IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TERESA PELTON,

Plaintiff,

v.

GREEN COUNTY
SHERIFF'S DEPARTMENT,

Defendant.

OPINION AND ORDER

00-C-0672-C

- -

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. Plaintiff Teresa Pelton alleges that she has been discriminated against on the basis of her sex by defendant Green County Sheriff's Department.

Presently before the court is defendant's motion for summary judgment. As a preliminary matter, because defendant filed its motion for summary judgment and proposed findings of fact on September 27, 2001, plaintiff's response was due no later than October 18, 2001. See Pretrial Conf. Order, Feb. 2, 2001, dkt. #7, at 2-3. Plaintiff did not file a response to defendant's motion (or request an enlargement of time) on or before the

stipulated deadline. Instead, on November 13, 2001, plaintiff filed a motion for an enlargement of time to respond to defendant's motion for summary judgment. On the same day, this court entered an order denying plaintiff's motion, explaining that although defendant's proposed findings of fact would stand undisputed, pursuant to Fed. R. Civ. P. 56, defendant can prevail on its motion for summary judgment only if the undisputed facts indicate that it is entitled to judgment as a matter of law. Nevertheless, two days later plaintiff filed a response to defendant's motion for summary judgment, a response to defendant's proposed findings of fact and a "renewed request" for permission to respond. To be clear, because plaintiff's responses to defendant's motion for summary judgment were filed late, they will not be considered in deciding this motion for summary judgment.

Because I find that plaintiff was not meeting defendant's legitimate expectations and has not shown that she was treated less favorably than similarly situated male employees, she cannot show that she has not met her burden of a prima facie showing of sex discrimination. Therefore, defendant's motion for summary judgment will be granted.

From the findings of fact proposed by defendant and from the record, I find that the following material facts are undisputed.

UNDISPUTED FACTS

Plaintiff Teresa Pelton is a citizen of Wisconsin who resides in Belleville, Wisconsin. Defendant Green County Sheriff's Department is a state agency with administrative offices located in Monroe, Wisconsin.

On March 16, 1998, plaintiff, who is female, was hired as a deputy sheriff by defendant. From 1991 to 1998, plaintiff had been employed as a police officer for the City of Verona, Wisconsin. Plaintiff had decided to seek employment with defendant because she believed there were opportunities to work in the "K-9" and "Explorer" units even though the Green County position paid less and was further from her residence than her previous position with the City of Verona.

At the time plaintiff was hired, Patrick Conlin was sheriff, J. Michael Welsh was chief deputy of the department, and there were at least three other full-time female deputy sheriffs employed by defendant. Plaintiff understood that she was required to serve a one-year probationary period, that she could be terminated without recourse to the grievance procedure and that the probationary period allowed defendant to evaluate her fitness to work as a permanent employee.

During plaintiff's first two months of employment, she was given field training by Deputy Mark LaPage and Sergeant Britt Gempeler. Plaintiff believes that the field training prepared her to handle patrol duties adequately. After completion of her field training,

plaintiff volunteered to perform clerical duties for one month and then resumed regular patrol duties. Plaintiff's patrol duties included patrolling the highways of Green County.

According to plaintiff, from mid-June 1998 to December 1998 she had no employment difficulties.

The effectiveness of a patrol officer's service is measured, in part, by the amount of self-initiated field activity. This measurement reflects the number of self-initiated officer contacts with citizens and, for the most part, represents writing traffic citations and assisting stranded motorists. During the period from June 1998 to February 1999, plaintiff had the lowest number of self-initiated contacts for any officer on her shift. Plaintiff knew that self-initiated contacts were an important part of being a Green County Deputy Sheriff and that deputies should be "out on the road." Only one other officer on plaintiff's shift, William Eickelkraut, had approximately the same number of self-initiated contacts. He was a permanent employee who was counseled about his poor performance and, as a result, increased his number of self-initiated contacts. Sheriff Conlin and the newly hired chief deputy, David Wickstrum, believe that plaintiff spent too much time at the station house and not enough time out on patrol.

Sometime in January 1999, plaintiff's shift sergeant, Gempeler, warned plaintiff that her self-initiated contacts were too low.

On February 4, 1999, Conlin and Wickstrum informed plaintiff that they intended

to recommend to the Law Enforcement Committee of the County Board that plaintiff's probationary period be extended beyond one year. Following this meeting, plaintiff began to search for other employment.

Conlin and Wickstrum believe that as a result of their decision to extend plaintiff's probation, plaintiff adopted a poor attitude. According to Conlin, plaintiff had become openly hostile and was unwilling to say hello or exchange common pleasantries with him. On February 11, 1999, plaintiff submitted two reports of removing branches from the roadway. Wickstrum perceived these reports as an effort by plaintiff to "thumb her nose" at his directive to increase the number of her self-initiated contacts.

Although plaintiff had increased her self-initiated contacts, by March 1999, Wickstrum and Conlin were convinced that because of her poor attitude she should be terminated. Plaintiff was terminated on March 4, 1999.

OPINION

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174, 1178 (7th

Cir. 1993). Summary judgment may be awarded against the non-moving party only if the court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993). If the non-moving party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

A plaintiff in a Title VII employment discrimination action may prove discrimination by either direct or indirect evidence. In direct evidence cases, the plaintiff offers evidence that requires the finder of fact to draw no further inferences or make any presumptions that an impermissible factor was included in the employer's decision-making process. See Randle v. LaSalle Telecomm., Inc., 876 F.2d 563, 569 (7th Cir. 1989) ("[D]irect evidence, if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption."). The undisputed facts do not suggest any direct evidence that defendant discriminated against plaintiff on the basis of sex. Therefore, I turn to whether indirect evidence indicates defendant discriminated on the basis of sex.

In order to establish a prima facie case of sex discrimination on the basis of indirect evidence, plaintiff must show that she (1) is in a protected class; (2) was performing her job well enough to meet defendant's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees who were not in

her protected class. McNabola v. Chicago Transit Authority, 10 F.3d 501, 513 (7th Cir. 1993); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If plaintiff has made 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 Stores, 16 F.3d 174, 177 (7th Cir. 1994). "The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the employer honestly believes the reasons it offers." Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1029 (7th Cir. 1998) (quoting McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992)). Pretext is not simply a bad or stupid reason; it is "a lie, specifically a phony reason for some action." Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th Cir. 1996).

Defendant concedes that plaintiff meets the first and third prongs of her prima facie case because she is female and has been terminated, but defendant contends that plaintiff cannot establish the other two prongs (defendant's legitimate expectations and similarly situated employees) of her prima facie case.

As evidence that plaintiff was not performing her job well enough to meet its legitimate expectations, defendant points to the facts that plaintiff was not making enough self-initiated contacts, developed a poor attitude and became openly hostile after being

informed of this deficiency. Moreover, defendant argues that it warned both plaintiff and a male deputy that their self-initiated contacts needed to increase, demonstrating that defendant's warning was not given because plaintiff is female, but rather because plaintiff was not performing to defendant's standards. Although plaintiff increased her number of self-initiated contacts, she was terminated because she exhibited a poor attitude and became openly hostile when her superiors directed her to increase her self-initiated contacts. Defendant may legitimately expect plaintiff to accept direction without developing a negative attitude. Taking the facts in the light most favorable to the non-moving party, I find that no reasonable factfinder could conclude that plaintiff was meeting defendant's legitimate expectations. Simply, plaintiff has not put forth any evidence that would put the adequacy of her performance into dispute.

Even if plaintiff could demonstrate that she was meeting defendant's legitimate expectations, she has failed to adduce evidence sufficient to establish that a similarly situated male employee was treated more favorably. Plaintiff alleges that Eichelkraut, a male deputy, was similarly situated and received more favorable treatment. However, Eichelkraut was a permanent employee and plaintiff was a probationary employee and, for that reason, they are not similarly situated. Probationary employees are similarly situated only to other probationary employees. See Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-18 (7th Cir. 2000) (similarly situated "normally entails a showing that the two employees dealt with

the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or their employer's treatment of them."); see also Spath v. Hayes-Wheels Int'l-Indiana, 211 F.3d 392, 397 (7th Cir. 2000) (holding comparable employees must be similarly situated "in all respects"); McKenna v. Weinberger, 729 F.2d 783, 789 (D.C. Cir. 1984) (female probationary employee not similarly situated to male permanent employee). Moreover, both Eichelkraut and plaintiff were warned about the need to increase self-initiated contacts but only plaintiff developed a poor attitude regarding this directive. Because Eichelkraut and plaintiff are not similarly situated, I find that no factfinder could reasonably conclude that Eichelkraut was a similarly situated employee who was treated more favorably than plaintiff.

It is worth noting that even if plaintiff had submitted her responses to defendants' motion for summary judgment in a timely fashion, the outcome of defendant's motion for summary judgment would have been the same. This is because even assuming the truth of plaintiff's allegations, for example, that she was watched more closely, was chosen for a "ride-along" selectively and was to be given an extended probation, these facts would not establish a prima facie case that she was discriminated on the basis of her sex. In each instance, plaintiff compares herself to permanent employees. By definition, probationary employees can be watched more closely, be expected to provide ride-alongs and be given extended probation.

Because plaintiff has not shown that she was meeting defendant's legitimate expectations or that she was treated less favorably than similarly situated male employees, she has not met her burden of a prima facie showing of sex discrimination. Therefore, defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. Defendant Green County Sheriff's Department's motion for summary judgment is GRANTED.

2. The clerk of court is directed to enter judgment for defendant and close the file.

Entered this 4th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge