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United States District Court, N.D. Illinois, Eastern Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
REGIS CORPORATION, Defendant.

No. 99 C 8270. | Nov. 30, 2001.

Opinion

ORDER

GOTTSCHALL, District J.

***1** Plaintiff, Equal Employment Opportunity Commission ("EEOC"), and plaintiff-intervenors, Silvia Picazo and Rosa Gomez, have filed suit against defendant, Regis Hairstylists Salon ("Regis"). Plaintiffs allege that Regis engaged in discrimination based on national origin against ten Hispanic hair stylists at a Regis salon located in North Riverside, Illinois. In an order dated August 3, 2001, the court granted in part and denied in part Regis' motion for partial summary judgment regarding certain claims made by plaintiffs. Two claims on which the court ruled in Regis' favor included plaintiffs' claim that Regis engaged in a pattern and practice of discrimination and that Regis discriminatorily discharged plaintiff Rosa Gomez. Now, the EEOC moves the court under Federal Rule of Civil Procedure 59(e) to reconsider both rulings and moves the court to allow it to supplement the record with additional evidence in support of Gomez's discriminatory discharge claim. For the reasons set forth below, the court grants the EEOC's Rule 59 motion and denies its motion to supplement the record.

Analysis

The EEOC moves for reconsideration under Rule 59(e), which allows parties to move to "alter or amend" an order within ten days of entry of the order. Fed.R.Civ.P. 59(e); *Popovits v. Circuit City Stores, Inc.,* 185 F.3d 726, 729 (7th Cir.1999). It is undisputed that the EEOC moved for reconsideration under Rule 59(e) in a timely manner. The court issued its order on August 3, 2001, and the EEOC filed its motion on August 16, 2001. Excluding weekend days as well as the date of entry of the order (the customary practice "when the period of time prescribed [by a rule] is less than eleven days," *Popovits,* 185 F.3d at 729), the EEOC filed its motion within nine days of the order, thereby satisfying the ten-day time limit prescribed by the rule.

What is disputed is whether the EEOC has satisfied the substantive standards under Rule 59. The Seventh Circuit has stated that Rule 59(e) "permits parties to bring to the court's attention errors so they can be corrected without the costs associated with appellate procedure." *Id.* at 730. The court continued, "[T]he rule does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could or should have been presented to the district court prior to the judgment." *Id.* (citations omitted). However, the court added, "if an issue arises to which a party does not have the opportunity to respond, granting the [Rule 59] motion ... may be appropriate." *Id.*

A. Pattern and Practice Claim

The EEOC requests that the court revisit its decision to grant summary judgment on plaintiffs' pattern and practice claim of national origin discrimination against Regis. The EEOC contends, among other things, that Regis first sought summary

judgment on the pattern and practice claim in Regis' reply brief, and that had the EEOC had a chance to brief the issue, the EEOC would have offered sufficient evidence and legal authority to warrant a denial of summary judgment on the claim. Because the EEOC did not have a chance to properly respond to Regis' argument, the EEOC argues, the court should vacate its ruling regarding the pattern and practice claim. Regis responds that the court properly granted summary judgment on the claim. Regis argues that it sought summary judgment on the claim in its reply brief because the EEOC first raised the claim in its response brief. Prior to this time, Regis argues, the EEOC never gave Regis notice that a pattern and practice claim existed.

***2** The court grants the EEOC's Rule 59 motion regarding the pattern and practice claim. Because of the unstructured nature of the complaint, it is understandable that Regis believes that it was never given notice of a pattern and practice claim prior to the filing of the EEOC's response brief. However, nestled in one paragraph of the complaint is the allegation that Regis "has engaged in a *pattern and practice* of unlawful employment practices...." (Compl. ¶ 12) (emphasis added). Plaintiffs fail to develop the claim or even mention the claim again in the complaint; however, the claim is made, and notice is given to Regis that such a claim exists.

It appears that Regis failed to move for summary judgment on the pattern and practice claim or offer argument regarding the claim in its memorandum in support of its motion for summary judgment. Consequently, even though the EEOC briefly described the merits of the claim in its response brief, the EEOC did not have proper notice from examining Regis' motion for summary judgment that it should "wheel out *all* its artillery to defeat [the motion for summary judgment]." *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.,* 90 F.3d 1264, 1270 (7th Cir.1996) (emphasis added). As the Seventh Circuit has stated, "if an issue arises to which a party does not have the opportunity to respond, granting the [Rule 59] motion ... may be appropriate." *Popovits,* 185 F.3d at 730. Therefore, the decision to grant summary judgment on the pattern and practice claim is vacated. The parties are hereby invited to file motion papers and briefs in support of and opposition to summary judgment on the pattern and practice claim.

B. Gomez Claim

The EEOC also seeks to revisit the court's decision to grant summary judgment in favor of Regis on the claim that Regis illegally discharged plaintiff Rosa Gomez based on her national origin. The basis for the EEOC's motion is a letter that, the EEOC contends, casts doubt on Regis' asserted non-discriminatory reason for Gomez's discharge, namely that she was violating Regis' conflict of interest policy by running her own hair salon business.

In its Local Rule 56.1 fact statement, defendant offered evidence that Rosa Gomez was fired because the salon manager for the North Riverside salon, Michele Copeland, believed in good faith that Gomez was operating a home salon in competition with Regis and in violation of its conflict of interest policy. Defendant offered Copeland's testimony that in May, 1997, the state cosmetology board conducted an inspection of the salon and found towels in some of the stylists' drawers that the board ordered removed. Copeland testified that she removed towels from Gomez's station and found a small pile of business cards advertizing Gomez's personal salon. Copeland testified that she found more of Gomez's business cards at the front desk of the salon. Copeland recognized the phone number on the cards as Gomez's home number and called the number. There was a message in Spanish which Copeland asked another stylist, Michael Garcia, to translate. Garcia told Copeland that the message listed the beauty stylist services that Gomez performed. Moreover, Copeland testified that another stylist, Angelina Flores, told her that Gomez had been handing out personal business cards and that Gomez and stylist Silvia Picazo were planning to open their own salon. Regis offers the above deposition testimony as evidence of its honest belief that Gomez was violating Regis' conflict of interest policy.

***3** Gomez and the EEOC dispute, by Gomez's testimony, that Copeland found a pile of business cards at Gomez's station and at the front desk of the salon. Gomez testified that she kept two or three cards made while she was in beauty school as souvenirs but never took them out of her wallet. Further, the EEOC has produced the sworn testimony of Michael Garcia that the only conversation that he had with Copeland on the occasion of his translation of the business card was his translation of the business card. Garcia was asked if there was any further conversation with Copeland, and he testified that there was not. Neither party asked Garcia specifically about whether he recalled translating a message on an answering machine, so both sides are equally responsible for whatever ambiguity on this subject is left by his testimony. Angelina Flores has denied under oath that she made the statements to Copeland that Copeland claims Flores made.

While both the testimony of Gomez and Garcia could be clearer in disputing the precise statements made by Copeland,

Gomez and the EEOC have done enough to demonstrate that the version of events provided by Copeland is disputed. The EEOC has evidence that Gomez only had a few cards and never took them out of her wallet. It has Flores' sworn testimony denying that she told Copeland what Copeland has sworn Flores told her. Moreover, it appears that Garcia will contradict Copeland's assertion that he told her that Gomez's home answering machine advertized beauty services. While defendant points out that it is undisputed that Copeland saw at least a few business cards advertising beauty services by Gomez, defendant has never asserted that it fired her solely because it found a few business cards. Regis fired her, it claimed, because it had evidence that Gomez, among other things, had cards available for distribution at the salon; was rumored to be distributing them; advertised beauty services on her home answering machine; and was rumored to be planning to open her own salon. If the EEOC can cast sufficient doubt on Copeland's account of some of the reasons why she believed that Gomez was violating Regis' conflict of interest policy, a jury may be allowed to discredit the entirety of Copeland's purported belief. *Russell v. Acme–Evans Co.,* 51 F.3d 64, 69 (7th Cir.1995) (stating that where plaintiff has produced evidence of the pretextual nature of one of the employer's asserted grounds for its adverse action, where the one ground is "fishy and suspicious" or is "intertwined" with the remainder of the employer's explanation, the plaintiff can survive summary judgment.)

The court has decided to reconsider its decision on Gomez's discriminatory discharge claim not because of the EEOC's late-produced (and probably hearsay) letter from the state board. It has rather decided *sua sponte* to review the summary judgment materials, and, as a result, it has reached the conclusion that there is a material factual dispute concerning the Gomez termination, and that its previous decision was in error. The motion for summary judgment with respect to the Gomez termination is therefore denied.

***4** The EEOC has also moved to supplement the record with the aforementioned letter, contending that the letter must be admitted into evidence because it shows the merits of Gomez's discriminatory discharge claim. Because the court does not rely on the letter in order in reaching its decision on Gomez' claim, it need not reach the question of whether the letter may be admitted into evidence at this time. The EEOC's motion to supplement the record is denied as moot without prejudice in light of this order.

Conclusion

Plaintiff's motion for reconsideration is granted, and its motion to supplement the record is denied. Regis' motion for summary judgment on Rosa Gomez's discriminatory discharge claim is denied.