IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JUDITH HERZOG,

Plaintiff,

v. MEMORANDUM and ORDER

CITY OF WATERTOWN, 07-C-213-S

Defendants

Plaintiff Judith Herzog brings this action against defendant City of Watertown under the Age Discrimination and Employment Act (ADEA) and Title VII. In her complaint she alleges that she was laid off because of her age on September 26, 2003; was not hired for the Assistant Manager-Water Position because of her gender and was not hired for the position of Account Clerk in March 2004 because of her age.

On August 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. That same date plaintiff moved for partial summary judgment on her gender discrimination claim. These motions have been fully briefed and are 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 the motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Judith Herzog (date of birth 3/9/55) is an adult resident of the City of Watertown, Wisconsin. Defendant City of

Watertown is a municipal entity and local government as defined by Wisconsin law.

Plaintiff began work with the City of Watertown on January 15, 1990 as a bookkeeper in the Water Department. In July 2000 plaintiff was promoted to Accounting Supervisor for the Water Department. There were three second level supervisors in the water department: plaintiff, Richard Kuerschner and Mike Rowoldt.

Plaintiff supervised the work of Billing Clerk Lori Bachler. Water Meter Technician Michael Craig, Water Meter Tester Sixto Villegas and Donna Christian. In her December 17, 2001 performance evaluation plaintiff was rated outstanding. Until June 2002 plaintiff's supervisor was Water Department Manager Michael Olesen. From July 2002 to December 2002 plaintiff reported directly to the Water Commission.

The City of Watertown Common Council approved the merger of the Water and Wastewater Departments effective January 1, 2003. Paul Lange became the Manager of both departments and was allowed to select an assistant in each department. The November 4, 2002 minutes of the Finance Committee Meeting reflect that "the new leadmen in each department will get another $5,000.00." No job description was prepared for the position of the assistant in the water department.

As a result of the merger plaintiff's accounting work was transferred to the Clerk/Treasurer's office on January 1, 2003. Plaintiff then performed more clerical and data entry work.

In January 2003 the City of Watertown contracted with the accounting firm, Virchow, Krause to provide an efficiency study of the merged Water and Wastewater departments. A draft report was prepared and submitted in February 2003 but the final report was submitted in November 2003. The report recommended that accounting and administrative functions be realigned and that one position be eliminated.

During the period of 2001-2004 the City's layoff policy provided as follows:

> Should, in the opinion of the City, a reduction in personnel become necessary in any job classification, employee will be laid off based on a consideration of the employee's skills, abilities, qualifications, past performances, attitude, length of continuous service, as well as on a consideration of the efficient operation of the City. Employees affected by the reduction in personnel in their job classification may be transferred to, or allowed to replace employees in, other equal or lower-paying job classifications. Those employees who are laid off will have recall rights for a period of one year and will be recalled based on the considerations listed above. (Section 4.22 of the City Code.)

At the end of August 2003 Mr. Lange decided to eliminate plaintiff's position after evaluating the employees based on their work performance after January 1, 2003. He determined that Lori

Bachler and Donna Christian were more qualified than plaintiff but did not make any written comparisons.

Plaintiff's employment was terminated on September 26, 2003. Plaintiff's duties were reassigned to other individuals. A dispute remains as to who these individuals were.

During 2003 Mr. Lange also evaluated employees for the newly created position of Assistant Manager-Water. He did not advertise for this position. Lange considered Mike Rowoldt and Richard Kuerschner, two of the 3 second level supervisors in the Water Department for this position. He also considered Mike Craig, a water department employee, for the position. At no time did Mr. Lange consider plaintiff who was the third second level supervisor in the water department for the position.

On September 29, 2003 Mr. Lange hired Richard Kuerschner, a 61 year old man who had worked in the Water Department for 19 years, for the position. In a September 7, 2004 letter defendant stated that plaintiff was not considered for the position because she was not qualified and did not have any of the necessary state licenses (water, ground water and distribution and iron removal).

In March 2004 the City of Watertown advertised for Account Clerk Position in the Clerk/Treasurer's Office. Based on the ad for this position plaintiff was qualified for the position. Although the City had recall policy as described above plaintiff was not recalled for this position. The City received 42

applications and tested thirty-two applicants. Fourteen applicants were interviewed by Michael Hoppenrath, Cindy Ruppecht and Dawn Schumacher. Plaintiff was tested and interviewed but was not one of the top five candidates. Hoppenrath wrote on his interview sheet about plaintiff as follows, "older but seems dedicated to service to customers."

On March 29, 2004 Hoppenrath recommended that the Finance/Personnel Committee hire Sheryl Rupnow (d/o/b/: 8/19/58 for the position. The Committee approved the hire.

MEMORANDUM

Plaintiff claims that she was terminated from her position and not hired for a position because of her age. She also claims that she was not hired for the Assistant Manager position because of her gender.

Plaintiff argues that she is entitled to summary judgment on her gender discrimination claim based on the direct method of proof. She argues that defendant did not consider her for the leadman position because she is a woman. Direct evidence essentially requires an admission by the decision-maker that his actions were based on her gender. Radue v. Kimberly-Clark Corp. 219 F.3d 612, 616 (7th Cir. 2000).

The decision-maker, Mr. Lange, did not admit that his actions were based on plaintiff's gender. Use of the term leadman for the

position is not an admission of gender discrimination. Plaintiff is not entitled to judgment in her favor on her gender discrimination claim based on the direct method of proof.

Defendant moves for summary judgment on plaintiff's gender discrimination claim based on the indirect method of proof. Under the burden shifting methodology for indirect proof of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), plaintiff must first establish a *prima facie* case of discrimination by showing she was a member of a protected class, that she was qualified for the Assistant Manager-Water position, she suffered an adverse employment action concerning the position, and similarly situated employees not in the protected class were treated more favorably. Peters v. Renaissance Hotel Operation Company, 307 F.3d 535, 545-546 (7th Cir. 2002).

Plaintiff has shown she was a member of a protected class. At the time plaintiff was not hired there was no job description or written qualifications for the position. Accordingly, it cannot be determined whether she was qualified for the position. Plaintiff was not promoted to the position. The three people that Mr. Lange considered for the position were men. Two of the men were second level supervisors in the water department like plaintiff. One of these men, Richard Kuerschner, was hired for the position. A genuine issue of material fact remains as to whether plaintiff can establish a prima facie case of gender discrimination.

Were plaintiff to have demonstrated a *prima facie* case the burden shifts to defendant to articulate a non-discriminatory legitimate reason for plaintiff's termination. Plaintiff would then have to prove that the reason was pretextual. Id.

Defendant appears to be claiming that plaintiff was not considered for the position because she was not qualified. Plaintiff contends that this reason is pretextual for gender discrimination. She contends that there was no job description at the time Kuerschner was hired and that there was lack of written qualifications for the position. A genuine issue of material fact remains as to whether plaintiff was not hired for the position because she is a woman. Accordingly, defendant's motion for summary judgment on plaintiff's gender discrimination claim will be denied.

Plaintiff claims that she was discriminated because of her age when she was laid off from her position in the Water Department and not hired for the Account Clerk Position in the City's Clerk/Treasurer's office.

To establish a prima facie case of age discrimination plaintiff must show she was age forty or older, that she was performing her job according to the employer's legitimate qualifications, that she was laid off and that younger employees were treated more favorably. Gordon v. United Airlines, 246 F.3d 878, 885-886 (7th Cir. 2001). Factual disputes remain as to whether

plaintiff was performing according to the employer's legitimate qualifications and whether younger employees were treated more favorably.

Were plaintiff to have demonstrated a *prima facie* case the burden shifts to defendant to articulate a non-discriminatory legitimate reason for plaintiff's termination. Plaintiff would then have to prove that the reason was pretextual. Id.

Although Mr. Lange says that plaintiff was not as qualified as the younger employees. This fact is disputed by plaintiff.

It is also possible that plaintiff could prove that Lange's reasons were pretextual for age discrimination because it is disputed whether the City's lay off policy was followed in eliminating plaintiff's position. Defendant's motion for summary judgment on this claim will be denied.

Plaintiff also contends that she was not hired for the Account Clerk Position because of her age. It is disputed whether plaintiff was qualified for this position. Defendant contends that she was not.

Genuine issues of fact remain concerning whether this was the real reason or a pretext for age discrimination. It is disputed whether defendant followed its own recall policy when it did not recall plaintiff for the position before advertising the position.

Defendant argues that because it hired a person who was only four years younger than plaintiff she cannot prove age

discrimination. In Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893(7th Cir. 1997) the Court stated that while an age difference less than ten years is presumptively insignificant or insubstantial plaintiff may nonetheless show that the employer's decision was motivated by age. It is undisputed that on his interview sheet interviewer Mike Hoppenrath stated that plaintiff was "older but seems dedicated to service to customers." This statement raises an inference of pretext. Accordingly, defendant's motion for summary judgment on plaintiff's age discrimination claim concerning the Account Clerk position will be denied.

ORDER

IT IS ORDERED that plaintiff's motion for partial summary judgment on her gender discrimination claim is DENIED.

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

Entered this 6th day of September, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ
District Judge