

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

VERONICA A. WILLIAMS,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02-2080-D/A
)	
CITY OF MEMPHIS (Inspection Bureau),)	
)	
Defendant.)	
)	

**ORDER DENYING DEFENDANT’S MOTION TO DISMISS AND MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Defendant City of Memphis’ (“Defendant” or “City”) motion to dismiss under Federal Rule of Civil Procedure (“FRCP”) 12(b)(6) and motion for summary judgment under FRCP 56. Plaintiff Veronica A. Williams (“Plaintiff”) asserts claims of sex discrimination against Defendant pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e, et seq. In particular, as a result of a disciplinary incident in March 2001, Plaintiff claims that Defendant (1) refused her bids for position appointments although she had seniority for positions that became open; (2) gave her a five-day suspension plus employment conditions for a workplace infraction although a male employee was given only a two-day suspension for the same infraction; and (3) terminated her employment. On June 26, 2002, this Court ordered partial dismissal of Plaintiff’s claims, so the claims now remaining relate only to prohibitions on using seniority to bid occurring within 180 days of Plaintiff’s Equal Employment Opportunity Commission (“EEOC”)

filing.¹ Defendant argues first that Plaintiff's remaining claims relating to prohibitions on bidding are also time-barred, because they represent merely the present effects of past acts that occurred outside the time limit. Defendant also argues that Plaintiff offered no evidence that her December 2001 termination related to the March 2001 incident, nor did she exhaust her remedies with regard to the termination. Finally, Defendant contends that, even if her claims are not time-barred, Plaintiff has offered no evidence that any disciplinary or subsequent seniority-related actions were taken because of her sex. Specifically, Defendant asserts that, under the McDonnell Douglas / Burdine burden-shifting framework, Plaintiff cannot make out a prima facie case of discrimination, Defendant has a legitimate non-discriminatory reason for its actions, and Plaintiff cannot prove that Defendant's proffered reason is pretextual. For the following reasons, the Court denies Defendant's motion to dismiss and motion for summary judgment.

I. Factual and Procedural Background²

On March 8, 2001, Plaintiff was employed as a vehicle examiner for the City of Memphis, Inspection Bureau. Plaintiff had worked in that position since 1990. While Plaintiff was working that day, her supervisor, Charles Moragne, threw a holster into the booth that she had been using. Plaintiff did not put on the holster. Although the City later found that Plaintiff refused to obey a direct order from Mr. Moragne to wear the holster, Plaintiff claims that he did not tell her to put it on or to do anything with it, so that there was no order that she could have disobeyed. Mr. Moragne

¹In this situation, an EEOC charge must be filed within 180 days of the allegedly discriminatory act, or the claim is time-barred. See 42 U.S.C. § 2000e-5(e)(1). Plaintiff filed an EEOC charge on November 7, 2001. Therefore, only discriminatory acts occurring 180 days or fewer before November 7, 2001 can support valid claims.

²Unless otherwise noted, facts are taken from Plaintiff's complaint and amended complaint and from a deposition of Plaintiff taken May 22, 2003 and its attached exhibits.

left the area after depositing the holster, and when he came back, he told Plaintiff to get off the line and leave.

Plaintiff received a letter informing her that she was being charged with Gross Insubordination under the Memorandum of Understanding and with several violations of the City of Memphis Work Rules and the City of Memphis Personnel Policy. A fact-finding hearing was held on March 12, 2001. The City found that Mr. Moragne had instructed all employees, including Plaintiff, to wear the holster, but that Plaintiff refused to do so. Terence McBride, Manager of the Motor Vehicle Inspection Bureau, decided to terminate Plaintiff's employment based on the violations arising out of the March 2001 incident, Plaintiff's length of employment, and her record of past discipline.

By March 2001, Plaintiff had accumulated the following disciplinary violations on her work record: three suspensions for gross insubordination; oral reprimands resulting from insubordination, citizen complaints about her behavior, verbal abuse directed toward Mr. Moragne, and an unauthorized absence; and a suspension and direction to contact the Employee Assistance Program ("EAP") for an assessment resulting from behavior toward a co-employee. (Def. City of Memphis' Mem. in Supp. of Mot. for Summ. J. at 4 ¶ 15.)

After Mr. McBride decided to terminate her, Plaintiff filed a grievance with her union. That resulted in another hearing, at which Plaintiff's termination was reduced to a five-day suspension. Plaintiff was not allowed to say anything at this hearing. Upon request, Plaintiff received a letter from Donnie L. Mitchell, Director of the Division of Public Services and Neighborhoods for the City of Memphis, stating that her termination was reduced to a suspension based on her many years of service for the City and on Mr. Mitchell's willingness to help her resolve any personal problems that

might affect her work record. The letter included two conditions for the reduction in discipline: (1) that Plaintiff enroll in the EAP or other similar organization, and (2) that Plaintiff accept a transfer to another inspection station, with the understanding that she would not be allowed to displace other employees' seniority. Plaintiff acknowledges that the counseling condition was in place by the end of the hearing, but she denies that the condition regarding her seniority was resolved in her presence at the hearing. Plaintiff also denies that she accepted either condition.

Although Plaintiff received Mr. Mitchell's letter in April or May 2001, she claims that she did not find out about the change in her seniority rights until sometime later in 2001, when she attempted to use her seniority to transfer back to her original station. Her supervisor, however, told her that Mr. McBride gave an order that Plaintiff could not sign the transfer sheet. Transfers were based solely on seniority. Plaintiff later tried to bid for other jobs using her seniority, but she was again not allowed to sign up.

Also in March 2001, a male co-worker of Plaintiff, Benny Parker, was disciplined for the same infraction committed on the same day as Plaintiff. Following a fact-finding hearing, Mr. Parker received only a two-day suspension. Mr. Parker had no prior disciplinary record. (*Id.* at 8 ¶ 47-49.)

In December 2001, Plaintiff received a letter from Mr. McBride stating that an investigation had shown that Plaintiff intentionally inspected and illegally passed vehicles not in accordance with the City's inspection programs. The City found that she had committed unauthorized use of City property in violation of the Memorandum of Understanding; that she violated Division Work Rules regarding willful misrepresentations and falsifications, stealing from the City, and using City equipment for private benefit or gain; and that she violated several analogous provisions of the City

of Memphis Personnel Manual. Plaintiff was terminated at that time. Plaintiff believes that her termination stemmed from the March 2001 disciplinary incident.

Plaintiff claims that Mr. McBride had been “messing” with her for some years and that they had been having “rounds” ever since he started working with her. She also heard Mr. Moragne tell other employees that he had told Mr. McBride to stop picking on certain people. Plaintiff believes that the people Mr. Moragne referred to were the older employees and those employees who were good workers. Plaintiff also claims that Mr. McBride flirts with many women that come into the workplace, and that he has “been to bed” with some of them. Her interactions with Mr. McBride led her to believe that the City’s treatment of her was because of her sex.

On February 11, 2002, after receiving a right to sue letter from the EEOC, Plaintiff commenced this suit. Plaintiff then filed an amended complaint on April 25, 2002. The Court has jurisdiction pursuant to 28 U.S.C. § 1331. The Court summarily dismissed some of Plaintiff’s claims as time-barred on June 26, 2002. On January 31, 2003, Defendant filed the instant motion to dismiss, arguing that the remaining claims are also time-barred. Defendant then filed this motion for summary judgment on July 31, 2003, raising the same time-bar arguments and new arguments.

II. Legal Standard

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In other words, summary judgment is appropriately granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322

(1986).

The party moving for summary judgment may satisfy its initial burden of proving the absence of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party's case. *Id.* at 325. This in turn may be accomplished by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the opponent's evidence to show why it does not support a judgment for the nonmoving party. 10a Charles A. Wright et al., Federal Practice and Procedure § 2727, at 35 (2d ed. Supp. 1996).

Facts must be presented to the court for evaluation. Kalamazoo River Study Group v. Rockwell Int'l, 171 F.3d 1065, 1068 (6th Cir. 1998). The court may consider any material that would be admissible at trial. 10a Charles A. Wright et al., Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). Although hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999).

In evaluating a motion for summary judgment, all the evidence and facts must be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). Justifiable inferences based on facts are also to be drawn in favor of the non-movant. Kalamazoo River, 171 F.3d at 1068.

Once a properly supported motion for summary judgment has been made, the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific

facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586.

III. Analysis

A. Timeliness of Remaining Claims

Plaintiff’s remaining claims must be timely to proceed. To be actionable, any discriminatory act must have occurred within 180 days of November 7, 2001, the date on which Plaintiff filed her EEOC charge. “A discrete...discriminatory act ‘occurred’ on the day that it ‘happened.’” National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002). In Morgan, the Supreme Court held that:

[t]he existence of past acts and the employee’s prior knowledge of their occurrence... does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

Id. at 113. The Court counseled “‘strict adherence to the procedural requirements specified by the legislature.’” Id. at 108 (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)). The timely acts must themselves be discriminatory to support a Title VII violation; they cannot be simply the “present effects of past discrimination.” Tenenbaum v. Caldera, Nos. 00-2394, 01-1704, 2002 WL 2026347, at **3 (6th Cir. Aug. 29, 2002). See also Sharpe v. Cureton, 319 F.3d 259, 268 (6th Cir. 2003) (noting that Morgan overturned Sixth Circuit law regarding the serial violations type of

continuing violation exception, in that plaintiffs may no longer prove a continuing violation by showing that time-barred acts are sufficiently related to timely filed acts so as to be actionable still).

Plaintiff's remaining claims are based on prohibitions on bidding despite seniority that occurred within the 180 day period. Plaintiff alleges that such a denial occurred in July 2001, when she initially tried to transfer back to her original inspection station, and that similar denials occurred later, although she cannot remember any specific dates. Those dates are within the 180 day period. The Court must ask whether any such incidents are themselves independently discriminatory or are merely the present effects of past discrimination.

On one hand, the bidding denials may be simply a direct result of Plaintiff's discipline, because one of the conditions of the reduction in punishment was that she not be allowed to displace other employees' seniority. On that view, even assuming that the discipline was itself discriminatory, its later effects - i.e., the administration of the punishment - would not be independently discriminatory acts. Instead, they would be neutral decisions to follow through on mandated punishment. Cf. Dixon v. Anderson, 928 F.2d 212 (6th Cir. 1991) (holding that continuing payment of benefits in retirement system that differentiated between members and non-members was merely neutral effect of past decision, even if initial decision to operate retirement system so as to treat members and non-members differently was discriminatory). On the other hand, Plaintiff has alleged that the bidding prohibitions were the result of Mr. McBride's direct order, and that Mr. McBride had been "messing" with her for years. She also believes that her interactions with Mr. McBride show that her treatment was discriminatory. On those facts, it is possible that the bidding prohibitions were not simply the direct result of the punishment, but they may have been independent discriminatory acts by Mr. McBride. A genuine issue of material fact exists as to the

genesis of the bidding prohibitions, such that it would be improper for the Court to hold that Plaintiff's remaining claims are time-barred. Defendant's motion for summary judgment is denied on this ground. Defendant's motion to dismiss raised only this argument and therefore is also denied.

B. Termination Claim

As to Plaintiff's claim of discrimination in her termination, Defendant argues that, not only is there no evidence to connect the termination to the March 2001 incident, but Plaintiff also has failed to exhaust her administrative remedies on this claim. This Court has already dismissed Plaintiff's termination claim based on her failure to exhaust. (Order of Partial Dismissal and Order to Effect Service of Process at 4.) Defendant's argument is therefore moot.

C. Evidence of Sex Discrimination in Timely Filed Claims

Defendant argues that Plaintiff has no evidence to prove discrimination in either her initial discipline or in the subsequent enforcement of that discipline. Defendant's arguments rely solely on a purported lack of direct evidence and of evidence that would support a finding of discrimination under the McDonnell Douglas / Burdine burden-shifting framework. A violation of Title VII, however, may be proved other than through McDonnell Douglas / Burdine.

The Civil Rights Act of 1991 made unlawful discrimination based on so-called mixed motives: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). "The mixed-motive analysis permits a finding of liability where the employer is motivated by both unlawful considerations and legitimate reasons." See Gibson v. City of Louisville, 336 F.3d 511, 513 (6th Cir.

2003). Mixed-motive discrimination may be proved through direct or circumstantial evidence. See Desert Palace, Inc. v. Costa, 123 S.Ct. 2148, 2150 (2003). Once the plaintiff produces evidence that the decision-maker relied on impermissible factors, the burden shifts to the employer to prove that it would have made the same decision even without considering the impermissible factors. See Wexler v. White's Furniture, Inc., 317 F.3d 564, 571 (6th Cir. 2003).

Although Plaintiff has not alleged direct evidence of sex discrimination, she has presented circumstantial evidence sufficient to raise a genuine issue of material fact as to whether sex played a motivating factor in her inability to use her seniority to bid on positions. Taking the facts in the light most favorable to Plaintiff, the Court may consider circumstantial evidence raised by Plaintiff, such as her allegation that Mr. McBride had been “messing” with her for years and her belief that Mr. McBride’s difficulties with her were due to her sex. Those allegations could raise an inference of a discriminatory motive. In addition, although her claim based on the discrepancy in discipline is time-barred, Plaintiff may use those facts as background evidence to support her timely filed claims of discrimination. See Morgan, 536 U.S. at 113. From the discrepancy between the male co-worker’s two-day suspension and Plaintiff’s five-day suspension plus continuing employment conditions, it is possible to infer that the impermissible consideration of sex may have played a motivating factor. That impermissible motivation, in turn, may have transferred to subsequent denials of seniority benefits as well. Furthermore, mixed motive discrimination would be unlawful even if Defendant also had legitimate reasons for its decision, such as Plaintiff’s past disciplinary record. Plaintiff need only present evidence that *a* motivating factor was her sex.

IV. Conclusion

Plaintiff's remaining claims are not time-barred, and a genuine issue of material fact remains as to whether Defendant violated Title VII through the actions that its representatives took here. Accordingly, the Court DENIES Defendant's motion for summary judgment and DENIES Defendant's motion to dismiss.

IT IS SO ORDERED this _____ day of _____ 2003.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE