IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

JANET B. VENABLE,

Plaintiff,

v.

Action No. 88-0836-R

SAMUEL R. PIERCE, JR.,
SECRETARY, DEPARTMENT
HOUSING AND URBAN DEV_____

Defendant.

MEMORANDUM OPINION

The plaintiff brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., charging racial discrimination in failure to promote. The matter is currently before the Court on the defendant's motion to dismiss or in the alternative for summary judgment. For the reasons stated below, the motion for summary judgment will be granted.

Factual Background

The plaintiff, a black woman, was hired by the Richmond office of the Department of Housing and Urban Development (HUD) in 1979 as a GS-5. She is currently a GS-6 Housing Program Assistant in the Multifamily Programs Branch of the Housing Development Division. Prior to September, 1985, there were three GS-12 positions in that Branch, called "Multifamily Housing Representatives" (MHRs). In September, 1985, one of the MHRs was transferred, and the HUD Regional Office instructed the Richmond

office not to fill the vacancy. Later, after one of the two remaining MHRs was permanently detailed to another division, and the single remaining MHR was unable to handle the entire workload, the Branch supervisor asked for permission to fill a second MHR position. That position was filled by transferring Robert Smith, a white male GS-12, from another Branch within the Housing Development Division. The gist of the plaintiff's case is her allegation that, in the past, MHR positions have been filled by promoting GS-6's, and that the decision to fill this position through transfer of a GS-12 from another Branch, rather than by opening it up to competition among GS-6's, was in fact a pretext to ensure that she would not have a chance to compete for the position.

In April, 1986, the plaintiff filed an administrative complaint through HUD, alleging the above facts, as well as an earlier, similar incident involving the MHR slot, and a history of promoting white GS-6's but not black GS-6's. Adjudication of this complaint resulted in a decision of no discrimination, based on the fact that Venable was not qualified for the position she sought. Defendant's Exhibit E. This lawsuit followed.

In her compliant, the plaintiff states three grounds for alleging violation of Title VII. The first is the incident described above, in which she was passed over for promotion to a higher position. She next alleges that HUD management has engaged in a pattern and practice of discrimination in the filling of this position over the past four years. Finally, she

alleges that she has suffered reprisals as a result of filing her complaint. She argues that all of these actions constitute a violation of Title VII. She demands promotion to the higher position, a retroactive pay increase commensurate with this position, and an end to such discriminatory practices.

The plaintiff filed this suit pro se on December 12, 1988. On March 24, 1989, the defendant filed the instant motion to dismiss or in the alternative for summary judgment. On March 29, this Court ordered that the plaintiff file a response to this motion within eleven days. On April 10, 1989, the plaintiff filed a pleading styled "Response to Order," consisting of a declaration by plaintiff herself, and a bundle of unordered, unexplained documents. By the time of the pretrial conference on April 17, the plaintiff had retained an attorney to represent her. In spite of this fact, the plaintiff filed -- pro se -- another bundle of documents on April 21, also styled "Response to Order." Following a hearing on May 2, 1989, this Court ordered the parties to submit briefs commenting on the effect of Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (May 1, 1989), decided the previous day. These briefs have been received and considered, and the motion is ripe for decision.

Failure to promote

In order to make out a prima facie case of discrimination under Title VII, the plaintiff must show: (1) that she belongs to a protected class; (2) that she applied for and was qualified for

a job for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of her qualifications. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). Once these elements have been established, the burden shifts to the defendant to "produce evidence that the plaintiff was rejected, or someone else preferred, for a legitimate nondiscriminatory reason." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If such a reason is articulated, the plaintiff may attempt to rebut it by showing it to be a pretext. Id. at 255.[1]

The plaintiff is a black woman. She made known to her supervisor that she was interested in the MHR position. She was rejected. The position remained open. None of these facts is in dispute. The defendant disputes the plaintiff's qualification for the position. The plaintiff alleges that, in the past, MHR positions have been filled by promoting GS-6's, and that she was, therefore, qualified for the position. This contention is supported by the Notice of Position Vacancy of August 6, 1987,

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[1] When this Court ordered rebriefing based on Hopkins, it had available to it only news media reports on the impact of the case. In the meantime, the Court has not only had the opportunity to read and reflect on the opinion itself, but to apply it in the case of Adams v. Frank, C.A. No. 88-0637-R (E.D. Va., May 10, 1989). As the present case is purely a "pretext" and not a "mixed motive" case, the burden of proof on the defendant is governed by Burdine, supra, and not Hopkins. Adams, slip op. at 6, citing Hopkins, 57 U.S.L.W. at 4474.

listing the MHR position as a GS-7. Plaintiff's Exhibit 5, page 3. This evidence is sufficient to present a prima facie case of racial discrimination.

Under Burdine, the defendant must now offer evidence of a nondiscriminatory reason for this employment decision. It does this through the affidavit of Mary Ann Wilson, the director of the Housing Development Division responsible for filling the MHR position in September, 1985. Defendant's Exhibit A. Ms. Wilson states that because of the backlog that had accrued in the absence of the second MHR, and because a promoted GS-6 would require far more training and supervision than a reassigned GS-12, she and G. William Thomas, manager of the Richmond office, decided to fill the position by reassignment. This, the defendant contends, was the nondiscriminatory reason for the decision to place transfer Robert Smith into the position, rather than opening it up to competition among the plaintiff and similarly situated GS-6's.

The defendant has provided evidence of a nondiscriminatory reason for its employment decision. Therefore, in order to escape summary judgment, the plaintiff must offer evidence in rebuttal, demonstrating this reason to be a pretext. This she has not attempted to do. In spite of the fact that the plaintiff had retained an attorney prior to the filing of her second "Response to Order," she did not enlist his help in preparing a coherent pleading. Nor did the plaintiff herself attempt to make sense to the Court of the mass of documents she stapled together

and submitted. Although the Court has reviewed these documents, it is unable to discern from among them one which might serve to introduce a question of fact as to whether the proffered nondiscriminatory reason was a pretext. In view of this state of affairs, the Court will grant the defendant's motion for summary judgment on the cause of action for failure to promote.

Pattern and practice

In her complaint to this Court, the plaintiff alleges that the HUD- Richmond office has engaged in a pattern and practice of discrimination in filling the MHR position over the past four years. In her administrative complaint, she specified that Genon Thorpe, Jean Hall, Stuart Seiler, Walter White, and Selena Venson all held the position she now holds. Of these people, the first three moved into supervisory positions; all three are white. White, Venson and the plaintiff have not been promoted; all are black. Defendant's Exhibit E. In addition, the plaintiff provides the affidavits of Flora J. Harris, Gwendolyn M. Hendrick, Cephas N. Blount, Claudia Dorofeeff, and Felicia Womack, all alleging discrimination of one sort or another on the part of the defendant or other supervisory employees at HUD-Richmond. Plaintiff's Exhibit 10.

The Supreme Court has held that, in order to demonstrate a pattern or practice of discrimination, a plaintiff must:

> prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. [She must] establish by a preponderance of the evidence that racial discrimination was the company's standard

> operating procedure -- the regular rather than the unusual practice.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977). In Tate v. Dravo Corp., 623 F. Supp. 1090, 1103 (W.D.N.C. 1985), the court held that "the testimony of seven former black employees of the Defendant regarding their individual experiences" to be "too few, too unrelated, too sporadic, and too isolated" to infer a pattern and practice of discrimination. That court went on to note that such anecdotal evidence is generally only credited by courts when accompanied by statistical evidence. Id., see also Holsey v. Armour & Co., 743 F.2d 199, 214 (4th Cir. 1984).

The plaintiff has not alleged facts sufficient to constitute a pattern and practice of discrimination. Although her administrative complaint contains reference to three whites who were promoted and three blacks who were not, she never elaborates on this "pattern" with affidavits or documentary evidence in response to the motion for summary judgment. The affidavits she does provide are from other employees, not all of them from her Branch. They detail only isolated and sporadic instance of discrimination. None of this evidence raises a genuine issue of material fact. Summary judgment will therefore be granted with respect to the plaintiff's claim of a pattern and practice of discrimination.

Retaliation

The third count of the plaintiff's complaint alleges acts of retaliation following the filing of her complaint. The defendant alleges that this count should be dismissed because it was not raised in the initial administrative complaint, nor have administrative remedies been separately exhausted with respect to this count. The Fifth Circuit has held that a retaliation claim is ancillary to the original claim, and therefore need not have been the subject of a separate complaint. Gottlieb v. Tulane University of Louisiana, 809 F.2d 278, 284 (5th Cir. 1987); Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981). The Fourth Circuit has explicitly reserved decision on this issue. Aronberg v. Walters, 755 F.2d 1114, 1115 (4th Cir. 1985). Even assuming, arguendo, that the Fourth Circuit would adopt the reasoning of the Fifth Circuit on this issue, summary judgment is appropriate in favor of the defendant on the plaintiff's retaliation claim.

In her Response to Order, the plaintiff presents only a series of interoffice memos from management denying her leave, once to vote, and a second time to attend a Fair Practices/Human Rights. Plaintiff's Exhibit 8. Because the defendant takes the position that this claim is barred for failure to exhaust administrative remedies, it does not attempt to rebut the claim factually. However, in each case, the memo in question contains a convincing reason for the denial of leave, and the plaintiff presents no evidence of pretext, for example, that similarly

situated co-workers were granted such leave. The plaintiff has therefore failed to raise a genuine issue of material fact with respect to her retaliation claim, and summary judgment is appropriate.

Conclusion

Because the plaintiff has failed to raise a genuine issue of material fact with respect to any of her claims, summary judgment is hereby GRANTED and judgment is hereby ENTERED in favor of the defendant.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

HELEN C. WILSON,

Plaintiff,

v.

CELIE SMITH, ET. AL.,

Defendants.

C.A. 3:90CV00655

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court on consideration of the Title VII portion of Plaintiff's claim. Plaintiff's § 1983 claim was tried to a jury on July 9, 1991. The jury found that Plaintiff Helen Wilson was not discriminated against on the basis of her race. Following trial, the Court now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Rules of Civil Procedure.

I. FINDINGS OF FACT

1. Plaintiff Helen C. Wilson ("Wilson") is a black female who was formerly employed as a licensed practical nurse at the Beaumont Learning Center ("Beaumont"), a prison for adolescent offenders operated by defendant Virginia Department of Youth and Family Services (formerly the Department of Corrections).

2. Wilson began her employment as a nurse with Beaumont in March of 1979. By letter dated December 16, 1990, Wilson resigned her employment effective December 31, 1990. She took early retirement as of that date.

3. During Wilson's employment at Beaumont, she worked various shifts, but she was primarily assigned to work the "first shift" or "night shift" which lasts from 11:00 p.m. to 7:00 a.m.

4. Wilson preferred to work the night shift.

5. Wilson's first supervisor was Mrs. Jonnie B. Earle. On at least one occasion, Mrs. Earle experienced difficulty with Wilson's attendance. Defendant's Exhibit 3.

6. Wilson's second supervisor was Mrs. Diane Gittman. In 1983, while serving under Mrs. Gittman, Wilson received a Group Two disciplinary action for failure to report to work for an assigned shift. Defendant's Exhibit 7.

7. On October 26, 1987, Mrs. Celie Smith ("Smith"), a white female, became Wilson's immediate supervisor. Although Smith had considerable nursing experience, she had never been a supervisor.

8. During Smith's tenure, the Beaumont infirmary was chronically under-staffed and under-funded. These conditions made it very difficult to provide 24 hour nursing coverage.

9. In an effort to provide continuous medical care to the students at Beaumont, Smith instituted an "on call" policy and strictly enforced the existing sick leave and vacation policies. These measures were not favorably received by the over-worked nursing staff. Although Smith assigned herself considerable call

duty, this did not relieve the problem.

10. Smith's inexperience, strict enforcement of policies, and management style made Smith unpopular with the nursing staff.

11. In an effort to supplement the staff, Smith hired a number of new nurses, many of whom were black. For a variety of reasons, these new nurses did not remain at Beaumont.

12. In her capacity as Wilson's immediate supervisor, Smith had the responsibility of scheduling Wilson's work and of evaluating her performance as an employee of Beaumont. Smith also had the authority to initiate disciplinary action against Wilson, if appropriate.

13. Smith routinely gave Christmas and birthday cards to her staff in an effort to promote comradery. These cards were generally appreciated. For example, Wilson thanked Smith for a thoughtful 1990 birthday card.

14. In 1988, Smith sent Wilson a birthday containing a depiction of a watermelon. Defendant's Exhibit 17. This card was commercially produced. Smith did not intend any racial comment giving Smith the card. A reasonable person would not find the card racially offensive.

15. Wilson interpreted Smith's management practices as racially motivated. On January 17, 1989, Wilson filed a complaint with the Virginia Office of Equal Employment Services. In April 1989, EEO Program Specialist Alexis Thornton ("Thornton") conducted an investigation of Wilson's claim.

16. Thornton concluded that there was evidence of racial

discrimination. Plaintiff's Exhibit 15. This conclusion was based on five incidents. First, Thornton found that Smith made a comment to Wilson that a patient's hair was so "nappy that she (Smith) didn't want to touch it." Plaintiff did not present any evidence of this incident at trial. Second, Thornton found Smith was unjustifiably concerned about Wilson's failure to shake down a thermometer. Third, Thornton was concerned that Wilson was asked to do cleaning. Defendant proved at trial that all the nurses were instructed to clean. Thornton admitted at trial that she was unaware of this policy. Fourth, Thornton was concerned about the birthday card already discussed. Finally, Thornton found that Smith's call policy was unfair. However, the Defendant proved at trial that all the nurses were obligated to take call.

17. Thornton did not talk to the Director of Beaumont, nor did she review the official employment policies governing nurses. Thornton indicated that it was unfair that Wilson was switched to the night shift. She was unaware that Wilson requested the night shift and had previously worked the night shift.

18. On May 21. 1990, the Office of Equal Employment Services wrote a letter to Wilson advising her that they had found evidence of discrimination, but that Wilson had indicated that she was not "currently experiencing any difficulties in the workplace." Plaintiff's Exhibit 16.

19. Smith has never been accused of racism by anyone other than Wilson. There is no evidence that she treated black nurses or patients any differently than white nurses.

II. CONCLUSIONS OF LAW

1. Wilson's charge of racial discrimination is without merit. There is no indication that Wilson was asked to work more shifts than white nurses, or was subjected to harsher treatment with regard to scheduling. Instead, conditions at Beaumont forced Smith to adopt practices which caused Smith to be disliked by all the nurses.

2. There is no evidence that Smith ever altered Wilson's time records to deny her pay. Rather, the evidence indicates that Smith corrected the time sheet of anyone who mistakenly signed in the wrong place.

3. Giving Wilson the "watermelon" birthday card did not constitute racial harassment.

4. The investigation by the Virginia Equal Employment Service was cursory in nature. Its conclusion is not supported by the facts. The investigation apparently assumed that any "unfair" treatment of Wilson was racially motiviated. In fact, Wilson was treated no differently than the other nurses.

5. In her action under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), alleging disparate treatment, it is Wilson's burden to show that the Defendant intentionally discriminated against her because of her race, resulting in some adverse employment action. In this case, Wilson alleges that she was compelled to resign because of the hostile, racist environment

created by Smith. This is essentially a constructive discharge theory. See Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985).

6. In order to establish constructive discharge, Wilson must prove that: (1) the employer deliberately made employment conditions so intolerable as to force the employee to leave, and (2) that working conditions, viewed objectively, would force any reasonable person to leave the employment. Bristow at 1255. Wilson's evidence establishes neither of these conditions, so her case must be dismissed.

7. The Court agrees with the finding of the jury that Wilson was not the victim of discrimination based upon her race. There was no environment of racial animus at Beaumont. Rather, external factors created a difficult and strained work environment for all the employees, regardless of their race.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law to all counsel of record.

DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE