

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

WANDA D. SHEPPARD,

Plaintiff,

v.

SUPERIOR SERVICES, INC. AND
EVERETT BOUDREAU,

Defendants.

OPINION and ORDER

14-cv-61-bbc¹

Plaintiff Wanda Sheppard has filed a complaint in which she alleges that defendants Superior Services, Inc. and Everett Boudreau disciplined her, failed to consider her for promotions and fired her because of her race and sex. I understand her to be attempting to bring claims under Title VII of the Civil Rights Act and 42 U.S.C. § 1981, as well as state law claims for intentional and negligent infliction of emotional distress.

Plaintiff seeks leave to proceed in forma pauperis and has already made a prepayment of half of the filing fee, as directed by the court. The next step is to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915. In addressing any pro se litigant's

¹ I am assuming jurisdiction over this case for the purpose of issuing this order.

complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). Having reviewed the complaint, I conclude that plaintiff may proceed on her Title VII, § 1981 and state law tort claims.

Plaintiff alleges the following in her complaint.

ALLEGATIONS OF FACT

Plaintiff Wanda Sheppard is an African American woman. She began working for defendant Superior Services, Inc. on January 1, 2010, when the company "assumed the full food services contract" at Fort McCoy, Wisconsin. Plaintiff was supervised by defendant Everett Boudreau, a project manager for the company.

Defendant Boudreau constantly told plaintiff and coworker Renea Richardson (also an African American manager) that "targets were on [their] backs," which I understand to be threats aimed at plaintiff and Richardson because they are African American women. In January 2010, defendant Boudreau told plaintiff that he wanted her to work on a Wednesday evening, even though plaintiff was already scheduled to work that morning. Plaintiff told Boudreau and another supervisor that she could not work that Wednesday evening because she had prior plans to fly out of town. In response, Boudreau gave plaintiff double shifts on January 16 and 17, 2010 (a Saturday and Sunday), in addition to plaintiff's existing schedule (plaintiff describes this schedule as running "straight through until that next Friday, January 22," but also states that she had "only two days off during this entire time period," so I understand her to be saying that the two days off were prior to January

16).

Because plaintiff was working so many shifts, she began to suffer a migraine headache. Plaintiff went to the emergency room and was diagnosed as "being dehydrated and stressed due to lack of rest." Plaintiff called work to notify the building manager that she was in the emergency room, receiving intravenous fluids, but no one answered. When plaintiff returned to work, she was "written up" for failing to call the building manager.

On approximately January 25, 2010, plaintiff was "written up" for "opening one side of the dining facility because her count was over 100 people." Plaintiff had been briefed that "the opening line was 200 people or less on one side." Plaintiff states that she "fed 130 people that night on her shift." (I understand plaintiff to be saying that she followed the instructions she had been given but was reprimanded anyway.)

Plaintiff thought that she was being treated unfairly and wanted to file a grievance against defendant Boudreau. Once Boudreau found out that plaintiff intended to file a grievance, he "went on a witch hunt for false statements against plaintiff."

On April 26, 2010 plaintiff complained to defendant Boudreau about an incident in which a cook (who was white) called plaintiff a "bitch," used profanity the whole day, was being insubordinate and did not want to work. Boudreau looked up the company's policy and told plaintiff that the cook's conduct was grounds for termination, but he decided to give the cook a written warning instead. Plaintiff told Boudreau, "Sir if I had cursed at [the cook] you would have fired me." Boudreau answered, "Yes, you would have lost your job." Plaintiff asked Boudreau, "How do I as a manager file a grievance?" (I understand plaintiff to be

saying that she wanted to file a grievance against Boudreau.) Boudreau's reply was "through [him]." Boudreau then became upset, started reprimanding plaintiff, tore up the cook's written warning and told the cook that "he would get rid of the problem."

Defendant Boudreau then got another employee, John Parkyn, to make false statements against plaintiff, even though Parkyn had always told plaintiff that she was doing a wonderful job and had never told her that her performance was unsatisfactory. Plaintiff believes that Parkyn thought he had to make these false statements because "Boudreau was assisting [him] with his promotion."

When a building manager position became vacant, defendant Boudreau did not post the position or fill the position based on "seniority or knowledge," but instead hired his friend, Mike Kindt, a white man. Kindt and plaintiff were both assistant managers at the time.

When another building manager position became vacant, defendant gave Parkyn, a white man, the job instead of filling it on "seniority or knowledge." Parkyn and plaintiff were both assistant managers at the time. Parkyn did not possess various knowledge about the job that plaintiff did. Although plaintiff was not considered for the job, she was asked to train Parkyn to teach him the things that she knew.

Later, a "culinary teaching" position became open. Boudreau did not post the job. Instead, he told only a few people about the job and told them to apply. Plaintiff was not one of the people told about the job. Boudreau ended up giving the job to Parkyn. This opened up Parkyn's manager position, but plaintiff was not considered.

Defendant Superior Services has a policy stating that "when hiring or promoting in those job categories in which women, minorities, handicapped individuals or veterans are underutilized, we will take affirmative action to seek out qualified applicants without regard to sex, color, age, national origin, handicap or veteran status. All terms and conditions of employment are and will continue to be established on the basis of the individual's qualifications and ability to perform the job." Plaintiff, who has a bachelor's degree and significant experience in food service, was never given an opportunity to apply for the jobs detailed above.

Defendant Boudreau told company management that he would not be hiring new staff and instead would be laying people off. Instead, in March 2010 he hired Tom Schmidt, a white man, as a cook and in April 2010, he hired Ben Barnhart, a white man, as a cook. Then, in late April 2010, Boudreau told plaintiff's daughter (who also worked for Superior Services) that she was going to be placed in "cook training status." However, on May 4, 2010, Boudreau told the building manager to tell plaintiff's daughter that she could not be in cook training status anymore. Shortly thereafter, plaintiff's daughter was laid off.

Plaintiff reported Boudreau's various forms of misconduct to human resources, but no action was taken. On May 19, 2010, plaintiff told management that she intended to file an equal employment opportunities complaint. The next week, she was fired. Plaintiff has suffered mental anguish and emotional distress from this treatment.

OPINION

A. Claims under Title VII and 42 U.S.C. § 1981

I understand plaintiff to be bringing race and sex discrimination and retaliation claims against defendant Superior Services under Title VII of the Civil Rights Act and race discrimination and retaliation claims against both Superior Services and defendant Boudreau under 42 U.S.C. § 1981. Johnson v. General Board of Pension & Health Benefits of United Methodist Church, 733 F.3d 722, 727 (7th Cir. 2013) (“Section 1981 permits suits against individual agents of an employer, while Title VII does not.”); Friedel v. Madison, 832 F.2d 965, 966 n.1 (7th Cir. 1987) (“claims of sex discrimination are not cognizable under section 1981”).

Plaintiff alleges that she (1) faced discriminatory discipline; (2) was discriminated against regarding promotions; (3) was discriminated against and retaliated against when she was fired for saying that she intended to file an equal employment opportunities complaint; and (4) faced a hostile work environment. (I do not understand plaintiff to be attempting to bring claims regarding the treatment of her daughter, because the daughter is not named as a plaintiff, but the allegations regarding plaintiff’s daughter may be relevant to defendants’ discriminatory intentions.)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), makes it unlawful for an employer to “fail or refuse to hire . . . or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” Thus, to have an actionable Title VII claim, plaintiff must allege that discrimination took

place because of her race, color, gender or national origin. Swanson v. Citibank, NA, 614 F.3d 400 (7th Cir. 2010) (complaint alleging discrimination is sufficient if it “identifies the type of discrimination that she thinks occur[red] . . . , by whom . . . and when”).

In addition, Title VII also prohibits employers from “requiring people to work in a discriminatorily hostile or abusive environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Thus, an employer violates Title VII “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” Id. (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986)) (internal citation omitted).

Claims under § 1981 include the same elements and employ the same analysis and methods of proof as a Title VII claim, Johnson v. City of Fort Wayne, 91 F.3d 922, 940 (7th Cir. 1996), although as stated above, § 1981 covers only race, and not sex, discrimination.

At this stage, plaintiff’s allegations that she was constantly threatened, treated unfairly in disciplinary matters and promotion decisions and ultimately terminated for complaining about these problems are sufficient to state claims of discrimination, retaliation and hostile work environment based on race and sex under Title VII as to defendant Superior Services and based on race under § 1981 as to both Superior Services and defendant Boudreau.

Plaintiff should know that she will not be able to rest on her allegations at later stages in the case. To prove her claims at summary judgment or trial, she will have to come

forward with specific facts showing that a reasonable jury could find in her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed. R. Civ P. 56.

With respect to her discrimination claims, plaintiff will have to show that her race and sex were reasons she was disciplined more harshly, not considered for promotions and ultimately terminated. Hossack v. Floor Covering Associates of Joliet, Inc., 492 F.3d 853, 860 (7th Cir. 2007). Similarly, to prevail on her retaliation claim, plaintiff will have to show that defendant considered her allegations of discrimination as one of the reasons for terminating her. To prevail on her hostile work environment claims, plaintiff must prove that (1) she subjectively perceived the environment as abusive; and (2) that the environment “objectively hostile or abusive.” Harris, 510 U.S. at 21-22.

Discrimination, retaliation and hostile work environment claims are classic examples of claims that are easy to allege but hard to prove. Many pro se plaintiffs make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove her claim with the allegations in her complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or her personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

A plaintiff can prove discrimination and retaliation claims in various ways. For example, a plaintiff may adduce evidence that the defendant treated similarly situated employees who are not African American or female better than it treated her, Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006), or that defendant consistently treated black or female employees or employees who complained about discrimination less favorably than

they treated white, male or non-complaining employees. Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008). A “similarly situated” employee is someone who is “directly comparable” to the plaintiff in all material respects.” Grayson v. O’Neill, 308 F.3d 808, 819 (7th Cir. 2002). In considering whether an employee is directly comparable, courts take into account whether the employees had the same job description, were subject to the same standards, were supervised by the same person and had comparable experience, education and other qualifications. Bio v. Federal Express Corp., 424 F.3d 593, 597 (7th Cir. 2005).

In addition, plaintiff may rely on evidence of suspicious timing or discriminatory statements by a decision maker or statements suggesting that the decision maker was bothered by plaintiff’s complaints about discrimination. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). However, even if plaintiff was fired a short time after she complained, that closeness in time is rarely enough to prove an unlawful motive without additional evidence. Mobley v. Allstate Insurance Co., 531 F.3d 539, 549 (7th Cir. 2008) (“Evidence of temporal proximity, however, standing on its own, is insufficient to establish a causal connection for a claim of retaliation.”)

Evidence of discrimination may include a showing that a defendant’s reasons for its actions are pretextual. Simple v. Walgreen Co., 511 F.3d 668 (7th Cir. 2007). A pretext is more than just a mistake or a foolish decision; it is a lie covering up a true discriminatory or retaliatory motive. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006).

“[T]he question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason was his reason: not a good reason, but the true reason.” Id. at 417-18. A plaintiff may show that a decision is pretextual with evidence that an employer’s stated motive did not actually motivate the decision, Freeman v. Madison Metropolitan School District, 231 F.3d 374, 379 (7th Cir. 2000), that defendant “grossly exaggerated” the seriousness of an incident, Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept., 510 F.3d 681, 693 (7th Cir. 2007), that defendant violated its own policies and procedures, Davis v. Wisconsin Dept. of Corrections, 445 F.3d 971, 976-77 (7th Cir. 2006), or with any other evidence tending to show that the employer’s stated reason is false.

With regard to plaintiff hostile work environment claims, circumstances that bear on the determination include “[T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Harris, 510 U.S. at 23.

B. State Law Claims

I understand plaintiff to be attempting to bring Wisconsin state law claims for negligent infliction emotional distress and intentional infliction of emotional distress. Although these are state law claims, I may exercise supplemental jurisdiction over the claims under 28 U.S.C. § 1367(a).

To maintain a claim for intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant's conduct was intended to cause emotional distress; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) she suffered an extreme disabling emotional response to the defendant's conduct. Rabideau v. City of Racine, 2001 WI 57, ¶ 33, 243 Wis. 2d 486, 627 N.W.2d 795 (citing Alsteen v. Gehl, 21 Wis. 2d 349, 359-60, 124 N.W.2d 312, 318 (1963)).

To state a claim for negligent infliction of emotional distress, a plaintiff must show that (1) the defendant's conduct fell below the standard of care; (2) the plaintiff suffered an injury; and (3) the defendant's conduct was a cause in fact of the plaintiff's injury. Bowen v. Lumbermen's Mutual Casualty Co., 183 Wis. 2d 627, 632, 517 N.W.2d 432, 434 (1994).

I conclude that at this point, plaintiff's allegations of race and sex discrimination described above, along with her allegations that the acts caused her emotional harm, are sufficient to state claims upon which relief may be granted both against defendant Boudreau and defendant Superior Services under either theory. Javier v. City of Milwaukee, 670 F.3d 823, 828 (7th Cir. 2012) (doctrine of respondeat superior assigns vicarious liability to employer for torts of employees acting within scope of employment).

ORDER

IT IS ORDERED that

1. Plaintiff Wanda Sheppard is GRANTED leave to proceed on her claims that

- a. defendant Superior Services, Inc. violated her rights under Title VII of the Civil Rights Act by disciplining her, failing to consider her for promotions subjecting her to a hostile work environment and terminating her because of her race and sex and because she complained about discrimination.
- b. defendants Superior Services and Everett Boudreau violated her rights under 42 U.S.C. § 1981 by disciplining her, failing to consider her for promotions, subjecting her to a hostile work environment and terminating her because of her race and because she complained about discrimination.
- c. defendants Superior Services and Boudreau intentionally inflicted emotional distress upon her and negligently inflicted emotional distress upon her.

2. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that she files with the court. Once plaintiff learns the name of the lawyer or lawyers that will be representing defendants, she should serve the lawyers directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that she has sent a copy to defendants or to defendants' attorneys.

3. Plaintiff should keep a copy of all documents for her own files. If she is unable to use a photocopy machine, she may send out identical handwritten or typed copies of her documents.

4. I am sending copies of plaintiff's complaint and this order to the United States Marshal for service on defendants.

Entered this 6th day of May, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge