IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LINDA BOYEA,

OPINION AND ORDER

Plaintiff,

04-C-0403-C

v.

PAROC, INC., d/b/a
FANTASTIC SAMS,

Defendant.

- -

This is a civil action brought by plaintiff Linda Boyea against defendant Paroc, Inc. for alleged violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 - 12134; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654; the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-11.395; and the state Family and Medical Leave Act, Wis. Stat. § 103.10. Plaintiff alleges that when she worked as a hair stylist for a salon operated by defendant, her coworkers harassed her because of her age and a perceived disability; younger workers were allowed to take more breaks from work than she was; she was terminated from her job because of her age and perceived disability; and defendant failed to provide her with leave

under either the state or federal Family and Medical Leave Act or to accommodate her disability.

The case is before the court on defendant's motions for summary judgment and for sanctions under Fed. R. Civ. P. 11. Also before the court are defendant's motion to strike portions of plaintiff's "evidence and item reference list" and its motion to strike plaintiff's second response to the motion for summary judgment and Rule 11 motion. I will begin with the motions to strike.

1. Defendant's motion to strike portions of plaintiff's evidence and item reference list

In response to defendant's motion for summary judgment and proposed findings of fact and its motion for Rule 11 sanctions, plaintiff submitted a response, dkt.#39, and a document titled "evidence and item reference list," dkt. #40. (It is necessary to identify each of the filings by docket number because many of them have the same title.) Defendant objects to some of the documents that make up the "list" on the grounds that plaintiff did not provide them copies of the "items," the items are inadmissible hearsay or, as to item U, irrelevant. The motion will be granted in full. I will give no consideration to items B, D through N or items P, R, T (there is no item S), U, V or Y (there is no W, X or Z). I will consider items A, A9, O, Q and C, to which defendant has no objections.

2. Defendant's motion to strike plaintiff's second response

On January 31, 2005, plaintiff filed a second response to defendant's motion for summary judgment. Dkt. #59. Defendant has moved to strike most of that response as irrelevant, cumulative of materials previously submitted, untimely or not in the form required under this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was sent to plaintiff early in these proceedings. Defendant's motion will be granted.

In plaintiff's "Response to Defendant's 1/18/2005 Motion to Strike & Petition for Fees and Costs Pursuant to It's Rule 11 Motion for Sanctions," dkt. #52, she defends her failure to support her proposed findings with citations to the record in her "Response to Defendant's 12/30/2004 Rule 56 and 11 Motion," dkt. #39 (filed on January 14, 2005), on the ground that "The DEFENDANT has not yet received all of my (Plaintiff) responses to DEFENDANT'S Rule 56 Motion." Dkt. #52 at 1 and following pages. She asserts that the court gave her 30 days in which to file her response and the time has not yet run. Plaintiff is correct when she says that she had 30 days in which to file a response and that the time did not expire until January 31, 2005, when she filed her second response, but this does not explain why she filed a document titled response on January 14. The court and opposing counsel assume that when a party files a "response" within the allotted time that the response is complete. Nothing in the January 14 response would have alerted a reader to the

possibility that the response is only a first draft of a complete response to be filed later. In any event, nothing in the second response that plaintiff filed cures the problems that defendant identified in its motion to strike.

The magistrate judge's preliminary pretrial order, dkt. #7, warns pro se litigants such as plaintiff that they will not have a second chance to do over their responses to motions for summary judgment. Id. at 8. This circuit considers summary judgment the "put up or shut up" moment in a lawsuit, "when a party must show what evidence it has that would convince a trier of fact to accept its version of events." Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir.1999). Plaintiff had a full opportunity to submit proposed findings of fact and did so on January 14, 2005. I will take those proposals into account and give no consideration to the later-filed submission.

3. Fact-finding

From the findings of fact proposed by the parties, I find that the following facts are material and undisputed. (In finding these facts, I have had to ignore most of plaintiff's proposals because they are not supported by evidence that I can locate in the record or they rely on evidence that would be inadmissible at trial or are irrelevant. For example, it is irrelevant to any of her claims whether Gigi Rauckman agreed to report back to her about the results of Rauckman's investigation of a complaint that plaintiff had submitted about

her work environment. Also, I have ignored proposed facts that begin, "It is believed that.")

UNDISPUTED FACTS

Plaintiff Linda Boyea is a 48-year-old individual residing in Chippewa Falls, Wisconsin. She is trained as a hair stylist/cosmetologist. Defendant Paroc, Inc., d/b/a Fantastic Sams, is a Wisconsin corporation that owns and operates several hair salons in and around Eau Claire, Wisconsin, including the shop at which plaintiff worked.

At all times relevant to this suit, plaintiff was employed as a hair stylist at Fantastic Sams, working about 32 hours a week. On January 7, 2002, she submitted a written request for a medical leave to "Fantastic Sams Corporate Regional Office," saying that she was requesting approved medical leave for six weeks for surgery. She gave the anticipated starting and ending dates for the leave and said that she expected to return to her position as a stylist at the end of her leave. Her request was approved by defendant's owner and by the manager of the Chippewa Falls salon at which plaintiff worked. After plaintiff's initial leave ended, defendant permitted her to take additional time off during 2002, along with intermittent leave after she returned to work.

On or about December 11, 2002, plaintiff told Gigi Rauckman, one of defendant's owners, that she wanted to meet with management and could not return to work until she had done so. Rauckman agreed to meet with plaintiff on December 12. Before the meeting, plaintiff prepared a written "Employee Complaint/Grievance," listing her concerns about

working at the Chippewa Falls salon. The apparent trigger for the grievance was a confrontation between plaintiff and the salon manager, Jayne Shunk, on the morning of December 11, at which Shunk told plaintiff that one of them should leave the salon.

At the December 12 meeting, plaintiff told Rauckman about verbal harassment she had allegedly received from Jayne Shunk and stylist Laura Schindler. Rauckman told plaintiff she would look into the situation. Plaintiff wanted Rauckman to discipline Shunk by moving her to a different salon. After this meeting, plaintiff had no additional contact with Rauckman.

In response to plaintiff's grievance, Rauckman spoke directly with Shunk on December 12. The discussion upset Shunk and Rauckman excused her from work immediately. Four of the stylists later called defendant to say they were quitting because they believed that Shunk had been fired. To address their concerns, Rauckman called all the Chippewa Falls stylists and she and Will Rauckman, another owner, held an emergency meeting with them, to discuss plaintiff's complaint. At the end of the meeting, both Will Rauckman and Gigi Rauckman concluded that plaintiff had no factual basis for her claims.

Plaintiff's next regularly scheduled day for work at the salon was Monday, December 16, 2002. She did not show up for work that day or on any other scheduled workday that week and she did not appear for work on the following Monday, December 23. Defendant

had not approved any of the absences. On December 16 and December 17, plaintiff asked Kip Landry to call the salon to say that plaintiff would not be working that day for "personal reasons."

Plaintiff saw a doctor on December 18, who did not tell her to take a leave of absence or to quit her job. About 10:18 p.m. that day, she sent a fax to defendant's Eau Claire office, saying that she would not be available for work the next day. On December 19, 2002, she called defendant's regional office to speak with Gigi Rauckman. When Gigi Rauckman was not available to take the call, plaintiff spoke with Will Rauckman and told him that she would need to take a family medical leave. She did not say why she needed a medical leave or how long it might last. She asked about the situation at the Chippewa Falls salon; Rauckman told her that he did not see anything wrong with the current management at the salon and had no intention of doing anything about it.

Plaintiff had no other contact with anyone at the salon for any reason after December 19, 2002. On December 23, 2002, Will Rauckman wrote plaintiff that defendant was terminating her employment because of unauthorized absences from work.

During the 52 weeks before plaintiff made her demand for family medical leave on December 19, 2002, she worked no more than 1075.40 hours for defendant and possibly fewer.

OPINION

Plaintiff is proceeding pro se in her litigation of this lawsuit. Although this puts her at a distinct disadvantage, the court has made a number of efforts to help her to understand what is expected of her. The magistrate judge entered a lengthy and comprehensive order, explaining the court's expectations of pro se litigants and her obligations and the deadlines she must meet, and incorporating a copy of the court's Procedure to be Followed on Motions for Summary Judgment. He has explained at length, in orders resolving the parties' discovery disputes, what she must do to obtain discovery, as well as the discovery to which she is entitled. See Orders at dkt.##13, 15,18, 20, 22, 23 and 37. Even defendant's counsel has provided information for plaintiff in its briefs about what she needs to prove in order to make out the claims that she has alleged in her complaint, which I have construed as (1) a work environment hostile to older workers; (2) disparate treatment of younger workers; (3) discriminatory termination; (4) violation of the federal Family and Medical Leave Act; (5) failure to accommodate a disability; (6) violation of the state Family and Medical Leave Act; and (7) violation of the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.395. (She does not explain what the alleged violations of the state laws are.)

As a non-lawyer, plaintiff might not have understood before she filed this suit that she would have to do more than simply identify statutes that she believes defendant violated and describe actions that she thinks were unlawful. In fact, as she should have realized from

reading defendant's brief in support of its motion for summary judgment, she has a much more difficult job. She must identify the elements of each of her claims, propose facts that show that she can prove each of the elements and show that she has evidence to support each one of the facts she proposes. For example, to prove a violation of the federal Family and Medical Leave Act, she must prove each of the following elements of the claim:

1. Defendant is covered by the Act (because it employs at least 50 persons or more during at least 20 weeks of the year);

2. Plaintiff has worked at least 1,250 hours in the 12 months preceding the request;

3. Plaintiff had a serious health condition as defined in 29 C.F.R. § 825.114(a)(2) that left her unable to perform the functions of her position;

4. Plaintiff advised her employer as promptly as practicable under the particular facts and circumstances of the case of the date on which the serious health condition developed, its probable duration and the "appropriate medical facts within the knowledge of the health care provider regarding the condition," 29 U.S.C. § 2613(b)(3);

5. Defendant denied her request.

Plaintiff's next task is to determine what evidence she would need at trial to prove each of the elements. In the example I have used, she does not need proof that defendant is covered by the Act because defendant does not deny that it is. She has gathered time

records in an effort to prove that she worked more than 1,250 hours in the year preceding her request for leave. To prove that she had a serious health condition when she asked for leave, she could have filed an affidavit from a doctor or properly certified records from a hospital. To prove that she advised defendant of her condition and the length of the time that she needed to be away from work and that defendant denied the request, she could have set out in a sworn affidavit what occurred or filed defendant's answers to her requests for admission, if the answers were favorable to her position. At that point she would have been ready to set out the facts she was proposing and identify the evidence that she had gathered to support each fact.

Unfortunately, plaintiff did not do what was required of her. Rather than submit proposed facts related to each element of each claim, she has submitted a scattergun array of allegations about her work environment along with huge quantities of "evidence" that is either inadmissible or irrelevant. As a result, she is unable to show that defendant violated any of the acts she has cited.

If it appeared that the failure of proof were a failure that plaintiff could remedy if she had a better understanding of the way a lawsuit progresses, I might give her additional time in which to submit evidentiary materials. However, it is clear from the materials in the record that it is not more time that she needs but a different set of facts and circumstances. She may have been subject to some inappropriate comments and may have felt she was not

appreciated because of her age but nowhere in the mass of materials that she has submitted is there any indication that defendant violated any of her federal or state rights. Plaintiff has taken a few disagreeable experiences at work and blown them into a federal lawsuit that cannot withstand close scrutiny. The regrettable consequence is that defendant has been required to incur considerable costs in defending against her claims.

A. Summary Judgment

1. Hostile environment based on age

Title VII prohibits discrimination on the grounds of sex in working conditions. Although it makes no specific reference to sexual harassment, courts have extended its protections to that form of sex discrimination. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (holding that plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created hostile or abusive work environment and adding that "'sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality"). It is an open question whether a hostile work environment based on *age* is actionable under the Age Discrimination in Employment Act. Bennington v. Caterpillar Inc., 275 F.3d 654, 660 (7th Cir. 2001) ("This circuit has assumed, without deciding, that plaintiffs may bring hostile environment claims under the

ADEA.") (citing Halloway v. Milwaukee County, 180 F.3d 820, 827 (7th Cir. 1999)).

If plaintiff were suing defendant for sexual harassment in violation of Title VII, she would have to establish that (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on her sex; (3) the sexual harassment unreasonably interfered with her work performance by creating an intimidating, hostile or offensive work environment that had a serious effect upon her psychological well-being; and (4) there is a basis for employer liability. McPherson v. City of Waukegan, 379 F.3d 430, 437-38 (7th Cir. 2004). Adapting this formula to age-based harassment, plaintiff would have to show that she had been subjected to harassment based on age that unreasonably interfered with her work performance by creating so hostile and abusive an environment as to alter the terms and conditions of her employment.

Plaintiff attempted to propose facts about comments that her coworkers made to her while she was working for defendant in 2002. She has not supported her proposals with admissible evidence; even if she had, the few comments she quotes fall far short of establishing a hostile environment under the law. Such a showing would require more than a few statements to the effect that plaintiff should "toughen up" or that she probably knows all the songs on the oldies station or even that she needs a tan because she "looks like shit." Unpleasant or unwelcome as such comments would be, they do not amount to harassment that is so severe or pervasive as to alter a person's working environment and create an

abusive workplace. Examining the frequency of the discriminatory conduct that plaintiff has alleged, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998), no reasonable jury could find that the Chippewa Falls salon environment was hostile or abusive.

2. Disparate treatment with regard to compensation

The Age Discrimination in Employment Act prohibits discrimination against an employee because of her age. To succeed on a claim of disparate treatment under the Act, plaintiff must show that she is within the protected class (over 40), which she is, and that her defendant's discriminatory motives were one of the reasons she suffered an adverse employment action.

A plaintiff bringing a discrimination claim can rely on direct or indirect evidence that her age was one of the reasons her employer took an adverse action against her. Plaintiff has no evidence to suggest that Will Rauckman harbored any discriminatory animus against older employees. This leaves her with only one avenue for proving her case: proceeding under a variation of the burden-shifting test set out in McDonnell Douglas v. Green, 411 U.S. 792 (1973). Under this test, a plaintiff must show that she was in the protected class, she was performing her job satisfactorily, she suffered an adverse employment action and substantially younger employees were treated more favorably. Hoffman v. Primedia Special

Interest Publications, 217 F.3d 522, 524 (7th Cir. 2000).

However, plaintiff has adduced no proof that she could make any of the last three required showings. She submitted a chart showing that her earnings were lower than those of other employees, but she did not show how the chart was made or by whom; she has not shown the ages of the other employees; and she has not accounted for differences in working hours, regular customers or other matters that might affect the average hourly earnings. She has adduced no admissible evidence from which a factfinder could find the most basic element of her claim, which is that other employees were treated differently in any respect. She has not cited any evidence to show that other employees were given favored treatment that led to greater compensation. She has made a number of allegations to that effect but allegations do not create disputes of facts that a jury must resolve.

3. Termination from employment

Plaintiff challenges her termination from her job, alleging that defendant fired her either because of a perception that she is disabled or because of her age. She has no evidence to support either one of these allegations. With respect to a perceived disability, she has not shown that defendant perceived her as having any health condition that qualifies as a medical disability under the Americans with Disabilities Act. Her post-surgical condition would not qualify as "a physical or mental impairment that substantially limits one or more

of the major life activities of" an individual, 42 U.S.C. § 12102(2)(A)-(C), in the absence of a showing that this condition limited her in the basic functions of life. The record is devoid of any evidence that her employer regarded her as having such an impairment.

Defendant proposed as fact that it terminated plaintiff because of unauthorized absences. Plaintiff has not put this fact into dispute. She complains that defendant should have granted her request for family and medical leave but she has not adduced any facts to show that she was eligible for such leave or that she complied with the statutory prerequisites for obtaining such leave from her employer. She does not deny that she failed to report for work during the ten days before Christmas 2002.

With respect to age discrimination, plaintiff has adduced no evidence that she was fired because of her age. She has no direct evidence of age bias on the part of defendant and she cannot make the prima facie showing of a disparate treatment claim because she cannot show that was performing her job satisfactorily at the time of her termination. In fact, she was refusing (or simply failing) to come to work. She has no evidence that any younger employee who failed to show up for work was retained and not fired.

4. Family and Medical Leave Act claim

As I explained earlier in this opinion, plaintiff cannot prevail on this claim unless she can prove that she was eligible for the statutory leave, that she had a serious health condition

within the meaning of the Act and that she brought this condition to defendant's attention when she applied for leave and that she told defendant how long she expected she would have to be on leave. The burden of proving entitlement to FMLA leave is on the employee. Kohls v. Beverly Enterprises Wisconsin, Inc., 259 F.3d 799, 804 (7th Cir. 2001).

Plaintiff's own evidence shows that she had not worked enough hours in the preceding year to qualify for leave. Even if this calculation is not correct, plaintiff has failed to adduce any admissible evidence that she had a serious health condition and that she brought it to defendant's attention. Indeed, in her Response to Defendant's Rule 56 and Rule 11 Motions, dkt. #39, at 31, she states that when she talked with Rauckman on December 19, 2002, she "could not state any specifics or detail regarding my condition, because I myself did not know what was going on with me medically, and did not feel comfortable discussing the nature what [sic] problems I experienced the day before I spoke with Mr. Rauckman." At p. 32, she continues: "After informing William Rauckman that I would be taking a Family Medical Leave on December 19, 2002, there was no further contact regarding notification of my absence, because I believed a Family Medical Leave is (or should have been) considered an excused absence justifiable per medical recommendations."

5. Failure to accommodate a disability

Finally, I turn to plaintiff's claim under the Americans with Disability Act that defendant did not accommodate the known physical or mental limitations of an otherwise qualified person with a disability. To succeed on this claim, plaintiff would have to show that she had a qualifying disability, that defendant knew of any disability, that she was otherwise qualified for her styling job and that defendant failed to accommodate her disability. She has adduced no admissible evidence on any of these elements.

6. State law claims

In addition to her federal claims, plaintiff has alleged claims under the state Family and Medical Leave Act, Wis. Stat. § 103.10, and the Fair Employment Act, Wis. Stat. 111.31-111.395. However, she has not explained how she thinks defendant violated these statutes. I conclude from this omission that plaintiff has waived any argument about the applicability of these statutes. See Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). I can see no way that plaintiff would be able to show that defendant violated these statutes when she cannot show that it violated any of the very similar federal statutes.

B. Rule 11 Sanctions

It is clear that defendant is entitled to summary judgment on plaintiff's claims. She has shown no legal or factual basis for prosecuting this case. The question is whether defendant is entitled to Rule 11 sanctions for having to defend against a baseless lawsuit.

Defendant filed a Rule 11 sanctions motion on plaintiff on November 10, 2004, explaining the grounds for seeking sanctions and offering plaintiff 21 days in which to withdraw her complaint. After plaintiff refused the opportunity, defendant filed its motion for sanctions in this court on December 30, 2004. Dkt. #30. In a later filed petition for fees and costs, dkt. #50, it explained that it is seeking costs and attorney fees in the amount of $26,108.71. In opposition to the motion, plaintiff offers only her oft-repeated beliefs that she has been subjected to discriminatory treatment by defendant and that defendant and its attorneys have misrepresented the facts, falsified their testimony and fabricated documents.

Plaintiff is proceeding without counsel and for that reason is entitled to greater latitude in her filings than a person represented by counsel. This does not mean, however, that she is free to make allegations that are without foundation. Her lack of legal training does not shield her from the consequences of making claims that she cannot substantiate. Despite the directions she has received from the court, she has persisted in proceeding as she wishes, rather than in conformity with the Federal Rules of Civil Procedure or the procedures of this court. She has wasted the court's time and defendant's resources pursuing improper kinds of discovery and filing impenetrable, voluminous documents. Defendant warned her

that she was running the risk of subjecting herself to sanctions and gave her the opportunity to withdraw her complaint before the sanctions could be imposed. The warning did not deter her.

Plaintiff cannot claim that she had no reason to believe that her case was tenuous at best. She started out in the Equal Rights Division of the state of Wisconsin and withdrew her complaint after she received an adverse ruling at the initial stage of the proceedings. This should have suggested to her that she would have difficulty proving her federal claims as well.

Because I have found that plaintiff had no legal or factual basis for her suit in this court, I will grant defendant's motion for Rule 11 sanctions. I believe that $2,500 is an appropriate sanction. Although it falls far short of reimbursing defendant for its expenses, it is sufficient to deter plaintiff from repeating the conduct that led to the imposition of the sanction.

ORDER

IT IS ORDERED that defendant Paroc Inc.'s motions to strike plaintiff's second response and portions of plaintiff's "evidence and item reference list" are GRANTED. Defendant's motion for summary judgment is GRANTED. Defendant's motion for sanctions pursuant to Fed. R. Civ. P. 11 is GRANTED; defendant is awarded $2,500 as a

sanction for bringing a suit that lacked any basis in law or fact. Plaintiff Linda Boyea may have until June 15, 2005, in which to pay defendant the sum of $2,500. The clerk of court is to enter judgment for defendant and close this case.

Entered this 25th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge