

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERI L. MARSH,

Plaintiff,

v.

MEMORANDUM AND ORDER

STEVENS CONSTRUCTION CORPORATION,

06-C-310-S

Defendant.

On February 28, 2007 judgment was entered in the above entitled matter in favor of defendant Stevens Construction Corporation against plaintiff dismissing her complaint and all claims contained therein with prejudice and costs.

On March 9, 2007 plaintiff moved pursuant to Rules 50 and 59, Federal Rules of Civil Procedure, for judgment as a matter of law or in the alternative for a new trial. These motions have been fully briefed and are ready for decision.

FACTS

On February 27, 2006 the jury returned a verdict in the above entitled matter finding that plaintiff's gender was not a motivating factor in the defendant's decision to deny her overtime work or concrete pour training and that plaintiff was not subjected to a hostile work environment either by her co-workers or her

supervisors. The jury also found that the plaintiff's opposition to discrimination was a motivating factor in an adverse employment decision but that the decision would have been the same regardless of her opposition to discrimination.

MEMORANDUM

Plaintiff moves for judgment as a matter of law under Rule 50, Federal Rules of Civil Procedure. Rule 50(a) allows a party to challenge the sufficiency of the evidence prior to the submission of the case to the jury while Rule 50(b) sets forth the procedural requirements for **renewing** a Rule 50(a) motion post-verdict. Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 564 U.S. 394 (2006). If a Rule 50(a) motion for judgment as a matter of law is not made, a party has no motion to renew after the jury's verdict under Rule 50(b). Zelinski v. Columbia 300, Inc., 335 F.3d 633, 636 (7th Cir. 2003).

In this case plaintiff did not move for a judgment as a matter of law at any time prior to the filing of his post-verdict Rule 50 motion. Since plaintiff made no prior motion he has no motion to renew pursuant to Rule 50(b). Accordingly, plaintiff's motion for judgment as a matter of law will be denied.

In the alternative plaintiff seeks a new trial because the verdict is against the clear weight of the evidence. In deciding defendant's motion for a new trial pursuant to Rule 59, Federal

Rules of Civil Procedure, the Court must consider whether the trial was unfair to the moving party. Forester v. White, 846 F. 2d 29 (7th Cir. 1988).

Plaintiff raised three claims in this case. She alleged that her gender was a motivating factor in the defendant's decision to deny her overtime work and concrete pours; that she was subjected to a hostile work environment by both her co-workers and her supervisors and that her opposition to discrimination was motivating factor in any adverse employment decision taken by the defendant. In denying defendant's motion for summary judgment the Court found that factual issues remained concerning these claims.

At trial there was evidence presented that plaintiff was denied work in concrete pours as well as Saturday overtime and that similarly situated male employees were not. There was also testimony presented that plaintiff had more hours at the higher paying King Street site than her male co-workers and that she was allowed to participate in concrete pours. Testimony was also presented that plaintiff was not as good a worker as her male co-workers. Un-rebutted evidence was presented that her male co-workers did not work overtime on Saturdays either. The jury's verdict that plaintiff's gender was not a motivating factor in the defendant's decision to deny her work in concrete pours or overtime on Saturdays was not against the clear weight of the evidence.

Concerning plaintiff's hostile work environment claim plaintiff testified at trial that she was subjected to sexual harassment by her supervisor Ron Weitzel and her coworker Hugh Bohne. Hugh Bohne and Ron Weitzel testified that they had not made any inappropriate comments to plaintiff. Testimony was also presented that plaintiff participated in telling sexual jokes and stories in the workplace. It was the jury's role to decide who was telling the truth. The jury's finding that plaintiff was not subjected to a hostile work environment was not against the clear weight of the evidence.

Plaintiff claims that but for her complaint of gender discrimination and sexual harassment she would not have been transferred from the King Street site. Plaintiff testified that she was transferred from the King Street site because she complained of discrimination. The jury found that she had been subjected to an adverse employment decision because she complained of sexual discrimination.

Evidence was presented that plaintiff wanted to transfer to the Weston Street site so that she could participate in concrete pours. Ms. Gullickson, the Human Resources Manager, testified that plaintiff wanted to transfer and perform concrete pours. The jury's finding that the defendant's adverse employment decision would have been the same regardless of plaintiff's opposition to discrimination is not against the clear weight of the evidence.

Plaintiff contends that the verdict was unfair because the jury was confused about who were plaintiff's co-workers and who were her supervisors. While deliberating the jury asked the following question:

In reference to question # 3 on the special verdict: What constitutes management under jury instructions under Hostile Work environment co-workers section (See #5 + 6) Who were Teri's managers?

In reference to question # 5 of the special verdict: What constitutes supervisor under supervisor harassment with no tangible employment action? Who was/were her supervisors?

The Court answered as follows:

Members of the Jury: Referring to your question concerning #3 and # 5 of the special verdict-the instructions given to the jury provide you all the information which may be necessary to answer these questions. The managers + supervisors are those whom you can best recall from the testimony, exhibits + other evidence provided.

The jury's question concerned plaintiff's hostile work environment claim. Any confusion arising either from the verdict or the instructions did not make the trial unfair to plaintiff because she did not object to either the instructions or verdict. Plaintiff has not shown that the jury's question made the verdict unfair to her.

The jury's verdict was not against the weight of the evidence or unfair to the plaintiff. Accordingly, plaintiff's motion for a new trial will be denied.

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ORDER

IT IS ORDERED that plaintiff's motions for judgment as a matter of law and for a new trial is DENIED.

Entered this 11th day of April, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge