IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

FILED
JUL 15 2002
LARRY W. PROPES, CLERK
U. S. DISTRICT COURT

Equal Employment Opportunity Commission,

Plaintiff,

vs.

Li'l Cricket Store, Inc.,

Defendant.

Civil Action No. 6:01-3871-25AK

REPORT OF MAGISTRATE JUDGE

This matter is before the court on the defendant's motion for summary judgment. In the complaint, the plaintiff Equal Employment Opportunity Commission ("EEOC") alleges religious discrimination in violation of Title VII.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS

The EEOC brought this action against the defendant Li'l Cricket Store, Inc., ("Li'l Cricket"). Specifically, the EEOC alleges that Li'l Cricket failed to accommodate the religious beliefs and request for accommodations of an employee, Mary M. Booker ("Booker"), by requiring her to work on Sundays and terminating her. Booker was the manager of the Li'l Cricket convenience store in Greenville, South Carolina, from January 1999, to May 11, 1999, when Li'l Cricket purchased the store. Prior to that time, Booker had served as the manager of the store for 13 years when it was owned by EZ Serve.

Booker was a member of Macedonia Baptist Church and actively involved with the church. She regularly attended Sunday morning church services and prayer meetings (Booker dep. at 5-8; Dowell dep. at 5-7). Sunday worship at Macedonia starts with Sunday School at 9:30 a.m. and ends at approximately 1:30 p.m. (Dowell dep. at 22). Additionally, Booker was a member of her church's choir (Logan dep. at 25-28; Dowell dep. at 12). Booker testified that she believed she should worship the Lord the whole day on Sunday (Booker dep. at 21). While employed by Li'l Cricket, Booker worked for three supervisors, Mark Davis ("Davis"), Marie Kimenau ("Kimenau"), and Les Swanger ("Swanger"). Booker testified she asked them to excuse her from work on Sunday so she could attend worship services (Booker dep. at 25-27, 32). On some occasions when the store had a personnel staffing shortage, Booker has worked on Sunday.

Li'l Cricket's Policy and Procedure Manual indicates Sunday work is a requirement: "Employees should be prepared to work 7 days, in a workweek, if business and staffing requires additional days or shifts" (pl. mem. ex. A). Li'l Cricket's President, Gordon Zuber ("Zuber") testified that he frequently puts written warnings in supervisors' mailboxes about this attendance policy (Zuber dep. at 35). Li'l Cricket's employment application asks potential employees to state whether "there is any reason you cannot be available any day of the week. . . " (pl. mem. ex. D). Kimenau asked Zuber to grant Booker a religious accommodation so she could attend church on Sunday, but Zuber refused, noting that Booker had signed the application (Kimenau dep. at 29).

Prior to her termination, Booker worked on the following Sundays: February 14, 1999, February 21, 1999, and February 28, 1999. Zuber issued several warnings to Booker's supervisor at that time (Davis) about Li'l Cricket's weekend work sharing policy (Zuber dep. at 33). Booker testified at her deposition that Davis never told her about these warnings and she was unaware of them (Booker dep. at 50-5 1). On April 5, 1999, Kimenau became Booker's supervisor. At that time, Zuber delivered a "Final Warning" for Booker

to Kimenau about managers sharing weekends off. Kimenau testified that if she did not take immediate action, Booker would be terminated for violation of the Sunday work sharing policy (Kimenau dep. at 25-26; pl. mem. ex. F).

On April 6, 1999, Kimenau met Booker for the first time and talked to her about weekend work (Kimenau dep. at 27). During this meeting, Booker told Kimenau that she needed a religious accommodation to attend church on Sunday (Kimenau dep. at 27). Kimenau relayed Booker's request for a religious accommodation to Zuber (Kimenau dep. at 29). Zuber denied the request and wrote on the Final Warning, "Marie [Kimenau], it's not their choice. I've been through this before!" (pl. mem. ex. F; Zuber dep. at 33). Kimenau, who was only temporarily supervising Booker's store, took no further action. She testified that she "really wasn't concerned with it because I was going to turn the problem over to somebody else" (Kimenau dep. at 9). On April 26, 1999, Kimenau was reassigned to other duties.

On April 17, 1999, an employee quit her job, leaving only two employees who were permanently assigned to work at Booker's store (Booker dep. at 38; Frady dep. at 41-42). On May 3, 1999, Swanger became Booker's supervisor (pl. mem. ex. C). On May 6, 1999, Swanger visited Booker's store and asked to review the store schedule. The schedule indicated that Booker would work on Saturday, May 8th , but not Sunday, May 9th. Swanger objected to her absence on Sunday and he told her he expected her to be at work. Booker testified she told him that because she goes to church on Sundays, she needed to have Sundays off. He responded that she needed to work Sundays and he told her there was no exception to the Li'l Cricket policy. Booker responded by calling Senior Vice President Terry Lehman ("Lehman"). She told him that she was more than willing to work six days a week if she could only have Sundays off (Booker dep. at 34). Lehman told her, "Ma'am, if you cannot work Sundays, we don't need you" (Booker dep. at 34). At his deposition, Lehman admitted that at the time he spoke to Booker he understood that, absent

an undue hardship, Li'l Cricket had a specific duty to accommodate her religious beliefs(Lehman dep. at 116). Lehman testified that he informed Swanger of the company's legal duty to accommodate Booker. After her discussions with Swanger and Lehman, Booker scheduled Frady to work a double shift on Sunday, May 9, 1999 (Booker dep. at 37; Frady dep. at 37).

On Tuesday, May 11, 1999, Swanger confronted Booker and fired her, giving her no explanation (Booker dep. at 53-55). In Booker's personnel file, Swanger wrote that he terminated Booker because she "changed schedule, assign (sic) other employees to work schedule without supervisor's approval. Repeated offense, refused to work any weekends" (def. mem. ex. 33). However, on Booker's termination papers, Swanger wrote that Booker was terminated for "Not Notifying Supervisor, You Are getting Someone from Another store to fill in for You! 5/2/99; 5/8/99" (def. mem. ex. 33; Booker dep. at 54; pl. mem. ex. K). Swanger cited the company's procedural manual, which provides that: "You may never work at another store unless your supervisor tells you to." (pl. mem. ex. 0 and P).

APPLICABLE LAW

Rule 56(c) of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The judgment sought 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 judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that she is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case

under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in her pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). "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." *Anderson*, 477 U.S. at 248. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action that he bears the burden of adducing at a trial on the merits.

ANALYSIS

Religious discrimination claims may be brought under two theories: (1) "disparate treatment" claims and (2) "failure to accommodate" claims. *See Chalmers v. Tulon Co.*, 101 F.3d 1012, 1017 (4th Cir.1996). Disparate treatment claims are analyzed

under the burden shifting framework of *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 1973), while accommodation claims are reviewed to determine, among other things, whether the employer can accommodate the employee's needs without undue hardship. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996).

Although Title VII similarly classifies religion, sex, and race as illegal considerations, the definition of "religion" in the statute places it in a special category. "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). Because this definition includes a requirement that an employer "accommodate" an employee's religious expression, an employee is not limited to the disparate treatment theory to establish a discrimination claim. An employee can also bring an action based on the theory that the employer discriminated against her by failing to accommodate her religious conduct. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

To prove a claim under the disparate treatment theory, an employee must demonstrate that the employer treated her differently than other employees because of her religious beliefs. The evidentiary burdens placed on the employee under this theory mirror those placed on employees alleging employment discrimination based on race or sex. Accordingly, a plaintiff, alleging disparate treatment with respect to her discharge, satisfies her burden at the summary judgment stage if she establishes that her job performance was satisfactory and provides "direct or indirect evidence whose cumulative probative force supports a reasonable inference that [the] discharge was discriminatory." *See Lawrence v. Mars, Inc.*, 955 F.2d 902, 905-06 (4th Cir.), *cert. denied*, 506 U.S. 823 (1992). If the employee cannot provide direct evidence, she can utilize a burden-shifting scheme similar to the one the Supreme Court articulated in *McDonnell Douglas*, to develop an inferential

case. *Lawrence*, 955 F.2d at 905-06. This might consist of evidence that the employer treated the employee more harshly than other employees of a different religion, or no religion, who had engaged in similar conduct. *See Moore v. City of Charlotte*, 754 F.2d 1100, 1105-06 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985). If the employee presents such evidence, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions towards the employee. *Id.* at 1105. The employee is then required to show that the employer's proffered reason is pretextual, and that the employer's conduct towards her was actually motivated by illegal considerations. At all times, the ultimate burden of persuasion lies with the employee. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

While Li'l Cricket contends Booker was terminated for failing to follow company procedure regarding the reassigning of employees without permission, there is evidence that Li'l Cricket terminated Booker because she refused to work on Sundays. In her personnel file, it was noted she was a repeat offender who refused to work Sundays (pl. mem. ex. L). Lehman testified he was aware that Booker needed an accommodation to attend church on Sundays (Lehman dep. 39). Booker testified that Lehman told her, "Ma'am, if you cannot work Sundays, we don't need you"(Booker dep. at 34). The Supreme Court recently clarified a plaintiff's burden at the pretext stage in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court made clear that, under the appropriate circumstances, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully retaliated." *See EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852 (4th Cir. 2001)(citing *Reeves*). If no rational fact finder could conclude that the employer's job action was retaliatory, then the case should not proceed beyond summary judgment. *See id.* at 854. However, in the absence of evidence requiring such a conclusion, a prima facie case and evidence of pretext raises a sufficient inference of retaliation to entitle a plaintiff

to survive a motion for summary judgment. There is sufficient evidence to permit a factfinder to conclude that Li'l Cricket's asserted justification for terminating Booker was false. Accordingly, summary judgment is inappropriate as to this claim.

To establish a prima facie religious accommodation claim, Booker must establish that (1) she has a bona fide religious belief that conflicts with an employment requirement; (2) she informed Li'l Cricket of this belief; and (3) she was disciplined for failure to comply with the conflicting employment requirement. *See Chalmers*, 101 F.3d at 1019. The burden then shifts to Li'l Cricket to demonstrate that it could not accommodate her religious needs without undue hardship to its business. *See id.*

"[A]n employee who is terminated for refusing to work on Sundays can maintain an accommodation claim even if other nonreligious employees were also fired for refusing Sunday work, and even though the employer's proffered reason for the discharge - the refusal to perform required Sunday work – is legitimate and nondiscriminatory (because the Sunday work rule applies to all employees, regardless of religion). *Id.* at 1018. If the employee has notified the employer of his religious need to take Sundays off, the burden rests on the employer to show that it could not accommodate the employee's religious practice without undue hardship. *See EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 118 (4th Cir.) (en banc) (definition of religion under Title VII requires employers to make reasonable accommodations, short of undue hardship), *cert. denied*, 488 U.S. 924 (1988).

In *Brown v. Polk County*, 61 F.3d 650, 654 (8th Cir.1995), *cert. denied*, 516 U.S. 1158, the Eighth Circuit rejected the defendant's argument that because the plaintiff never explicitly asked for accommodation for religious activity, he could not claim the protections of the Title VII. The Court stated that the defendant requires "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Id.* Furthermore, the refusal even to attempt to accommodate an employee's

religious requests, prior to the employee's violation of employment rules and sanction, provides some indication, however slight, of improper motive on the employer's part. *Chalmers*, 101 F.3d at 1020-1021.

On April 6, 1999, Kimenau met with Booker and Booker told her that she needed a religious accommodation to attend church on Sunday (Kimenau dep. at 27). Kimenau relayed Booker's request for a religious accommodation to Zuber (Kimenau dep. 28-29). Kimenau testified that she told Zuber that two other employees would rather work weekends but Zuber replied that it was company policy (Kimenau dep. 29;def. mem. exs. 19 and 20). Zuber denied the request and wrote on the Final Warning, "Marie, it's not their choice. I've been through this before!" (pl. mem. ex. F; Zuber dep. at 33). Clearly, there is evidence that Booker requested a religious accommodation in April and Li'l Cricket did not respond to her request. Furthermore, there is evidence that she was subsequently terminated in May for failing to work on Sundays. Pursuant to *Chalmers*, there is evidence of an improper motive on Li'l Cricket's part and summary judgment is inappropriate on this claim.

CONCLUSION AND RECOMMENDATION

Based on the foregoing, it is recommended that the defendants' motion for summary judgment be denied.

William M. Catoe
United States Magistrate Judge

July 15, 2002

Greenville, South Carolina