IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

PAMELA D. ALEXANDER,

Plaintiff,

v. MEMORANDUM AND ORDER

NAMEPROTECT INC., 05-C-674-S

Defendant.

Plaintiff Pamela D. Alexander commenced this civil action claiming that defendant NameProtect, Inc. discriminated against her on the basis of her gender and pregnancy under Title VII. In her complaint she alleges that she was laid off and not recalled because of her pregnancy and gender.

On March 31, 2006 defendant filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, an affidavit and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Plaintiff Pamela D. Alexander is an adult resident of Ohio. Defendant NameProtect, Inc. is a privately-held corporation headquartered in Madison, Wisconsin, currently employing approximately 65 people. It provides comprehensive trademark clearance and monitoring services. Its primary product lines are Trademark Research and VigilActive.

NameProtect hired plaintiff in January 2003 for the position of strategic account manager, principally a sales position, with an initial base salary of $55,000 plus commissions. Plaintiff sold both Trademark Research and VigilActive.

By the fall of 2003 NameProtect was a in a difficult position financially. The Board of Directors hired two new senior management personnel, Alex Kasper and Mark McLane. Soon after these hires NameProtect negotiated a third round of financing from Mason Wells, a private equity investor, to keep the company afloat and handle cash flow problems. The Board of Directors directed McLane to make the company profitable and grow the VigilActive product. McLane decided to transfer the majority of the company's resources and people into the VigilActive side of the business and segment the two product lines.

Plaintiff was directed to concentrate on VigilActive sales. McLane told plaintiff that he wanted his strongest salespeople on the VigilActive side. Kolpien told plaintiff that she could go back to selling Trademark Research if she was not successful selling VigilActive. Plaintiff received a $10,000 raise for moving to VigilActive. Plaintiff sold VigilActive to the Better Business Bureau, Freddie Ma, AIG and Federal Express.

Toward the end of February 2004 plaintiff began to tell people at NameProtect that she was pregnant. Her supervisor, Mike Kolpien, offered to cover her territory for her while she was on

maternity leave. Around March 1, 2004 plaintiff told Alex Kasper that she was pregnant. He advised her that her maternity leave would be unpaid. In an effort to assist plaintiff, Kasper investigated whether other similar companies offered paid maternity leaves. He ultimately concluded that NameProtect should not change its policy of granting unpaid maternity leaves.

In March 2004 McLane determined that a reduction in force of employees tied to VigilActive was necessary. He chose to lay off plaintiff, Mike Kolpien, Darla Marshman and Chris Pitzo. The three individuals that remained on the VigilActive sales force were Kevin Omiliak, Mark Pankow and Paul Iemma. Shortly after the lay offs Pankow left the company and Kolpien was rehired as a salesperson.

Plaintiff was terminated by McLane on March 12, 2004 but her last day of employment was March 15, 2004. McLane told plaintiff she was laid off for budgetary reasons. He never mentioned to plaintiff any problems with her performance. McLane chose to lay off plaintiff instead of other sales persons, in part, based on her respective sales potential. (Defendant's response to plaintiff's proposed finding of fact 67). McLane stated in his deposition, "Pam was a quality contributor to our company when she was here."

Plaintiff was not recalled by the defendant after she was terminated. From September 2004 to January 2005 NameProtect hired an additional five salespeople.

MEMORANDUM

Plaintiff claims she was terminated because of her pregnancy and gender. To establish a prima facie case of pregnancy discrimination plaintiff must establish that she was in a protected class, she was performing the job within the legitimate expectations of her employer, she was subject to an adverse employment action and the employer treated similarly situated male employees more favorably. Bragg v. Navistar Int'l Transp. Corp., 164 F.3d 373, 376 (7th Cir., 1998).

It is undisputed that plaintiff was in a protected class, that she was performing the job within the legitimate expectations of her employer and that she was laid off. Defendant argues that she was not treated less favorably than similarly situated employees because three other individuals were terminated. Plaintiff contends that the other employees who were laid off were not similarly situated to her. She contends that the other VigilActive salespersons who were similarly situated to her and were male were not terminated. It remains disputed whether defendant treated similarly situated male employees more favorably than plaintiff.

Defendant would then be required to articulate a legitimate business reason for its decision. Defendant states at the time of plaintiff's termination that she was being laid off for budgetary reasons.

Plaintiff would then be required to prove that this reason is not the real reason, but a pretext for pregnancy discrimination. McDonnell Douglas v. Green, 411 U.S. 792 (1973). It is undisputed that plaintiff, a successful salesperson, was terminated for budgetary reasons but other persons were hired as salespersons less than a year after her termination. This fact raises a genuine issue of fact as to whether the employer's reason that plaintiff was laid off for budgetary considerations is credible.

Further, a changed story is evidence of pretext. Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 291 (7th Cir. 1999). In this case although defendant initially stated its reason for terminating plaintiff was budgetary concerns it subsequently asserted that plaintiff was chosen for lay off because she had not demonstrated the sales potential of the other salespersons. A dispute remains whether defendant's reasons were a pretext for pregnancy discrimination. Plaintiff is entitled to a trial on the issue of the reason for her termination. Accordingly, defendant's motion for summary judgment on plaintiff's discrimination claim will be denied.

Plaintiff is also pursuing a claim that defendant failed to hire her for available sales positions after she was terminated. Defendant argues that she is foreclosed from pursuing this claim because she did not formally apply for these positions. Plaintiff argues that she was not formally required to apply for the

positions because defendant should have informed plaintiff of the available positions after her termination. The Court has held that in a lay off case a failure-to-rehire claim is not cognizable where an individual failed to apply for the available position. Ritter v. Hill'n Dale Farm, Inc., 231 F. 3d 1939, 1045 (7th Cir. 2000). Accordingly, plaintiff cannot pursue her failure-to-rehire claim because she did not apply for available positions. This claim will be dismissed.

ORDER

IT IS ORDERED that defendant's motion for summary judgment on plaintiff's failure-to-rehire claim is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on plaintiff's termination claim is DENIED.

Entered this 5th day of May, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge