ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	§	
Plaintiff,	§	
v.	§	CAUSE NO. 3:01-CV-1838-K
KASPAR WIRE WORKS, INC. a/k/a KASPAR RANCH HAND, INC.	§	
Defendant	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendant Kaspar Wire Works, Inc.'s motion for summary judgment, Plaintiff Equal Employment Opportunity Commission's ("EEOC") motion for partial summary judgment, and the EEOC's unopposed motion to amend its pleadings to add additional parties. For the reasons stated below, the Court GRANTS Kaspar Wire Works, Inc.'s motion for summary judgment and DENIES AS MOOT the EEOC's motion for partial summary judgment and motion for leave to amend to add additional parties.

I. Factual and Procedural History

This is an employment discrimination case brought by the EEOC on behalf of Tommy Patino, alleging national origin discrimination in violation of Title VII of the

Civil Rights Act of 1964. The EEOC claims that Patino, who was the warehouse manager for Kaspar Ranch Hand, LLP ("Ranch Hand"), was passed over for a promotion to assistant store manager at the Dallas location, and that the position was filled with a Caucasian man named Marc Madison. The EEOC's suit arises from comments allegedly made by Ranch Hand's District Manager, Kevin Miles, who was in charge of hiring the assistant store manager for the Dallas store. Louis Coby, manager of Ranch Hand's Dallas store, testified that Miles said Patino did not get the job because "being Hispanic, his English was not very well, and his people skills is not good." Coby also testified that Miles said Patino would receive a dollar-per-hour raise to "shut him up." Finally, Coby testified that Miles told Patino he did not get the promotion because "he was very important in the back, that we need his position covered as warehouse manager, and he was more valuable in the warehouse manager position." Approximately one year after he was passed over, Patino was given the assistant manager's position, but quit after one month on the job.

For reasons that are not clear from the record, the EEOC did not sue Ranch Hand. Instead, the EEOC sued Kaspar Wire Works, Inc., which is a related but wholly separate entity, alleging that Kaspar Wire Works is also known as Kaspar Ranch Hand, *Inc.*, and that the entities should be treated as one employer for purposes of Title VII. The obvious problem with the EEOC's complaint is that Patino did not work for Kaspar Ranch Hand, Inc., either; he worked for Kaspar Ranch Hand, LLP. Therefore, the EEOC

moved for leave to add Ranch Hand as a defendant, but contends that Kaspar Wire Works should remain a party. Kaspar Wire Works does not oppose the addition of Ranch Hand, but argues that Kaspar Wire Works and Kaspar Ranch Hand, Inc., should be dismissed.

In its motion for summary judgment, Kaspar Wire Works argues that even if the EEOC sued the right entity, it has failed to produce sufficient evidence to create a legitimate issue on whether Patino was a victim of intentional discrimination. Kaspar Wire Works contends that Miles' alleged statements are not evidence of any discriminatory animus because, at most, they suggest that Miles knew Patino was Hispanic and that Patino lacked the skills necessary for the position. Kaspar Wire Works insists that Patino was not promoted because the assistant manager position was created to improve the Dallas store's performance through the addition of an employee with experience in retail sales, marketing, and customer service, and that Patino's resume does not reflect that he had experience in these areas. Kaspar Wire Works points out that at the time Madison was hired, Patino's primary experience was as a welder and fabricator, and that he had only one year experience managing Ranch Hand's warehouse.

Kaspar Wire Works also asserts that Madison was substantially more qualified at the time for the assistant manager's position than Patino. Madison had more than a decade of management, retail sales, and marketing experience. Moreover, Ranch Hand is in the aftermarket automotive accessories industry, and Madison managed sales and

marketing for companies in the aftermarket automotive industry for seven years immediately before he applied for the assistant manager's position. Finally, Madison had experience managing his own business.

The EE OC counters that no written job description existed requiring the applicants to have the skills Ranch Hand sought, and that a newspaper advertisement for the position, which also referenced other open positions, only required applicants be "professional and highly motivated." In addition, EEOC argues that Patino was qualified because he performed some of the duties later assigned to the assistant manager's position while managing Ranch Hand's warehouse, and that he helped train Madison. The EEOC asserts that this evidence is not only *prima facie* evidence of discrimination, but also proves that the justification given for Miles' employment decision is a pretext. As such, the EEOC insists that Kaspar Wire Works' summary judgment must be denied.

II. Standard of Review

To survive Kaspar Wire Works' motion for summary judgment, the EEOC must present sufficient evidence to create a fact issue regarding discrimination, either through direct or circumstantial evidence. "A plaintiff who can offer sufficient direct evidence of intentional discrimination should prevail, just as in any other case where a plaintiff meets his burden." *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 40 (5th Cir. 1996)

(citing *Portis v. First Nat'l Bank of New Albany, Miss.*, 34 F.3d 325, 328 n.6 (5th Cir. 1994)). Direct evidence of discrimination, however, is rare.

Consequently, the Supreme Court devised an evidentiary procedure in *McDonnell Douglas, Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), that allows a plaintiff to meet his burden of proof through circumstantial evidence. Under the *McDonnell Douglas* framework, a plaintiff can establish a *prima facie* case of discrimination in a failure to promote case by showing (1) he is a member of a protected class; (2) he sought and was qualified for the position; (3) he was rejected for the position; and (4) the employer continued to seek applicants with the plaintiff's qualifications. *Haynes v. Pennzoil Co.*, 207 F.3d 296, 300 (5th Cir. 2000). Establishing a *prima facie* case creates an inference of intentional discrimination, and "the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions." *Id.*

If the defendant articulates a non-discriminatory reason for its employment decision, the plaintiff must then prove that the defendant's proffered explanation is a pretext. *Id.* Once a case reaches the pretext stage, the inference of discrimination ends, leaving only the ultimate issue of whether there is a conflict in substantial evidence sufficient to create a fact issue regarding discrimination. *Id.*; *Long v. Eastfield College*, 88 F.3d 300, 308 (5th Cir. 1996) (en banc). Evidence is substantial if it is of such quality and weight that reasonable and fair minded people in the exercise of impartial judgment might reach different conclusions. *Long*, 88 F.3d at 308.

III. Analysis

A. Direct Evidence of Discrimination

The first issue in this case is whether the EEOC's evidence is direct or circumstantial. The EEOC argues that Miles' alleged statements are direct evidence of intentional discrimination because, taken together, they leave no room for inference or presumption. Specifically, the EEOC argues:

> If Miles was not going to promote Patino truly because he had poor English and poor people skills, why not tell Patino what he was lacking so that he could work to improve in those areas. Miles never told Patino or Coby what Patino needed to do to improve his English skills. He never recommended further education or any kind of training. Further, if he was truly not promoted because he lacked the necessary skills, Miles would not have given Patino a dollar raise "to shut him up." In this case there is no justifiable explanation for Miles comments.

EEOC's Response and Brief in Support (sic) of Defendant's Motion for Summary Judgment, p. 11 (citations to appendix omitted).

The EEOC misunderstands the Fifth Circuit's definition of direct evidence. Direct evidence is "evidence, which if believed, would prove the existence of a fact (i.e. unlawful discrimination) without any inferences or presumptions." *Nichols*, 81 F.3d at 40-41 (5th Cir. 1996) (quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993)). Essentially, the EEOC argues that the evidence here is direct, because only one reasonable inference can be drawn when all of the facts are considered. However, evidence is circumstantial if any inference is needed to prove the ultimate fact. As the

excerpt above demonstrates, the conclusion urged by the EEOC requires a fact finder to infer Miles' intent based on his conduct.

Even Miles' statement regarding Patino's language and people skills is circumstantial at best. On its face, it proves only that Patino was passed over because he lacked the necessary skills. To divine any discriminatory animus would require an inference that, because Miles attributed Patino's poor English to his national origin, that Miles intentionally discriminated against Patino. Consequently, the EEOC has not presented direct evidence of discrimination.

B. *Prima Facie* Evidence of Discrimination

Because the EEOC's case is based on circumstantial evidence, the EEOC must rely on the evidentiary procedure adopted in *McDonnell Douglas.* Clearly, Patino is a member of a protected class, he applied for the assistant manager's position, and was rejected. To establish a *prima facie* case of discrimination, however, the EEOC must also offer some proof that Patino was qualified for the position and that Ranch Hand considered other applicants with similar qualifications. *Haynes*, 207 F.3d at 300. The evidence presented by the EEOC on these two points is wholly insufficient.

The EEOC argues that Patino was qualified because there were no written job qualifications, only the statement in the advertisement requesting "professional and highly motivated" applicants. The EEOC contends that Patino's resume and his

performance at Ranch Hand showed that he had both of these qualifications. The EEOC also argues that Patino was informally performing the duties of assistant manager, he was never cited for poor performance, and he trained Madison for the position. Finally, the EEOC argues that Ranch Hand interviewed nine other applicants after Patino was passed over.

None of the EEOC's evidence, however, suggests that Patino had all of the skills required for the position or that Ranch Hand ever considered any other applicants with qualifications similar to Patino's. First, it is unreasonable to infer, as the EEOC suggests, that the job placement advertisement, which applied to several open positions at Ranch Hand, fully described the qualities required for the assistant manager's position. Moreover, that Patino informally performed some of the assistant manager's duties before the position was filled is not evidence that Patino had all of the qualifications Ranch Hand legitimately required. In fact, the evidence shows that Patino was not experienced in marketing, sales, or customer service.

The same is true of evidence that Patino trained Madison in some respects. One would expect a current employee to provide guidance to a new employee on how the company operates, including the operation of the warehouse. There is no evidence offered by the EEOC, however, that Patino trained Madison in the marketing, customer service, and retail sales skills Ranch Hand sought. In fact, the evidence presented establishes that Madison had vastly superior experience in these areas. While Madison

had more than 10 years of relevant experience, Patino's primary experience was as a fabricator and welder. He had no experience in managing a retail sales establishment. Therefore, there is no support for an inference that, because Patino trained Madison in some areas, Patino had the skills required for the job.

Even more troubling, the EEOC all but ignores the final requirement in *McDonnell Douglas* that it prove Ranch Hand "continued to seek applicants *with the plaintiff's qualifications*." *Haynes*, 207 F.3d at 300. (emphasis added). The EEOC argues that this element is met because Miles interviewed nine applicants for the position, but offers no evidence that any of these other applicants had qualifications similar to Patino's. It is insufficient to present only evidence that an employer considered other applicants after it passed over the complainant. That evidence proves nothing, because virtually every employer that passes over one applicant will consider others. To meet its burden of proof, the EEOC had to show that Patino had qualifications similar to the nine individuals interviewed. However, no such evidence was proffered. The EEOC's failure on this count is fatal to its claims.

C. Pretext and Intentional Discrimination

The final step in the *McDonnell Douglas* framework requires Kaspar Wire Works to produce some evidence in support of a legitimate non-discriminatory reason for its employment decision. If Kaspar Wire Works meets its burden, the EEOC must then

produce evidence showing the reason given is a pretext and that discrimination is the real reason for the action taken. *Rubenstein v. Administrators of the Tulane Ed. Fund*, 218 F.3d 392, 400 (5th Cir. 2000) (holding that the plaintiff's evidence was insufficient to support an inference that the real reason for the employment decision was discrimination). Here, Kaspar Wire Works met its burden of production by presenting evidence that Patino was passed over for the assistant manager's position because he did not have the skills required for the position, and because Madison was more qualified. The only remaining issue, therefore, is whether or not there is any evidence of discrimination. *Reeves*, 530 U.S. at 142-43, 120 S. Ct. at 2106. Again, the EEOC's evidence does not raise a legitimate fact question on discriminatory intent.

First, the EEOC did not present any evidence to rebut Kapar Wire Works' explanation that Patino was passed over because he was not qualified, and because Madison was more qualified. The EEOC never argues that Patino is equally or more qualified than Madison, and the resumes show that Patino's management experience pales in comparison to Madison's. Moreover, Patino's resume shows that he had very little experience relevant to the position. Patino was a welder who managed a warehouse. He was not an experienced retail manager. Moreover, no other evidence supports the EEOC's argument that Patino's national origin was the reason he was denied the position.

EEOC again relies on Miles' comments to prove that he did not select Patino

because he is Hispanic. Remarks are sufficient evidence of discrimination if they are made by a person principally responsible for an employment decision and indicate some discriminatory animus. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 225 (5th Cir. 2000) (citing *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000)); *see also Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996) (establishing a four-part test for determining whether a comment in the workplace is sufficient evidence of discrimination).

Here, Miles' remarks do not rise to the level of evidence of discrimination because nothing in his statements indicates discriminatory animus. To hold otherwise would be tantamount to holding that every mention of national origin sufficiently relates to a protected class to warrant an inference that the comment is evidence of discriminatory intent. This case is a prime example of how mere reference to national origin, without more, is not evidence of discrimination. As discussed above, Miles' statements support the argument that Patino was not offered the position because he lacked the necessary qualifications, in this case people skills and a command of the English language. Clearly, Patino's lack of people skills was a non-discriminatory reason for not giving him the job. It is equally legitimate for Miles to exclude Patino from consideration, if he believed Patino's English skills were insufficient to adequately perform the sales, marketing, and customer service required by the position. No dislike, hatred, or discriminatory intent was evidenced by Miles' attributing Patino's trouble with the English language to his

predominately Spanish-speaking national origin. There is no evidence that Miles refused to consider any Hispanic person, because he assumed that all Hispanics have trouble with English. Rather, here, a particular Hispanic person, Patino, lacked the language skills necessary to manage a retail sales establishment. Therefore, the only evidence regarding Patino's national origin is innocuous.

Additionally, there is no evidence Miles' attempt to quiet Patino with a dollar-per-hour raise was designed to prevent Patino from filing a discrimination claim, as the EEOC suggests. Coby testified that he believed the dollar-per-hour raise was intended to "keep Tommy from asking for the assistant manager's position" and further testified that it was not calculated "to keep his mouth shut about some dark company secret []". The only reasonable inference that can be drawn from this comment, then, is that Miles wanted to soften the blow of his employment decision. This inference is further supported by Coby's testimony that Miles told Patino that the reason he did not get the position was that he was more valuable in the warehouse manager's position, which suggests that Miles wanted to avoid any tension with Patino.

The Fifth Circuit has recently affirmed summary judgment in two similar cases that involved allegedly discriminatory comments, finding in each that the plaintiff failed to prove discrimination. First, in *Rubenstein v. Administrators of the Tulane Edu. Fund*, 218 F.3d 392 (5th Cir. 2000), a Jewish professor who was denied tenure produced evidence that members of the responsible committee made discriminatory comments, including

a statement by one member "that if 'the Russian Jew' could obtain tenure, then anyone could." *Id.* at 400. Tulane asserted that its decision was based on Rubenstein's poor student evaluations and his lack of involvement on departmental committees. The Fifth Circuit affirmed the district court's summary judgment because, although Rubenstein presented some evidence that his lack of involvement on committees was also caused by the allegedly discriminatory actors, he did not refute the evidence that he received poor student evaluations. Therefore, despite the racially-charged comments of the decision makers, the court held that Rubenstein's evidence "[was] not so persuasive so as to support an inference that the real reason was discrimination." *Id.*

The Fifth Circuit reached a similar conclusion in *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400 (5th Cir. 2001). There, an African-American school teacher sued the school district alleging racial discrimination after the district's superintendent refused to renew his contract. The basis of his claim was a comment made by the superintendent shortly after Auguster was hired that the district had problems with black coaches in the past and "if there was another problem, no matter what it was, that [the superintendent] would do his best to get rid of [Auguster], from day one." *Id.* 401. The superintendent also told Auguster that he "had bad luck with black men working in Abbeville." *Id.*

The school board argued that Auguster was terminated because he had improperly used corporal punishment on a student and showed a "R" rated movie to his class.

Again, despite the disconcerting comments, the court affirmed the district court's summary judgment, holding that Auguster failed to establish that the school board's proffered explanation for its decision was pretext for discrimination in light of the overwhelming evidence that Auguster was unfit as a teacher. *Id.* at 405. Consequently, the court held that, without more, the superintendent's comments did not support an inference that the real reason for the school board's refusal to renew Auguster's contract was discrimination. *Id.* at 405-06, 406 n.6.

In this case, the comments at issue are substantially less offensive, and the evidence supporting the defendant's justification is equally strong and unrebutted. Miles' alleged comments, even when viewed in the light most favorable to the EEOC, do not evidence any discriminatory animus at all. Moreover, it is clear that Patino was not qualified for the assistant manager's position, and that Madison was substantially more qualified. Therefore, just as in *Rubenstein* and *Auguster*, the EEOC's evidence rebutting Ranch Hand's non-discriminatory justification is not so persuasive that it supports a reasonable inference that the real reason for Miles' decision was discrimination. For these reasons, summary judgment is appropriate.

IV. Conclusion and Order

For the reasons stated above, Defendant Kaspar Wire Works' motion for summary judgment is **GRANTED**. In addition, the Court **DENIES AS MOOT** the

EEOC's motion for partial summary judgment and its motion for leave to amend its pleadings to add additional parties. Judgment will be entered that the EEOC and Patino take nothing.

SO ORDERED.

March 3rd, 2003.

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UNITED STATES DISTRICT JUDGE