mr. White told two other employees, one immediately after the interview, that Ms. Adamo turned down the position. White Dep. 104:6-10; Dyer Dep. 104:4-6, 11-13; Hall Decl. ¶ 15.

Ms. Adamo claims that she never rejected the position. Rather, she says that she explained to Mr. White several reasons why she was willing to take the pay cut including that her current employer was scheduled to close, she believed overtime pay would close the pay gap, and she wanted steady employment. Adamo Decl. ¶ 11. Ms. Adamo also claims that Mr. White discouraged her from taking the job by telling her that the governing collective bargaining agreement was due to expire, causing uncertainty as to whether there would be a strike and the future amount of pay. Ms. Adamo contends that no male applicants were told about the expiration of the collective bargaining agreement.

---

[1]Vulcan acquired CalMat Co., now a wholly owned subsidiary, in 1999. Plaintiff applied for employment at CalMat and her allegations regard CalMat.

There is conflicting evidence regarding how the interview ended. Mr. White contends that the interview ended when Ms. Adamo said she could not accept the pay cut and Mr. White said that he was sorry that she could not accept the position and thanked her for filling out an application. White Dep. 88:10-24. Ms. Adamo testified that Mr. White discouraged her throughout the interview by telling her about the potential strike, the pay rate, and saying that he really wanted an experienced driver. Adamo Dep. 77:14-16. Ms. Adamo testified that the last words she recalled saying were, "If you keep my name on record, if you need a driver, call me." Id. at 85:16-17. She testified further that she believed the next step in the interview process would be that Mr. White would call Ms. Adamo, but that he never called and she never received a letter. Adamo Dep. 87:1-11. By declaration submitted by the EEOC, Ms. Adamo testified that "White kept stressing that he wanted only experienced mixer drivers, and terminated the interview." Adamo Decl. in Support of EEOC's Opp. to Def. Mot. for Summ. J. at ¶ 12. It is undisputed that Ms. Adamo had no experience as a mixer truck driver.

III. STANDARDS OF LAW

A. Summary Judgment and Summary Adjudication.

Federal Rule of Civil Procedure 56(c) 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 judgment as a matter of law." In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

Summary judgment must be granted if the party responding to the motion fails "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The evidence offered need not be in a form admissible at trial to avoid summary judgment. Id. at 324. When the moving party does not bear the burden of proof, summary judgment is warranted by demonstration of an absence of facts to support the nonmoving party's case. Id. at 325.

The Court must determine whether evidence has been presented that would enable a reasonable jury to find for the nonmoving party. Liberty Lobby, 477 U.S. at 249-252. If the Court finds that no reasonable fact-finder could, considering the evidence presented by the nonmoving party and the inferences therefrom, find in favor of that party, summary judgment is warranted.

If the Court is unable to render summary judgment upon an entire case and finds that a trial is necessary, it shall if practicable grant summary adjudication for any issues as to which, standing alone, summary judgment would be appropriate. See Fed. R. Civ. P. 56(d); see also California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998), cert. denied (Oct. 5, 1998).

B. Title VII Burdens of Proof.

The substantive law governing a Title VII failure to hire case is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and its progeny. McDonnell Douglas sets forth the order of presentation and facts that must be shown at each step. First, the plaintiff must establish a *prima facie* case of discrimination. To establish the *prima facie* case, the plaintiff must show that:

(1) the plaintiff belongs to a protected class;

(2) she was qualified for and applied for a position for which the employer was seeking applicants;

(3) despite these qualifications, she was rejected; and

(4) the position remained open and the employer continued to seek applicants from persons with plaintiff's qualifications.

Id. at 802.

Once the plaintiff establishes the *prima facie* case, the burden of production, but not persuasion, shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Id. The defendant must set forth the reasons for the plaintiff's rejection through admissible evidence. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 254-555 (1981).

After the defendant articulates and supports with admissible evidence a legitimate,

nondiscriminatory reason for its action, the burden shifts to the plaintiff to establish that the employer's articulated reason is a pretext for discrimination. The plaintiff may prove pretext "either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256.

"As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because 'the ultimate question is one that can only be resolved through a searching inquiry -- one that is most appropriately conducted by a factfinder, upon a full record." Chuang v. Univ. of Cal. Davis, Bd. of Tr., 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting Shinidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996)). When a plaintiff establishes the *prima facie* case, either through direct or circumstantial evidence, he will "*necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision." Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1986). Furthermore, when there is evidence beyond the McDonnell Douglas presumption, "a factual question will almost always exist with respect to any claim of a nondiscriminatory reason." Sischo-Nownejad v. Mercer Comm. College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991).

IV. ARGUMENTS

A. The Defendant Argues That Ms. Adamo Cannot Demonstrate the Second and Fourth Steps of the *Prima Facie* Case or Prove Pretext.

Defendant claims that Plaintiff cannot show: (1) step 2 of the *prima facie* case - that she applied for a position for which the employer was seeking applicants, and (2) step 4 of the *prima facie* case - that the position remained open and the employer continued to seek applicants from persons with plaintiff's qualifications. Defendant further contends that Plaintiff cannot show pretext because it cannot show that CalMat's business justifications - that it believed Ms. Adamo rejected the mixer driver position and that there were no plant/pit driver positions available when Ms. Adamo inquired - are false.

Defendant claims that the plant/pit truck driver position was not available when Ms.

Adamo inquired. Ms. Hall testified that there were no such positions available on June 25, 1996. Hall Decl. ¶ 11. Kyle Smith was hired on June 14, 1996, just before Ms. Adamo inquired. Id.¶ 9. Ms. Hall testified that a plant/pit job did not open again for two months. The next plant/pit driver hired applied on August 23, 1996 and was hired on August 29, 1996. Id. ¶¶ 16-17. Ms. Hall declared that openings only arose one at a time. Hall Decl. ¶ 6. An additional male job applicant testified that he was also told that there was no plant/pit truck driver position available around the same time as Ms. Adamo's application. Belyou Decl. ¶ 5. Mr. Belyou's application is dated June 27, 1996, two days after Ms. Adamo applied. Id. Ex. A.

To refute the EEOC's evidence of job application logs showing that there was an application accepted for the position within a few days of Ms. Adamo's inquiry, Defendant points out that it records every application, whether a position was available or not.

Defendant also points out that the person who told Ms. Adamo that the plant/pit truck driver was not available was a woman (Ms. Hall), and that same woman arranged an interview for the mixer driver position. Thus, Defendant argues it is not reasonable to find that Ms. Hall was engaging in discrimination when she told Ms. Adamo the position was not available and arranged an interview for the available mixer driver position.

Defendant argues that it was Ms. Adamo who turned down the mixer driver position because of the pay cut. The interviewer, Mr. White, testified that she turned down the job because of the pay cut and his contemporaneous notes reflect the same. White Dep. 88:10-24, 89:16-16; 101:2-7. Two other employees testified that Mr. White told them that Ms. Adamo turned down the job well before the discrimination charges, and one was told immediately after the interview. Dyer Dep. 104:4-6, 11-13; Hall Decl. ¶ 15.

Defendant also points out two inconsistencies in Ms. Adamo's claims. First, Defendant argues that Ms. Adamo's contention that she did not reject the position is undermined by her admission that she never called back to check on the status of her application. Adamo Dep. 87:4-7. Further, Ms. Adamo's testimony that she hoped to hear back about the position undermines her contention that she was rejected at the interview.

B. The Plaintiff Argues That There Are Triable Issues of Fact Whether the Plant/Pit Truck Driver Position Was Available and Whether Ms. Adamo Rejected the Mixer Driver Position.

Plaintiff argues that the plant/pit truck driver position was available on the day she applied.[2] Two employees testified that Mr. White announced the position. One testified that Mr. White stated the day before Ms. Adamo applied, on June 24, 1996, that there were openings for mixer drivers and production drivers. Lubic Decl. ¶ 15. The other testified that he believed there were openings in all driver categories in approximately June of 1996. Germann Decl. ¶¶ 2-4. An application was accepted for the position two days after Ms. Adamo applied from Charles Belyou. Johnson Decl. Ex. 24. (Belyou, however, provided a declaration that he was also told no plant/pit position was available. Belyou Decl. ¶5.)

Plaintiff says that she never rejected the mixer driver position. She said she told Mr. White she was willing to accept the pay decrease because her current employer was scheduled to close, she believed overtime pay could close the pay gap, and she wanted steady employment. Adamo Decl. ¶ 11. Plaintiff contends that Mr. White discouraged her from taking the position by telling her the collective bargaining agreement was due to expire and that Defendant was only looking for experienced mixer drivers. Plaintiff says that none of the six male drivers eventually hired recalled Mr. White mentioning the expiration of the collective bargaining agreement. Bryson Decl. ¶ 3; Sengle Dep. 15:1-19; Andrews Dep. 15:14-17:25.[3] (Plaintiff admits, however, that she brought up the subject of the strike. Adamo Dep. 68:12.)

Plaintiff contends that she has demonstrated the *prima facie* case because:

(1) she is a woman;

(2) there is no dispute that Ms. Adamo met the minimum qualifications and that she applied for the mixer driver position;

(3) Ms. Adamo was rejected; and

(4) Defendant continued to seek applications from persons with Ms. Adamo's

---

[2]The EEOC's Uniform Guidelines on Employee Selection Procedure define an applicant as "a person who has indicated an interest in being considered for hiring..." Swanson Decl. Ex. G, p. 11998.

[3]Plaintiff did not provide citations to evidence from the other three drivers.

qualifications.

Plaintiff also argues that Defendant was not in compliance with mandates by the U.S. Department of Labor's Office of Federal Contract Compliance Programs.[4]

V. DISCUSSION

Summary adjudication is granted for Defendant and against the EEOC on Plaintiff's plant/pit driver claim because Plaintiff failed to prove step four of the *prima facie* case - that the position remained open and the employer continued to seek applicants from persons with plaintiff's qualifications. The EEOC's only evidence that a position remained open and Defendant continued seeking applications is an "Applicant Flow Log" showing one applicant for a "production driver" after Ms. Adamo's June 25, 1996 inquiry. Johnson Decl. Ex. 10. However, that applicant testified that he was told that there was no plant/pit truck driver position available on the day he applied. Belyou Decl. ¶ 5. The evidence shows that a plant/pit job did not open again for two months. The next plant/pit driver hired applied on August 23, 1996 and was hired on August 29, 1996. Id. ¶¶ 16-17. Because Plaintiff cannot show that there was an open position for which Defendant continued to seek applications, summary adjudication is granted on Plaintiff's plaint/pit (or production) driver claim.

Summary adjudication is denied on Defendant's motion for summary adjudication on Plaintiff's mixer driver claim. Mr. White says that Ms. Adamo turned down the position; Ms. Adamo says that she did not turn down the position and actually expressed several reasons why she was willing to take a pay cut. For purposes of this motion all doubts must be resolved in favor of the EEOC. There is a triable issue of fact whether CalMat rejected Ms. Adamo or Ms. Adamo rejected CalMat.

///

///

///

///

///

---

[4]Defendant complains that this information is privileged and irrelevant.

VI. CONCLUSION

Summary adjudication is granted on Plaintiff's plant/pit truck driver claim and denied on Plaintiff's mixer driver claim. Therefore, Defendant's Motion for Summary Judgment is denied, and Summary Adjudication is granted on Plaintiff's plant/pit truck driver claim.

IT IS SO ORDERED.

DATED: 5-24-01

UNITED STATES SENIOR DISTRICT JUDGE

cc: All Parties
Magistrate Judge