

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

CHERYL GARNETT-JOHNSON,)	
Plaintiff,)	
)	
v.)	No. 00-2872 D
)	
TOYS "R" US-Delaware, Inc.,)	
Defendant.)	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendant Toys "R" Us-Delaware, Inc. ("TRU")'s motion for summary judgment as to plaintiff's employment discrimination claims under (a) Title VII, (b) 42 U.S.C. §1981, and (c) the Equal Pay Act. For the reasons stated herein, defendant's motion is **GRANTED**, and plaintiff's complaint is **DISMISSED**.

I. Factual Background

Beginning in 1987, a series of promotions vaulted plaintiff from entry-level sales to Store Director of a high-volume Toys "R" Us ("TRU") store. (Def. Memo at ¶¶2-8, Pl. Resp. at ¶¶2-8). In fall 1997, plaintiff's store was selected for certain remodeling, to "increase floor size, minimize storeroom size, and emphasize customer service while decreasing the prior task oriented environment." (Def. Memo at ¶22, Pl. Resp. at ¶22). As a result of the "new atmosphere and culture," plaintiff was expected to meet new challenges. (Def. Memo at ¶23, Pl. Resp. at ¶23).

During the eight-week remodel, plaintiff's store experienced problems with "product flow, staffing and recruitment and loss prevention." (Def. Memo at ¶24, Pl. Resp. at ¶24). On at least one occasion, the remodel team or other management personnel met with plaintiff to discuss these problems. (Def. Memo at ¶25, Pl. Resp. at ¶25).

In February 1999, Doug Bell became District Manager of TRU and plaintiff's immediate supervisor. In April 1999, Bell and TRU Regional Vice President for Memphis, Ed Siegler, visited plaintiff's

store. Upon evaluating the premises, Sieglar informed plaintiff that its conditions were "the worst he had ever seen," and directed Bell "to make immediate improvements." (Def. Memo at ¶¶40, 41, Pl. Resp. at ¶¶40, 41). Subsequently, Bell and plaintiff agreed on a plan for plaintiff to improve the performance of the store. (Def. Memo. at ¶42, Pl. Resp. at ¶42).

On or about May 14, 1999, Bell met with plaintiff, and noted that, while many of the problems had been corrected, the "improvement was inconsistent and was not maintained." (Def. Memo. at ¶44, Bell at 177, ln. 8-9). On or about June 1, 1999, Sieglar also noted improvement, but "overall, he noted that the store's condition was still below acceptable levels." (Def. Memo. at ¶45,46, Sieglar at 31, ln. 1-7, 35, ln. 22-25).

On July 14, 1999, Bell and other management personnel met with plaintiff "to discuss removing her from the....store." (Def. Memo. at ¶52, Pl. Resp. at ¶52). At that time, there were no openings for Store Director in TRU's two non-remodeled Memphis stores. (Def. Memo. at ¶54, Pl. Resp. at ¶54). Consequently, Bell offered to transfer plaintiff as Store Director to a lower volume store in Nashville, or as Assistant Store Director to a similar volume Nashville store. (Def. Memo at ¶55, Pl. Resp. at ¶55). Bell further offered to transfer plaintiff's husband, a Memphis-area TRU manager, to an equivalent position in Nashville, and to pay the costs of relocation. (Def. Memo. at ¶56, Pl. Resp. at ¶56). Plaintiff declined both offers. (Def. Memo. at ¶57, Pl. Resp. at ¶57). Instead, plaintiff proposed a demotion from Store Director to manager of a Memphis store. (Def. Memo. at ¶58, Pl. Resp. at ¶58). After conferring with TRU Human Resources, Bell granted plaintiff's request. (Def. Memo. at ¶59, Pl. Resp. at ¶59).

Upon demotion to manager, plaintiff's salary was frozen, and she lost certain bonuses and benefits reserved to Store Directors. (Def. Memo. at ¶¶60,61, Pl. Resp. at ¶¶60,61). Plaintiff was replaced as Store Director by Robert Neely, an African-American male. (Def. Memo. at ¶63, Pl. Memo. at ¶63).

On August 2, 1999, plaintiff's filed a charge with the EEOC, alleged race discrimination of the part of TRU. On October 13, 1999, plaintiff filed an amended charge to include gender discrimination.

On September 19, 2000, plaintiff filed suit in this Court, alleging that her demotion violated (a) Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et. seq, (b) the Equal Pay Act ("EPA"), 29 U.S.C. § 206d, and (c) 42 U.S.C. §1981. On September 21, 2000, TRU moved for summary judgment, contending that plaintiff's wage discrimination and disparate treatment claims are not properly before the Court, and that plaintiff's remaining Title VII claims fail to establish the existence of race or gender discrimination.

II. Summary Judgment 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, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

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, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). However, the nonmovant "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).

III. Discussion

A. Plaintiff's 42 U.S.C. §1981 and Equal Pay Act Claims are Properly before the Court

Defendant contends that plaintiff's failure to allege a pattern of pay inequity, disparate treatment, or violations of the Equal Pay Act before the EEOC preclude her from raising these issues in her judicial complaint. (Def. Mot. at 10). The Court disagrees. Even a cursory reading of the applicable statutes and opinions demonstrates that there is no administrative exhaustion requirement for actions under 42 U.S.C. §1981 or under the Equal Pay Act. See e.g. Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974)("We adopt the prevailing view that a plaintiff need not pursue his Title VII remedies before instituting a cause of action under Section 1981."); See also County of Washington v. Gunther, 452 U.S. 161, 175 n.14 (1981) ([T]he Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints.").

Accordingly, the Court finds that plaintiff's disparate treatment and wage discrimination claims under 42 U.S.C. §1981 and the Equal Pay Act are properly before the Court.

B. Plaintiff Fails to Establish Prima Facie Claim of Race or Gender Discrimination under Title VII or 42 U.S.C. §1981

The McDonnell Douglas burden shifting framework is applicable to claims brought under Title VII and to claims under 42 U.S.C. § 1981. Patterson v. Mclean Credit Union, 491 U.S. 164 (1989). Under McDonnell Douglas, plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Wilson v. Stroh Companies, Inc., 952 F.2d 942, 945 (6th Cir. 1992). A plaintiff may establish a prima facie case of discrimination either by presenting direct evidence of intentional discrimination by the defendant, Terbovitz v. Fiscal Court, 825 F.2d 111, 114-15 (6th Cir. 1987) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985)), or by showing the existence of circumstantial evidence which creates an inference of discrimination. McDonnell Douglas, 411 U.S. at 802. Under the latter approach, plaintiff must show that (1) she is a member of a protected group, (2) she was subject to an adverse employment decision, (3) she was qualified for the position, and (4) she was replaced by a person outside of the protected class. Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992). The fourth element may also be satisfied by showing that "a comparable non-protected person was treated better." Id. at 582. The record before the Court indicates that defendants offered to transfer plaintiff to Nashville, Tennessee as Director of a lesser volume store, or as Assistant Director of an equal volume store. (Def. Memo at ¶55, Pl. Resp. at ¶55). Plaintiff contends, without more, that both options constituted demotion, and that she subsequently requested demotion to manager "as a means of staying in the Memphis area." (Pl. Mot. Opp. at 16). Plaintiff concedes that, as Director of the Nashville store, her salary and eligibility for bonuses would not have changed. (Pl. Aff. at 236-37).

The Sixth Circuit holds that a transfer with no change in wages or benefits amount to a "constructive discharge" to be actionable as an "adverse employment action." Darnell v. Campbell County Fiscal Court, 731 F.Supp. 1309 (E.D. Ky. 1990), aff'd, 924 F.2d 1057 (6th Cir. 1991). Moreover, a constructive discharge must be based on objective criteria that would create intolerable conditions that a reasonable person could not be expected to bear. Id.; Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987).

In the case at bar, there is no evidence or allegation that plaintiff's transfer to Nashville would have created intolerable conditions. Plaintiff expressed personal interest in remaining in Memphis. (Pl. Aff at 243). However, mere "subjective preferences are insufficient to turn a transfer of location into a constructive discharge." Darnell, 731 F.Supp. at 1313.

Therefore, as plaintiff has failed to establish or even allege that her transfer would have created intolerable conditions, the Court finds that plaintiff has not met her prima facie burden of

demonstrating adverse employment action under the second prong of McDonnell Douglas. The Court need not analyze plaintiff's claims under the remaining prongs of McDonnell Douglas. Accordingly, defendant's motion as to plaintiff's Title VII and 42 U.S.C. §1981 race and gender discrimination claims is GRANTED.

C. Plaintiff Fails to Establish Prima Facie Wage Discrimination Claim under Title VII or Equal Pay Act

The analysis of a claim of unequal pay for equal work is essentially the same under the Equal Pay Act and Title VII. Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000); Korte v. Diemer 909 f.2d 954 (6th Cir. 1990). To establish a claim of unequal pay for equal work, a plaintiff has the burden to prove that the employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions." Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); 29 U.S.C. § 206(d)(1). Once a plaintiff has established that she has been paid unequally for equal work, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." Id., at 196. In any event, plaintiff must first establish a *prima facie* case of discriminatory compensation by proving that different wages were paid to employees of different groups for substantially equal work. Id., at 195-96.

In the instant case, plaintiff contends that Gus Humble, a male employee with six months seniority, was promoted to Director at a salary of \$48,000, while plaintiff, after 13 years seniority, was paid \$45,742. Beyond this bare assertion, however, plaintiff wholly fails to allege the further elements of the statute. Moreover, plaintiff concedes that her allegations are based on a comparison of her starting salary in 1993 and Humble's starting salary in 1998. (Pl. Aff. at 275). Finally, it is not disputed that, at the time of her 1999 demotion, plaintiff earned *more* than any of the other male Store Directors in Memphis. (Def. Mot. at 26).

Therefore, as the record is devoid of specific evidence or allegations of unequal pay for equal work under similar conditions, the Court finds that plaintiff has failed to establish a prima facie case of wage discrimination under Title VII or the Equal Pay Act. Accordingly, defendant's motion for summary judgment as to plaintiff's wage discrimination claim is **GRANTED**.

IV. Conclusion

For the foregoing reasons, defendant's motion for summary judgment as to plaintiff's Title VII, 42 U.S.C. §1981, and Equal Pay Act claims is GRANTED, and plaintiff's complaint is

DISMISSED.

IT IS SO ORDERED this _____ day of _____, 2001

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE