IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREA L. SHORTER,

OPINION AND ORDER

Plaintiff,

03-C-0512-C

v.

StarMED STAFFING
PERSONNEL, INC.,

Defendant.

- -

Plaintiff Andrea L. Shorter brought this civil suit against defendant StarMed Staffing Personnel, Inc., contending that defendant had discriminated against her on the basis of her race by making false accusations against her, terminating her without cause, replacing her with a white employee and failing to turn over to a bankruptcy trustee money it had withheld from her wages. Plaintiff brings her suit under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e - 2000e-17.

I conclude that plaintiff has failed to adduce evidence sufficient to allow a jury to find that defendant discriminated against her on the basis of her race. She has no direct evidence of racial discrimination and she cannot establish a prima facie case of discrimination that

would create a presumption of discrimination requiring defendant to come forward with its reasons for disciplining and terminating her.

Before setting out the undisputed facts, it is necessary to say a few words about plaintiff's responses to the facts proposed by defendant. Although counsel received copies of this court's Procedure to be Followed on Summary Judgment Motions, which explains in detail how to propose and oppose facts, plaintiff did not follow the procedures. Instead of proposing a fact to put into dispute another fact proposed by defendant, she simply stated that she objected to the fact and why ("argumentative," "conclusory," "self-serving," etc.). For example, defendant proposed as fact that plaintiff walked off a shift at a nursing home on October 30, 2001, leaving the home short-staffed. In response, plaintiff said only that the fact was false and completely unsupported by any evidence other than Kolleen Kuran's declaration. What plaintiff should have done, if she could, was to propose as a fact that she did not leave her shift early on October 30 and did not leave the nursing home short-staffed and cite evidence that would support this proposed fact. Had she done so, she would have shown that she had some evidence (even if it was only her own affidavit) that if introduced at trial would allow a jury to find that she did not walk out on a shift. Unfortunately for plaintiff, she left undisputed so many of the facts proposed by defendant that no reasonable jury could find in her favor on her claim of race discrimination.

I find from the facts proposed by defendant and opposed by plaintiff that the

following are material and undisputed.

UNDISPUTED FACTS

Plaintiff Andrea Shorter is African American. She was employed as a certified nursing assistant by defendant StarMed Staffing Personnel, Inc., from sometime in 2001 until May 2002 and worked at various locations in and around Madison, Wisconsin. Her supervisors were Timothy Hess and Kolleen Kuran.

Defendant provides supplemental staffing of registered nurses, licensed practical nurses and certified nursing assistants for area medical providers that have staffing shortages. Defendant began operating in the Madison area in mid-2001; by mid to late 2002, it had grown considerably. In 2001, it had about 50 hours a week of placements with clients; in 2002, it was 700 to 800 hours a week. It was of critical importance to defendant that the personnel it placed showed up for work on time. If they did not, the medical care provider would either be short-staffed or would have to keep its regular staff overtime to cover for the tardy substitute employee and patient care would suffer.

When plaintiff began work, she was told that none of the members of defendant's field staff were guaranteed full-time work. Rather, the amount of work available was dependent upon defendant's customers' needs and the employee's flexibility. She was given a number of company policies, including one stating that tardiness was unacceptable.

During September and October 2001, plaintiff had shifts at The Belmont Nursing Home, as did other employees of defendant. On or about October 30, plaintiff had an angry emotional outburst directed at one of The Belmont's nurses. Plaintiff walked off the job, deserting her position and leaving The Belmont short-staffed. After October 30, The Belmont would not allow plaintiff to be placed there. Defendant warned plaintiff orally that her behavior at The Belmont had been inappropriate and that it should not happen again.

After the incident at The Belmont, plaintiff reported that she had strained her back when lifting a patient at the nursing home. Over the next few months, she sought treatment for her back injury and had lifting and other work restrictions in effect at various times. Because of plaintiff's lifting limitations and her specific request, defendant offered plaintiff shifts at Meriter Hospital, where there was less lifting.

Plaintiff may have been given fewer shift opportunities than other employees because she refused to work second or third shift hours, declined a number of shifts because of conflicts such as physical therapy appointments, was frequently tardy and was not as dependable as other staff members. Defendant gave Brenda Hall, an African-American, more work shifts than plaintiff because of her dependability and her willingness to work whatever shifts were available. In one month in 2002, for example, Hall worked 28 shifts. Two other African-American employees worked 135.5 hours and 117.5 hours during the month of May. During that same month, Caucasian nursing assistants worked between 44.5 hours and

136.5 hours.

At the beginning of March 2002, plaintiff was released to work without restrictions. She told Kuran, her supervisor, that she wanted to work only at Meriter Hospital. In February, March and April 2002, plaintiff had frequent emotional outbursts toward her supervisors, Kuran and Hess. She yelled at them when they offered her a second or third shift, despite their verbal warnings that such behavior was inappropriate and would not be tolerated.

In late April 2002, plaintiff telephoned defendant's office on two occasions to say that she would not show up for a scheduled shift. On May 25, 2002, Meriter Hospital called, informing defendant's weekend "on call" contact that plaintiff was 35 minutes late for her shift and had not arrived. The hospital representative told defendant that plaintiff was tardy constantly. That was the first that defendant knew that plaintiff had been reporting late for work at Meriter. At the time, Meriter was defendant's largest client in the Madison area.

Defendant decided to replace plaintiff for her remaining scheduled shifts on May 26 and May 27, 2002, until it could discipline her. Kuran arranged to meet with her on May 28, 2002, to issue her a counseling report for habitual tardiness after being warned that such behavior was unacceptable; her history of yelling at defendant's staff, including her supervisors; and for trying to "self-schedule" herself for shifts at Meriter after being told that such actions were inappropriate. Defendant did not allow its certified nursing assistants to

self-schedule. (Registered nurses were allowed to do so because defendant found them more dependable than its nursing assistants when they scheduled themselves for work.)

When Kuran gave plaintiff a counseling form at the May 28 meeting, plaintiff read the report and began to exhibit signs that she was about to have an emotional outburst. Kuran interrupted her to remind her that if she raised her voice, swore or yelled at Kuran, she would be terminated immediately. Plaintiff responded in a loud voice. Kuran repeated her warning. Plaintiff stood up and yelled, "I ain't signing this." Kuran told plaintiff that she was terminated and was to leave the premises immediately. Defendant has terminated two other employees for tardiness and absenteeism, Nichole Porter and Jenny Walker, both of whom are Caucasian.

After leaving the office on May 28, plaintiff called a few hours later to indicate her availability for work. Kuran reminded her that she had been fired and would not be scheduled for any additional shifts. Plaintiff threatened to come back to the office but Kuran told her she would not be allowed to return and that she should contact defendant's corporate office if she had any questions. Plaintiff never contacted anyone at the corporate office.

Defendant withheld a total of $732.00 from plaintiff's paychecks and paid it over to the Bankruptcy Trustee.

OPINION

Although plaintiff does not make it explicit, she is proceeding under the burden-shifting test set out in McDonnell Douglas v. Green, 411 U.S. 792 (1973). This test allows a plaintiff to show discrimination by proving that she is a member of a protected class, she was performing her work satisfactorily (or qualified for the job she was seeking), she was terminated (or subjected to some other adverse job action) and non-members of the protected class were treated more favorably. If a plaintiff can make this showing, it becomes the obligation of the employer to explain what if any legitimate non-discriminatory reason motivated its employment decision. If it does this, the plaintiff can try to show that the reason given was not the real reason.

Plaintiff did not propose it as fact, but I have found that she is African-American because she alleged it in her complaint and defendant has never contested it. Therefore, she meets the first prong of the test: membership in a protected class. She meets the third prong of having been subject to an adverse job action; it is undisputed that she was terminated from her job. She has more trouble with the second requirement that she was meeting her employer's reasonable job expectations. It is undisputed that she was frequently tardy for shifts, tried to self-schedule her work in violation of defendant's rules and had outbursts of anger at co-workers and her supervisors. It is undisputed that defendant found this conduct unacceptable and told her so on several occasions. In her declaration, dkt. #14,

at 2, ¶ 8, plaintiff avers that she performed all her duties in a competent and professional manner while employed by defendant. It is well-settled that an "employee's self-evaluation cannot create an issue of fact about an employer's honest assessment of inadequate performance." Wyninger v. New Venture Gear, Inc., 361 F.3d 965, 980 (7th Cir. 2004) (citing Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1460 (7th Cir.1994); Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir.1992)).

Finally, plaintiff cannot make the fourth requirement of the test. She has adduced no evidence that any person not in the protected class was treated more favorably. The only evidence on this issue was offered by defendant and shows that defendant terminated two Caucasian employees for tardiness and absenteeism. Plaintiff argues that defendant has made no showing that any non-minority employees were similarly situated to her: none were single parents, had back injuries or had a special needs child placed with them. Plaintiff misapprehends the showing that defendant must make to prevail on summary judgment. It is not obligated to show on summary judgment that none of its non-minority employees had family and personal burdens similar to her. It is plaintiff's burden to come forward with enough evidence to allow a reasonable jury to find that defendant treated her differently from non-minority employees. It is not enough for her to show that defendant did not make special accommodations to her because of her family problems unless she can show that it made such accommodations for non-minority employees. Defendant cannot be held liable

for failing to make the special accommodations plaintiff wanted; it is liable only for discrimination. Plaintiff's allegations in her brief suggest that she thinks she could prove that defendant treated her unfavorably, denying her the shifts she requested, rescheduling her from previously scheduled shifts and hours, disciplining her for self-scheduling and offering her late shifts and shifts outside Madison despite her having told defendant that such shifts would be impractical. She never proposed these allegations as fact, so they cannot be considered. Even if she had, they are insufficient to show discrimination by themselves; plaintiff would have to show that defendant gave more favorable treatment to other employees not in plaintif's protected class.

It is not necessary to discuss plaintiff's claim that defendant did not make payments to the Bankruptcy Trustee as it was required to do. Plaintiff has proposed no facts to support her contention. In any event, she has not explained why she believes that this alleged failure was discriminatory.

Because plaintiff has not shown that she can make out a prima facie case of race discrimination and she has not suggested that she could make out a case for race discrimination by under any method other than McDonnell Douglas, defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant StarMed Staffing Personnel, Inc. is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 4th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge