IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOYCE ELLIS,

OPINION AND ORDER

Plaintiff,

99-C-0823-C

v.

APPLIED MOLDED PRODUCTS CORP.,

Defendant.

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This is a civil suit for money damages brought by plaintiff Joyce Ellis against her former employer, defendant Applied Molded Products Corp. Ellis contends that she was terminated because of her age and sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 29 U.S.C. § 2000e-2000e-17, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and that while she was employed, she was paid less than men who were performing work equal to hers in terms of skill, effort and responsibility, in violation of the Equal Pay Act, 29 U.S.C. § 206(d). The case is before the court on defendant's motion for summary judgment. I conclude that defendant has shown that plaintiff cannot make out a case of either sex or age discrimination. Plaintiff has adduced no evidence to put into dispute defendant's explanation

that its decision to lay off a number of managerial employees, including plaintiff, was motivated solely by financial concerns. Those concerns made it necessary to lay off certain employees it had reason to believe were not performing as well as the employees that were retained or who held jobs that could be combined with those of other employees. However, plaintiff has adduced sufficient evidence to raise a jury question on her claim that she was paid less than a male employee performing the same job she had held previously.

From the facts proposed by the parties, I find that the following are both undisputed and material.

UNDISPUTED FACTS

Defendant Applied Molded Products Corp. is a Wisconsin corporation that manufactures custom molded plastics for various companies that integrate defendant's products into their own products. Defendant's manufacturing process has three departments: the Sheet Molding Compound Department, the Molding Department and the Paint Department.

In June 1997, defendant purchased certain assets of Menasha Corporation in Watertown, Wisconsin. Many former Menasha employees applied for employment with defendant, including plaintiff Joyce Ellis, a white female born on May 17, 1943. Plaintiff had

been a supervisor in Menasha's Molding Department and was hired by defendant for the same position in its own Molding Department. In November 1997, plaintiff became a supervisor of the repair line in defendant's Paint Department.

Donald Jankowski is Group Operations Manager for defendant and its two sister companies. When he assumed this position in November 1998, he was instructed by William Avellone, Chief Executive Officer of the combined companies, to focus his time and attention on the defendant company. Jankowski's understanding was that the company's manufacturing departments were out of control, it had huge manufacturing variances each month and it was losing money. Jankowski conducted an operations review, starting with the financial reports and the profit and loss statement for the first five months of the 1998-99 fiscal year. These statements revealed a cumulative year-to-date loss of approximately $900,000. The "quick close production report" for the month of October 1998 showed a negative manufacturing variance for the month in excess of $300,000. (A negative manufacturing variance is the amount by which defendant's actual production costs, such as material, direct labor and overhead, exceed its standard production costs.)

Jankowski noted from the report that the largest negative variances related to products produced for Bombardier, New Holland and General Motors. Of the $59,662 negative variance for Bombardier, $24,437 (41%) was attributable to the Paint Department; of the

$44,018 negative variance for GM, $24,119 (55%) was attributable to the Paint Department; and of the $99,899 negative variance for New Holland, $73,694 (74%) was attributable to the Paint Department. Jankowski spent the months of November and December 1998 observing the manufacturing process in the Paint Department and talking to employees.

At the time, the Paint Department had two shifts and three supervisors: Ray Wolfram (born in 1952), Mark Zimmerman (born in 1968) and plaintiff. Wolfram was Area Manager, a position to which he had been promoted from second shift supervisor. However, he was responsible for the second shift in addition to his new duties for a period of time until the new second shift supervisor was named. As second shift supervisor, he was responsible for all activities on the shift, unlike Zimmerman and plaintiff, who had split responsibilities on the first shift. Zimmerman supervised the painters; plaintiff supervised repair employees. Zimmerman's area of supervision included the hanging operation (hanging particular parts on the conveyor), the washing and drying operation, the paint application operation, the finessing operation (touch-up repairs too minor to be sent to the repair area), and the auditing and packaging operation. Plaintiff was responsible for the repair employees, who made repairs to defective or non-conforming parts and sent them back to be painted.

Zimmerman had been a supervisor in defendant's Paint Department since he began working for defendant on June 10, 1997. Plaintiff had been a supervisor in that department

since November 26, 1997. Jankowski concluded from his observations of the three supervisors that Wolfram was more knowledgeable than either plaintiff or Zimmerman and had a good working knowledge of defendant's paint systems (filtration and the paint mixing areas) and a good working knowledge of paint application and paint testing, but was spread too thin to cover both shifts.

Plaintiff had almost no experience as a painter. Jankowski believed that she had little or no knowledge of paint application or painting systems, knew almost nothing about the actual operation of the paint booths, did not know how to adjust paint application work with the spray techniques and had no working knowledge at all concerning paint mixing and little working knowledge about the repair area. (Plaintiff's proposed fact that she had extensive knowledge of all areas of the paint department is unsupported by anything other than her averment to that effect in an affidavit filed after she had been deposed. When she was asked during her deposition whether she had any training in painting, she replied that she had attended a few seminars on the subject in 1981. Accordingly, I find that defendant's proposed facts about plaintiff's lack of personal experience and specialized knowledge in painting are undisputed.) Jankowski believed that Zimmerman knew more about these matters but was still lacking in the skills Jankowski thought were needed to solve the problems in the Paint Department.

Jankowski believed that plaintiff's supervisory skills were weak, that she was ineffective in disciplining employees under her supervision and in getting them focused on their tasks and the need to meet production standards and that the repair area failed routinely to meet production standards. In Jankowski's opinion, Zimmerman and plaintiff were poor in following through to insure that standards were met. Jankowski believed that defendant's cost overruns were the result of chronic poor supervision and performance in the Paint Department's repair area, leading to the area's repeated failure to meet its standard for the number of parts reworked or repaired on a per hour and per shift basis.

In mid to late November 1998, defendant lost its business from New Holland. This business constituted approximately 15% of defendant's revenues in 1998.

Jankowski concluded that the plant was ineffective and disorganized. Employees were focusing on the wrong activities, the manufacturing floor lacked leadership and production standards and quotas were not being met. Jankowski decided it was necessary to streamline operations and reduce costs, particularly after the loss of the New Holland business. Even before this, however, Jankowski had determined that he would not keep either plaintiff or Zimmerman as employees in the Paint Department. He planned to lay off both plaintiff and Zimmerman and replace them with someone from outside the plant to take over the second shift from Wolfram, who would be transferred to the first shift where he would function as both

Area Manager and first shift supervisor.

In preparation for the change, Jankowski placed a want ad for a paint supervisor in the local papers in mid-November 1998. Mike Janke, age 33, responded to the ad and was hired as second shift supervisor on December 11, 1998, allowing Wolfram to focus on his duties as Area Manager. Janke began work on December 28, 1998, at a base salary of $47,000, $2,000 more than he had been earning in his prior job. At the time, plaintiff was earning a base salary of $37,560, which was the salary at which she had started with defendant and the same salary she had been earning at Menasha; Zimmerman was earning a base salary of $37,855; and Wolfram was earning $46,000.

Following the loss of New Holland's business, Jankowski laid off all probationary employees, established new purchasing guidelines, eliminated all overtime and emphasized the importance of meeting production quotas. On January 7, 1999, Jankowski laid off four salaried employees: plaintiff, then aged 55; Dave Berton, aged 39; James Millhouse, aged 57; and Sarah Nehls, aged 33. Berton was the Engineering and Manufacturing Manager. Jankowski had assumed some of Berton's duties and had concluded both that defendant could not afford Berton's services any longer and that Berton was accountable for many of the plant's inefficiencies. Millhouse was the Industrial Engineer; Jankowski held him responsible for many of the plant's problems, along with Berton, since the efficiency of the manufacturing process was

Millhouse's primary responsibility. In Jankowski's opinion, Millhouse had done nothing to improve efficiency in the two months that the operations had been under review, despite repeated requests. Nehls was one of two Human Resource Administrators. Jankowski chose to retain Vicki Herbers and lay off Nehls because he did not think she was working to the best of her ability.

Jankowski refrained from laying off Zimmerman in January because Wolfram had health problems. Jankowski needed Zimmerman to supervise the first shift while Wolfram took medical leave. After Wolfram's health improved in mid-March 1999, Jankowski laid off Zimmerman. At the same time, he laid off Bob McElwee, aged 41, who had been Quality Assurance Manager, because of his work performance, his behavior at work and Jankowski's belief that defendant could not afford both a Quality Assurance Manager and a Quality Assurance Supervisor. Jankowski retained Betty Christensen as Quality Assurance Supervisor. Christensen was 50 at the time.

After the January layoffs, Jankowski focused his attention on the Molding Department because he believed that part of the Paint Department's inefficiency was the result of the poor quality of the molded products sent to it for painting. The department had been running three shifts for about a month. Mark Schlatter was the lead and first shift supervisor. His birth date was April 9, 1962 and his base salary was $45,150 a year. Karen Behlke was second shift

supervisor. She was born on May 11, 1947 and, as of January 1999, had a base salary of $36,000. Dan Kuhlman supervised the third shift. He was born on October 7, 1963 and had a base salary of $35,000 in January 1999. Schlatter had been a supervisor in the Molding Department since about June 10, 1997; Behlke became a supervisor in December 1997.

Toward the end of March 1999, one of defendant's customers, John Deere, cut out essentially 50% of its estimated requirements in its agricultural business, which led to a reduction in the business it did with defendant. At about the same time, defendant abandoned its RIM business, which meant it no longer did snowmobile business for Bombardier and resulted in a drop of nearly 50% in defendant's gross sales to Bombardier. In response to these changes, Jankowski laid off 60 unionized hourly workers and three additional salaried employees: Karen Behlke, aged 51, who was the second shift supervisor in the Molding Department; Teresa Franks-Heiman, aged 32, who was the Shipping and Receiving Supervisor; and Geoff Kaufmann, aged 46, who was the Coating Process Engineer. Jankowski laid off Behlke because he was reducing the shifts in the Molding Department from three to two and, in his opinion, she was the least productive of the three shift supervisors. He laid off Franks-Heiman because he combined her job with that of the Plant Scheduler and he laid off Kaufmann because he believed that Wolfram and Janke could perform the job just as well and had the time to do it after the loss of the Bombardier and Deere business.

OPINION

A. Motion to Strike Affidavits

In response to plaintiff's proposed findings of fact, defendant filed additional proposed findings of fact and conclusions of law, together with affidavits and what appear to be excerpts from the personnel files of plaintiff and Mark Zimmerman. Plaintiff has moved to strike the affidavits as untimely and the personnel file excerpts as inadmissible hearsay. The affidavits are not untimely; in fact, they are specifically permitted under this court's rules. See Procedures to be Followed on Motions for Summary Judgment § III (A)(5) (moving party may serve and file materials permitted by Fed. R. Civ. P. 56(e) in rebuttal to opposing party's response).

As to the personnel file excerpts, defendant points out that plaintiff authenticated the entire personnel files of both plaintiff and Mark Zimmerman in the affidavit of Ann Rogers Snodgrass, dkt. #45, filed in opposition to the motion for summary judgment. Presumably plaintiff believes that defendant made and kept the files in the ordinary course of business, therefore exempting them from the hearsay exclusion. See Fed. R. Evid. 803(6). Therefore, I see no reason to strike them from consideration. However, I will not consider the excerpt from Ray Wolfram's personnel file that was attached to defendant's reply brief rather than submitted with the additional proposed findings of fact.

B. Age and Sex Discrimination Claims

Plaintiff has no direct evidence of discrimination. She is resting her age and sex discrimination claims on the well known McDonnell Douglas formulation. She argues that she has established a prima facie case, as McDonnell Douglas requires: 1) she was 55 when she was terminated and thus, in the protected class; 2) she was performing her job well enough to meet defendant's legitimate expectations; 3) she suffered an adverse employment action; and 4) she was treated less favorably than similarly situated employees who were younger than she and male. If plaintiff makes such a case, defendant will be required to offer an explanation for its actions, after which plaintiff will have an opportunity to show that the explanation is a pretext for unlawful discrimination. See, e.g., Darnell v. Target Store, 16 F.3d 174, 177 (7th Cir. 1994). The fact that this is a reduction in force case does not change the structure of the McDonnell Douglas test but requires merely a slight change in the fourth factor that the position remained open after the plaintiff had applied for it. See, e.g., Adams v. Ameritech Services, Inc., __ F.3d __, Nos. 98-1506, 98-2259 & 98-2307, 2000 WL 1569416 (7th Cir. Oct. 23, 2000) ("Conceptually, one can think of a RIF as a situation . . . in which the employer decided whom from a defined group it will 're-hire' or retain, considering all existing employees as roughly like applicants for retention.")

Defendant contends that plaintiff cannot make it through the first stage because she is

unable to make either the second or the fourth showings required for a prima facie case. Plaintiff maintains that she has satisfied the second prong as to her job performance by showing that neither Jankowski nor any other representative of defendant ever complained to her about her performance, that no one ever warned her that she might lose her position if things did not improve and that when she was terminated, she was told it was for economic reasons. Defendant disputes plaintiff's assertion that she had never been criticized for her performance or warned of the need to improve.

Courts cannot resolve factual disputes on summary judgment; their role is only to determine whether there are factual disputes that require a trial. Therefore, I will assume that plaintiff is correct and that she was aware of no complaints about her work. Furthermore, although the asserted lack of prior criticism does not mean that plaintiff was meeting defendant's legitimate expectations at the time she was laid off, see Anderson v. Stauffer Chemical Co., 965 F.3d 397, 401 (7th Cir. 1992) ("What matters is whether [plaintiff] was meeting his employer's expectations *at the time of his discharge.*"), I will assume for the sole purpose of deciding this motion that plaintiff was meeting defendant's legitimate expectations.

On the fourth prong, that plaintiff was treated less favorably than similarly situated younger employees or similarly situated male employees, plaintiff first bases her alleged disparity of treatment on defendant's decision to retain plaintiff's co-supervisor, Mark

Zimmerman, who was only 30. This comparison does not assist her because defendant's plan all along was to lay off Zimmerman as soon as Wolfram recovered from his medical problems, see Collier v. The Budd Co., 66 F.3d 886, 890 (7th Cir. 1995) (court may evaluate employer's plan for retaining, replacing or reassigning employees when determining whether terminated employee has made prima facie case), and, in fact, defendant laid Zimmerman off as planned. Moreover, Zimmerman's greater experience in painting was a non-discriminatory reason for keeping him and not plaintiff on for the temporary period in which Wolfram needed help.

Failing in the comparison with Zimmerman, plaintiff argues that the hiring of Janke shows that defendant treated at least one younger employee more favorably. She cites Miller v. Borden, 168 F.3d 308, 313 (7th Cir. 1999), for the proposition that courts must consider the terminated employee's "fungibility" or usefulness to the employer in comparison to other employees when they are determining whether an employer gave preferential treatment to younger employees, but she cannot show that she and Janke were fungible. Janke had experience in painting as well as in supervising a painting operation. Plaintiff did not have experience in painting and she lacked extensive knowledge about painting.

Finally, plaintiff argues that she was treated less favorably than Mark Schlatter, the first shift molding supervisor, who was much younger than plaintiff and who was kept on by defendant in the same job that plaintiff had held previously. Defendant denies that the job

functions Schlatter was performing in early 1999 were identical to those that plaintiff had performed in 1997, but for the purpose of deciding this motion, I must assume that they were. Plaintiff's comparison with Schlatter raises the question whether discrimination can be inferred from a showing that one younger, similarly situated employee was treated more favorably than the terminated employee in the face of evidence that another equally young and similarly situated employee was not. I am doubtful that such a showing is sufficient but I will proceed on the assumption that it is. See, e.g., Miller, 168 F.3d at 313 ("In the 'fungibility' type of situation, all the employee needs to establish is that he was *treated less favorably* than one or more similarly situated younger employees.") (Citations omitted).

Having found that plaintiff can overcome the hurdle of the prima facie case, I turn to the issue of pretext. Plaintiff's task is to show that defendant's stated reasons for laying her off could not be the real reasons it took the action it did. Defendant has come forward with the explanation that the company's financial condition was deteriorating rapidly, that it was losing money on a large scale, particularly in the Paint Department, that its customers were expressing dissatisfaction with defendant's products, that Jankowski viewed plaintiff and Zimmerman as inadequate for the jobs they were performing and for the challenge of changing the company culture and improving financial viability. For these reasons, defendant explains, Jankowski laid off both of them and hired Janke as their replacement, believing that Janke had the painting

and supervisory experience the company needed to cure the problems in the Paint Department.

Plaintiff has not shown that defendant's explanation is unbelievable or dishonest in any respect. She tries to dispute the honesty of defendant's contrary belief by citing her lengthy supervisory history, her own statements that she was performing as well or better than other supervisors and the obstacles she faced in running her department efficiently. First, it is irrelevant how long plaintiff had been a supervisor; the issue is whether she was one of the best performers at the end of 1998, when defendant had to make layoffs and take other cost cutting measures. Just because an employee performs adequately enough in good times to avoid criticism and layoff does not mean that the employee's non-retention in financially troubled times implies discrimination. See Gustovich v. AT & T Communications, Inc., 972 F.2d 845 (7th Cir. 1992) (although employees' jobs were not in danger "in placid times," it did not follow that their layoffs in tighter times were discriminatory, when employees had been rated as less qualified than other employees).

Second, plaintiff's own statements about the quality of her performance are of little value. See Cengr v. Fusibond Piping Systems, Inc., 135 F.3d 445, 453 (7th Cir. 1998) ("'general averments of adequate performance by [plaintiff] or a co-worker are ordinarily insufficient to create a factual issue on summary judgment; rather [plaintiff] must specifically

refute the facts which allegedly support the employer's claim of deficient performance'") (quoting Sirvidas v. Commonwealth Edison Co., 60 F.3d 375, 378 (7th Cir. 1995)). See also Gustovich, 972 F.2d at 848 (employee's self-serving statements about his ability may create a material dispute about his ability but do nothing to establish that employer's proffered reasons are pretext for discrimination). Third, that plaintiff faced obstacles in running her department may show that defendant's decision was incorrect; it does not show that the decision was a coverup for discrimination. Plaintiff has not shown that other employees did not face similar obstacles or that defendant did not take the obstacles into consideration in evaluating her performance.

Defendant was in a situation in which it had to cut costs and improve performance and do so quickly, before it lost so much money it would be out of business. In that situation, it was necessary to lay off employees, both hourly and salaried. In choosing the persons to lay off, Jankowski concentrated on the persons he believed were the weakest performers or had job responsibilities that could be assumed by another employee for a net cost saving. Jankowski believed both that plaintiff fell into the weak performer category and that defendant could save money by having one supervisor for the shift for which both plaintiff and Zimmerman had been responsible. Plaintiff has not shown that this explanation is a pretext for discrimination by age or sex. Citing Collier, 66 F.3d at 893, she argues that the court should not accept Jankowski's

statements about his reasons for the layoffs, but should let a jury evaluate his credibility. In Collier, the court of appeals reversed the district court's grant of summary judgment, holding that the jury should determine the truthfulness of the decision maker's reasons for terminating the plaintiff and reallocating his responsibilities to younger workers. The court found that defendant had produced little to no evidence to support its decision that plaintiff was less qualified than the younger employees who were retained. In this case, however, defendant has financial records that identify the Paint Department as a primary source of the company's severe financial problems. Whatever the reasons for the problems, whether high turnover, unreasonable demands by defendant, defendant's refusal to allow additional cure time or plaintiff's and Zimmerman's ineffectiveness as shift supervisors, Jankowski was entitled to believe that a change in management in the department might help solve the problem. He may have been wrong about who was responsible for the problems but he cannot be accused of manufacturing the crisis to disguise an intent to practice age and sex discrimination.

As discussed in connection with plaintiff's prima facie case, defendant kept Mark Schlatter while laying off plaintiff, although plaintiff had previously performed Schlatter's job in the Molding Department. Plaintiff disagrees with the wisdom of defendant's decision, but she cannot show that it implies pretext. Schlatter was in another department; Jankowski was dealing with the problems in the Paint Department.

The lack of any discriminatory intent on Jankowski's part is supported by a review of the nine managerial workers laid off in the first quarter of 1999. Of the nine, five were within the protected age group; four were not. Five were male and of these five, all but one were younger than plaintiff by at least nine years. Two (plaintiff and Karen Behlke) were females over 50 and the remaining two were females in their early thirties. Plaintiff tries to make the layoffs look suspicious by pointing out that defendant cannot cite a single example in which it had an opportunity to choose between a male and a female in the same job classification and chose to retain the female or in which it had a chance to choose between a younger and older worker in the same classification and chose to retain the older worker. When the sample size is as small as plaintiff has made it, no conclusions can be drawn. Indeed, the artificiality of plaintiff's comparison is evident when one looks at McElwee and Christensen. Both were in quality assurance, one as "manager" and one as "supervisor," so they were not in the "same job classification," as plaintiff defines the term. However, the fact is that when defendant was faced with the choice of laying off a younger male or an older female, it laid off McElwee, a 41-year-old male manager and retained Christensen, a 50-year-old female supervisor.

I conclude that defendant is entitled to summary judgment on plaintiff's claims of age and sex discrimination.

C. Equal Pay Act Claims

The Equal Pay Act requires equal pay for men and women who are doing jobs that are substantially the same. "Sameness" is determined by comparing the skill, effort and responsibility needed to perform the job rather than by comparing job titles, classifications or descriptions. See, e.g., Lang v. Kohl's Food Stores, Inc., 217 F.3d 919 (7th Cir. 2000). Plaintiff contends that she performed jobs that were the same as male supervisors but was paid less. She compares her jobs to those of Zimmerman, who ran the other part of her shift; Janke, who was hired to run the entire first shift; Wolfram, who ran the second shift alone; and Mike Schlatter, who replaced her in the Molding Department as first shift supervisor. With one exception, the comparisons fail. Zimmerman was paid only $297 a year more than plaintiff and he had responsibilities totally different from hers. She supervised repair work; he supervised the rest of the work in the Paint Department, including washing and drying, paint application, auditing and packaging. Wolfram and Janke ran entire shifts by themselves; theirs are not comparable jobs. The one exception is Mike Schlatter, who took over the same shift in the Molding Department that plaintiff had run at a lower salary. (Schlatter started out at $39,000 and his salary was raised to $43,000 a year later; plaintiff was being paid only $37,650 when she left the job.)

Defendant alleges that Schlatter had more responsibilities than plaintiff but this

allegation is in sharp dispute. Plaintiff alleges that she performed exactly the same duties as Schlatter when she was in charge of the shift, including scheduling for the entire department and attending the supervisors' meeting each morning. Given this dispute, it will be necessary for a jury to resolve the disputed facts. Therefore, I will deny defendant's motion for summary judgment on the Equal Pay Act claim.

ORDER

IT IS ORDERED that plaintiff Joyce Ellis's motion to strike affidavits and excerpts of personnel files is DENIED. FURTHER, IT IS ORDERED that the motion for summary judgment filed by defendant Applied Molded Products Corp. is GRANTED with respect to plaintiff's claims of age discrimination in violation of 29 U.S.C. §§ 621-34 and her claims of sex discrimination in violation of 29 U.S.C. §§ 2000e-2000e-17, and DENIED with respect to plaintiff's claim of sex discrimination in violation of the Equal Pay Act, 29 U.S.C. § 206(d).

Entered this 22nd day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge