IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KAREN A. BEHLKE,

OPINION AND ORDER

Plaintiff,

00-C-0107-C

v.

APPLIED MOLDED PRODUCTS CORP.,

Defendant.

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This is a civil suit for money damages brought by plaintiff Karen A. Behlke against her former employer, defendant Applied Molded Products Corp. Plaintiff 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. She contends also 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 the motion must be denied in all respects. Plaintiff has adduced evidence that is sufficient to raise doubts about the believability of

defendant's explanation that its decision to lay off plaintiff and retain two younger male employees who were similarly situated was motivated solely by its opinion that plaintiff was not performing as well as the employees that were retained and not by an intent to discriminate. In addition, 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 Karen A. Behlke, a female born on May 11, 1947. Plaintiff had been a group leader in Menasha's Molding Department and was hired by defendant for the

same position in its own Molding Department. On December 12, 1997, plaintiff became a shift supervisor in the 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 and that much of the negative variance 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 Joyce Ellis (born in 1943). 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. To this end, he made the decision to lay off both Ellis and Zimmerman in the Paint Department, find someone from outside the plant to take over the second shift from Wolfram and transfer Wolfram to the first shift where he would function as both Area Manager and first shift supervisor. Jankowski hired Mike Janke, age 33, 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, Joyce Ellis 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: Ellis, then aged 55; Dave Berton, aged 39; James Millhouse, aged 57; and Sarah Nehls, aged 33. Berton was the Engineering and Manufacturing Manager. Millhouse was the Industrial Engineer. Sarah Nehls was one of two Human Resource Administrators.

After the layoffs in January 1999, Jankowski focused on the Molding Department because it was his belief that some of the Paint Department's problems stemmed from the poor quality of the molded products it received from the Molding Department. Before December 1998, defendant had run two eight-hour shifts in the Molding Department, but in early November 1998, Jankowski decided that the company needed to return to a three-shift schedule after shipping and delivery problems developed with the two-shift plan. In mid-November, defendant promoted Dan Kuhlman from Quality Assurance Inspector to third shift Molding Department supervisor. Kuhlman had approximately one month of training in preparation for his new position.

Mark Schlatter was the lead supervisor and first shift supervisor in the Molding Department. In that capacity he attended the supervisors' meetings in the morning and did the majority of scheduling for the Molding Department. Plaintiff supervised the second shift

and Kuhlman was supervisor for the third shift. Schlatter was born on April 9, 1962 and had an annual base salary of $45,150. Plaintiff had a base salary of $36,000 a year, as of January 1999. Kuhlman, who was born on October 7, 1963, had a base salary of $35,000 a year.

In the first quarter of 1999, Jankowski reviewed the operations of the Molding Department and the performances of all three supervisors to determine the number of parts produced by each shift that met company specifications; how well each supervisor controlled his or her shift, including how well the supervisor handled his or her employees, made sure they worked their full shifts, and monitored their starting and ending times; and how well each supervisor enforced and applied defendant's policies and discipline.

In mid-March 1999, Jankowski 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. She was 50 at the time.

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 reaction injection molding business, which meant it no longer did snowmobile business for

Bombardier and resulted in a nearly 50 % drop in defendant's gross sales to Bombardier. In response to these changes, Jankowski laid off 60 unionized hourly workers and three additional salaried employees: plaintiff, aged 51; 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 plaintiff after reducing the shifts in the Molding Department from three to two. 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 appears to be an excerpt from the personnel files of Joyce Ellis. 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 plaintiff's personnel file in the affidavit of Ann Rogers Snodgrass, dkt. #43, 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.

B. Age and Sex Discrimination Claims

Plaintiff has no direct evidence of discrimination. She is resting her age and sex discrimination claim on the well known McDonnell Douglas formulation. She argues that she has established a prima facie case, as McDonnell Douglas requires: 1) she was 51 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.") Plaintiff's claim is that defendant had a defined group of three Molding Department supervisors and chose to retain the two younger males, despite the fact that one had almost no experience as a supervisor in the position.

Defendant contends that plaintiff cannot make it through the first stage because she is unable to make the second showing required for a prima facie case. Plaintiff maintains that she has satisfied the second prong as to her job performance by proposing facts that neither Jankowski nor any other representative of defendant ever complained to her about her performance, that defendant had promoted her to shift supervisor, that no one ever warned her that she might lose her position if things did not improve, that her shift often had better production rates than the other two shifts, that her shift's attendance was no worse than any other shift's, that she was told shortly before she was laid off that she was doing a great job and given a raise, that Schlatter had many deficiencies as a supervisor and that when she was

terminated, she was told it was because of downsizing. Defendant disputes all of these proposed facts and has proposed as facts of its own that Jankowski talked to plaintiff at length about the need for improvement on her shift, that plaintiff's shift routinely produced a higher rate of non-conforming parts than the other two shifts and that the employees on plaintiff's shifts had high absentee rates and were lax about starting and quitting times and breaks. Because I cannot resolve factual disputes on summary judgment, I must assume that plaintiff is correct about the lack of good reasons for choosing her for layoff rather than Kuhlman or Schlatter.

Plaintiff meets the other three prongs of the prima facie case: she was in the protected classes (she was 51 and female); she was laid off; and similarly situated younger male employees in her department were retained. I turn then 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 had lost business and needed to reduce shifts in the Molding Department and that Jankowski viewed plaintiff as the least capable of the three shift supervisors.

Plaintiff disputes Jankowski's view by alleging that she was skilled in molding, that she was as capable of managing her employees as either of the other two supervisors and that

Kuhlman was inexperienced both in supervision and in molding operations. Ordinarily, such allegations are of questionable 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 v. AT & T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992) (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). In this case, however, plaintiff's statements tend to refute defendant's generalized opinions of plaintiff's performance, which are unsupported by any objective evidence such as daily production records, absentee reports or statistical evidence of differences in shift performance. In a comparable case, the Court of Appeals for the Seventh Circuit found summary judgment inappropriate when the plaintiff's testimony about his own qualifications and experience addressed the employer's assertions that the retained employees were more qualified. See Collier v. The Budd Co., 66 F.3d 886, 892 (7th Cir. 1995). In the court's view, this called into question the employer's contention that it had retained a younger worker because of his expertise. The court found it significant that the employer did not produce

evidence showing how the retained employee's technical background was superior to the plaintiff's or why a superior technical background would be necessary in selling products. "Essentially, [the employer] asks the court to take [its decision makers'] word that they believed that [the retained employees] were more qualified than [the plaintiff]." Id. at 893. When the resolution of the claim depended on whether the decision makers' testimony is to be believed, the "credibility judgment is best left to the finder of fact." Id.

As in Collier, a jury will have to decide the credibility of Jankowski's opinion and decide whether defendant laid off plaintiff because she was older or a woman or because Jankowski honestly believed that she was a less effective supervisor than Schlatter and Kuhlman. I cannot say as a matter of law that Jankowski's choice was made solely because of his objective evaluation of her strengths and weaknesses as a supervisor.

Plaintiff's case is unlike that of Joyce Ellis, one of the two shift supervisors in the Paint Department whom defendant terminated. It was significant that in Ellis's case, both she and the younger male employee who split the supervisory responsibilities of their shift were laid off. In addition, defendant was able to point to financial evidence showing that the Paint Department in which Ellis worked was the major source of cost overruns. Ellis was unable to put into dispute defendant's assertions that she lacked personal experience in painting and specialized knowledge about painting operations and that an employee brought in to replace

her and her co-supervisor had greater experience in painting as well as the ability to manage the entire shift in place of the two supervisors. Replacing two supervisors with one is an obvious money saving decision, regardless of the comparative talents of the employees involved. In Ellis's case, I determined that whatever the reasons for the problems in the Paint Department, 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 and that his decision to lay off both the younger male and the older woman showed that neither age nor sex discrimination motivated his decision.

This is a more difficult case. There is no doubt that defendant was in a situation in which it had to cut costs and improve performance and do so quickly. It was losing large amounts of money. In that situation, it was necessary to lay off employees, both hourly and salaried. It may well be that defendant laid off plaintiff because Jankowski honestly believed she was not productive. However, his decision is not obviously non-discriminatory, as it was in Ellis's case. In the Molding Department, defendant had a choice among an older woman and two younger men and chose to retain the two younger men. In support of the decision, defendant can point only to Jankowski's testimony that he thought plaintiff was a less effective supervisor than the two men. Against that is plaintiff's testimony to the contrary, making

defendant's proffered reason a matter of credibility.

It is true that a review of the nine managerial workers laid off in the first quarter of 1999 tends to show that Jankowski did not make his decisions on the basis of age or sex. 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 (Joyce Ellis and plaintiff) 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. As helpful as this evidence is to defendant, it is insufficient to allow me to conclude that in the specific Molding Department decision, sex or age discrimination played no role.

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 Wolfram in the Paint Department and Schlatter, who ran the first shift in the Molding Department. Although defendant argues that both these men had duties that made their jobs more difficult than plaintiff's, the extent of their additional duties is disputed. Plaintiff alleges that she performed exactly the same duties as Schlatter with the one exception of attending the supervisors' morning meetings and that this one duty does not make his job different from hers. She argues also that Wolfram had duties that were essentially the same as hers. At this stage, I cannot say as a matter of law that plaintiff could not show that either Schlatter's and Wolfram's jobs or both were substantially similar to hers.

ORDER

IT IS ORDERED that plaintiff Karen Behlke's motion to strike affidavits and a personnel file excerpt is DENIED. FURTHER, IT IS ORDERED that the motion for

summary judgment filed by defendant Applied Molded Products Corp. is DENIED in all respects.

Entered this 22nd day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge