UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LESLIE A. QUINN, Plaintiff, vs. THE SALVATION ARMY, Defendants.	)	CV 99-3794-FMC (SHx) **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. Introduction

This matter is before the Court on defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). Defendant moves for summary judgment on the grounds that plaintiff cannot meet her burden of proof as a matter of law because undisputed facts defeat essential elements of plaintiff's retaliation and gender discrimination claims. Plaintiff argues that the evidence provided is sufficient to advance her claims of retaliation

and gender discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000 et seq.[1]

II. Standard

In reviewing a motion brought under Rule 56(c), the Court construes all evidence and reasonable inferences drawn therefrom in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2414, 91 L.Ed.2d 202 (1986); *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir.1995). The Court must assume the truth of direct evidence set forth by the opposing party and may consider the "plausibility and reasonableness" of any inferences arising from circumstantial evidence offered by that party. *Kortan v. State of California*, 5 F.Supp.2d 843, 848 (C.D.Cal. 1998) (citing *Anderson*, 477 U.S. at 249-50 (1986)); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992).

Summary judgment is only proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256.

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[1]Defendant also filed Evidentiary Objections and a Motion to Strike Portions of the Declarations of W. Michael Hartman and Leslie Quinn. The Court notes that it was not necessary to address these matters in reaching its decision.

Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Anderson*, 477 U.S. at 248.

Summary judgment is properly granted where the moving party demonstrates an absence of facts necessary to establish an essential element of a cause of action upon which judgment is sought. *Celotex, supra*, 477 U.S. at 323. Upon such showing, the non-moving party must "go beyond the pleadings" and offer "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Mere disagreement or the bare assertion that a genuine issue of material fact exists is not sufficient and will not preclude the grant of summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

III. Discussion

A. Plaintiff's Retaliation Claim

A presumption of retaliation under Title VII arises upon a showing by plaintiff that: 1) plaintiff engaged in a protected activity; 2) an adverse employment action was taken against plaintiff by the employer; and 3) a causal link exists between plaintiff's protected activity and the adverse employment action. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994); *see also Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994). Upon a prima facie showing of retaliation, the burden shifts to defendant to provide a "legitimate, non-retaliatory reason for any adverse actions taken." *Steiner*, 25 F.3d at 1464-65. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact

as to whether it discriminated against the plaintiff." *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

If defendant provides legitimate, non-discriminatory reasons for the actions taken, plaintiff bears the "ultimate burden of showing that . . . [the] proffered reasons are pretextual" for a motive prohibited under Title VII. *Id.* at 1465. "A plaintiff cannot defeat summary judgment simply by making a prima facie case . . . In response to defendant's offer of non-retaliatory reasons, the plaintiff must produce specific, substantial evidence of pretext." *Wallis, supra*, 26 F.3d at 890. (Emphasis added.) To meet its ultimate burden, plaintiff must provide evidence that the proffered reasons are false and pretextual. *Kortan, supra*, 5 F.Supp.2d at 852 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

Defendant argues that plaintiff has failed to meet her initial burden as a matter of law by failing to establish that any "adverse employment action" was taken against her. An adverse employment action is one that has a "material adverse effect upon the terms or conditions of employment stemming from the employer's action." *Cellini*, 51 F.Supp.2d 1028, 1038 (S.D.Cal. 1999). However, not all conduct occurring after a protected activity is actionable under Title VII. *Strother v. So. Calif. Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996). Examples of adverse employment actions include those that impact the "hiring, granting of leave, discharging, promoting, and compensating" of employees. *Kortan, supra*, 5 F.Supp.2d at 853 (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.

1995)); *see Steiner*, *supra*, 25 F.3d at 1465, n.6 (there is no adverse employment action where an employee is not "demoted, put in a worse job, or given any additional responsibilities.").

Plaintiff alleges that the following actions taken against her constitute adverse employment actions and support her claim for retaliation under Title VII. First, plaintiff's supervisor, Captain Hendrik Aalders ("Aalders"), issued four negative written reports ("write-ups"), which were included in plaintiff's personnel file. Second, Aalders required plaintiff to submit to a drug test. Third, Aalders talked about plaintiff to other employees, including spreading a rumor that plaintiff had relapsed in her recovery from alcoholism. Fourth, Aalders changed operational policies without plaintiff's involvement. (Q: What do you believe was done that amounts to retaliation against you . . . . A: I received write-ups . . . I was given a urinalysis test . . . I was talked about to my employees behind my back . . . Policy and procedure was changed without my knowledge . . . . That's what I can recall right now.[2]) (Cohen Decl.¶2, Ex. A, pp. 499-500.)

Defendant argues that none of these actions constitute an adverse employment action because plaintiff suffered no material or adverse effect on the terms or conditions of her employment as a result of these actions.

1. The Write-Ups

Plaintiff was written-up on four separate occasions by Aalders. Plaintiff alleges that these write-ups were retaliatory in nature because they were issued subsequent to plaintiff's

[2]The Court notes that plaintiff does not allege any acts of retaliation other than those identified above.

submission of reports critical of Aalders to his superiors. The first write-up was issued on September 15, 1998. It reprimanded plaintiff for calling into work during her vacation in violation of policy forbidding this conduct. Plaintiff acknowledges that no discipline was imposed as a result of this write-up. (Plaintiff's Statement of Genuine Issues, pg. 12, lines 1-3.). Plaintiff also acknowledges that she was not fired, demoted, suspended, transferred or reduced in pay as a result of this written warning. (*Id.*, lines 12-16.).

The second write-up was issued on September 30, 1998 because plaintiff allegedly failed to make accurate entries in the mileage logbook relating to her use of a Salvation Army issued car. Plaintiff acknowledges that no discipline was imposed as a result of this write-up. (Plaintiff's Statement of Genuine Issues, pg. 13, lines 19-21.). Plaintiff also acknowledges that she was not fired, demoted, suspended, transferred or reduced in pay as a result of this written warning. (*Id.*, pg. 14, lines 1-5.).

The third write-up was issued on October 7, 1998 because plaintiff had not submitted an inventory report on time. Plaintiff acknowledges that no discipline was imposed as a result of this write-up. (Plaintiff's Statement of Genuine Issues, pg. 17, lines 1-2.). Plaintiff also acknowledges that she was not fired, demoted, suspended, transferred or reduced in pay as a result of this written warning. (*Id.*, lines 12-13.).

The final write-up was issued on November 11, 1998. It reprimanded plaintiff for her failure to regularly attend staff meetings. Plaintiff acknowledges that no discipline was imposed as a result of this write-up. (Plaintiff's Statement of Genuine Issues, pg. 20, lines

13-14.). Plaintiff also acknowledges that she was not fired, demoted, suspended, transferred or reduced in pay as a result of this written warning. (*Id.*, lines 17-18.).

Plaintiff argues that these write-ups were adverse employment actions because they carried the threat of potential future discipline for repeat offenses. An adverse employment action, however, requires a "concomitant adverse impact, such as a demotion or a change in responsibilities." *Kortan, supra,* 5 F.Supp.2d at 853; *see also Steiner, supra,* 25 F.3d at 1465, n.6; *Cellini, supra,* 51 F.Supp.2d at 1038 (written reprimands did not constitute a cognizable adverse employment action because plaintiff failed to demonstrate that they had an adverse material effect on the terms and conditions of his employment.). The possibility that such actions might have a future adverse effect is insufficient. Plaintiff also argues that these write-ups "polluted" her personnel file. (Cohen Decl., pg. 532, lines 3-5.). This argument carries little weight.

Plaintiff does not provide any evidence to indicate that these write-ups were ever used as the basis for any adverse actions taken against her. The Court concludes that the four write-ups issued to plaintiff were not adverse employment actions.

2. The Urinalysis Test

In September, 1998, Aalders requested that plaintiff submit to a drug test. Plaintiff was told at the time that all employees authorized to use Salvation Army vehicles were required to submit to the test. ("Q: When Captain Aalders asked you for the urine sample, did he tell you that everyone who had access to a Salvation Army vehicle was going to be

tested? A: Yes.) (Cohen Decl., pgs. 516-17, lines 25-4.) Though plaintiff believed the request was unwarranted, she submitted to the test.

Plaintiff acknowledges that she was not fired, demoted, suspended, transferred or reduced in pay pending the results of the test or subsequent to the determination of the test results. (Plaintiff's Statement of Genuine Issues, pg. 16, lines 1-4.) The Court's analysis in Part III.A. controls the resolution of this issue.

Plaintiff has not established that the drug test had any adverse effect on the terms or conditions of her employment. The Court concludes that this was not an adverse employment action.

3. Spreading Rumors About Plaintiff to Other Employees

Plaintiff alleges that Aalders spread rumors that she had relapsed in her recovery from alcoholism. However, plaintiff's own deposition testimony contradicts this allegation. (Q: You said that Captain Aalders told people you had relapsed. What information do you have about that? . . . . A: There were some rumors amongst other employees that I had relapsed. . . . Q: Do you have any knowledge that Captain Aalders started or spread a rumor that you had relapsed? A: No. Q: You are guessing or speculating that he did aren't you? A: Yes.") (Cohen Decl., pgs. 500 & 502, lines 11-20 and lines 4-10, respectively.)

Not only has plaintiff failed to establish that Aalders took this alleged action, plaintiff has failed to demonstrate that it actually occurred. In addition, plaintiff has the burden of proof to demonstrate that this constituted an adverse employment which had a material

adverse effect on the terms or conditions of her employment. The Court's analysis in Part III.A. controls the resolution of this issue.

The Court concludes that plaintiff has not met the required burden of proof.

4. The Changing of Policy Without Plaintiff's Input

Defendant admits that operational policies, regarding the "rag-out" of clothing in the Salvation Army's thrift stores, were changed without consulting plaintiff. (Q: [A]nother thing you mentioned as evidence of retaliation was that policies and procedures were changed without your knowledge. A: Correct.) (Cohen Decl., pg. 502, lines 11-14.). Plaintiff acknowledged, however, that her job duties did not include setting policies. (Q: You aren't the person who sets policies and procedures at the Salvation Army, are you? A: Correct.) (*Id.*, lines 17-19.) To prove an adverse employment action, plaintiff bears the burden to demonstrate that the action taken resulted in a material adverse effect on the terms and conditions of her employment. The effect identified by plaintiff was that she felt "out of the loop." (Q: [C]an you explain how the decision to change the rag-out and mark down dates constitutes retaliation against you? A: We have a chain of command, and up until this happened, everything always went through me. He [Aalders] started going directly to the employees without my knowledge . . . So he wasn't keeping me in the loop as to what was going on.") (*Id.*, pg. 505 lines 10-24.). This is simply not sufficient to establish a material adverse effect on the terms and conditions of her employment.

Neither the terms nor the conditions of plaintiff's employment were adversely affected because there was no concomitant reduction in plaintiff's responsibilities. *Kortan*, *supra*, 5 F.Supp.2d at 853. The Court's analysis in Part III.A. controls the resolution of this issue. Plaintiff has failed to meet her burden with respect to this matter.

Defendant has offered evidence in support of its contention that even if plaintiff did suffer some adverse employment action, there were legitimate, non-retaliatory reasons for each disciplinary action taken against plaintiff. Because plaintiff has failed to produce evidence sufficient to demonstrate a prima facie case of retaliation, the Court need not address this evidence. Under these circumstances, the burden does not shift to the defendant to justify its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04, 93 S.Ct. 1817, 1825-26, 36 L.Ed.2d 668 (1973).

B. Plaintiff's Gender Discrimination Claim

Under Title VII, an employer is prohibited from discriminating "against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U.S.C. §2000e-2(a). To establish a prima facie case of gender discrimination under this section, a female party must show that an employer paid female employees lower salaries than comparably qualified male employees working in similar positions. *County of Washington v. Gunther*, 452 U.S. 161, 167, 101 S.Ct. 2242, 2247, 68 L.Ed.2d 751 (1981). Upon such showing, the burden shifting analysis discussed in Part III.A. begins. *McDonnell Douglas Corp.*, *supra*, 411 U.S. at 802.

Plaintiff identifies several actions by defendant which she claims constitute gender discrimination under Title VII. First, plaintiff points to the fact that her starting salary was $3,000 dollars lower than the salary paid to her male predecessor. Plaintiff argues that she was paid less because she was a woman. Under certain circumstances, a lower starting salary might be sufficient to create an inference of discrimination. That is not the case here. Plaintiff's own Declaration directly contradicts her allegation that her starting salary was based on gender. ("Upon receiving approval to hire me, I was advised by Major Phillips that I would not receive $24,000 per year but rather $21,000. The decrease in pay was purportedly due to my lack of retail experience and not having a drivers license.") (Quinn Decl., pg.2, ¶4, lines 14-17.) ("Because Ms. Quinn's qualifications did not equal those of her predecessor, I did not approve paying her an equal salary to her predecessor.) (Starrett Decl., pg.2, lines 4-5.).

Next, plaintiff claims that defendant paid new male employees higher salaries than their female predecessors. To support this claim, plaintiff submits personnel records obtained from the defendant. This evidence would not be admissible at trial to support her claim of discrimination. Statistical evidence is held to a high standard. Unless it shows a "stark pattern of discrimination" that cannot otherwise be explained, it is not admissible. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423 (9th Cir. 1990). This is especially true where the statistical universe is so small. *Morita v. Southern Calif. Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976).

Finally, plaintiff points to the fact that she was only given a three percent raise, rather than an increase to her predecessor's salary level. Plaintiff claims this small increase was based on her gender. ("The three percent increase did not bring my salary to what the previous store supervisor had received . . . I always believed that I would receive the $24,000 annual salary once the issue with my license was resolved. In addition . . . I already had three years of retail experience with the Salvation Army; therefore, there was no justification to not proceed to raise my salary to the salary of my predecessor.") (Quinn Decl., pgs. 2-3, lines 25-2.) The Court notes that a male employee received the same salary increase as plaintiff. (Plaintiffs Statement of Genuine Issues, pg. 7, lines 13-14.). In addition, there is evidence that three percent was the standard raise for Salvation Army employees. (The Salvation Army does not normally give raises in excess of three percent.) (Starrett Decl., p.2, lines 16-17.). Finally, plaintiff was informed that she did not receive a higher raise because the center was not doing well financially. (Q: What was the response you received from Colonel Starrett [to your salary request]? A: That the center was not financially doing well . . . Q: Did he [Starrett] tell you that the income from the center was down over $100,000 for the first half of 1998? A: I believe he did, yes. Q: Did he tell you that there shouldn't be any raises at all? A: Yes, he did.) (Cohen Decl., pgs. 304-305, lines 25-12.).

Defendant has offered evidence in support of its contention that even if the inference of gender discrimination was established, there were legitimate, nondiscriminatory reasons for the pay differentials. Because plaintiff has failed to produce evidence sufficient to

demonstrate a prima facie case of gender discrimination, we need not address this evidence. Under the circumstances, the burden does not shift to the defendant to justify its actions. *McDonnell Douglas Corp.*, *supra*, 411 U.S. at 803-04.

IV. Conclusion

For the reasons stated above, the Court grants defendant's motion for summary judgment.

IT IS SO ORDERED.

Date: January 18, 2000

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Florence-Marie Cooper, Judge
United States District Court