UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:98-CV-488-H

NICHELLE RODGERS PLAINTIFF

V.

APPLE SOUTH, INC. DEFENDANT

MEMORANDUM OPINION

This is an employment discrimination and retaliation case. Defendant, Apple South, Inc. (Apple) has moved for summary judgment on all of Plaintiff's claims. Plaintiff, Nichelle Rodgers, sued under KRS § 344.010, et seq.; 42 U.S.C. § 2000, et seq. (Title VII); and 42 U.S.C. § 1981. Defendant argues that Plaintiff's demotion was based on legitimate business reasons, not discrimination or retaliation. Plaintiff claims that the employer's justifications are a pretext. After carefully examining the evidence, this Court finds no basis to support Plaintiff's claim. Defendant is entitled to summary judgment.

Plaintiff, an African American, began working for Apple in May of 1994. A good employee, she was promoted to Key Hourly Employee, then Manager in Training (MIT). In order to complete her manager training, she attended Enrichment Week, a series of training classes for assistant and associate managers. During a class on customer relations, participants were given a series of hypothetical situations and asked to discuss how the manager on duty should handle each problem. One of the hypothetical situations was:

Two white customers come into the restaurant and they get a black gay waiter, and the

> customers ask to speak to a manager. And the waiter goes to get the manager, the manager comes over, and the two white customers tell the manager they want a pretty young white girl to wait on them.

Plaintiff claims that she was the first to raise her hand for this hypothetical, but the instructor did not call on her. According to Plaintiff, the instructor, Christina Moraitis, told the trainees that the appropriate response would be for the manager to wait on the table or to get the requested server to wait on them. Plaintiff was offended by this response and discussed her concern with Arlie Harger, a coordinator of Enrichment Week. Ms. Harger told Plaintiff that the instructor's response was inappropriate. Plaintiff asked Ms. Harger to keep their conversation confidential.

At the end of Enrichment Week, Plaintiff failed her final exam. Ms. Harger, Mike Liedberg (former Director of Corporate Training) and Toni Jones (former Director of Employee Relations) met with Plaintiff to discuss her performance. During this meeting, they also talked about Plaintiff's concerns with the instructor's response. Because Plaintiff failed her exam, the Training Department recommended that she not be promoted to Assistant Manager. Despite this recommendation, Apple promoted Plaintiff. She was placed in a store managed by the Area Supervisor, Mario Cernadas.

Plaintiff began work as a manager in late April, 1996. In June, Cernadas received a report that Plaintiff had discussed a pornographic movie with employees on one occasion and made reference to an employee's genitals on another. Although Plaintiff now denies making the comments, at the time, she signed a statement admitting having made them and received a written warning. Shortly thereafter, Cernadas discovered a substantial cash shortage on Plaintiff's closing shift. While there is no allegation that Plaintiff stole any money, managers are responsible for any cash shortage on their shift. Plaintiff was issued another written warning.

This time she was also suspended for two days with pay and demoted to an hourly position at the same rate of pay. Cernadas reached the decision to discipline Plaintiff in this way after a discussion with Ms. Jones. Plaintiff refused to accept the demotion and did not return to work.

II.

To establish a prima facie case of retaliation, Plaintiff must show that (1) she engaged in protected activity, (2) Defendant was aware of the activity, (3) Defendant caused Plaintiff to suffer an adverse employment action, and (4) there was a connection between the adverse employment action and the protected activity. *See Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). Once Plaintiff establishes a prima facie case, Defendant must prove a legitimate business reason for the action. If Defendant does this, Plaintiff must establish that Defendant's reason is only a pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (describing the burden shifting analysis under Title VII). Plaintiff can establish pretext by showing that Defendant's reason (1) has no basis in fact, (2) did not actually motivate the discharge, or (3) was insufficient to motivate the employment action. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

Under Title VII, Plaintiff must demonstrate that she participated in a Title VII proceeding or opposed a violation of Title VII. Internal communications with corporate employees do not constitute a Title VII proceeding. *See Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989). Therefore, Plaintiff's conversations with Ms. Harger, Ms. Jones and Mr. Liedberg do not qualify as participation in such a proceeding.

The conversations do, however, entitle Plaintiff to retaliation protection for opposing a

violation of Title VII.[1] Allegations that an individual employee is racist will not trigger statutory protection, but allegations that a company policy or practice unlawfully discriminates will. *See id.* It is a close call whether Plaintiff was protesting Ms. Moraitis' tolerance of racial prejudice or what Plaintiff perceived to be Apple's policy. Nevertheless, the Court concludes that a jury could find that Plaintiff reasonably believed that she was contesting an unlawful employment practice.[2] After all, Ms. Moraitis was an instructor hired by Apple to train new managers. It might be reasonable to assume that any opinions that Ms. Moraitis expressed during training represent the company not merely herself.

Plaintiff has also established that the employees responsible for demoting her were aware of her opposition activity. Ms. Jones was present during the discussions regarding Plaintiff's complaint at Enrichment Week. Mr. Cernadas' knowledge at the time, and how he obtained it, remains somewhat in dispute. For purposes of summary judgment, however, it should be assumed that he was also aware of Plaintiff's complaint.

The more difficult question is whether Plaintiff can demonstrate a connection between her protected activity and her adverse employment action. The evidence showing such a connection is quite weak. Plaintiff presents no direct evidence of retaliation. Moreover, the two employers involved in her discharge, Jones and Cernadas, are both in a protected class.[3] No

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[1]Plaintiff argues that 42 U.S.C. § 1981 provides broader protection than Title VII. The Court need not address this issue since it finds that Plaintiff's activities fall within Title VII.

[2]Defendant argues that Apple's policy is not unlawful and Ms. Moraitis either misstated it or Plaintiff misheard it. The argument gains support from other evidence of record. Apparently, Ms. Hager informed Plaintiff that Ms. Moraitis' statements, even if made, did not represent company policy. This may be true, but as long as Plaintiff lodged her complaint with a good faith belief that Apple was engaged in an unlawful employment practice, Plaintiff is entitled to protection.

[3]Ms. Jones is African American, and Mr. Cernadas is of Hispanic descent.

evidence suggests that either has a racial bias. It seems counterintuitive that one minority would retaliate against another for challenging an alleged racist company policy. Under these circumstances, the connection between Plaintiff's protected activity and her demotion is tenuous. Nonetheless, the close proximity in time, less than two months, and the parties' knowledge, may be enough, absent any contrary evidence, to suggest a causal connection. *See Wrenn*, 808 F.2d at 500 (connection may be demonstrated by proximity in time between the adverse action and the protected activity). As such, the Court finds that Plaintiff has established a prima facie case.

The burden now shifts to Defendant to provide a non-discriminatory rationale for its actions. Defendant has met this burden by offering a legitimate business reason. Defendant says that it demoted Plaintiff after discovering a cash shortage within days of sexual harassment complaints against Plaintiff, who had been in her management position less than two months. The action ultimately taken was neither drastic nor irrevocable. Defendant told Plaintiff that she must return to an hourly position after her two day, paid suspension but that she could continue at the same rate of pay and receive additional training to become a manager again.

Defendant's legitimate business reason shifts the burden once again to Plaintiff to establish that Defendant's reason was nothing more than a pretext for retaliation. Plaintiff attempts to challenge Defendant's explanation in two ways. First, she disputes the underlying facts of the charges against her. She denies making any comments that could be construed as sexual harassment. This denial is refuted, however, by her disciplinary record. Plaintiff signed a counseling form admitting that she had made the comments. Moreover, Plaintiff's file contains two letters Cernadas received regarding her behavior. Even if Plaintiff never made harassing comments, if Cernadas demoted her in part because he believed that she had, that would be a

non-discriminatory reason for discharge. The important issue here is whether Defendant had a reasonable basis for believing the allegations against Plaintiff to be true. Though Plaintiff disputes those events now; earlier she admitted them. Therefore, Defendant had every reason to believe the allegations. Plaintiff cannot show pretext on this basis.

Plaintiff also labels the sexual harassment rational as a "post hoc rationalization" for her demotion. She points out that Cernadas did not mention it in his affidavit explaining why he demoted her and that he testified in his deposition that he would not have demoted her absent the cash shortage. The Court cannot agree with Plaintiff's characterization of Cernadas' testimony. Cernadas' statements are consistent with Apple's position in this suit. His statements reaffirm that the cash shortage was the immediate cause of Plaintiff's demotion, but they do not indicate that Cernadas considered the appropriate response to Plaintiff's shortage in a vacuum. It goes without saying that when an employee has received a written reprimand, that reprimand will necessarily factor in to future disciplinary decisions.[4] The very purpose of a written reprimand is to alert an employee that she is moving closer to an adverse employment action. None of these facts suggest that Defendant concocted the reasons for its employment action or that the stated reasons were not its true motivation.

Plaintiff also implies that she was framed for the cash shortage. She points out that other people in the store had access to both keys to unlock the safe and that it is suspicious that Cernadas phoned her about the shortage before 7am. She claims the bank document indicating the shortage was ambiguous and that if Apple had really believed that she was responsible for

[4]This is not like the cases in which the employer claims to have fired an employee for excessive absences and later argues that the employee's numbers were also too low.

the shortage, they would have deducted the money from her pay checks.

The Court does not believe that a reasonable jury would question Defendant's credibility based on these facts. There is simply no evidence from which a jury could conclude that Cernadas framed her. There is no motive. Plaintiff and Cernadas enjoyed a positive working relationship prior to her demotion. If Cernadas wanted to get rid of Plaintiff, he would have terminated her rather than demoting her. If another employee took the money during Plaintiff's shift, the shortage would still be Plaintiff's responsibility. Defendant never alleged that Plaintiff stole the money. In fact, if that had been the case, she would have been terminated. Instead, she was disciplined for mismanagement.

Plaintiff also argues that the cash shortage was insufficient to motivate her demotion. She claims that no other employee has been demoted for a single cash shortage. Defendants do not dispute this, but they contend that this view ignores the other factors at play in Plaintiff's case. First, other employees have been terminated for cash shortages. Plaintiff was demoted instead because, as a new manager, Apple thought that it may not have provided her adequate training on money management. The demotion enabled the company to offer Plaintiff further training without risking more assets.

Plaintiff's situation was also unique because she had recently been reprimanded for sexual harassment. When Cernadas found the cash shortage, having had other difficulties with her, he thought that action was required. So, he took the relatively mild step of demoting Plaintiff, keeping her at the same rate of pay, providing additional training with the possibility of returning to the position of manager. Plaintiff has not offered evidence from which a reasonable jury could conclude that a non-protected employee with substantially similar conduct was treated

differently. She has offered no evidence of another employee with a cash shortage who had been accused of sexual harassment nor of a manager who had failed his or her management exam then had a substantial cash shortage within the first few months on the job.

Plaintiff cannot establish that Apple's offered rationale for her demotion is a pretext. The only evidence she has of a connection between her complaint and her demotion is the proximity in time. This connection is weak and easily outweighed by Apple's non-discriminatory explanation for its action. The Court finds that Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

III.

In order to establish a prima facie case of racial discrimination, Plaintiff must demonstrate that (1) she is a member of a protected class, (2) she was subjected to an adverse employment action, (3) she was qualified for her position, and (4) she was replaced by a person outside of the protected class or that a comparable non-protected person was treated better. *See Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 658 (6th Cir. 1999).

Plaintiff is unable to make a prima facie case for racial discrimination.[5] While she is a member of a protected class who suffered an adverse employment action, Plaintiff was not replaced by anyone, let alone someone from a non-protected class. Moreover, she cannot establish that a non-protected person was treated better under similar circumstances.[6] As

[5]Defendants cited statements in their brief allegedly made by Plaintiff during settlement discussions. The Court disregarded these statements as it was improper for Defendants to have made them. Statements made in an attempt to settle a case should not later be used against the party who made them.

[6]Plaintiff attempts to prove differential treatment based on the fact that Ms. Moraitis called on three white MITs rather than her in response to the hypothetical discussed above. There is no causal connection between the alleged failure to call on Plaintiff and her demotion. Ms. Moraitis did not participate in the decision to demote Plaintiff, and there is no evidence of racial bias against Ms. Jones or Mr. Cernadas, the two people who decided to demote Plaintiff. As such, the Court does not consider that incident in evaluating Plaintiff's claim.

discussed above, Plaintiff's situation was unique. When Cernadas discovered the cash shortage after Plaintiff's shift, she was a new manager who had failed her management test and recently been accused of sexual harassment. Under these circumstances, she cannot be compared to other managers with one cash shortage but no other problems. Further, because she failed her manager test and had multiple complaints against her during her first two months as manager, Plaintiff has not established that she was qualified for her position. Moreover, the same analysis concerning Defendant's legitimate business reasons for acting and the absence of any evidence showing pretext apply to the racial discrimination claim with equal or greater force than to the retaliation claim. Plaintiff has not presented evidence from which a reasonable jury could find discrimination.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Having read Defendant's motion for summary judgment and Plaintiff's response, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment is SUSTAINED, and Plaintiff's complaint is DISMISSED WITH PREJUDICE.

This is a final and appealable order.

This ___ day of April, 2000.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record