

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PEGGY ANN DUFF EL and
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION,

Petitioner,

v.

J.C. PENNEY, INC.,

Respondent.

OPINION and ORDER

06-C-744-C

In this proposed civil action for monetary, injunctive and declaratory relief, petitioner Peggy Duff El seeks leave to proceed in forma pauperis on her claim that respondent J.C. Penney, Inc. terminated her employment because of her gender, age and race in violation of Title VII of the Civil Rights Act of 1964. In an order dated December 21, 2006, I directed petitioner to complete the court's affidavit of indigency indicating the source of the money she uses to pay for her basic necessities, such as food, clothing and shelter, and to indicate how much, if any, equity she has in her home. Although petitioner did not complete the standard affidavit form, she has provided information from which I am able to conclude that she qualifies for pauper status.

The next step is determining whether her proposed action is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915(e)(2). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). Although it is far from clear that petitioner will be able to adduce evidence to support her allegations, her complaint states a claim under Title VII of the Civil Rights Act of 1964. Therefore, her request to proceed in forma pauperis will be granted.

Before turning to the factual allegations of petitioner's complaint, I note that she has named the City of Madison Equal Opportunities Commission as co-plaintiff in this action. However, no representative of the commission has signed the complaint, as required by Fed. R. Civ. P. 11(a), and the documents plaintiff has attached to her complaint make clear that the commission considered her case and found it to lack merit in large part. Because it does not appear that the City of Madison Equal Opportunities Commission has consented to be a plaintiff, I will dismiss it from this lawsuit.

From the allegations of petitioner's complaint, her affidavits of indigency and publicly-available state court records, I draw the following facts.

FACTUAL ALLEGATIONS

A. Petitioner's Employment at J.C. Penney

Petitioner was born January 15, 1958. She is a black woman of "Asiatic" descent.

On June 23, 1993, petitioner began working as a hairstylist for respondent J.C. Penney. In February 1999, she was promoted to the position of senior designer. One month later, on March 17, 2003, petitioner learned that her co-worker, Eric Jorgenson, had been promoted to the position of senior designer after working in the salon for only six months. Jorgenson is a white man, who was less than 40 years old at the time of his promotion.

Plaintiff learned that six other stylists had been promoted to the rank of senior designer in much less than the six years it took for petitioner to receive her promotion. These stylists were: Brooke Miller, a white woman under 40 years of age, Debra Giannattasio, a white woman under 40, Judy Slaughter, a white woman over 40, Pam Clark, a white woman over 40, Yvonne Ball, a black woman under 40, and Sandra Becker, a white woman over 40.

Plaintiff remained a senior stylist for more than four years. In that time, five stylists were promoted to the level of master designer (one step above senior designer), even though they had worked at the salon for only one to two years and were less qualified than plaintiff. They included: Amy Knapton, a white woman under 40, Amy Ramesh, a white woman under 40, Karen Pergolski, a white woman over 40, Torry Thorlu-Ghla, a white woman over

40 and Susan Schroeder, a white woman over 40.

Petitioner filed a complaint with the City of Madison Equal Opportunities Commission, in which she asserted that respondent was discriminating against her on the basis of her age, race, national ancestry and gender. On October 8, 2003, petitioner was “forced” to resign from her job because of respondent’s “daily harassment” in retaliation for her filing of the complaint. After her resignation, petitioner was “blackballed” in the salon business and was unable to find other employment in the industry.

After leaving her job, petitioner filed a second complaint with the Equal Opportunities Commission, in which she contended that respondent had retaliated against her for filing her first complaint. Although the hearing officer found no probable cause to believe petitioner had been discriminated against because of her color or race, the commission reversed that decision, stating:

Taking the record as a whole and resolving all disputed facts in favor of the Complainant, the Commission finds that a reasonable person could believe that the Complainant’s color/race was a factor in her treatment. Though another employee of Complainant’s race was promoted to higher levels in the Respondent’s salon, the record fails to establish a legitimate, nondiscriminatory reason for the Complainant not to be promoted in the same timeframe. Given this lack of a nondiscriminatory reason, the Commission is compelled to enter a finding of probable cause with respect to the complainant’s allegations of discrimination based on color/race.

The commission affirmed the hearing officer’s decisions that there was probable cause to believe petitioner had been retaliated against following her first Equal Opportunities

Commission complaint and that there was no probable cause to believe petitioner had been discriminated against because of her of national origin, age or gender. (Although petitioner does not indicate what happened next, it appears from documents attached to the complaint that her case went to conciliation. She has not reported the outcome of that process.)

Financial Status

Petitioner has two dependents. She receives \$833 each month in child support payments; this is her only income. On April 6, 2006, in Dane County Case No. 2005-CV-3956, United States of America v. Peggy A. Duff et al., a judgment of foreclosure was entered, directing that petitioner's home be forfeited and sold. Petitioner's appeal was dismissed by the Wisconsin Court of Appeals on November 30, 2006. A foreclosure sale is scheduled for January 30, 2007.

OPINION

Petitioner's complaint and the documents attached to her complaint reveal that she is troubled by many events, including her employment with respondent, her termination from that job, her subsequent unsuccessful employment with the United States Post Office and her inability to secure unemployment benefits. Although petitioner is clearly distressed by all of these occurrences, I discern four possible claims against the sole respondent in this

case, J.C. Penney. Each arises under Title VII of the Civil Rights Act of 1964, which 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). Specifically, plaintiff contends that she was denied promotions because of her race, her age or her gender and was constructively discharged in retaliation for filing a grievance with the City of Madison Equal Opportunity Commission.

With respect to her discrimination claims, petitioner alleges that during her six years of employment at respondent’s salon, other employees were promoted more quickly than she was promoted, although her qualification equaled or exceeded theirs. Of the employees she has identified, all but one is a woman and approximately half were over the age of 40. Only one was black. From these facts, I conclude that petitioner has pleaded herself out of court on her claims for gender or age discrimination because she admits that co-workers who share her age and gender were granted promotions. Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005) (“[L]itigants may plead themselves out of court by alleging facts that defeat recovery.”). However, petitioner does allege that, with one exception, all of the employees promoted more quickly than she were white. At this early stage of the proceedings, she has done enough to state a claim for racial discrimination.

With respect to petitioner’s claim for retaliatory constructive discharge, she has

alleged only that she was “harrassed” as a result of her first complaint to the Madison Equal Opportunities Commission, and that the commission later found probable cause to support her charge. Although it is much too soon to tell whether petitioner will be able to prove her claim, she has done enough to put respondent on notice of the charge against it. She is required to do no more and her request for leave to proceed in forma pauperis will be granted with respect to her claim that respondent retaliated against her because of her complaint to the Equal Opportunities Commission.

ORDER

IT IS ORDERED that

1. Petitioner Peggy Duff El’s request for leave to proceed in forma pauperis is
 - a) GRANTED with respect to her claims that respondent J.C. Penney
 - i) discriminated against her because of her color or race and
 - ii) retaliated against her because she filed a complaint with the City of Madison Equal Opportunities Commission;
 - b) DENIED with respect to her claims that respondent
 - iii) discriminated against her because of her gender; and
 - iv) discriminated against her because of her age.
2. Petitioner’s complaint will be forwarded to the marshal’s office for service on

respondent.

3. Petitioner should be aware of the requirement that she send each respondent a copy of every paper or document that she files with the court. Once respondent's attorney is known, petitioner should send one copy of all documents to the lawyers rather than to respondent directly. Petitioner should retain a copy of all documents for her own files. If petitioner does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to each respondent or to respondent's attorney, once he or she is known.

Entered this 12th day of January, 2007.

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