IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JEANETTE PETTS,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-553-S

ROCKLEDGE FURNITURE LLC,
A DIVISION OF ASHLEY
FURNITURE INDUSTRIES, INC.,

Defendant.

Plaintiff Jeanette Petts commenced this lawsuit under Title VII against Rockledge Furniture LLC, a Division of Ashley Furniture Industries, Inc.. In her complaint she alleges that she was terminated in April 2005 because of her gender.

On March 1, 2007 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits 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 that there is no genuine dispute as to any of the following material facts.

Plaintiff Jeanette Petts is an adult resident of the State of Wisconsin. Defendant Rockledge Furniture LLC (Rockledge) does business in the Western District of Wisconsin. Ashley Furniture Industries, Inc. (Ashley) is a furniture manufacturer. Defendant Rockledge's HomeStores exclusively sell furniture manufactured by Ashley. Rockledge's HomeStores are located in Franklin, Madison

and Pewaukee, Wisconsin. The HomeStores range in size from 42,500 to 62,000 square feet.

In April 2003 Rockledge hired Brett Johnson to be the Manager of its Madison HomeStore. Johnson and Daryl Kleiman, Rockledge's General Manager, interviewed applicants for the management team. They interviewed plaintiff for an Assistant Manager position. Petts was not hired for the Assistant Manager position but Johnson hired her as a salesperson at the Madison HomeStore. She began working there in September 2003 and was compensated on a 100 percent commission basis with a $7.75 an hour draw.

In late 2003 Johnson was transferred to the position of Operations Manager. In July 2004 he became the General Manager and had hiring and firing authority over all personnel. In late 2004 Johnson promoted plaintiff to Assistant Manager over operations at the Madison HomeStore. She was compensated on a salary system without any commission. Terry Kean was the Store Manger and Scott Rorek was the Assistant Manger over sales. Rorek was paid more than plaintiff.

The Madison HomeStore was not profitable in 2004. By mid-March 2005 Johnson had developed a multi-faceted plan to reduce costs and improve profitability. One part of the plan included the elimination of an Assistant Manager at the Madison HomeStore. This meant that the position of either plaintiff or Rorek would be eliminated. Johnson chose to eliminate plaintiff's position

because Rorek had more seniority than plaintiff and had 10 years experience in the big-box retail market.

On April 5, 2005 Johnson and Kean met with plaintiff and advised her that they were eliminating her position. She was offered three positions in the Pewauakee store: Sales-Lead Position; Interior Design position and Sales Position. She was also advised that she would be eligible to reapply for a management position when one became available. Plaintiff declined the other positions offered her because they were not "financially suitable" and because of the long commute. She acknowledges that at least one of the positions would have paid her more than she was earning as an assistant store manager.

After plaintiff's position was eliminated Wendy Bonner and Cindy Gamex-Trujillo assumed the majority of her duties. From April 5, 2005 until October 2005 the Madison HomeStore continued to operate with one Assistant Manager. An assistant manager position in Pewaukee was also eliminated on April 5, 2005. That position had been occupied by Mary Tortorice.

Shortly after plaintiff's termination Johnson promoted a woman Heidi Benites to an Assistant Manager position at the Franklin Home Store. Joe Goad was hired as assistant store manager in the Pewaukee Store at the end of April 2005. When Scott Rorek was promoted to Store Manager at the Madison store, Mark Mader filled

his prior position as Assistant Manager. Plaintiff was not advised of any open management positions.

Plaintiff heard Scott Rorek, her co-worker, make comments about men being better than women. She also felt he treated the male sales staff nicer than he treated the female sales staff. Although plaintiff testified at her deposition that Johnson made negative comments about women in meetings, she was not able to identify with any specificity what he said or when he said it.

It is disputed whether in 2004 Johnson told Jennifer Kane, who was the front end office manager, "As long as you keep acting like a man you will get places." It is further disputed whether Johnson overheard Scott Rorek say "it sounds just like a woman".

MEMORANDUM

Plaintiff claims her position was eliminated because of her gender. There are two methods to prove gender discrimination; the direct method and the indirect method. Under the direct method plaintiff must present evidence that points directly to a discriminatory reason for the employer's action. Blise v. Antaramian, 409 F. 3d 961, 966 (7th Cir. 2005). He can demonstrate through suspicious timing, ambiguous statements, behavior toward other employees in the protected group, and other evidence from which an inference of discriminatory intent might be drawn. Phelan v. Cook County, 463 F.3d 773, 780 (7th Cir. 2006).

The only specific remark that Johnson who eliminated plaintiff's position is alleged to have made is to Jennifer Kane in 2004. He is alleged to have said "As long as you keep acting like a man you will get places." This comment to another employee at least a year before plaintiff's position was eliminated is not a comment from which discriminatory intent can be drawn concerning the elimination of plaintiff's position. Plaintiff can cite to no specific statements made by Johnson in her presence which were negative concerning women.

Rorek who was plaintiff's co-worker said "it sounds just like a woman". The fact that Johnson may or may not have heard this comment does not create any inference of discriminatory intent on the part of Johnson who was the decision maker. Plaintiff has failed to show that Brett Johnson said any negative comments about women that affected his decision to eliminate plaintiff's position. Steinhauer v. DeGolier, 359 F. 3d 481, 488 (7th Cir. 2004).

In that case the Court stated as follows:

> Moreover, even if these comments were sufficient to create an inference of an anti-male bias, to avoid summary judgment Steinhauer must still present sufficient evidence that the defendants discriminated against him because of his sex, and the record as a whole prevents such a finding. Rather, the record shows that Steinhauer was hired less than six months before his termination by DeGolier, based on Steven's recommendation, and that the same two individuals later decided to fire him. Under these circumstances, it is unreasonable to infer that DeGolier and Stevens decided to terminate

> Steinhauer based on his sex since they had just decided to hire him not withstanding his sex. (Citations omitted.

Id.

Plaintiff also argues that in addition to the comments, the fact that both assistant manager positions that were eliminated were occupied by women and that she was not considered for further assistant store manager positions raise an inference of gender discrimination. Any inference of gender discrimination created by these facts is rebutted by the facts that Johnson hired plaintiff and promoted her notwithstanding her gender. Id. Plaintiff has presented no evidence that points directly to any discriminatory intent on the part of Johnson.

Plaintiff may also prove gender discrimination using the indirect method of proof. Plaintiff was not terminated; rather her position was eliminated and her duties were reallocated to other employees. To demonstrate a prima facie case in this mini-reduction in force case plaintiff must show she was a member of a protected class; 2) she was meeting her employer's legitimate job performance expectations; 3) she suffered an adverse employment action and 4) her duties were absorbed by employees not in the protected class. Merillat v. Metal Spinners, Inc., 470 F.3d 685, 690 (7th Cir. 2006).

Since plaintiff's duties were absorbed by two female employees she cannot demonstrate a prima facie case of discrimination where

defendant eliminated her position. Plaintiff argues that to demonstrate a prima facie case of discrimination the fourth element should instead be: 4) at least one similarly situated employee not in her protected class was treated more favorably. Wyniger v. New Venture, 361 F.3d 965, 978 (7th Cir. 2004). This is the fourth element used in cases where an employee is terminated.

Plaintiff contends that Johnson treated the similarly situated Rorek better than her when he did not eliminate Rorek's position. Defendant contends that Rorek was not similarly situated because he had more experience than plaintiff. Plaintiff might be able to demonstrate a prima facie case of discrimination using this standard.

Were plaintiff to demonstrate a prima facie case of discrimination, the burden shifts to the employer to articulate legitimate reasons for its actions. Dunning v. Simmons Airlines, Inc., 62 F.3d 863, 868 (7th Cir. 1995). Johnson proposed a cost-reduction plan which would eliminate one of the Assistant Manager positions form the Madison HomeStore. He decided that plaintiff's position should be eliminated rather than Rorek's because Rorek had more seniority as a manager with Rockledge and more relevant experience. These are defendant's articulated legitimate business reasons for its actions.

The burden then shifts to plaintiff to show that the reasons were pretextual for gender discrimination. Pretext means more than

an unusual act; it means something worse than a business error; pretext means deceit to cover one's tracks. Kulumani v. Blue Cross Blue Shields Assoc., 244 F.3d 681, 685 (7th Cir. 2000).

Plaintiff argues that defendant's reasons for the decision to terminate plaintiff's position were pretextual for gender discrimination. They argue that because the defendant could have saved more money by eliminating Rorek's position since he made more money than plaintiff their reason was pretextual. The Court must not second guess the business judgment of an employer in evaluating pretext. See Stewart v. Henderson, 207 F.3d 374, 378 (7th Cir. 2000). Defendant's choice to eliminate plaintiff's position was motivated by his belief that retaining the more senior manager with the most relevant experience would be most beneficial to Rockledge.

No reasonable fact finder could infer pretext from the evidence presented by plaintiff. Plaintiff has not shown either by the direct or indirect method that she was discriminated against on the basis of her gender. Accordingly, defendant is entitled to judgment as a matter of law on plaintiff's gender discrimination claim.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

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

Entered this 10th day of April, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge