IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

NEIL T. NOESEN,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-071-S

MEDICAL STAFFING NETWORK, INC., WAL-MART STORES, INC. and STATE OF WISCONSIN,

Defendants.

Plaintiff Neil T. Noesen commenced this civil action against defendants Medical Staffing Network, Inc., Wal-Mart Stores, Inc. and the State of Wisconsin under Title VII and 42 U.S.C. §§ 1983 and 1985. He alleges in his complaint that he was terminated as a pharmacist because he refused to distribute contraceptive articles and that defendants violated his First Amendment rights. Counts 2 and 3 of plaintiff's complaint against defendant Medical Staffing Network, Inc. have been dismissed.

On May 5, 2006 defendant State of Wisconsin moved to dismiss plaintiff's complaint. Plaintiff filed a brief in opposition to this motion on May 26, 2006.

On May 5, 2006 defendants Medical Staffing Network, Inc and Wal-Mart Stores, Inc. filed motions for summary judgment under Rule

56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and briefs in support thereof. Plaintiff has filed opposition briefs to both motions. Defendant Medical Staffing Network has replied. No further briefing is required.

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 defendants' motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Neil Noesen is an adult Wisconsin resident. He is a pharmacist who received his degree in pharmacy in 1999 and has a professional license to practice pharmacy in the State of Wisconsin. Defendant Medical Staffing Network, Inc. (MSN) is a business that places pharmacists in temporary and permanent positions. Defendant Wal-Mart Stores, Inc. is a retail establishment having stores around the country including Onalaska, Wisconsin.

In 2004 the State of Wisconsin Pharmacy Examining Board brought disciplinary proceedings against plaintiff concerning his pharmacy license because he had refused to process or refer a young woman's contraceptive prescriptions. On or about April 13, 2005 the Board found that he had engaged in a practice constituting a danger to the health, welfare or safety of a patient. The Board reprimanded plaintiff and limited his pharmacy license. Specifically the Board ordered, "Prior to providing pharmacy services at any pharmacy, [Noesen] shall prepare a written notification specifying in detail the pharmacy practices he will decline to perform as a result of his conscience." He was also

ordered to specify in detail the steps he will take to ensure that a patient's access to medication is not impeded by his failure to perform a service.

Plaintiff applied to MSN for a pharmacy position in February 2005. His application advised that his license was under investigation in the State of Wisconsin. Plaintiff also stated that he was Catholic and he would not dispense contraceptive articles. Plaintiff was an at-will employee of MSN.

In July 2005 Wal-Mart in Onalaska, Wisconsin needed temporary assistance in the Pharmacy Department. Despite plaintiff's disciplinary record and self-imposed limitations, Wal- Mart agreed to have plaintiff placed at its Onalaska store on July 13, 2005. MSN faxed to Wal-Mart the decision of the Wisconsin Pharmacy Examining Board. Plaintiff also gave Roger Overton, a Wal-Mart Pharmacist, who regularly works at the Onalaska store, a document to sign acknowledging that plaintiff would not "participate in the provision of contraceptive articles while contracting with our pharmacy." The document states as follows:

> I respectfully decline to perform the provision of, or any activity related to the provision of contraceptive articles due to conscience.
> I decline complete or partial cooperation with patient care situations which involve the provision of or counsel on contraceptive articles. These declinations include, but are not limited to: Transfers, Referrals,

> Renewals, all dispensing functions which include verification and assembly, prescriptions called-in, faxed, sent digitally or brought to my attention in any way for the purpose of being processed, Drug information requests, Patient Consultations, Insurance Claims, any Pharmacy function related to contraceptive articles not explicitly mentioned here.

Overton signed the document. Plaintiff worked at the Onalaska store on July 13, 14, 20, 25 and 26, 2005.

Overton never asked plaintiff to transfer, refer, renew, dispense, verify or touch prescriptions for birth control. When plaintiff was working another pharmacist was always available to fill customer prescriptions and answer inquiries about birth control.

On Monday July 25, 2005 Overton told plaintiff that he could not simply walk away from customers or leave them on hold indefinitely. Plaintiff reminded Overton of the document he had signed on July 13, 2005. Overton responded that he had agreed to accommodate plaintiff's objections but needed some signal from plaintiff that a customer required assistance.

On July 26, 2005 plaintiff walked into the pharmacy and stated in front of the entire staff that he had filed a complaint of harassment against Overton with MSN, which he called his agent. Plaintiff believed Overton was pressuring him to attend customers who were seeking birth control. Overton responded that he did not

harass plaintiff but simply asked him to signal if a customer was seeking to have a birth control prescription filled. Plaintiff attempted to involve other employees in his dispute with Overton.

Plaintiff called Overton a liar in the middle of the pharmacy where other employees were present. At approximately 11:00 a.m. on July 26, Overton phoned his Regional Director, Kara Williams, and stated that plaintiff had just called him a liar and that plaintiff's behavior was disruptive. Williams and Overton discussed the matter and agreed that Overton would ask plaintiff to leave the pharmacy after lunch. After lunch Overton informed plaintiff that his services were no longer required, that he would be paid for the remainder of the day and if he had any further questions he could contact MSN.

Williams called MSN and advised that plaintiff was not notifying Overton where a patient was waiting to be assisted. Shortly thereafter Wal-Mart Regional Manager Chris Duffy called to report problems with plaintiff which included not advising Overton that a person is waiting for assistance with a birth control prescription. He also advised MSN that plaintiff was asked to leave but refused.

Plaintiff refused to leave the Wal-Mart store. Manager Gordon Rassmussen called the Onalaska police department to have him

removed from the store. Plaintiff was removed from the store in a wheelchair because he refused to do so.

Plaintiff called MSN on July 27, 2005 and stated that he no longer wished to work with MSN unless MSN could place him in a Christian hospital that does not dispense contraception. Plaintiff was terminated by MSN because of his poor performance and his inappropriate and disruptive conduct at the Onalaska Wal-Mart on July 26, 2005.

MEMORANDUM

Defendant Wal-Mart Stores, Inc. moves for summary judgment on plaintiff's 42 U.S.C. §§ 1983 and 1985(3) claims. To state a claim under 42 U.S.C. § 1983 plaintiff must allege that his constitutional rights were violated by a person acting under color of state law. See Gayman v. Principal Fin. Services, 311 F.3d 851, 852 (7th Cir. 2005), cert. denied, 457 U.S. 943 (2003). Plaintiff has not alleged that Wal-Mart is a state actor. Accordingly, plaintiff's 42 U.S.C. § 1983 claim against Wal-Mart will be dismissed.

To state a claim under 42 U.S.C. § 1985(3) plaintiff must allege a conspiracy for the purpose of depriving any person equal protection of the laws, an act in furtherance of the conspiracy and an injury to the person. Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, the Court limited the application of the

statute's first clause to conspiracies motivated to deprive a plaintiff of rights constitutionally protected against private (and not just governmental) deprivation. In Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 297 (1993), the Court defined the rights which were protected against private action as only the constitutional right of interstate travel and the rights granted by the Thirteenth Amendment. Plaintiff has not alleged a conspiracy to deprive him of either of these rights. Accordingly, plaintiff's claim under 42 U.S.C. § 1985(3) against Wal-Mart will also be dismissed.

Plaintiff's Title VII claims against MSN and Wal-Mart Stores remain. It is undisputed that plaintiff was employed by MSN at the Wal-Mart Store in Onalaska. In his EEOC charge plaintiff names Wal-Mart as his employer and not MSN. Although it appears plaintiff has not exhausted his administrative remedies against MSN, the Court will address his Title VII claim as to each defendant.

A claim for religious discrimination under Title VII can be asserted under disparate treatment and failure to accommodate theories. See Soria v. Ozinga Bros, Inc., 704 F.2d 990, 997-99 (7th Cir. 1983). To establish a *prima facie* case of disparate treatment discrimination plaintiff must show he was a member of a protected class, he was meeting his employer's legitimate performance

expectations, he suffered an adverse action and similarly situated individuals not in the protected class were treated more favorably. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Once plaintiff establishes a *prima facie* case the burden shifts to the defendants to articulate a legitimate, non-discriminatory reason for its action. Id. The burden then shifts back to the plaintiff who must then prove that the defendants' explanation is a pretext for discrimination. Id..

It is undisputed that plaintiff was not meeting the legitimate expectations of either Wal-Mart or MSN. He was placing customers on hold indefinitely and not assisting in-store customers without notifying another pharmacist. He was disruptive and called the other pharmacist, Roger Overton, a liar. Further, when he was asked to leave the store he refused.

Plaintiff also failed to establish a *prima facie* case because he has not shown a similarly situated employee not in the protected class was treated differently. Had plaintiff established a *prima facie* case defendants have articulated a legitimate non-discriminatory reason for terminating his employment: his abandonment of customers, his disruptive behavior and his refusal to leave the store. Plaintiff has produced no evidence that these reasons were pretextual for religious discrimination. In fact both defendants honored his religious beliefs by agreeing that he did

not have to dispense birth control devices or medication. Defendants are entitled to judgment in their favor on plaintiff's Title Vii disparate treatment claim.

Title VII requires an employer to attempt to accommodate the religious need of its employees provided the accommodation would not work an undue hardship on the employer. 42 U.S.C. §2000e(j). Plaintiff does not allege that MSN failed to reasonably accommodate his religious beliefs. He is pursuing this claim only against Wal-Mart.

To establish a *prima facie* case of failure to accommodate plaintiff must demonstrate that 1) the practice or observance conflicting with an employment requirement is religious in nature, 2) he called the religious practice or observance to the employer's attention and 3) the religious practice or observance was the basis of discriminatory treatment. EEOC v. Ilona of Hungary, Inc., 108 F. 3d 1569, 1575 (7th Cir. 1997)

For purposes of this motion defendant Wal-mart concedes that plaintiff may be able to establish a *prima facie* case of failure to accommodate. The burden then shifts to Wal-Mart to prove it reasonably accommodated plaintiff. Title VII requires an employer to provide one reasonable option that will eliminate the conflict between the employee's job and religious beliefs. Ansonia Board of Education v. Philbrook, 479 U.S. 60, 70 (1986).

At the beginning of his assignment at Wal-Mart plaintiff declined to perform any activity related to providing contraceptive articles. Defendant Wal-Mart gave plaintiff the exact accommodation that he sought. Plaintiff then sought the additional accommodation, seeking to avoid situations where he might briefly interact with a customer who requested a prescription for birth control. The other pharmacist suggested that plaintiff advise him or another pharmacist of the happening. Plaintiff refused to comply with this request which did not require him to provide contraceptive articles. Plaintiff was not entitled to an additional accommodation under the law. Accordingly, defendant Wal-Mart is entitled to judgment in its favor on plaintiff's reasonable accommodation claim. The motions of defendants Wal-Mart and MSN for summary judgment on plaintiff's claims will be granted.

Defendant State of Wisconsin moves to dismiss plaintiff's complaint for lack of jurisdiction. The State of Wisconsin is not a person who can be sued under 42 U.S.C. §§ 1983 or 1985(3). Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Accordingly, these claims against defendant State of Wisconsin must be dismissed.

Since the State of Wisconsin was not plaintiff's employer, plaintiff's Title VII claims against the State must also be dismissed. Plaintiff has not demonstrated any basis for this

Court's jurisdiction of his claims against the State of Wisconsin. Accordingly, the motion to dismiss the State of Wisconsin will be granted.

Plaintiff is advised that in future proceedings he must offer argument not cumulative of that already made to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that the motions of defendants Medical Staffing Network, Inc. and Wal-Mart Stores, Inc. for summary judgment are GRANTED.

IT IS FURTHER ORDERED that the motion of defendant State of Wisconsin to dismiss plaintiff's complaint is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants and against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 1st day of June, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge