IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MISTY N. SORENSON,

OPINION AND ORDER

Plaintiff,

11-cv-161-bbc

v.

SENTRY INSURANCE COMPANY,

Defendant.

- -

Plaintiff Misty Sorenson worked for defendant Sentry Insurance Company from 2002 until 2009, when defendant terminated her as part of a company reorganization. Defendant says it chose plaintiff for termination rather than other employees because she was younger and had less experience with the company. Plaintiff says it was because she had been given a diagnosis of thyroid cancer a few months earlier, was using medical leave and was costing the company too much money in medical bills. She raises claims under the Americans with Disabilities Act, 42 U.S.C. § 12112, the Family and Medical Leave Act, 29 U.S.C. § 2615, and the Employee Retirement Income Security Act, 29 U.S.C. § 1140.

Defendant has filed a motion for summary judgment under Fed. R. Civ. P. 56, in which it argues that plaintiff has not adduced sufficient evidence to show that its reasons for terminating her are pretextual. Because I conclude that a reasonable jury could find that defendant's stated reasons were not the real motivation for the decision, I am denying the

motion.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Misty Sorenson began working for defendant Sentry Insurance Company in June 2002 in the claims department. She was promoted in 2004, 2005 and 2007.

A. 2008 Reorganization

In 2008, the claims department was divided into consumer products claims and business products claims. Bob Reko, the vice president of the business products claims department, concluded that it was necessary to "realign" the department and lay off some employees because the department was experiencing a decline in revenues and in the overall number of claims. At that time, seven employees were terminated; plaintiff was promoted to a position as a claims technical specialist senior. The human resources department did not make any recommendations regarding whether any employees should be reassigned or terminated.

Plaintiff's former position, claims specialist for national accounts, was filled by Kathy Fleming, whose former position as an associate director had been eliminated as part of the reorganization. "[T]here was some effort put to finding [Fleming] a role" because of "her performance, her reputation and the fact that [defendant] knew a lot of customers really

liked working with her." Anderson Dep., dkt. #76-2, at 50.

B. 2008 Promotion

In November 2008, plaintiff was promoted to a position as a claims services manager and she began reporting to Tami Hurrish, the director of operational services. Roz Soik (call center manager), Elizabeth Filtz (medical cost containment unit manager) and Lori Lamb (a supervisor) also reported to Hurrish. In a December 2008 weekly report, Hurrish wrote: "Misty Sorenson has assumed her role as Services and Systems Manager. She has proven to be a fast learner and is very independent. She has met a little resistance, but appears to be breaking down the barriers in a professional manner." Reko believed that plaintiff was "a very sharp young lady and worked claims business pretty well." Reko Dep., dkt.#49, at 10.

In her 2008 performance review of plaintiff, Hurrish wrote:

> Misty has accomplished a great deal since joining the Operations Department. She is working to change the perception of her staff both to gain the respect of the Claims staff she supports and to increase the motivation of her team members. Misty embraces new challenges and new learning opportunities, she brings energy to her department and is a welcome addition to my staff.

In their performance evaluations for 2008, plaintiff, Soik and Filtz each received a rating of "meets expectations." Plaintiff's numerical rating was 3.0, Filtz's was 2.81 and Soik's was 2.80.

C. Cancer Diagnosis

Shortly after plaintiff was promoted, she received a diagnosis of thyroid cancer. In weekly reports to Reko in December 2008 and January 2009, Hurrish included the following statements about plaintiff's medical leave:

- Misty Sorenson will be out on FMLA from December 23rd through January 6th, (tentative), and then more time thereafter which has not yet been determined. I expect this to be extended due to additional medical concerns that came out of her pre-op visit.

- Misty remains out on FMLA. I expect her return January 12th with intermittent FMLA thereafter.

- One full time FMLA until late January, two full time intermittent with restrictions FMLA's with no known end date, one full time FMLA for an Operations Supervisor for two weeks in January, an additional FMLA for Misty beginning in early February with an unknown duration.

- Misty Sorenson beginning January 23rd again for an unknown duration. She will be radioactive when she returns so I'm working with health services on this issue.

While employed by defendant, plaintiff was a participant in the Sentry Employee Medical Plan. Joe Fritzsche, the vice president of human resources, was the administrator for the medical plan. Two to four times a year, Fritzsche received and reviewed reports regarding the losses of the medical plan. Once a month he reviewed the expenses for the medical plan. The "billed amount" of plaintiff's medical expenses in 2008 and 2009 was approximately $97,000, which was well over the average for the other plan participants.

D. Whittington Becomes the Vice President of the Department

Tom Whittington became the vice president of the business products claim

department in February 2009. At that time, the department was continuing to experience a decline in the claims it was handling and the revenues it was receiving, so Whittington decided that another "realignment" was needed.

In an email dated February 18, 2009, Hurrish asked plaintiff for names of employees in her "area" who were on medical leave and their estimated return date. In an email dated February 24, 2009, Hurrish asked plaintiff, Soik, Filtz and Lamb to include "FMLA information" in their weekly reports. Plt.'s PFOF ¶ 50, dkt. #74, Dft.'s Resp. to Plt.'s PFOF ¶ 50, dkt. #90. Hurrish requested this information so that she could include it in her weekly reports to Whittington. In those reports, Hurrish did not identify plaintiff by name or position as someone who had a cancer diagnosis or who had been approved for medical leave. However, in the March 3, 2009 weekly report to Whittington, Hurrish stated, "Services FMLAs-1 intermittent." In the March 10, 2009 weekly report she stated, "Services FMLAs one intermittent."

E. 2009 Reorganiztion

In March 2009, Whittington began discussing possible reorganization plans with Sherry Anderson and Tom Donnelly, the senior directors for the department of business products claims. As part of the reorganization process, Whittington, Anderson and Donnelly identified employees who were not meeting defendant's expectations. They terminated one employee for this reason. In the operations department, they decided to demote Hurrish to a newly created position as manager of the claims contact center.

Initially, Whittington, Anderson and Donnelly considered making plaintiff the manager of the medical cost containment unit, demoting Filtz from that position to a supervisor position and terminating Soik. Anderson was not plaintiff's supervisor, but she thought that plaintiff seemed "very competent" and "picked up on the issues." Anderson Dep., dkt. #90, at 16. In recommending plaintiff, Anderson relied on comments from Hurrish. In a memo dated March 10, 2009, Anderson recommended demoting Filtz and terminating Soik.

In March 2009, in a weekly report to Whittington, Hurrish wrote, "Misty's visit to Richmond was very productive." From February 22, 2009 through March 14, 2009, Soik failed to meet the call center's "bench marks."

On March 20, 2009, Whittington met with Fritzsche to discuss the reorganization. Fritzsche said that they should "review" the decision to demote Filtz and give her position to plaintiff because "as a matter of general practice, we don't bump people like that. If she was in the role, she was going to stay in the role." Fritzsche Dep., dkt. #45, at 88. In addition, Fritzsche told Whittington that they "needed to do further investigation into [plaintiff's] performance." Whittington Dep., dkt, #43, at 105. After this meeting Whittington handwrote "Roz Soik displaced" on a memo to Fritzsche dated March 20, 2009.

Fritzsche asked Mike Cloud, director of employment and employee relations, to analyze the proposed changes and identify other concerns "from a human resources" perspective. As part of his analysis, Cloud considered each employee's past performance,

years of service, race, age and gender. (Cloud says that he identified employees' age, race and gender "to ensure that there weren't any unintended employment practice risks" such as "age discrimination, gender discrimination, race discrimination, those things listed under Title 7." Cloud Dep., dkt. #51, 90.) He did not include disability or medical leave as part of his analysis.

Cloud had access to plaintiff's confidential human resources file, which included information showing that plaintiff had had a biopsy in November 2008. Cloud sat across from plaintiff on one occasion while plaintiff discussed her cancer diagnosis.

Cloud spoke with Karen Houdek, a senior human resources advisor and Cloud's subordinate, about the proposed changes. Houdek stated that she was "shocked" that Soik was being recommended for termination and that it would be better "to take action on Misty [plaintiff] versus Roz [Soik]." Houdek knew at the time that plaintiff had thyroid cancer because she had been sent a copy of an email related to plaintiff's medical leave for cancer treatment.

Houdek spoke to Whittington about the reorganization, telling him about alleged deficiencies in plaintiff's work performance that were not part of her personnel file. (The parties do not cite evidence showing whether Houdek approached Whittington or Whittington approached Houdek, how the conversation came about or what deficiencies Houdek identified. Whittington said the conversation occurred sometime between February 10, 2009 and April 1, 2009. Whittington Dep., dkt. #43, at 106.)

Cloud told Fritzsche that he was concerned about terminating Soik in light of her

years of service with defendant and her age. Soik had worked for defendant for 29 years and was 52 years old. Plaintiff had worked for defendant for 6 years and was 34 years old.

In a memo dated March 30, 2009, Hurrish ranked each of the four employees who reported to her. Lamb was ranked first, Filtz second, Soik third and plaintiff fourth.

In a memo dated April 1, 2009 from Whittington to Cloud and Fritzsche, Whittington wrote that Soik "is ranked the lowest of [Hurrish's] managers and there is no place for her in this alignment." Dkt. #77-10. In addition, he wrote that "Misty Sorenson has been chosen for the MCCU Manager role due to her ability to be innovative in looking for new and improved measures to serve our customers at a lower cost." (Whittington says that he prepared the memo before April 1, but he does not remember when he prepared it. Whittington Dep., dkt. #43, at 82.)

On April 1, 2009, Whittington and Fritzsche met again to discuss the reorganization. Frtizsche recommended to Whittington that plaintiff be terminated. (Whittington testified that Anderson and Donnelly recommended plaintiff's termination as well, Whittington Dep., dkt. #43, at 103, but he does not identify when they made this recommendation or in what context and defendant cites no documents or testimony from Anderson or Donnelly showing that they made such a recommendation.) Because Whittington did not know plaintiff well, he deferred to Fritzsche and relied on the feedback from Houdek. Whittington decided to retain Soik and terminate plaintiff.

Plaintiff was the only employee in the business products claims department who was terminated as a result of the 2009 reorganization. Another employee, Mary McCarron, was

going to be terminated under the reorganization plan, but Fritzsche identified a position in the company for which he believed she was qualified. McCarron was later assigned to that position. Scott Labott was transferred from a claim manager to a claim adjuster, a position for which plaintiff was qualified. Whittington did not talk to Fritzsche about finding another position for plaintiff. (Whittington says he did not have that discussion because he "knew that there were more reductions coming up in another reorganization later in the year." Whittington Dep., dkt. #90, at 160.)

Defendant prepared a document related to the 2009 reorganization called "Separation Allowance Program Selection List." On the page listing the positions in the claims department, the document states that "[s]elections were based on comparative job performance or length of management experience."

Several months after plaintiff was terminated, Hurrish prepared a memo (the parties do not explain why) in which she discussed various concerns she had had with plaintiff's performance while working for defendant.

OPINION

Plaintiff's claims arise under three federal statutes: (1) the Americans with Disabilities Act, which prohibits employers from discriminating against "a qualified individual on the basis of disability," 42 U.S.C. § 12112(a); (2) the Family and Medical Leave Act, which prohibits employers from retaliating against employees for taking leave authorized by the Act, Goelzer v. Sheboygan County, Wisconsin, 604 F.3d 987, 992 (7th

Cir. 2010); and (3) the Employee Retirement Income Security Act, which prohibits employers from retaliating against a plan participant for exercising rights under the plan, 29 U.S.C. § 1140. For the purpose of summary judgment, defendant does not deny that plaintiff was disabled within the meaning of the ADA at the time she was fired, that her medical leave was authorized under the FMLA or that she was a plan participant under ERISA. In addition, defendant does not challenge plaintiff's ability to establish a prima facie case under what is called the "indirect" method of proof with respect to any of her claims. E.g., Vance v. Ball State University, 646 F.3d 461, 473 (7th Cir. 2011). Rather, the only argument defendant develops is that plaintiff cannot prove that defendant's reasons for firing her are pretextual. Accordingly, I will focus on that issue as well. Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 736 (7th Cir. 2006) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the district court should not rely on that ground in its decision."). This makes it unnecessary to consider plaintiff's argument in her opposition brief under the "cat's paw" doctrine, Staub v. Proctor Hospital, 131 S. Ct. 1186, 1193 (2011), or other issues that are relevant to the "direct method" of proof.

A. Pretext

A pretext is "a deliberate falsehood." Forrester v. Rauland–Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006). Thus, to establish pretext the plaintiff must do more than show that the defendant's decision was mistaken, unfair or foolish. Scruggs v. Garst Seed Co., 587

F.3d 832, 839 (7th Cir. 2009). Rather, the plaintiff must adduce evidence that the defendant's reasons for its decision are not worthy of belief. Silverman v. Board of Education of City of Chicago, 637 F.3d 729, 743-44 (7th Cir. 2011). Evidence of pretext is evidence of discrimination because, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000).

Defendant's reasons for terminating plaintiff are less straightforward than in many employment discrimination cases. It says that it terminated plaintiff as part of a reorganization and that it chose her because she was younger and had not worked for the company as long as another employee being considered for termination. However, to evaluate those reasons, it is necessary to understand how defendant says it arrived at them.

It is undisputed that, initially, defendant was not going to fire plaintiff as part of the reorganization; it was going to *promote* her, demote Filtz and terminate Soik. This is the first fact that raises an eyebrow. It is surprising that defendant's decision changed so dramatically over the course of a few days or weeks. Holland v. Jefferson National Life Insurance Co., 883 F.2d 1307, 1316 (7th Cir. 1989) (sudden change of mind is evidence of retaliatory motive). Plaintiff says that the reason for the change is that those involved in the reorganization discovered during the process that she had cancer and was taking leave and

costing the plan nearly $100,000 in medical bills. Defendant provides an alternative explanation, but its story has enough holes in it that a reasonable jury would be entitled to reject it.

Defendant says it decided not to demote Filtz because it has an "anti-bumping" policy. Defendant does not explain exactly what the policy is, but I assume that defendant's position is that it has a policy against *demoting* certain employees for the purpose of retaining others. To the extent that defendant is arguing that it had a more general policy against the placement of one employee into another employee's position, that is contradicted by the 2008 reorganization, in which it reassigned plaintiff and placed another employee in her position. See also Dkt. #77-10 (in memo by Whittington regarding 2009 reorganization, stating "Paul Bergh . . . will be moved to the Associate Director of Property, replacing Dan Dougherty.").

However, even if I assume that defendant is referring to a policy about demotions, plaintiff has raised a genuine dispute about whether such a policy actually existed. First, defendant has failed to cite any documentation about the policy or even articulate the scope or rationale of the policy. Dunn v. Nordstrom, Inc., 260 F.3d 778, 785-86 (7th Cir. 2001) (absence of documentation to support nondiscriminatory reason may be evidence of pretext). See also Hurlbert v. St. Mary's Health Care Systems, Inc., 439 F.3d 1286, 1298 (11th Cir. 2006) (recognizing "an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext," and finding lack of documentation of articulated reasons for discharge suggestive of pretext). In its brief and

proposed findings of fact, defendant says it has a policy against "bumping employees from positions in which they are meeting the Company's expectations." Dft.'s Br., dkt. #55, at 5-6. See also Dft.'s PFOF ¶ 52, dkt. #56. However, the testimony defendant cites in support includes no discussion about the employee's performance level. Fritzsche Dep., dkt. #57-4, at 107; Reko Dep., dkt. #57-7, at 25-27. Both witnesses simply testified that defendant "doesn't bump" without explaining the policy or the reasons for it.

More important, defendant never explains why, if it has a policy against "bumping," it even considered demoting Filtz and placing plaintiff in her position. Were the senior directors and vice president of the department simply ignorant of the policy? Or did they disregard it initially without even bothering to note it, only to capitulate once others at the company pointed it out? Both of these possibilities are sufficiently unlikely to raise a genuine question whether Whittington, Anderson and Donnelly initially decided to "bump" Filtz because defendant did not have a policy against doing so. This view is further supported by Anderson's testimony that "there were a lot of . . . those kind of decisions being made at that time for a lot of people" when she was asked whether defendant would have moved one employee to retain another during the 2008 reorganization. Anderson Dep., dkt. #48, at 51.

Even if I assume that defendant had a legitimate reason for keeping Filtz in her position, that would not explain why defendant decided to terminate plaintiff rather than stick to its original plan to terminate Soik. In its briefs, defendant says that Whittington adopted the recommendation of the human resources department to terminate plaintiff

because she was younger and had been at the company fewer years than Soik.

Defendant does not explain the rationale for the fire-the-younger-employee policy in its brief, but Fritzsche's testimony suggests ironically that it was part of a larger effort to avoid discrimination lawsuits. (The Age Discrimination in Employment Act does not prohibit discrimination against younger employees, General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004), so a preference for older workers would not run afoul of that statute.) Defendant says little about how it applied this practice and it does not provide a persuasive explanation for considering some protected characteristics such as race, gender and age, but excluding others such as disability. Cloud testified nonsensically that disability was excluded because he limited his analysis to "active employees." Cloud Dep., dkt. #51, at 93. Defendant argues for the first time in its reply brief that it was prohibited by 42 U.S.C. § 12112(d)(4)(A) from asking employees under most circumstances whether they are disabled, Dft.'s Br., dkt. #88, at 16, but it cites no evidence showing that this was actually the reason for omitting any consideration of disability.

In any event, there are several potential problems with defendant's reliance on this explanation. First, it is not clear where the alleged practice came from. Fritzsche testified that defendant always looks at factors such as gender and age during a reorganization, Fritzsche Dep., dkt. #90, at 29, but, again, if that is true, it is not clear why Whittington, Anderson and Donnelly were unaware of this practice when they decided initially to retain plaintiff and terminate Soik or why there is no documentation showing the practice being used in the past. Surita v. Hyde, 665 F.3d 860, 878 (7th Cir. 2011) (proof of retaliation

includes evidence that defendant's conduct was "completely out of the ordinary"); Chaney v. Plainfield Healthcare Center, 612 F.3d 908, 916 (7th Cir. 2010)(pretext may be shown with evidence that defendant departed from past policies or practices); Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept., 510 F.3d 681, 693 (7th Cir. 2007) (same). Even limiting the focus to the 2009 reorganization raises questions because defendant did not initially identify age as a factor in its decision. In the only document either party cites setting forth the reasons for the termination decision, defendant stated that "comparative job performance or length of management experience" was the determinative factor. Dkt. #78-1. And in its initial responses to plaintiff's discovery requests regarding the reasons for the decision, defendant did not identify age as a criteria it used during the 2009 reorganization. Fischer v. Avanade, Inc., 519 F.3d 393, 406 (7th Cir. 2008) (failure to identify nondiscriminatory reason until later stages of litigation is evidence of pretext).

Second, as a more general matter, the reasons defendant has given for the decision have not been completely consistent. Simple v. Walgreen Co., 511 F.3d 668, 671 (7th Cir. 2007) ("[I]nconsistenc[ies] [are] suggestive of pretext and thus [are] evidence of discrimination."). Defendant does not cite plaintiff's job performance as a reason in its briefs, but some of defendant's witnesses *did* cite performance as a relevant factor. For example, when asked how it was decided that plaintiff would be terminated, Whittington stated that "Misty's performance on the job and—or her lack of performance on the job, the determination was that she would be displaced." Whittington Dep., dkt. #43, at 104. Also, Hurrish prepared a memo dated March 30, 2009 in which she ranked plaintiff the

lowest of all the four employees she supervised, including Soik. However, defendant never identifies any specific performance problems it considered as part of the decision. Rather, it is undisputed that the most recent performance evaluations ranked plaintiff higher than either Soik or Filtz. Whittington wrote in a memo that "Misty Sorenson has been chosen for the MCCU Manager role due to her ability to be innovative in looking for new and improved measures to serve our customers at a lower cost." He also wrote that Soik "is ranked the lowest of [Hurrish's] managers and there is no place for her in this alignment." Dkt. #77-10. Hurrish's memo ranking plaintiff lowest is particularly curious in light of her earlier glowing comments about plaintiff and Anderson's testimony that she relied on positive comments from Hurrish when initially recommending plaintiff for a promotion. Also puzzling is Whittington's testimony that Anderson and Donnelly recommended plaintiff's termination. Whittington Dep., dkt. #43, at 103. He could not identify when they made this recommendation or in what context and defendant cites no documents or testimony from Anderson or Donnelly in which they made such a recommendation.

Third, the process defendant used raises questions as well. Why did Fritzsche believe it was important to "to do further investigation into [plaintiff's] performance," but no other employee? Duncan v. Fleetwood Motor Homes of Indiana, Inc., 518 F.3d 486, 492 (7th Cir. 2008) (applying standard to plaintiff but not other employees is evidence of pretext). More generally, why was the human resources department making recommendations at all? Defendant does not identify any other instance in which the human resources department had done so in the past and it does not explain why it included the department in the 2009

decision making process.

Finally, plaintiff points out that defendant did not make any efforts to assist her in finding another position, even though it helped other employees during the 2008 and 2009 reorganizations. Defendant says that none of the other employees are similarly situated because they did not report to Hurrish, but it is not clear why that matters under the facts of this case. Although it is true that differential treatment of other employees is not evidence of discrimination unless the employees are similar "in all material respects," Good v. University of Chicago Medical Center, 673 F.3d 670, 675-76 (7th Cir. 2012), a difference in immediate supervisors would be material only if it was the other employees' immediate supervisor who provided the assistance. In this case, plaintiff says that Frtizsche and Whittington helped Mary McCarron find a new position, but did nothing to help her.

Alternatively, defendant says that plaintiff "has not identified any position . . . which was vacant and which met her qualifications," Dft.'s Br., dkt. #88, at 12, but that is not accurate. Defendant has admitted that plaintiff was qualified for the vacant claims adjuster position that went to another employee during the 2009 reorganization. Dft.'s Resp. to Plt.'s PFOF ¶ 41, dkt. #90. In his deposition, Whittington pointed to another reason, stating that he "knew that there were more reductions coming up in another reorganization later in the year." Whittington Dep., dkt. #90, at 160. That might be a reason for not assisting *any* employees with finding another position, but it does not explain why some employees were assisted rather than plaintiff.

At the end of its discussion regarding each of plaintiff's claims, defendant includes a

sentence that both Whittington and Fritzsche deny that they knew that plaintiff had cancer, was taking leave or was using her benefits at the time she was terminated. To the extent defendant is arguing that it is entitled to summary judgment because of Whittington's and Fritzsche's professed ignorance, the argument is unpersuasive. It is undisputed that multiple people involved in the reorganization knew about plaintiff's condition, leave and benefits. It is also undisputed that Fritzsche was the administrator for the medical plan and reviewed the plan's expenses. A reasonable jury could find that Fritzsche and Whittington knew about plaintiff's situation, either from documents they reviewed or from others who had personal knowledge.

B. Disparate Impact

Plaintiff includes one sentence in her opposition brief in which she says, "[b]y using age/sex/race standards rather than a disability criterion, Sentry violates 42 U.S.C. § 12112(b)." Plt.'s Br., dkt. #71, at 8. She does not develop an argument on this point or even identify which of the seven subparts of the cited provision might apply. In its reply brief, defendant assumes that plaintiff is raising a disparate impact claim under 42 U.S.C. § 12112(b)(3) and (6) and it objects on the ground that plaintiff did not include the claim in her complaint. Plaintiff filed a surreply, accompanied by a motion for leave to file it, in part so that she could develop her disparate impact theory further. However, she does not dispute defendant's assertion that she did not raise such a claim in her complaint and my own review of the complaint did not uncover it. Because it is well established that a plaintiff

may not raise a new claim in response to a motion for summary judgment, Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002) , I decline to consider plaintiff's disparate impact claim.

The rest of plaintiff's surreply brief is devoted to additional arguments for finding pretext on her other claims. Because I have concluded that plaintiff's evidence is sufficient without considering those new arguments, I am denying her motion for leave to file a surreply brief.

ORDER

IT IS ORDERED that

1. Defendant Sentry Insurance Company's motion for summary judgment, dkt. #54, is DENIED.

2. Plaintiff Misty N. Sorenson's motion for leave to file a surreply brief, dkt. #94, and amended motion for leave to file a surreply brief, dkt. # is DENIED.

Entered this 8th day of June, 2012.

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