EEOC v. Guardian

United States District Court for the Middle District of Tennessee, Nashville Division
October 22, 2002, Decided ; October 23, 2002, Entered
No. 3:99-1145

Reporter: 2002 U.S. Dist. LEXIS 26449
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, - and - PEGGY J. ROUILLIER, Intervenor, v. THE GUARDIAN, Defendant.

Prior History: EEOC v. Guardian, 2001 U.S. Dist. LEXIS 25254 (M.D. Tenn., Apr. 19, 2001)

Disposition: [*1] Defendant's motion for summary judgment denied.

Counsel: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Draga G. Anthony, Equal Employment Opportunity Commission, Memphis, TN.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Katharine W. Kores, Terry Beck, Lawrence "Ken" R. Kenyon, II, Equal Employment Opportunity Commission, Nashville, TN.

For THE GUARDIAN, defendant: Richard Lee Colbert, Kent B. Thomas, Beth C. Baggett, Colbert & Winstead, Nashville, TN.

For PEGGY ROUILIER, intevenor plaintiff: Irwin Bruce Venick, Dobbins & Venick, Nashville, TN.

Judges: WILLIAM J. HAYNES, JR., United States District Judge.

Opinion by: WILLIAM J. HAYNES, JR.

Opinion

MEMORANDUM

Plaintiff, Equal Employment Opportunity Commission ("EEOC"), on behalf of Peggy J. Rouillier ("Rouillier"), the subsequent Plaintiff-Intervenor, filed this action under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), *42 U.S.C. §§ 2000e, et seq.*, and Title I of the Civil Rights Act of 1991, 42 U.S.C. §§ 1981a, et seq., against the defendant, The Guardian ("Guardian"), an insurance corporation doing business [*2] in Tennessee. The gravamen of the Title VII claim is that Guardian engaged in disparate treatment of Rouillier when the Defendant discharged her for having a contract with a third party insurance company, but did not discharge four male field representatives who also had contracts with other third party insurance companies, including the company with whom Rouillier had a contract.

Before the Court is Defendant's motion for summary judgment (Docket Entry No. 76) contending that Plaintiff cannot establish a prima facie case of employment discrimination because (1) Rouillier was not qualified to maintain her Guardian field representative agreement because she failed to meet the legitimate expectations of her employer, or (2) Rouillier was not treated worse than similarly situated males because Rouillier was given a choice to terminate her outside contract whereas a similarly-situated male employee was not given that choice before his termination.

Plaintiffs respond, in sum, that they have established a prima facie case of employment discrimination because they have shown (1) that Rouillier was qualified to maintain her Guardian field representative agreement because she was [*3] meeting her employer's legitimate expectations for production and was one of Guardian's top producers, and (2) that Rouillier was treated worse than similarly situated males because Rouillier was given the ultimatum to terminate her third party contract or be fired when other male employees were not asked to terminate their third party contracts and were not fired.

For the reasons set forth below, the Court finds that the Plaintiffs have established a prima facie case of sexual discrimination, but genuine issues of material fact exist as to the Defendant's proffered reason for her discharge. Accordingly, the Defendant's motion for summary judgment is denied.

A. Review of the Record

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[*4] In 1991 and until her termination in early 1998, Rouillier was party to a field representative agreement with Guardian. [2] At all material times, Rouillier worked through a Guardian general agency named Tennessee Financial Group, Inc. ("Whitten Agency") that was owned and operated by J. Thomas Whitten. (Docket Entry No. 83, Plaintiff EEOC's Reply to Defendant's Statement of Undisputed Facts, P 2).

Rouillier, as a Guardian field representative, received regular compensation from Guardian that was, in effect, an advance against anticipated commissions. Id. at P 3. It is undisputed that at least to some extent, Rouillier's compensation as an field representative was recouped by Guardian from commissions earned by Rouillier on the sale of Guardian products. Id. at P 4. Ultimately, compensation [*5] advanced to an field representative that remained un-recouped by Guardian would be the financial responsibility of Guardian and/or the Whitten Agency. Id. at P 9.

In addition to advance compensation, Guardian also provided its field representatives, including Rouillier, with office facilities and covered the costs of certain overhead items. (Docket Entry No. 83, Plaintiff EEOC's Reply to Defendant's Statement of Undisputed Facts, P 5). In January of 1995, Guardian changed all field representatives to statutory employees. (Docket Entry No. 82, Plaintiff EEOC's Memorandum Statutory Employees, Exh. 6). This change freed the field representatives to exercise their judgement in the solicitation of applications as long as they made their principal activity the solicitation of applications for Guardian. Id. As statutory employees, the field representatives also received certain benefits under the Internal Revenue Code while maintaining their beneficial tax treatment as independent contractors. (Docket Entry No. 77, Memorandum of Law & Facts in Support of Defendant's Motion for Summary Judgement, p. 2).

Rouillier's field representative agreement called for immediate termination if [*6] Rouillier:

> (a) failed to validate her contract, unless extended or suspended;
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> (b) failed to attain the Annual Production Requirement (as published annually by the Company)
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> (c) solicited or placed business with any other company, participated in the affairs or operation of another insurance company, …, committd a fraudulent, immoral or dishonest act[], failed to report paid business, …, or failed to comply with the Company's rules and regulations.(Docket Entry No. 82, Field Representative Agreement, Exh. 4, P 14(c)).

In addition, it is undisputed that the field representative agreement also allowed Rouillier to maintain broker's agreements with third party insurance companies, and to quote and sell third party products under specific situations when the products did not compete with Guardian products, when Guardian products did not fulfill the customers needs, and when Guardian declined to offer a policy to a particular customer. (Docket Entry No. 77, Memorandum of Law & Facts in Support of Defendant's Motion for Summary Judgement, p. 3; Docket Entry No. 79, Hankins Dep., p. 47, 50-55; Docket Entry No. 82, Whitten Dep., Exh. 5, p. 122; Docket Entry No. 82, Career Exploration Manual, p. 11 P 14).

[*7] So long as Guardian either declined to offer a Guardian product to a particular customer or the company could not meet the needs of a particular customer, the Whitten Agency typically granted the field representative permission to sell the customer a third party product. (Docket Entry No. 79, Hankins Dep., p. 46, 50-52, 54-55). Guardian states that this was Whitten's policy and not Guardian's. (Docket Entry No. 79, Kropf Dep., p. 81-82; Hankins Dep., p. 98-100). The kind of permission required to sell third party insurance policies is disputed by the parties. Guardian asserts that Whitten required written permission in all circumstances before a sale of third party products. (Docket Entry No. 77, Memorandum of Law & Facts in Support of Defendant's Motion for Summary Judgement, p. 3-4). Plaintiffs assert that field representatives who had been with Guardian for three

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[1] Upon a motion for summary judgment, the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. Duchon v. Cajon Co., 791 F.2d 43, 46 (6th Cir. 1986)app.*840 F.2d 16 (6th Cir. 1988)* (unpublished opinion). As will be discussed infra, under recent Supreme Court holdings, upon the filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to withstand a motion for directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52, 106 S. Ct. 2502, 91 L. Ed. 2d 202 (1986), particularly where there has been an opportunity for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 276 (1986). The Court concludes that under the applicable law there are material factual disputes. Thus, this section does not constitute a finding of fact under *Fed.R.Civ.P. 56(d)*.

[2] Rouillier entered into her first field representative agreement in 1991 and signed a new field representative agreement in 1995. Rouillier continued under that field representative agreement until her termination in 1998.

years or more were not required to clear outside business. (Docket Entry No. 82, Plaintiff EEOC's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 2-3; Whitten Dep., Exh. 5, p. 122, lines 16-25; Career Exploration Manual, Exh. 8).

In March 1997, Rouillier entered into an agreement with and began [*8] selling Canada Life insurance products. (Docket Entry No. 83, Plaintiff EEOC's Reply to Defendant's Statement of Undisputed Facts, P 16). It is undisputed that the Canada Life agreement directed that Rouillier would receive annualized commissions as well as eighty percent (80%) of the override commission otherwise payable to the Canada Life general agent. Id. at P 17.

On March 15, 1998, Rouillier's field representative agreement was terminated by Anthony Kropf, Guardian's regional director of recruiting. The reasons for Rouillier's discharge are disputed. In sum, Rouillier states that Guardian provided several explanations for her termination and that these explanations have changed over time. Rouillier asserts that Guardian has proffered the following explanations: (1) that Rouillier was discharged for placing business with an outside carrier (Docket Entry No. 82, Position Statement of Guardian, Exh. 11, p. 65 Cal. 288, 4 P 4; Exh. 12, Answer, Fifth Defense); (2) that Rouillier was discharged for actively participating and assisting Shawn Arseneau, another Guardian field representative, in diverting business away from Guardian (Docket Entry No. 82, Defendant's Responses [*9] to Plaintiff's First Set of Interrogatories, Interrogatory numbers 6, 10, and 11); and (3) that Rouillier was discharged because she encouraged Arseneau to divert business away from Guardian and because of the large amount of business she was placing outside Guardian with Canada Life (Docket Entry No. 77, Memorandum of Law & Facts in Support of Defendant's Motion for Summary Judgement, p. 13-14).

Guardian asserts that Rouillier's decrease in production for Guardian and the Whitten Agency's concerns about Rouillier's relationship with Canada Life, which developed in late 1997, lead the Whitten Agency to doubt Rouillier's loyalty to Guardian and the Whitten Agency and were the catalyst for Rouillier's termination. (Docket Entry No. 79, Hankins Dep., p. 86). Guardian asserts that the Whitten Agency discovered documents which lead Guardian and the Whitten Agency to believe that Rouillier had assisted Arseneau in selling Canada Life products to an individual despite the fact that Guardian was able to and did issue a similar policy to that individual. (Docket Entry No. 77, Memorandum of Law & Facts in Support of Defendant's Motion for Summary Judgement, p. 4-8). Guardian asserts that this [*10] was in violation of Rouillier's field representative agreement and grounds for dismissal.

Guardian asserts that Rouillier was involved with Arseneau in diverting business from Guardian. Arseneau was a young, inexperienced field representative who was "in the hole" to Guardian, meaning that he had drawn more compensation than he had produced in sales of Guardian products. (Docket Entry No. 79, Arseneau Dep., p. 69) As a result, Arseneau had been placed on suspension by the Whitten Agency by the end of 1997. Id. at 114-115. Suspending a field representative meant that the field representative's advance commission payments were discontinued until the field representative generated enough business to justify resuming the advancement of commissions. Id. Therefore, Arseneau's salary was not being paid and any commissions he was earning went to offset his debt from excess advances.

B. Conclusions of Law

"The very reason of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on *Rule 56*, Federal Civil Judicial Procedure and Rules (West Ed. 1989). Moreover, "district [*11] courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the opposing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Accord, Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the United States Supreme Court explained the nature of a motion for summary judgment:

> *Rule 56(c) of the Federal Rules of Civil Procedure* provides that summary 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.' By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there [*12] be no genuine issue of material fact.
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> As to materiality, the substantive law will identify which facts are material. Only

> disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.477 U.S. at 247-48 (emphasis in the original and added in part). Earlier the Supreme Court defined a material fact for *Rule 56* purposes as "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citations omitted).

A motion for summary judgment is to be considered after adequate time for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where there has been a reasonable opportunity for discovery, the party opposing the motion must make an affirmative showing of the need for additional discovery after the filing of a motion [*13] for summary judgment. Emmons v. McLaughlin, 874 F.2d 351, 355-57 (6th Cir. 1989). But see Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

There is a certain framework in considering a summary judgment motion as to the required showing of the respective parties as described by the Court in Celotex

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact …. We find no express or implied requirement in *Rule 56* that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.Celotex, 477 U.S. at 323 (emphasis deleted).

As the Court of Appeals explained, "the moving party bears the burden of satisfying *Rule 56(c)* standards." Martin v. Kelley, 803 F.2d 236, 239, n. 4 (6th Cir. 1986). The moving party's burden [*14] is to show "clearly and convincingly" the absence of any genuine issues of material fact. Sims v. Memphis Processors, Inc., 926 F.2d 524, 526 (6th Cir. 1991)(quoting Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)). "So long as the movant has met its initial burden of 'demonstrating the absence of a genuine issue of material fact,' the nonmoving party then 'must set forth specific facts showing that there is a genuine issue for trial.'" Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (quoting Celotex and *Rule 56(e)*).

Once the moving party meets its initial burden, the Court of Appeals warned that "the respondent must adduce more than a scintilla of evidence to overcome the motion [and] … must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)(quoting Liberty Lobby). Moreover, the Court of Appeals explained that:

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, 'where the record taken [*15] as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has has at least some discretion to determine whether the respondent's claim is 'implausible.'Street, 886 F.2d at 1480 (cites omitted). See also Hutt v. Gibson Fiber Glass Products, 914 F.2d 790, (6th Cir. 1990) ("A court deciding a motion for summary judgment must determine 'whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." quoting Liberty Lobby)).

If both parties make their respective showings, the Court then determines if the material factual dispute is genuine, applying the governing law.

> More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.
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> ***
>
> Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily [*16] implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for

> a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'Liberty Lobby, 477 U.S. at 248, 252, 106 S. Ct. 2505, 91 L. Ed. 2d at 211-212, 214 (citation omitted and emphasis added).

It is likewise true that:

> In ruling on a motion for summary judgment, [*17] the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. It has been stated that: 'The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute ….'Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427, 91 Ohio Law Abs. 602 (6th Cir. 1962) (citation omitted). As the Court of Appeals stated, "all facts and inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion." Duchon v. Cajon Company, 791 F.2d. 43, 46 (6th Cir. 1986)app.*840 F.2d 16 (6th Cir. 1988)* (unpublished opinion) (citation omitted).

The Court of Appeals further explained the District Court's role in evaluating the proof on a summary judgment motion

> A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record [*18] for some specific facts that might support the nonmoving party's claim. *Rule 56* contemplates a limited marshalling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshalling of evidence, however, does not require the nonmoving party to "designate" facts by citing specific page numbers. Designate means simply "to point out the location of." Webster's Third New InterNational Dictionary (1986).
>
> Of course, the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court requires. This notice can be adequately accomplished through a local court rule or a pretrial order.InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989)cert. denied*494 U.S. 1091, 110 S. Ct. 1839, 108 L. Ed. 2d 967 (1990)*. Here, the parties have given some references to the proof upon which they rely. Local Rule 8(b)(7)(b) and (c) require a showing of undisputed [*19] and disputed facts.

In Street, the Court of Appeals discussed the trilogy of leading Supreme Court decisions, and other authorities on summary judgment and synthesized ten rules in the "new era" on summary judgment motions

> 1. Complex cases are not necessarily inappropriate for summary judgment.
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> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
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> 3. The movant must meet the initial burden of showing 'the absence of a genuine issue of material fact' as to an essential element of the non-movant's case.
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> 4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
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> 5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed

verdict motion is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of law.'

6. As on federal directed verdict motions, the 'scintilla rule' applies, i. [*20] e., the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10. The trial court has more discretion than in the 'old era' in evaluating the respondent's evidence. The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, 'where the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible. [*21] Street, 886 F.2d at 1479-80.

The Court has distilled from these collective holdings four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party "clearly and convincingly" established the absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts under the governing law?

With these legal principles in mind, the Court addresses the legal standards governing the claims in this action.

1. Sex Discrimination

Here, Rouillier alleges that Guardian discharged her based upon her sex. Under *Title VII of the Civil Rights Act*, it is unlawful for an employer to discharge or otherwise discriminate against an individual with respect to compensation, terms, conditions or privileges of employment on the basis of the individual's race, color, religion, sex or national origin. *42 U.S.C. § 2000e-2* [*22] *(a)*. To support a claim of disparate treatment discrimination, the plaintiff must show that the protected trait, here gender, actually played a role or influenced the employer's decision toward the plaintiff. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

The plaintiff may prove discrimination in two ways. First, the plaintiff may put forward direct evidence that the defendant had a discriminatory motive in carrying out its employment decision. "Such evidence would take the form, for example, of an employer telling an employee, "I fired you because you are [a female]." Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998). Because there will rarely be a situation when direct evidence of discrimination is readily available and "there will seldom be an 'eyewitness' … to the employer's mental processes", plaintiffs claiming [disparate treatment] discrimination may, alternatively, establish their cases through inferential and circumstantial proof as established in *McDonnell Douglas.*Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983)). [*23] "The entire purpose of the McDonnell Douglas*prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." Price Waterhouse v. Hopkins, 490 U.S. 228, 271, 109 S. Ct. 1775, 1802, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring).

Under the indirect evidence method in McDonnell Douglas, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) the plaintiff must first establish a prima facie case of discrimination by showing (i) that the plaintiff belongs to a class protected under Title VII; (ii) that she was qualified for the position she held prior to discharge; (iii) that she suffered some type of adverse employment action and (iv) that she was replaced by an individual not within the protected class. 411 U.S. at 802. When the plaintiff lacks the fourth element of the McDonnell Douglas prima facie criteria, a plaintiff can also make out a prima facie case by showing, in addition to the first three elements, that for the same or similar conduct she was treated differently than similarly situated non-protected employees. Mitchell v. Toledo Hosp., 964 F.2d. 577, 582 (6th Cir. 1992). [*24]

Once these elements are proven, "the burden then … shifts to the defendant to articulate some legitimate, non-discriminatory reasons for the plaintiff's rejection. McDonnell Douglas, 411 U.S. at 802. "The defendant must clearly set forth, through introduction of admissible evidence," reasons for it's actions …. Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 255, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The defendant "need not persuade the [trier of fact] that it was actually motivated by the proffered reasons," 450 U.S. at 254, but "only produce admissible evidence which would allow the trier of fact to rationally conclude that the employment decision was not motivated by discriminatory animus." Id. at 257. The defendant's burden is, thus, one of production; not persuasion. See id. at 254-55. Although the burden of production shifts to the defendant, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against [her] remains at all time with the plaintiff." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). [*25]

The plaintiff must then be given "the full and fair opportunity to demonstrate that the employer's proffered reason [was pretextual for discrimination]." Burdine, 450 U.S. at 256. This burden now merges with the ultimate burden of persuading the Court that the plaintiff has been a victim of intentional discrimination. Id. "Especially relevant to such a showing would be evidence that [non-protected] employees involved in acts … of comparable seriousness … were nevertheless retained …. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). An employer's termination of an employee for conduct that would otherwise warrant termination can be actionable, if the employer's sanctions are applied in a discriminatory manner. Id. at 283.

"[This] three-part inquiry provides 'an allocation of the burden of production and an order for the presentation of proof in Title VII discrimination cases.'" Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 659 (6th Cir. 2000)(citing Hicks, 509 U.S. at 506). These stages help facilitate courts in reaching the ultimate [*26] question of discrimination. Id. at 660.

To support her claim of sexual discrimination, Rouillier contends that while male employees were allowed to hold outside contracts with third party insurance companies, Rouillier was terminated after being given an ultimatum to end her contract with Canada Life or be fired. In addition, Rouillier points out that when Arseneau, a young field representative on suspension for not bringing in enough commissions, was terminated for diverting business away from Guardian, he was given a brokerage agreement, (Docket Entry No. 82, Brokerage Agreement, Exh. 40),
but when Rouillier, a long-time employee and one of Whitten's top producers, was terminated she was told she could not transfer into a brokerage agreement. (Docket Entry No. 82, Memorandum, Exh 23).

Rouillier does not present direct evidence of discrimination by the defendant, thus she must establish her claims indirectly by applying the McDonnell Douglas prima facie paradigm. "The prima facie phase '… serves to raise a rebuttable presumption of discrimination by 'eliminating the most common nondiscriminatory reasons for the employer's treatment of the plaintiff.'" Cline, 206 F.3d at 660 [*27] (quoting Burdine, 450 U.S. at 253-54).

The undisputed facts establish that Rouillier is within the Title VII protected class and suffered an adverse employment decision by the defendant. Rouillier, however, asserts that for the same or similar conduct, she was treated differently than similarly-situated male employees. In response, Guardian disputes that Rouillier can establish a prima facie case for discrimination because she cannot establish that she was qualified to be a Guardian field representative and she cannot identify any male employee to whom she was similarly situated in all relevant respects who was treated more favorably.

a. Was Rouillier "Qualified" to be a Guardian Field Representative?

To show that Rouillier was qualified, Plaintiffs must prove that Rouillier was performing her job "at a level which met [her] employer's legitimate expectations." McDonald v. Union Camp Corp., 898 F.2d 1155, 1160 (6th Cir. 1990) (citing Huhn v. Koehring, 718 F.2d 239, 243 (7th Cir. 1993)). In determining whether the Plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, [*28] the Court must examine the Plaintiff's evidence separately and independent from the nondiscriminatory reason produced by the employer as its reason for termination. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 660-61 (6th Cir. 1999).

In Cline, the Sixth Circuit concluded that the employer's nondiscriminatory reason for discharging the plaintiff cannot serve as the basis for holding that the Plaintiff was not qualified and was not satisfactorily performing her job. Id. at 661. An employee is not required at the prima facie stage to disprove the employer's proffered reason for discharging the employee. Id. at 664. Assessing whether an employee is meeting her employer's legitimate expectations is determined by looking at the employee's successful work record prior to the onset of the incidents which caused the employee's discharge. Id. at 663-64.

Guardian contends that although she was a highly competent professional in the insurance sales business, her

activities in allegedly diverting business away from Guardian disqualified her from maintaining her status as a field representative with Guardian. This [*29] argument has been rejected by the Sixth Circuit in Cline. To assess whether Plaintiff was qualified for the position, this Court must examine the Plaintiff's work record prior to the alleged issues with Canada Life.

Guardian has admitted that Rouillier performed her responsibilities as a field representative in accordance with the requirements of her field representative agreement up until her discharge. (Docket Entry No. 82, Defendant's Responses to Plaintiff's First Request for Admissions, Exh. 2, Admission No. 3). Whitten admitted that Rouillier was producing at a decent level at the time of her discharge, that Rouillier was bringing in good money to the Agency's bottom line, and that she was one of the Agency's best producers. (Docket Entry No. 82, Whitten Dep., Exh. 5, p.154, lines 17-20, 25, p. 155, lines 1-2). Rouillier was not discharged for failure to obtain annual production requirements as published yearly by Guardian. (Docket Entry No. 82, Kropf Dep., Exh. 7, p. 98, lines 12-25). The comments written by Whitten and Hankins on Rouillier's Producer Profiles in the months following the commencement of her Canada Life contract were positive. (Docket Entry No.82, Producers [*30] Profiles, Exh. 16-17). This Court concludes that the employment record of Rouillier is sufficient to qualify Rouillier for the field representative position and fulfills the third element of the prima facie case for discrimination.

b. Was Rouillier Treated Worse than Similarly-Situated Males?

The EEOC and Rouillier contend that there are genuine issues of material fact that Rouillier was treated worse that similarly-situated males in the Whitten Agency who held outside contracts with third party insurance companies. The Sixth Circuit explained in Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992) that to establish a prima facie claim of disparate treatment alleging that a "comparable non-protected person was treated better," it is fundamental that the plaintiff show that she and the non-protected comparable were "similarly-situated" in all relevant respects. Id. at 583. "Thus, to be … similarly situated the two comparables must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating [factors] that would distinguish their conduct [*31] or the employer's treatment of them for it." Id.Further, their conduct must have been of "comparable seriousness" to the conduct for which the plaintiff was discharged. Id. at 584.

Rouillier asserts that similarly-situated male employees to whom her treatment should be compared are the male field representatives who work for Whitten Agency and who were allowed to keep their third party contracts while Rouillier was given the choice to terminate her contract with Canada Life or be fired. Guardian disputes that these individual are similarly-situated because Guardian argues that these male field representatives were not suspected of using their relationships with an outside company to divert business from Guardian.

Guardian asserts that the only similarly-situated male that can be used for comparison is Arseneau and Guardian further asserts that he was treated worse than Rouillier because he was not given the choice to terminate to be fired, he was just fired. Rouillier responds to this argument by asserting that Arseneau was terminated because he had failed to meet his minimum requirements of production under his field representative agreement. Arseneau was suspended [*32] for failing to meet these production requirements, he then placed business outside Guardian without permission when he had only been a field representative for one year, and he lied about his activities when questioned by management.

The Sixth Circuit warned in Ercegovich v. Goodyear Tire and Rubber Co., 154 F.3d 344 (6th Cir. 1998), that Mitchell should not be read so narrowly as to require a plaintiff to be identically situated to the non-protected employee in every single aspect of their employment. Id. at 353. With such a narrow reading, "a plaintiff whose job responsibilities are unique to his or her position will never successfully establish a prima facie case …." Id. "The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be … similarly situated;" … they only need be similar in "all of the relevant aspects." Id. at 352. The relevant aspects for comparison are that the two individuals "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or [*33] mitigating [factors] that would distinguish their conduct or the employer's treatment of them for it." Mitchell, 964 F.2d at 584.

Here, all the males working for the Whitten Agency had the same supervisor and were subject to the same field representative agreement. All of the males in the office to whom Rouillier compares herself, had third party contracts and many had contracts with Canada Life. Arseneau had a third party contract, but he was on suspension for failure to produce enough commissions under his field representative agreement. This factor may not make him similarly-situated to Rouillier who was not on suspension and was fulfilling her field representative agreement. Since this is a differentiating factor "that would distinguish their conduct or the employer's treatment of them for it"

the Court concludes that in this respect Arseneau is not similarly-situated for comparison. Mitchell, 964 F.2d at 584.

As to the other males used for comparison, the Court concludes that there are genuine issues of material fact which exist that prevent the Court from determining whether the other males in the Whitten Agency with third party contracts [*34] are similarly-situated. In order to determine whether the other males are similarly-situated, the factual dispute regarding Rouillier's activities in diverting business away from Guardian must be resolved. Rouillier's involvement or non-involvement with Arseneau and the diversion of business has direct bearing on whether Rouillier breached her field representative agreement and whether the EEOC and Rouillier have presented a prima facie case of sex discrimination.

If Plaintiffs have presented a prima facie case then the burden shifts to the Defendant to present their reason for Rouillier's termination. Defendant offers Rouillier's involvement in diverting business away from Guardian as the reason for her termination. Since material factual disputes exist regarding the reasons for Rouillier's termination, summary judgement is not appropriate. The Plaintiff must be given a "full and fair opportunity to demonstrate that the employer's proffered reason [was pretextual for discrimination]," especially when "such a showing would be evidence that [non-protected] employees involved in acts … of comparable seriousness … were nevertheless retained …" Burdine, 450 U.S. at 256; [*35] McDonald, 427 U.S. at 282. Therefore, the Court concludes that genuine material factual disputes exist, and thus, summary judgement is inappropriate.

For the reasons set forth above, the Court concludes that the Defendants' motion for summary judgment should be denied.

An appropriate Order is filed herewith.

Entered this the 22nd day of October, 2002.

WILLIAM J. HAYNES, JR.

United States District Judge

ORDER

In accordance with the Memorandum filed herewith, Defendant's motion for summary judgment (Docket Entry No. 76) is **DENIED.**

It is so **ORDERED.**

ENTERED this 22nd day of October, 2002.

WILLIAM J. HAYNES, JR.

United States District Judge