IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PEGGY ANN DUFF EL,

Plaintiff,

OPINION and ORDER

06-C-744-C

v.

J.C. PENNEY, INC.,

Defendant.

- -

In this proposed civil action for monetary, injunctive and declaratory relief brought under Title VII of the Civil Rights Act of 1964, pro se plaintiff Peggy Duff El contends that defendant J.C. Penney, Inc. discriminated against her because of her race and constructively discharged her in retaliation for her filing a complaint with the City of Madison Equal Opportunities Commission.

Now before the court is before the court is defendant's motion for summary judgment, which plaintiff has not opposed. The undisputed facts reveal that plaintiff was not given job promotions because of she was less productive than other workers, not because of her race or because of the complaint she allegedly filed with the Equal Opportunities Commission. Because defendants did not violate plaintiff's rights under Title VII, their

motion for summary judgment will be granted.

From defendants' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Peggy Ann Duff El is a resident of Cottage Grove, Wisconsin.

Defendant J.C. Penney is a Delaware corporation with its principal place of business in Plano, Texas.

B. Plaintiff's Employment at Defendant's Salon

1. Job structure

Defendant operates department stores throughout the country. Some of these stores contain salons.

Before 1997, all stylists employed at defendant's salons who held the position of "designer" earned the same base rate of pay, plus a commission. In 1997, defendant implemented a credential pricing program, under which designers have the option of being promoted to the position of senior designer if their productivity is above average for the salon at which they work. (A designer's productivity is measured in dollars per hour and is

calculated by dividing the total dollar amount generated by a designer's services for a given week by the number of hours worked by the designer in that week.) If a designer's productivity exceeds the salon average by more than five dollars per hour, the designer may be promoted to the rank of master designer. The only difference between the designers is the fee charged to customers for salon services. That is, customers pay more for a haircut from a master designer than from a senior designer or a designer.

Offers of promotion are based solely on a designer's productivity. Factors such as experience, seniority and training are not considered when deciding whether to promote a designer to a higher level. Once a designer reaches a particular level, she cannot be demoted, even if her productivity declines.

2. Plaintiff's employment

Plaintiff began working for defendant in 1993. The credential pricing program was implemented in 1997; in September of that year plaintiff's productivity exceeded the salon average for the first time. Therefore, she was promoted to the position of senior designer. (Unfortunately, she never again succeeded in exceeding the salon's average productivity.)

Plaintiff noticed that other stylists with less experience were being promoted by defendant when she was not. These stylists included Eric Jorgenson, Debra Gianattasio, Pam Clark and Sandra Becker, each of whom had above average productivity and was promoted

to the position of senior designer, and Amy Knapton, Karen Pergolski, Tory Thorlu-Ghla, Susan Schroeder and Amy Ramesh, each of whom had productivity averages more than five dollar higher than the salon average and was promoted to the position of master stylist.

Plaintiff admits that she had no reason to believe that defendant discriminated against her because of her race other than the fact that other stylists were promoted more quickly than she was.

DISCUSSION

Title VII makes it "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Plaintiff has made two claims under this statute: (1) that she was discharged because of her race and(2) that she was discharged in retaliation for filing a grievance with the City of Madison Equal Opportunities Commission.

When faced with a motion for summary judgment, a court applies well-established standards. Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). Although the court examines the facts in the light most favorable to the non-moving party when considering a motion for

summary judgment, Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995), if the non-moving party fails to come forward with evidence on any essential element on which she would bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In responding to a motion for summary judgment on a Title VII claim, a plaintiff may show discrimination using a variety of methods, ranging from direct proof of racial animus to the McDonnell-Douglas burden shifting analysis often employed in cases arising under Title VII. However, a plaintiff may not rely on rank speculation to support a claim of racial discrimination.

In this case, plaintiff has not even tried to dispute defendant's explanation of its failure to promote her to the rank of master stylist. It is undisputed that plaintiff was required to meet certain productivity goals in order to be promoted and that she did not meet these goals. Other stylists met these goals and were promoted. Nothing about those facts permits the inference that defendant failed to promote plaintiff because of her race and plaintiff has not come forward with additional facts that might call into question the legitimacy of defendant's decision not to promote her.

The deficits in plaintiff's retaliation claim are even more apparent. Because she did not propose any facts in opposition to defendant's motion for summary judgment and because defendant proposed no facts relating to her retaliation claim, it is not clear what

defendant may have done that plaintiff viewed as retaliation. In fact, it is not even clear whether plaintiff actually filed a complaint with the Equal Opportunity Commission, and if so, when she did so.

The Court of Appeals for the Seventh Circuit has stated repeatedly that summary judgment is the "put up or shut up" moment in a lawsuit. A party's failure to show what evidence she has to convince a trier of fact to accept her version of the facts entitles the opposing party to summary judgment in its favor. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Because plaintiff has failed to meet her burden of coming forward with any evidence from which a jury could find that any defendant discriminated against her because of her race or retaliated against her because of a complaint she filed with the Equal Opportunity Commission, defendant's motion for summary judgment will be granted in its entirety.

ORDER

IT IS ORDERED that defendant J.C. Penney Inc.'s motion for summary judgment

is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 13th day of August, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge