EVLYN M. BRENNAN v. DONNA SHALALA

Civil Action No. DKC 98-2938

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

2000 U.S. Dist. LEXIS 4895

March 20, 2000, Decided

DISPOSITION: [*1] Defendant's motion for summary judgment GRANTED in part and DENIED in part.

COUNSEL: For EVLYN M. BRENNAN, plaintiff: Leizer Zalman Goldsmith, Law Office, Washington, DC.

For EVLYN M. BRENNAN, plaintiff: Roger A. Hayden, II, Pasternak & Fidis, P.A., Bethesda, MD.

For DONNA SHALALA, defendant: George Levi Russell, III, Office of the U. S. Attorney, Baltimore, MD.

JUDGES: DEBORAH K. CHASANOW, United States District Judge.

OPINION BY: DEBORAH K. CHASANOW

OPINION

MEMORANDUM OPINION

Plaintiff EvLyn Brennan brings this suit against Donna Shalala, Secretary of the Department of Health and Human Services alleging discrimination during her employment at the Food and Drug Administration's Center for Veterinary Medicine. Plaintiff alleges violations of Title VII of the Civil Rights Act and the Age Discrimination and Employment Act based upon age and gender discrimination and retaliation. The issues are fully briefed, and the court now rules without a hearing. Local Rule 105.6. For the reasons stated below, the court will GRANT in part and DENY in part Defendant's motion for summary judgment.

I. Background

Plaintiff began as an employee at the Center for Veterinary Medicine (CVM) [*2] in March 1987 at the age of forty-six. She was initially hired as a GS-5 secretary to work under the supervision of Dr. David Wagner. At all times relevant to this case, Dr. Stephen Sundlof was the Director of CVM. Dr. Sundlof had a Deputy Director, Dr. Michael Blackwell, and together they oversaw a number of Offices within CVM, including both the Office of Science and the Office of Surveillance. In turn, each Office had a Director and Deputy Director who oversaw the Divisions. Dr. Wagner, Plaintiff's supervisor, was the Director of the Division of Animal Research within the Office of Science. Dr. Norris Alderson was the Director of the Office of Science, and Dr. Charles Barnes was his Deputy Director. All of these individuals played a role at some point in Plaintiff's complaint.

Plaintiff worked without problem in the Division of Animal Research from 1987 until 1994. In the fall of 1993, all of the secretaries at the Division level, including Plaintiff, were promoted to the GS-6 level. At that time, Plaintiff had a good, friendly relationship with Dr. Wagner. During the course of her employment, Dr. Wagner always gave Plaintiff positive reviews. In September 1994, Dr. Wagner reviewed [*3] Plaintiff's per-

formance and gave her an overall rating of "Excellent," or four on a scale of one to five. However, Plaintiff had during that year served on detail to Dr. Alderson's Office of Science, and Dr. Alderson, Dr. Wagner's supervisor, upgraded Plaintiff's performance appraisal to the highest rating of five, or "Outstanding." According to Plaintiff, Dr. Wagner expressed resentment over the upgrade, and this incident was the first example of problems between Plaintiff and Dr. Wagner.

In June 1995, Plaintiff injured her ankle while at work and took a medical leave of absence for both that injury and an unrelated surgery during the summer of 1995. Plaintiff returned in August 1995. Upon her return, Dr. Wagner showed dissatisfaction with Plaintiff's use of leave. While before her leave of absence, Dr. Wagner had reluctantly agreed to assist Plaintiff in seeking a promotion to GS-7, after her return he told her he no longer approved of her promotion. He told Plaintiff that he was concerned that she was abusing her leave and that she was not loyal to her job, citing her extended absence and her interest in receiving details to other offices. Plaintiff also alleges that Dr. Wagner [*4] acted in a "hostile" manner towards her. Plaintiff told Dr. Wagner that she believed he was trying to replace her with a younger secretary. By mid-September 1995, Plaintiff met with Dr. Alderson to complain about the alleged harassment by Dr. Wagner. Dr. Alderson recommended that she visit the Department of Employee Relations regarding the problems.

At the end of September, Plaintiff requested a detail to the Office of Science as Dr. Alderson's secretary, a GS-7 position. She sent multiple emails to Dr. Alderson expressing interest in the position. Dr. Wagner, however, refused to approve the detail, telling Plaintiff that he could not manage in her absence because of a shortage of secretaries at CVM. Plaintiff never received a response from Dr. Alderson, and the position was instead given to a younger female, Linda Goodman, first as a detail and then a permanent position in late 1995. [1]

> 1 Defendant states that Plaintiff told a manager by email that she was not interested in the permanent position. However, the email message, provided as an exhibit in the Reply brief, is dated May 1997, and therefore must refer to a different position in the Office of Science.

[*5] On October 16, 1995, Plaintiff first contacted the EEOC office at CVM to seek guidance. Plaintiff states that her purpose at that time was not filing a complaint, but "looking for options, recommendations, how do I -- how do I go about getting out of a bad situation." Defendant's Motion Exhibit 1 at 43. Plaintiff also spoke with Dr. Sundlof, Director of CVM, and Dr. Blackwell, Deputy Director of CVM. Within days, Plaintiff received a call from Dr. Blackwell, informing her that she would be placed on detail in the Office of Surveillance's Division of Compliance in order to remove her from the allegedly discriminatory environment. Plaintiff initially was assigned on detail as secretary for the Director of the Division of Compliance.

Just after Plaintiff moved to the Division of Compliance, Dr. Barnes, the Deputy Director of the Office of Science, hired a new secretary for a GS-7 position. Plaintiff did not receive this promotion either. Instead, the Office of Science hired Yvette Whitney on a temporary basis in late 1995, and in February 1996, Dr. Barnes hired Kim Weitzel on a permanent basis. Both women are in their twenties. [2]

> 2 Plaintiff set forth the facts of Dr. Barnes' hiring of a new secretary for the first time in her Opposition.

[*6] On November 20, 1995, Plaintiff filed an administrative complaint of discrimination based upon age and sex and retaliation by Drs. Wagner and Alderson. Plaintiff alleges that during that time Dr. Alderson retaliated against her by a "campaign of character assassination." Dr. Alderson told other supervisors and the EEO counselor assigned to the case that Plaintiff was a "troublemaker" and a poor performer, despite his earlier rave performance reviews. Drs. Wagner and Barnes concurred in their statements to supervisors and the EEO counselor. [3] Around this time, Dr. Alderson also told managers at a meeting that "individuals that filed EEO complaints should not be rewarded." Benedict Affidavit P 3.

> 3 Drs. Wagner, Alderson, and Barnes all told the EEOC investigator that Plaintiff's performance as secretary was poor. The investigator found these evaluations to be out of sync with other supervisors' and colleagues' evaluations from CVM and indicated skepticism about the credibility of their statements:
>
> > Conversely, when interviewing her immediate supervisors, Dr. Wagner and Dr. Barnes, and, to a lesser extent, Dr. Alderson, about complainant's performance, they consistently commented that she performed poorly. These comments are interesting, given the fact that her last 2 EPMS ratings were Outstanding and Excellent, respectively. What is also interesting is that if she had performed as poorly as they stated, why wasn't she told about it earlier and given

> an opportunity to improve? There is no record of any meeting between complainant and supervisor in which her performance was ever discussed and remedies (additional training, help or future poor rating) recommended. In fact, there is no paper evidence to support any claims by CVM management that complainant was a poor performer.

[*7] During 1996, Plaintiff and Defendant attempted to enter into a settlement agreement regarding her complaint. Although Plaintiff signed four proposed agreements, administrators at the Food and Drug Administration refused, or at least failed, to sign each proposal. Dr. Sundlof, the Director of CVM, did sign at least one of the settlement agreements. Plaintiff sought a permanent position, rather than a detail, as secretary in the Division of Compliance in the Office of Surveillance. In August 1996, Toni Wooten, a woman in her twenties, received the permanent position of Division Secretary. In October 1996, Plaintiff filed a second administrative complaint, alleging discrimination and retaliation in Defendant's failure to finalize a settlement agreement.

In January 1997, Plaintiff accepted a GS-7 position with Dr. Linda Tollefson, the new Director of the Office of Surveillance. Plaintiff alleges that Defendant originally told her that the position would be permanent, but after a month in the position, she was notified that in fact she was only on detail to the GS-7 position, and therefore the promotion was temporary. In June 1997, Plaintiff received an award from one of her supervisors, [*8] Dr. Marissa Miller in the Office of Surveillance. However, in September 1997, Plaintiff received a failing performance appraisal from Dr. Tollefson. Furthermore, she received paperwork indicating that her temporary promotion had ended and she would revert to the GS-6 level. On November 10, 1997, at the recommendation of her supervisors and her therapist, Plaintiff applied for disability retirement for major depression. Defendant granted the application, effective March 28, 1998. Plaintiff filed this complaint on August 25, 1998.

II. Standard of Review

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The movant, then, bears two burdens. First, the movant must [*9] show that no genuine issues of material fact remain for the fact finder to determine at trial. Second, the movant must show that the law is in his favor.

Conversely, the non-movant must demonstrate that genuine issues of material fact exist. *See Anderson*, 477 U.S. at 248-49. This burden "is particularly strong when the non-moving party bears the burden of proof." *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990). A fact is material for summary judgment purposes if, when applied to the substantive law, it affects the outcome of the litigation. *See Anderson*, 477 U.S. at 248. A non-movant cannot create a genuine issue of material fact by resting upon her own mere allegations or denials contained in her pleadings, Fed. R. Civ. P. 56(e), nor can she create a dispute of fact by relying upon "mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Instead, in order for a genuine issue of material fact to exist, there must be sufficient evidence upon which a jury could return a verdict in the non-movant's favor. *See Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991). [*10]

In employment discrimination cases, courts are often wary of summary judgment because the defendant's intent is often the crucial element in such cases. *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 254 n.8, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir. 1987) ("Summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense."). Summary judgment is appropriate in such cases, however, where any factual dispute does not rise to the level of a "genuine issue of material fact." *See Boarman v. Sullivan*, 769 F. Supp. 904, 906 (D. Md. 1991). Summary judgment should be granted when a party "fails to make a showing sufficient to establish the existence of a showing sufficient to establish the existence of an essential element to that party's case, on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

III. Discussion

One of the difficulties in addressing the merits of [*11] Plaintiff's claims is that the nature and specific allegations of her claims have evolved throughout the course of the dispute and the accompanying litigation. Although her complaint did contain several allegations of failure to promote, Plaintiff did not provide some of the particular instances until her Opposition to the Motion

for Summary Judgment. In her complaint, Plaintiff raises allegations of discrimination based upon gender, yet her Opposition only addresses failure to promote based upon retaliation and age.

As a threshold matter, only so-called adverse actions are actionable under the employment discrimination statutes. *Munday v. Waste Management*, 126 F.3d 239, 243 (4th Cir. 1997). Although Plaintiff has enumerated a long list of grievances in the treatment she received at CVM, the Fourth Circuit has "consistently focused on the question of whether there has been discrimination in what could be characterized as ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and compensating." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). Accordingly, the focus of this court's inquiry must be the denial of promotions [*12] at the heart of Plaintiff's complaint. *See* Plaintiff's EEOC complaint ("The issues involved with my charges are centered around being denied a promotion to a GS-7 level."). The Opposition appears to narrow the claims at issue to four instances of failure to promote to a GS-7 position: (1) the failure to promote to a detail position as Dr. Alderson's secretary; (2) the failure to promote her to a permanent position in the Office of Science, either as Dr. Barnes' secretary or Dr. Alderson's secretary; (3) the failure to make her assignment to the Division of Compliance a permanent position; and (4) the failure to make her promotion to secretary of the Office of Surveillance permanent. These are the only claims that the court will address as they are the only ones involving adverse employment actions.

Where Plaintiffs rely upon circumstantial rather than direct evidence, the courts may employ the familiar McDonnell Douglas burden shifting framework under both Title VII and the ADEA. *See Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 731 (4th Cir. 1996) (ADEA); *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994) (Title VII). Under the McDonnell Douglas proof [*13] scheme, the plaintiff has the initial burden of proving a prima facie case of discrimination. In a typical failure to promote case, a plaintiff must prove by a preponderance of the evidence that: (1) she is in a protected class; (2) she applied for an open position; (3) she was qualified for the position; and (4) a failure to promote occurred under circumstances that raise a reasonable inference of unlawful discrimination. *See Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999). If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory explanation which would support a finding that unlawful discrimination was not the cause of the employment action. *Id.* If the defendant meets this burden of production, the plaintiff bears the ultimate burden of proving that she has been the victim of intentional discrimination. *Id.*

Plaintiff has failed to present a prima facie case of gender discrimination, specifically by not meeting the fourth prong of the prima facie case. All of the positions that she claims were discriminatorily refused to her were given to women. *See* [*14] *Etefia v. East Baltimore Comm. Corp.*, 2 F. Supp. 2d 751, 764 (D. Md. 1998) (no prima facie case of gender discrimination where one position was filled by someone of the same gender as plaintiff and other was not filled). In fact, Plaintiff has set forth absolutely no evidence of discriminatory animus with respect to gender or circumstances which would give rise to an inference of discrimination. Therefore, the court will GRANT summary judgment for Defendant with respect to any claims of gender discrimination.

Plaintiff has met the burden of presenting a prima facie case of age discrimination and retaliation. In her retaliation claim, Plaintiff's activity that put her in a protected class is the filing of an EEOC complaint. *See Nichols v. Comcast Cablevision*, 84 F. Supp. 2d 642, 2000 WL 222187, at *12 (D. Md. 2000). Plaintiff is also in a protected class for age discrimination because she was over the age of forty at the time of the adverse actions. *See Burns*, 96 F.3d at 731. With respect to the second prong, Plaintiff has presented evidence that she was at all times relevant to this litigation seeking a promotion to the GS-7 level. [*15] [4] She sent an email to Dr. Alderson requesting the detail to his office; she told several CVM supervisors that she wanted a GS-7 position in the Office of Science; she signed the memorandum of agreement in order to become a permanent secretary at the Division of Compliance; and she told her supervisor that she wanted a permanent position in the Office of Surveillance. In order to satisfy the third prong, Plaintiff presented evidence that she was qualified for the positions because of her years of experience at CVM and her excellent evaluations. In sum, Plaintiff has met the burden of the first three prongs of the prima facie case by demonstrating that she is in a protected class (both in age and protected activities), that she applied for the GS-7 positions, and that she was qualified for the positions.

4 Plaintiff alleges that she was during this period registered for all promotions to the GS-7 level by the "open continuous" process, which provided all selecting managers with a list of eligible candidates.

[*16] The fourth prong requires that Plaintiff set forth evidence that the rejection was under circumstances that give rise to an inference of discrimination. With respect to age discrimination, Plaintiff has met that burden by showing that at least three of the four positions were ultimately filled by much younger women. Furthermore,

Plaintiff alleges at least two of the women were new hires and therefore had less experience than Plaintiff. *See Burns*, 96 F.3d at 731 (equating the fourth prong with showing that "plaintiff was replaced by someone of comparable qualifications outside the protected class"). With respect to the retaliation claim, Plaintiff has met that burden by showing that the denials of promotions occurred after her filing of an EEOC complaint. The juxtaposition of the two events is enough to satisfy the prima facie case. In *Williams v. Cerberonics, Inc.*, 871 F.2d 452 (4th Cir. 1989), the Fourth Circuit held:

> Appellant's proof of a causal connection between the protected activity and her discharge essentially was that she was fired after her employer became aware that she had filed a discrimination charge. While this proof far from [*17] conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality.

Williams, 871 F.2d at 457. Plaintiff has satisfied the prima facie requirements for the four claims of denial of promotions based upon age and retaliation.

The burden then shifts to Defendant to set forth nondiscriminatory reasons for the failure to promote. The court finds that Defendant articulated a nondiscriminatory reason for each of the failures to promote. With respect to the denial of the detail to Dr. Alderson's secretary, Defendant argues that Dr. Wagner faced a shortage of secretarial assistance and therefore could not spare Plaintiff. Defendant also states that Dr. Wagner felt that Plaintiff had already been on enough details to other offices. With respect to the denial of the permanent promotion to Dr. Barnes' or Dr. Alderson's secretary, Defendant argues that it understood that Plaintiff did not want these positions because she was in the Office of Surveillance by then and did not want to return to the allegedly hostile environment at Office of Science. With respect to the permanent position as GS-7 [*18] secretary at the Office of Surveillance under Dr. Tollefson, Defendant presented evidence that Plaintiff did not perform satisfactorily after leaving the Office of Science.

The court finds that Defendant also articulated a nondiscriminatory reason for failing to promote Plaintiff to the permanent position of a GS-7 secretary at the Division of Compliance. Defendant states that the "settlement agreement was not implemented because it was not signed by the Director of EEO who did not agree with the terms." Motion at 32. While Plaintiff is correct in stating that Defendant could have promoted her independent of the settlement agreement, the court finds the proffered reason to be a sufficient explanation for the failure to promote. Plaintiff's supervisors in the Office of Surveillance could have easily believed that it would be inappropriate to promote her while the Agency negotiated a settlement agreement. Although perhaps the proffered reason for the non-promotion is ill-advised, it is still not a discriminatory reason under the ADEA or Title VII unless motivated by retaliation or age. *See Oates v. District of Columbia*, 262 U.S. App. D.C. 360, 824 F.2d 87, 93 (D.C. Cir. 1987) [*19] (although cronyism is an "ill-informed motivation, or even an illegal motivation," it still constitutes a nondiscriminatory reason under Title VII); *Odom v. Frank*, 3 F.3d 839, 850 (5th Cir. 1993) ("Again, misfeasance, malfeasance, or nonfeasance--without nexus to age or race--is not actionable here."). Thus, the court finds that these nondiscriminatory reasons are sufficient to shift the burden back to Plaintiff.

At this point, Plaintiff must show by a preponderance of the evidence that the legitimate reasons offered by Defendant were not the real reasons for the adverse actions, but merely a pretext for intentional discrimination. An employer is entitled to summary judgment unless the plaintiff has adduced sufficient evidence both that the reason was false, and that discrimination was the real reason for the adverse action. *Vaughan v. The Metrahealth Cos.*, 145 F.3d 197, 202 (4th Cir. 1998).

Plaintiff has presented no challenge to the reasons offered by Defendant for three of the failures to promote. First, Plaintiff does not dispute that Dr. Wagner denied her a detail as Dr. Alderson's secretary because he needed her secretarial assistance in his [*20] office. In fact, Plaintiff provides an additional nondiscriminatory reason for the denial, that Dr. Wagner refused to allow her the detail as a part of a "power struggle with Dr. Alderson." Opposition Exhibit N. Second, with respect to the failure to promote because of the pending settlement agreement, Plaintiff does not dispute that Defendant did not promote her because of the ongoing settlement negotiations. Assertions as to what should have been done or could have been done are irrelevant in determining Defendant's intent. "Therefore, if the plaintiff offers nothing to disprove the defendant's nondiscriminatory explanations, the explanations' weakness alone is insufficient to create an issue of pretext." *Burns*, 96 F.3d at 732. Finally, Plaintiff does not dispute that Dr. Tollefson found her performance to be poor in 1997. On this ground alone, the court could grant summary judgment for the Defendant on three of the failures to promote.

Plaintiff has also failed on most claims to raise a genuine issue of fact as to whether discrimination was the real reason for the failure to promote. With respect to her claim under the ADEA, Plaintiff has presented no evidence [*21] other than the ages and years of experi-

ence of the promoted secretaries to demonstrate discriminatory animus by Defendant. For example, the record contains no evidence of statistics supporting allegations of discrimination or derogatory remarks by supervisors. *See Malina v. Baltimore Gas & Elec. Co.*, 18 F. Supp. 2d 596, 603-04 (D. Md. 1998). Plaintiff has not provided information on the size of the applicant pool for the promotions, which makes it difficult for the court to determine the significance of the decision to hire much younger women for the positions. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994). Finally, Plaintiff has never produced evidence that those selected for the promotions were not qualified for the positions. The record simply does not bear out Plaintiff's claim that Defendant penalized her for being older than the other applicants. Therefore, the court will GRANT summary judgment for Defendant on all claims of age discrimination.

With respect to retaliation, mere evidence of knowledge and timing are not sufficient evidence to counter nondiscriminatory reasons for the failure to promote. *Williams*, 871 F.2d at 457. [*22] Plaintiff has provided no other evidence in the claims of failure to promote to a detail in the Office of Science, to a permanent position in the Division of Compliance, or to a permanent position in the Office of Surveillance. In combination with the absence of a dispute over the nondiscriminatory reasons for these actions, the court will GRANT summary judgment on the claim of retaliatory failure to promote in these three instances.

However, the court finds that there is a triable issue as to whether the failure to promote Plaintiff to a permanent position in the Office of Science (as secretary to Dr. Alderson or Dr. Barnes) stemmed from retaliation. Plaintiff disputes Defendant's proffered reason that the hiring managers did not believe Plaintiff wanted to return to the Office of Science. Plaintiff provided evidence that in fact she did want to return to the Office of Science in a permanent GS-7 position and told CVM supervisors so. Plaintiff also provided evidence of two remarks by Dr. Alderson, the Director of the Office of Science, that demonstrate discriminatory intent. Dr. Alderson admitted in his deposition that he called Plaintiff a "troublemaker" when speaking to other managers. [*23] Furthermore, Dr. Alderson told a group of managers that "individuals that filed EEO complaints should not be rewarded." The court finds that the latter comment in particular shows a discriminatory animus, and therefore raises a triable issue as to whether the failure to promote over which Dr. Alderson had an influence was motivated by retaliation. Therefore, the court will DENY the motion for summary judgment on this claim.

IV. Conclusion

For the reasons stated above, the court will GRANT in part and DENY in part Defendant's motion for summary judgment. The case will proceed on a claim of failure to promote to a permanent GS-7 secretary position in the Office of Science based upon retaliation in violation of Title VII. A separate Order will be entered.

DEBORAH K. CHASANOW

United States District Judge

Date: March 20, 2000