IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARGE JARRELLS,

ORDER

Plaintiff,

00-C-0433-C

v.

SELECT PUBLISHING, INC.

Defendant.

- -

This is a civil action for monetary relief, brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34. Plaintiff Marge Jarrells contends that defendant Select Publishing, Inc. discriminated against her because of her race and age when it did not hire her for a telemarketer position. Jurisdiction is present under 28 U.S.C. § 1331.

Both parties have filed motions for summary judgment. Because I conclude that no reasonable jury could find that defendant discriminated against plaintiff, I will deny plaintiff's motion for summary judgment and grant defendant's motion.

Before I set forth the undisputed facts, a word is required regarding plaintiff's

proposed findings of fact. First, most of plaintiff's proposed findings were conclusions rather than factual propositions. For example, plaintiff's second proposed finding of fact provides in part: "Select Publishing, Inc. Discriminates in their hiring practices regarding Age and Race." Whether defendant discriminated against plaintiff is the ultimate question in this case. The purpose of the proposed findings of fact is to give plaintiff the opportunity to present evidence that *supports* her contention of discrimination. Waldridge v. American Hoechst Corp. 24 F.3d 918, 923 (7th Cir. 1994) (proposed findings of fact are "intended to alert the court to precisely what factual questions are in dispute and point the court to the specific evidence in the record that supports a party's position"). Simply restating the allegations in the complaint does not the aid the court.

Second, plaintiff did not make clear which documents were intended to be her proposed factual findings. Plaintiff has one page labeled "Proposed Findings of Fact," but she has also sprinkled factual allegations on cover pages of her exhibits. Some of these allegations were sworn and signed, but many of them were not. Third, plaintiff continues to make factual allegations in her brief that she has not included in her proposed findings of fact.

This court sent plaintiff a copy of its procedures to be followed on motions for summary judgment on two occasions. In addition, on December 27, 2002, the court mailed plaintiff a memorandum for pro se litigants regarding summary judgment motions. In an

order dated November 15, 2002, I explained in detail how to propose facts properly. Despite all of these instructions, plaintiff has continued to disregard the court's summary judgment procedures. However, because plaintiff is litigating pro se and because I believe this case is best resolved on the merits rather than on technical deficiencies, I have looked past plaintiff's proposed findings of fact and examined the record directly to determine whether a genuine dispute exists. Furthermore, I have assumed that all of plaintiff's exhibits are properly authenticated and admissible. Finally, where plaintiff included a specific factual allegation in her exhibits or briefs, for example, "I am an African American Female born 6/16/41," I have assumed for the purpose of this motion that the fact is undisputed.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Defendant Select Publishing, Inc. sells advertising space on cards mailed to various demographic groups. Mia Klassy was an administrative assistant for defendant. In January 1998, defendant gave Klassy the responsibility of interviewing, hiring, managing and firing all part-time staff.

In February 1998, defendant placed advertisements for part-time telemarketing positions in the Wisconsin State Journal and on the University of Wisconsin Job Site.

Advertisements may be placed on the university site at no cost for up to four weeks. Ten to fifteen people came to apply for the positions. Each person completed an application and then was interviewed by Klassy.

Plaintiff Marge Jarrells was one of the applicants. On February 24, 1998, she responded to an advertisement placed in the Wisconsin State Journal. The advertisement provided in part: "Need articulate and well versed people." Plaintiff is an African-American female, born on June 16, 1941. Her application contained a box labeled "Special Questions," which contained spaces for height, weight, date of birth and foreign languages spoken. The box also included questions asking whether the applicant had been convicted of a crime in the last five years and was legally employable in the United States. Next to each question is a small box that can be checked. The directions inside the box state the following in all capital letters:

> DO NOT ANSWER **ANY** OF THE QUESTIONS IN THIS FRAMED AREA UNLESS THE EMPLOYER HAS **CHECKED** A **BOX PRECEDING** A QUESTION THEREBY INDICATING THAT THE INFORMATION IS REQUIRED FOR A BONA FIDE OCCUPATIONAL QUALIFICATION, OR DICTATED BY NATIONAL SECURITY LAWS, OR IS NEEDED FOR OTHER LEGALLY PERMISSIBLE REASONS.

None of the boxes on plaintiff's application was checked. However, plaintiff answered the questions regarding her height, her employability and the foreign languages she spoke.

Klassy interviewed plaintiff for approximately six or seven minutes. After the

interview, Klassy told plaintiff she would check plaintiff's references and call her. Klassy wrote her observations on the application: "Very nice, chewed gum, didn't follow directions on application." Klassy never checked plaintiff's references and decided not to hire plaintiff. Instead, defendant hired Laura Brunsch, a 23-year-old Caucasian. It also re-hired a former employee, Camille McCray, a 22-year-old African-American. Around the same time, Klassy also employed two or three individuals through a temporary agency.

When Klassy did not call plaintiff, plaintiff called Klassy, who told plaintiff that all the positions had been filled. When plaintiff saw another advertisement for telemarketers that defendant placed in the Wisconsin State Journal on March 1, 1998, she telephoned defendant again. An employee of defendant told plaintiff that positions were still available.

Between January 1997 and February 1998, defendant employed 56 people. Three of these employees were African-American. It is not known how many employees were over the age of 40 because defendant did not have a record of each employee's age. Of the 19 employees whose date of birth was known, three of them were older than 40 as of February 24, 1998. All of the 19 employees were younger than 40 at the time of being hired. From 1996 to January 1998, approximately 5% of the applicants for part-time positions were African-American. Approximately 1% of the applicants were over the age of 40.

Defendant's part-time employees are often left unsupervised because they work in the evenings when there is no full-time supervisor on duty. They are given written instructions

regarding each night's duties.

OPINION

Plaintiff is proceeding under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. She makes passing references also to the Wisconsin Fair Employment Act, which prohibits discrimination because of race and age, among other things. See Wis. Stat. § 111.321. However, the WFEA is generally interpreted in the same manner as federal discrimination statutes. Marten Transport, Ltd. v. Dept. of Industry, Labor and Human Relations, 176 Wis. 2d 1012, 1020, 501 N.W.2d 391, 395 (1993). Plaintiff has not suggested that there are any relevant differences between the WFEA and Title VII and the ADEA for the purpose of this case. Therefore, to the extent that plaintiff is making a claim under the WFEA, I conclude that it rises and falls with her federal discrimination claims.

Defendant is correct that because plaintiff would have the burden at trial of proving that defendant discriminated against her, it is also her burden on summary judgment to adduce enough evidence to permit a reasonable jury to find in her favor. See Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fuka v. Thomson Consumer Electronics, 82 F.3d 1397, 1402 (7th Cir. 1996). Plaintiff may meet this burden directly by presenting evidence that race or age was the determining factor in defendant's decision

or indirectly using the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 2000); Chiaramonte v. Fashion Bed Group. Inc., 129 F.3d 391, 396 (7th Cir. 1997). Plaintiff has not identified any direct evidence of discrimination, so I will evaluate plaintiff's claim under McDonnell Douglas.

Under the McDonnell Douglas framework, plaintiff must first satisfy a four-part test to demonstrate a prima facie case of discrimination. Specifically, plaintiff must show that (1) she is a member of a protected class; (2) she applied for an available position for which she was qualified; (3) defendant did not hire her; and (4) the position remained open or defendant gave the position to a person not in the protected class. Millbrook v. IBP, Inc., 280 F.3d 1169, 1174 (7th Cir 2002); Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 764-65 (7th Cir. 2001). This burden "is not onerous." Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

If plaintiff establishes a prima facie case, the burden of production shifts to defendant to articulate a non-discriminatory reason for failing to hire her. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000). If defendant can articulate a non-discriminatory reason, the burden shifts back to plaintiff to show that defendant's articulated reason is a pretext for discrimination. Id. at 143.

Defendant has not briefed the issue whether plaintiff has satisfied her prima facie

case, choosing to leave plaintiff to her proof. However, it appears to be undisputed that plaintiff is an African-American over the age of 40 and that defendant did not hire her. Plaintiff has presented little evidence that she was qualified for a telemarketing position. According to the newspaper advertisement to which she responded, the position required "articulate and well versed" applicants. I will accept as true plaintiff's averment that she is both of these.

Both of the applicants hired instead of plaintiff were substantially younger than plaintiff, but one of them was an African-American. Generally, a plaintiff alleging racial discrimination must show that the person hired was a different race from the plaintiff. Mills v. Health Care Service Corp., 171 F.3d 450, 454 (7th Cir. 1999). However, the court of appeals has also held that an "employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement." Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158-159 (7th Cir. 1996). Furthermore, once an employer has articulated a nondiscriminatory reason for making its decision, courts may assume that the plaintiff has established a prima facie case and proceed to the analysis of pretext. Rummery v. Illinois Bell Telephone Co., 250 F.3d 553, 556-57 (7th Cir. 2001).

Defendant has articulated two nondiscriminatory reasons for its decision not to hire plaintiff: (1) she was chewing gum during the interview; and (2) she failed to follow the

directions on the application. With regard to the first reason, plaintiff disputes that she was chewing gum. Defendant points out that its position is supported by a note that Klassy wrote on plaintiff's application that plaintiff "chewed gum." Regardless, resolving this dispute would require a credibility determination, which is not permitted at the summary judgment stage. Bellaver v. Quanex Corp., 200 F.3d 485, 491 (7th Cir. 2000).

However, to prevail on summary judgment, plaintiff must show that *both* of defendant's legitimate reasons are pretextual. Olsen v. Marshall & Ilsley Corp., 267 F.3d 597, 601 (7th Cir. 2001). It is undisputed that plaintiff did not follow the directions on her application. Further, plaintiff has offered no evidence to dispute defendant's proposed fact that the ability to follow directions is important for the job because part-time employees are often unsupervised and must rely on written instructions regarding their duties. (Plaintiff argues that this proposed fact should not be considered because it is not in affidavit form. However, both Fed. R. Civ. P. 56 and this court's summary judgment procedures make it clear that evidence does not have to be in the form of an affidavit. Defendant's proposed fact is derived from the sworn testimony of defendant's general manager and is therefore admissible.)

Plaintiff argues initially that her failure to follow directions is not a legitimate consideration because the "special questions" were illegal. Even assuming that the questions were inappropriate, this does not get plaintiff very far. Although the questions were on the

application, it is undisputed that plaintiff was instructed *not* to answer them. This was not a situation in which an applicant was penalized for refusing to answer unlawful questions. If plaintiff believed that the questions were improper, this would provide another reason to simply follow the instructions and disregard them. Defendant cannot be held liable for *plaintiff*'s choice to answer questions that defendant believed were irrelevant to the position and should not have been answered.

Second, plaintiff contends that defendant's reason is pretextual because Klassy hurried her and told her not to worry about proofreading her application. Defendant disputes that Klassy put any time pressures on plaintiff to finish her application. In determining whether to grant defendant's motion for summary judgment, I must view the facts in the light most favorable to plaintiff. Ransom v. CSC Consulting, Inc., 217 F.3d 467, 468 (7th Cir. 2000). However, even if I assume that plaintiff was hurried by Klassy, it does not follow that defendant is lying about its reasons for not hiring plaintiff. Plaintiff has adduced no evidence that other applicants were given more time to complete the application than she was. Regardless whether plaintiff would have caught her mistake had she be given time to proofread, neither Title VII nor the ADEA prohibits defendant from making a business judgment that following instructions is always important, even, and perhaps especially, when one is hurried. Heffernan v. Board of Trustees of Illinois Community College, 310 F.3d 522, 528 (7th Cir. 2002). ("[T]he law allows an employer substantial

scope for the exercise of its business judgment.")

Third, plaintiff points out that Klassy told plaintiff she would check her references but did not and that Klassy told plaintiff when she called that the telemarketer positions had been filled even though another advertisement appeared in the newspaper several days later. Both of these discrepancies are unremarkable. Anyone who has been interviewed or given interviews knows that the employer will often make statements about contacting references as a matter of course, regardless whether the employer believes the applicant is qualified. Furthermore, Klassy's statement that the positions had been filled was true. Plaintiff does not dispute that defendant had hired Laura Brunsch and Camille McCray by the time plaintiff called. Although it is true that Klassy did not tell plaintiff that new positions opened frequently, this is not surprising. Klassy had already determined that plaintiff was not qualified.

Finally, plaintiff points to the dearth of African-Americans and persons over 40 who are employed by defendant. Although statistics showing an imbalance in the workforce can be probative, see International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977), they are insufficient on their own to establish an individual case of discrimination. Adams v. Ameritech Services, Inc., 231 F.23d 414, 423 (7th Cir. 2001). Plaintiff has failed to present any evidence tying the statistical disparity to the decision not to hire her. In addition, the court of appeals has held that "[s]tatistical evidence which fails

to properly take into account nondiscriminatory explanations does not permit an inference of discrimination." Radue v. Kimberly-Clark Corp., 219 F.3d 612, 616-17 (7th Cir. 2000).

It is undisputed that only a small percentage of applicants for part-time positions with defendant are African-Americans and persons over 40, which would explain why defendant has hired few individuals from those groups. Plaintiff suggests that the reason for the low number of older applicants is that defendant recruits employees through the University of Wisconsin's job website for students, who are mostly 18 to 23 years old. Her argument loses force when she admits that defendant also advertises in the Wisconsin State Journal, which is how plaintiff learned that defendant was hiring. Further, the law does not require employers to place advertisements only in forums that have an audience representing a mirror image of the general population. Plaintiff must show that defendant's decision to recruit through the university was motivated by discriminatory intent; the mere fact that a forum attracts an audience that is disproportionately young is insufficient to show this. See EEOC v. Consolidated Services Systems, 777 F. Supp. 599, 607-08 (N.D. Ill. 1991) (employer's use of Korean newspapers and word-of-mouth to recruit new employees did not show discriminatory intent against non-Koreans). In short, plaintiff has failed to adduce evidence that would permit a reasonable jury to find in her favor. Therefore, I will grant defendant's motion for summary judgment.

After a long and sometimes arduous journey, this case has reached its end. Although

plaintiff will be dissatisfied with the decision, it is what the law requires. I know that plaintiff has a genuine belief that defendant discriminated against her. Perhaps she will now believe that this court has put its official seal of approval on what she views as defendant's unlawful behavior. It is understandable that an awareness of the persistence of prejudice in society would make plaintiff skeptical of the stated reasons behind an employer's decision not to hire her. Being rejected for employment can be painful; it can only be more so when there is a lurking suspicion that an irrelevant factor played a part in the decision. However, as I am sure plaintiff knows, not every decision made by an employer is a discriminatory one. Admittedly, it is sometimes difficult to determine whether an employer was motivated by discriminatory animus or legitimate business reasons. But in this case, the available evidence does not show that defendant considered plaintiff's age or race in deciding not to hire her. Although plaintiff believes she was qualified for the position, defendant was entitled to consider plaintiff's failure to follow the directions on the application. Thus, the law requires that judgment be entered in favor of defendant.

ORDER

IT IS ORDERED that Plaintiff's Marge Jarrells's motion for summary judgment is DENIED and defendant Select Publishing, Inc.'s motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close

this case.

Entered this 19th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge