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

PATRICIA TURNER,

Plaintiff,

v. No. 1:09-cv-01024-JDB-egb

YOUNG TOUCHSTONE COMPANY,

Defendant.

ORDER DENYING MOTION SEEKING PAYMENT OF ATTORNEY'S FEES

On referral for determination [D.E. 42] is Defendant's Motion Seeking Payment of Attorneys' fees [D.E. 40]. In response, Plaintiff has filed a notice document titled Plaintiff's Notice of Plea of Bankruptcy of Plaintiff's Active Chapter 13 Bankruptcy Case [D.E. 43] and Plaintiff's Response in Opposition to Defendant's Motion Seeking Payment of Attorney Fees [D.E. 49]. For the following reasons, Defendant's Motion is DENIED.

STATEMENT OF FACTS AND PROCEDURE

Plaintiff filed this lawsuit against Defendant in February, 2009, claiming damages for alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* Subsequently, Defendant's Motion for Summary Judgment was granted [D.E. 38]. Defendant now asks for the recovery of its attorney's fees in the amount of $35,928 as the prevailing party in this Title VII litigation.

Within her notice filed regarding Defendant's request for fees, Plaintiff indicated that she is in a Chapter 13 bankruptcy, having filed it on May 4, 2009. Commonly known as a "wage-earner bankruptcy," the Plaintiff as a "debtor" generally repays her creditors through payroll deductions over an extended period of time. Even though this lawsuit preceded her bankruptcy, according to Defendant, it was not aware of any bankruptcy stay and her lawsuit was not listed as a potential asset of the bankruptcy estate or otherwise. Consequently, Defendant says it was not on notice or aware of the bankruptcy. Defendant argues that regardless of the notice issue, the Automatic Stay provisions of Title 11 only apply to pre-petition debts, and not post-petition claims such as the claim for attorney's fees here. Defendant's claim for fees arose after the Court granted its Motion for Summary Judgment on June 24, 2010, eleven months after Plaintiff filed her Bankruptcy Petition. In Plaintiff's response, she notes that Defendant was required by the bankruptcy court to withhold $440 from her bi-weekly paycheck, and therefore was aware of her bankruptcy. How this bankruptcy may affect this federal lawsuit is the first issue before this Court.

Plaintiff should have included her pending lawsuit in her initial bankruptcy filing. See 11 U.S.C. §521(1) (2010) which requires the debtor, *inter alia*, to file a Schedule B-Personal Property listing her assets (Item 21—other contingent and unliquidated claims of every nature) and a statement of her financial affairs. But while she should have disclosed this lawsuit, it does not impact the issue here. The automatic stay of bankruptcy applies only to actions that could have been commenced before the bankruptcy. Section 362(a) provides "that a bankruptcy petition 'operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial . . .

action or proceeding against the debtor that was or could have been commenced' before the debtor filed for protection under the Bankruptcy laws." *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 908 (6th Cir. 1993) *citing* 11 U.S.C. § 362(a). Defendant is correct that its claim for attorney's fees did not and could not have arisen or been commenced until after Plaintiff had filed her bankruptcy petition. Defendant's claim for fees did not arise until June 24, 2010, as a result of obtaining summary judgment; accordingly, the stay is inapplicable.

The seminal issue then, is whether Defendant is entitled to recover these attorney fees. In *Balmer v. HCA, Inc.*, 423 F.3d 606, 615-16 (6th Cir. 2005), the court stated, "Courts should consider the following factors when making an attorney's fees determination: (1) whether the plaintiff presented sufficient evidence to establish a prima facie case; (2) whether the defendant offered to settle the case; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. Defendants may recover fees for frivolous claims only." The standard for granting attorney's fees to a prevailing employer is more stringent than that for awarding attorney's fees to a prevailing employee. *Christiansburg Garment Co.*, 434 U.S. 412, 417-18, (1978). Courts should not conclude that a claim was groundless just because it was ultimately unsuccessful. *Id.* at 421-22.

Here, there is no dispute that Defendant did not make an offer of settlement, and as well, that Judge Breen granted summary judgment. Whether a fee award is appropriate hinges on whether Plaintiff made a prima facie case. In order to do so, Plaintiff had to demonstrate that "(1) she is a member of a protected class; (2) she applied for and was qualified for a promotion; (3) she was considered for and was

denied the promotion; and (4) an individual of similar qualifications who was not a member of the protected class received the job at the time plaintiff's request for the promotion was denied." *White v. Columbus Metro.Hous. Auth.*, 429 F.3d 232, 240 (6th Cir. 2005) *citing Nguyen v. City of Cleveland*, 229 F.3d 559, 562-63 (6th Cir. 2000).

Plaintiff's lawsuit alleges two job promotion opportunities she was denied because of gender discrimination. These promotions were instead awarded to two men, Ross and Reynolds. Judge Breen's Summary Judgment Order notes that Plaintiff had been a team leader on the first shift in the fin and tube department since August 2003. Because of unsatisfactory work, the area coordinator position for that department became available. Plaintiff, along with Ross and Reynolds, each applied for this job and made it through the selection process as the three finalists. Plaintiff was first eliminated, Reynolds was the second eliminated and Ross gained the promotion. Plaintiff said that because of her experience in the fin and tube department, she was more qualified than Ross for promotion (Compl. p. 10). Thus, it appears to this Court, that Plaintiff made a prima facie case in regard to the first promotion involving Ross—that is she is a member of a protected class, she applied for and was qualified for a promotion, she was considered for and denied the promotion and an individual of similar qualifications who was not a member of the protected class received the job at the time her request for promotion was denied.

Subsequently, Reynolds was awarded another position (a position Plaintiff did not seek, although she complained about the lack of an announcement concerning that opening). Here, Plaintiff conceded she was not more qualified than Reynolds and did not assert or present evidence that they had similar qualifications (Compl. p. 13-14).

Without proof of the fourth element of similar qualifications, it appears to the Court that Plaintiff failed to make a prima facie case in the Reynolds' promotion.

Based upon the above, the Court finds that Plaintiff did present sufficient evidence to establish a prima facie case in respect to the Ross promotion, but failed to do so in the Reynolds promotion. Consistent with the three factors listed in *Balmer* and cited by Defendant (prima facie case established, no offer of settlement by Defendant and dismissal prior to trial) this Court concludes that Plaintiff has asserted at least one non-frivolous claim and therefore Defendant is not entitled to an award of attorney's fees. *See Balmer*, 423 F.3d at 617 *citing Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 242 (6th Cir. 1986), vacated as moot, 482 U.S. 901, 107 S. Ct. 2475, 96 L. Ed. 2d 368 (1987) (holding that "where one of the plaintiff's claims is non-frivolous, the defendant's attorney fees may not be shifted to the plaintiff even though others of the plaintiff's claims are patently without merit."); *Tarter v. Raybuck*, 742 F.2d 977, 987-88 (6th Cir. 1984) (holding that awarding attorney's fees was an abuse of discretion even though some of plaintiff's claims were meritless). Accordingly, Defendant's Motion Seeking Payment of Attorney's fees is DENIED.

SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: **August 31, 2010**

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.