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

BARBARA L. SORRELL,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 00-1188
	)	
HOME DEPOT U.S.A., INC.,	)	
	)	
Defendant.	)	

ORDER GRANTING HOME DEPOT'S MOTION FOR SUMMARY JUDGMENT

Facts

On June 23, 2000, Plaintiff, Barbara Sorrell, filed this employment discrimination action against Home Depot, U.S.A., Inc. and seventeen current and former employees of Home Depot.[1] Plaintiff has alleged violations of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Plaintiff also alleges causes of actions pursuant to the Tennessee Human Rights Act (THRA). See Tenn. Code Ann. § 4-21-101 et. seq. In addition to Plaintiff's civil rights claims, Plaintiff also asserts one count of negligent hiring. Defendant now seeks summary judgment on all grounds pursuant to Federal Rule of Civil Procedure 56.

Plaintiff alleges that Home Depot is responsible for the actions of its employees in

[1] Due to various orders since the filing of this action, the only Defendant which remains is Home Depot. Accordingly, the court will refer to Home Depot as Defendant.

failing to promote Plaintiff, harassing Plaintiff based upon her race, and retaliating against Plaintiff for filing a charge with the EEOC.

Defendant has now moved for summary judgment on all counts.

Summary Judgment

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require

submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

Plaintiff's Title VII Claim

Defendant has moved for summary judgment on Plaintiff's Title VII claim asserting that Plaintiff did not file a timely, verified charge of discrimination against it with EEOC. Before a plaintiff can file a Title VII action in federal court, a plaintiff must file a charge with the EEOC. See Haithcock v. Frank, 958 F.2d 671, 675 (6th Cir.1992). For a charge to be adequate, the charge must contain "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). In 1972, Congress amended Title VII to require all charges to be made under oath or affirmation. See Pijnenburg v. West Georgia Health Sys., Inc., 255 F.3d 1304 (11th Cir. 2001). To implement this requirement, the EEOC requires charges to be verified. See 29 C.F.R. § 1601.9. A charge can be verified by being "sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or supported by an unsworn declaration in writing under penalty of perjury." 29 C.F.R. § 1601.3(a).

The facts concerning the alleged filing of an EEOC charge are undisputed. On January 27, 1999, Plaintiff submitted two pages to the EEOC. The first page was titled

"charge of discrimination" and was the standard form used by the EEOC to obtain a charge of discrimination. See Plaintiff's Exhibit A. The form was filled out by Ms. Bonner of the Tennessee Human Rights Commission and submitted to Plaintiff for her signature. See Plaintiff's Deposition, at 281-83. Instead of signing the form, Plaintiff corrected her address on the form, made a large "X" over the factual allegations contained on the form, and wrote at the bottom of the factual allegations "I have attached the revision of my statement." Plaintiff's Exhibit A. At the bottom of the form was the statement "I declare under penalty of perjury that the foregoing is true and correct." Id. Plaintiff never signed this form.

The second page was the attached revision of Plaintiff's factual allegations. This page begins by indicating that it is directed to Ms. Bonner of the Tennessee Human Rights commission. The first full sentence on the page states: "Ms. Bonner please make the necessary revision in my statement and submit to me for my signature." See Plaintiff's Exhibit A. This page contains her proposed revisions and bears Plaintiff's signature at the bottom. The second page does not contain any statement acknowledging that the revised statement is made under oath or affirmation or that it was declared under penalty of perjury. See id.

Defendant argues that Plaintiff's letter was unverified and could not constitute a charge. Plaintiff argues that the two pages should be read together to constitute one document, signed by Plaintiff with full knowledge of the penalty of perjury. Accordingly, the issue is whether a signature on a letter requesting a change in a charge form can

constitute a verification when the letter does not indicate that the letter was signed under penalty of perjury. The court holds that it cannot.

In E.E.O.C. v. Calumet Photographic, Inc., 687 F.Supp. 1249 (N.D.Ill.1988) the court was faced with a similar factual situation. In that case, Clark (the party alleging discrimination) filed an unverified intake questionnaire. The EEOC then sent Clark a formal charge to be completed. Clark did not agree with the charge form as written, and was told to rewrite the form however she wanted. Clark made her revisions on a separate letter and signed the letter. Clark then filed the form and the letter with the EEOC. Clark did not execute the original form. The court ultimately decided that the case could proceed to trial since the suit was filed by the EEOC and not by Clark. However, the court indicated that had Clark attempted to file the suit, the letter would not have served as a verified charge. See Calumet, 687 F.Supp. at 1252 (cited with approval by Bacon v. Allstate Ins. Co., 1995 WL 360736 (N.D.Ill. 1995)).

Viewing the facts in the light most favorable to Plaintiff, the court finds that Plaintiff's interpretation does not reflect a reasonable interpretation of the nature of the two pages in dispute. The second page was, by its own terms, a request for a change to be made to the charge form and for the new amended charge form to be returned to Plaintiff for her signature. Plaintiff's own deposition indicates that she never signed a charge under penalty of perjury and did not intend to sign the letter under penalty of perjury. See Plaintiff's Deposition, at 282-87. The signature on the request was not intended to be a signature of the

charge form, it was simply an unverified signature on a request for a change in the charge. Since Plaintiff has not filed a verified charge with the EEOC, Plaintiff cannot assert a Title VII claim against Defendant. Accordingly, Defendant's motion for summary judgment is GRANTED as to counts I, II, and V of Plaintiff's complaint.

Plaintiff's 42 U.S.C. § 1981 Claim

Defendant has moved for summary judgment alleging that Plaintiff's actions are barred by the statute of limitations. "Section 1981 prohibits racial discrimination in the making and enforcing of private contracts." Newman v. Federal Exp. Corp., 266 F.3d 401 (6th Cir. 2001). Section 1981 "is generally invoked in the employment context for, e.g., claims of hostile environment, failure to promote, or wrongful dismissal . . .." Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001).

To present a § 1981 claim, a plaintiff is required to survive the burden shifting standards adopted by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). Under that standard, "a plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence." Christian, 252 F.3d at 869. Once the plaintiff proves a prima facie case of discrimination, then the burden shifts to the defendant to articulate a "legitimate, non- discriminatory reason for its actions." Id. If a defendant provides such a reason, then the plaintiff must "prove by a preponderance of the evidence that the defendant's proffered reason is not its true reason but a pretext for discrimination." Id. (citing Reeves,

530 U.S. at 142-43).

"Because § 1981. . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations." Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987). Tennessee law specifically provides a statute of limitations for federal civil rights actions. See TENN. CODE ANN. § 28-3-104 (a)(3). This statute provides for a one year statute of limitations for all "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes." Id. The complaint in this action was filed on June 23, 2000. Accordingly, barring the application of the continuous violation doctrine, any alleged discriminatory action by Defendant which occurred prior to June 23, 1999, would be barred by Tennessee Code Annotated § 28-3-104 (a)(3).

Defendant has alleged that all of Plaintiff's actionable claims occurred prior to June 23, 1999. Plaintiff has responded by alleging that the continuing violation doctrine applies. "The 'continuing violation' doctrine provides that when 'there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period.'" Kovacevich v. Kent State University, 224 F.3d 806 (6th Cir. 2000) (quoting Haithcock v. Frank, 958 F.2d 671, 677 (6th Cir.1992)). Accordingly, Plaintiff must present sufficient evidence of at least one incident of actionable conduct which would not be barred by the statute of limitations.

Plaintiff alleges that between June 23, 1999, and August 13, 1999, Plaintiff was

subjected to racial harassment. Racial harassment claims presented under § 1981 are analyzed in the same way as actions presented pursuant to Title VII. See Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir.1986) (holding that proof of liability for a racially hostile work environment is the same under Title VII and 42 U.S.C. § 1981). In order for a plaintiff to establish a prima facie case of racial harassment, a plaintiff must establish five elements. Newman v. Federal Exp. Corp., 266 F.3d 401, 405 (6th Cir. 2001). A plaintiff must present evidence "1) that he is a member of a protected class; 2) that he was subjected to unwelcome racial harassment; 3) that the harassment was based on race; 4) that the harassment had the effect of unreasonably interfering with his work performance by creating an intimidating, hostile, or offensive work environment; and 5) [of] the existence of employer liability." See id. Courts must look to the totality of the circumstances when deciding whether defendants have created a racially hostile work environment. See Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1988).[2] More specifically, when evaluating employer conduct, courts are to consider the frequency and severity of the conduct, the physically threatening or humiliating nature of the conduct, and the extent to which the conduct interferes with employee's work performance. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Offhand comments and isolated incidences, are not discriminatory changes in the terms and conditions of employment, unless the comments or incidences are egregious. See Faragher, 524 U.S. at 788. Further, simple teasing (unless extreme) is also not a

[2] Accordingly, the court will view the events allegedly occurring after June 23, 1999, in light of the events which allegedly occurred prior to June 23, 1999.

discriminatory change in conditions. See id. Finally, for a work environment to be hostile, it "must be both objectively and subjectively offensive." See Harris, 510 U.S. at 21-22.

Defendant has moved for summary judgment on the issue of racial harassment alleging that Plaintiff has been unable to prove that any incidences of harassment were based upon race. "Purposeful discrimination is a prerequisite to liability under section 1981." Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370 (6th Cir. 1984) (citing General Building Contractors Assoc., Inc. v. Pennsylvania, 458 U.S. 375, 388-89(1982)). In order to defeat Defendant's summary judgment motion, Plaintiff must present factual support, beyond her own belief, that the harassment was based upon impermissible discrimination. See Hartsel v. Keys, 87 F.3d 795, 802 (6th Cir. 1996); Mitchell v. Toledo Hosp., 964 F.2d 577, 585 (6th Cir. 1992).

Plaintiff responds with the bare assertion that she will be able to show racial harassment. The only factual support that Plaintiff has offered to bolster this claim is her response to Defendant's statement of facts not in dispute. See Plaintiff's Objections and Responses to Defendants' Statement of Facts and Request to Strike, at #12. Her response indicates that she was aware of two incidents in which racially derogatory comments were uttered. See id. Despite great effort, the court is unable to decipher which incidents to which Plaintiff is referring. Plaintiff's response simply does not clarify what type of comments were made, who made the comments, to whom the comments were directed, or even whether the comments contained any indication that they related to race. See Plaintiff's Deposition,

at 108-10; 453-54. This response is in conflict with Plaintiff's deposition testimony which indicates that Plaintiff could not recall one incident in which she was either the subject of a racial slur or made aware of a racial slur. See Plaintiff's Depostion, at 453. Plaintiff also admits that she was not made aware of any racial comments directed toward her or directed toward any other employee of Home Depot. See id., at 452-53.

Plaintiff has offered no other proof concerning a racial basis for the harassment that Plaintiff alleges. Accordingly, the court finds that Plaintiff has not presented sufficient evidence upon which a jury could find that the alleged incidents of harassment Plaintiff suffered were based upon Plaintiff's race.

Even if the court were to believe that Plaintiff had presented sufficient evidence that the harassment was based upon race, the court would also find that Plaintiff has failed to provide evidence of harassment, after June 23, 1999, which was unreasonably abusive or adversely affected her job performance. Plaintiff alleges that she was not provided a fax machine in her office until July 20, 1999. See Plaintiff's Exhibit B. Plaintiff asserts that access to the fax was essential for her job performance. However, the undisputed facts indicate that Plaintiff did have access to a fax machine on the special services desk once Plaintiff was provided an office in the front. See Plaintiff's Deposition, at 198.

Plaintiff also alleges that Ed Couch was rude to her over the telephone. Plaintiff's notes indicate that a scheduling dispute occurred between Plaintiff and Mr. Couch on June 28, 1999. See Plaintiff's Exhibit B. The dispute concluded with Mr. Couch simply hanging

up the phone. See id. Though is may have been an unpleasant experience, it by no means amounts to unreasonably abusive conduct.

Plaintiff also asserts that on July 1, 1999, Plaintiff was not allowed to review her files outside the supervision of store manager Brian Kilroy. See Plaintiff's Exhibit B. This incident is also not unreasonably abusive.

On August 13, 1999, Plaintiff alleges that she was harassed and disparaged by other employees. See Plaintiff's Exhibit B. Plaintiff's notes indicates that she falsely accused a fellow co-worker of selling carpet for an incorrect price and that another employee was upset by her mistaken audit. See id. This ultimately lead to another incident in which Ed Couch allegedly spoke to Plaintiff in a degrading tone. See id. Speaking in an unpleasant tone is not actionable under §1981; § 1981 regulates discrimination in contracts, not workplace decorum. Absent some indication that the unpleasant tone of voice is due to Plaintiff's race, it is not unreasonably abusive. Plaintiff has failed to present evidence of an incident of racial harassment after June 23, 1999.

Plaintiff alleges that she sought and was denied a promotion by Defendant after June 1999 due to her race. For a plaintiff to establish a prima facie case of failure to promote, a plaintiff must provide evidence (1) that plaintiff is a member of a protected class, (2) that she applied for and was qualified for the position she sought, (3) that she was rejected, and (4) that the position remained open after her rejection or went to a less qualified applicant.

See Roh v. Lakeshore Estates, Inc., 241 F.3d 491, 497 (6th Cir. 2001); Dews v. A.B. Dick Co., 231 F.3d 1016, 1020 (6th Cir. 2000).

Plaintiff alleges that in or about July of 1999, she sought the position of design center supervisor and was denied due to her race. However, Plaintiff testified in her deposition that she declined the opportunity to interview for that position because she did not believe that she should have to compete for the position. See Plaintiff's Deposition, at 246-48. Accordingly, the court finds that a jury could not reasonably find that Plaintiff actually sought the position of design center supervisor since she was offered the chance to interview for it and declined that invitation.

Plaintiff also alleges that she was denied the position of special services supervisor after June 23, 1999. However, Plaintiff's own testimony and notes verify that the position of special services supervisor never became open between June 23, 1999, and August 13, 1999. See Plaintiff's Deposition, at 74-75; Plaintiff's Exhibit B. Accordingly, Plaintiff has failed to present proof that she actually sought the special services supervisor position after June 23, 1999.

Defendant asserts that Plaintiff was not eligible for a promotion due to the fact that Plaintiff had not enrolled her name in the Job Preference Program (JPP). In response to this Plaintiff states that "she believes that someone was removing her name from the JPP." Plaintiff's Brief, at 7. Defendant has presented Joseph Pivo's declaration which states that once a person's credentials were properly entered into the JPP system, management at the

store was unable to remove the information. See Declaration of Joseph Pivo, ¶ 17. Plaintiff has offered no proof in response to this assertion other than her own belief. Further, Plaintiff admits in her deposition that she may have incorrectly entered her information into the JPP. See Plaintiff's Deposition, at 208.

Plaintiff argues that other persons at Home Depot were promoted without having entered their information into the JPP system. Even if Plaintiff's assertion were true, Plaintiff still eliminated herself from a broader range of promotion options by failing to enlist in the JPP and undermined her claim that she actually sought a promotion between June 23, 1999, and August 13, 1999. In any event, despite the fact that Plaintiff had failed to enroll in the JPP system, Plaintiff was given the opportunity to interview for a promotion and she declined.

The court finds that Plaintiff has offered no evidence that she sought a promotion between June 23, 1999, and August 13, 1999, as required to establish a prima facie case of failure to promote. The only reliable evidence presented shows that Plaintiff limited her promotion options and refused to interview for promotions. Plaintiff's belief that someone was removing her name and credentials from the JPP system is simply not sufficient evidence to overcome Defendant's motion for summary judgment.

In Plaintiff's response, Plaintiff also asserts that between June 23, 1999, and August 13, 1999, Plaintiff was subjected to retaliation for filing an EEOC charge against Home Depot. "A prima facie case of retaliation has four elements: 1) the plaintiff engaged in

legally protected activity; 2) the defendant knew about the plaintiff's exercise of this right; 3) the defendant then took an employment action adverse to the plaintiff; and 4) the protected activity and the adverse employment action are causally connected." Gribcheck v. Runyon, 245 F.3d 547 (6th Cir. 2001).

Defendant asserts that the actions that Plaintiff alleges were taken against her were not an adverse employment actions. In Kocsis v. Multi-Care Management, Inc., 97 F.3d 876 (6th Cir. 1996) the court adopted the Seventh Circuit's holding in Crady v. Liberty Nat. Bank and Trust Co., 993 F.2d 132 (6th Cir. 1993). See Hollins v. Atlantic Co., Inc., 188 F.3d 652 (6th Cir. 1999). In Crady, the Seventh Circuit elaborated upon the adverse employment action element to a retaliation claim. The court there determined that a plaintiff must show "a materially adverse change in the terms and conditions of employment" which are more than a mere inconvenience or change in job responsibilities. Crady, 993 F.2d at 136. According to the court, a materially adverse change could "be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Id .

In response to Defendant's motion for summary judgment, Plaintiff asserts that after she filed the unverified charge with the EEOC, the following occurred: (1) employees began to follow her around, (2) black employees were told not to talk to her, (3) Ed Crouch was disrespectful to her, (4) that another employee made a false allegation against her, and (5)

that her name was removed from the JPP system.[3] Plaintiff also alleges that at some point after the filing of her unverified charge with the EEOC, she was not permitted to review her files, unless she asked Mr. Kilroy. It should be noted that none of these actions, with the possible exception of the removal of her name from the JPP system, would constitute an adverse employment action. As discussed above, Plaintiff has not submitted any evidence to prove that her name and credentials were removed from the JPP system. Accordingly, taking the facts in the light most favorable to Plaintiff, the court finds that Plaintiff is unable to provide evidence of retaliation on which the jury could reasonably find for the plaintiff.

Plaintiff has failed to provide the court with evidence on which the jury could reasonably find for the plaintiff of one incident of actionable, racially discriminatory, conduct occurring after June 23, 1999; thus, the continuing violation doctrine cannot apply. Accordingly, Plaintiff's 42 U.S.C. § 1981 claim is barred by Tennessee Code Annotated § 28-3-104 (a)(3). Defendant's motion for summary judgment on Plaintiff's 42 U.S.C. § 1981 claim is GRANTED.

Plaintiff's State Law Claims

In counts III and IV Plaintiff asserts claims under Tennessee Human Rights Act. In count VII Plaintiff asserts a claim for negligent hiring and supervision. Since all of Plaintiff's federal causes of action are resolved, the court declines to continue exercising

[3] It is appropriate to note that some of these events occurred prior to June 23, 1999. One event actually occurred prior to Plaintiff's filing of the unverified charge with the EEOC. See Plaintiff's Exhibit C, (indicating that the Plaintiff was followed in October of 1998).

supplemental jurisdiction over Plaintiff's counts III, IV, and VII. Accordingly, counts III, IV, and VII are DISMISSED without prejudice.

Conclusion

Defendant's motion for summary judgment against Plaintiff's counts I, II, and V is GRANTED due to Plaintiff's failure to file a verified charge pursuant to 29 U.S.C. § 626(d) and 29 C.F.R. § 1601.12(b). Defendant's motion for summary judgment against Plaintiff's count VI is GRANTED because, taking the undisputed facts in the light most favorable to Plaintiff, Plaintiff is unable to present sufficient evidence of a discriminatory action which is not barred by the statute of limitations. The remaining claims are state law claims filed within this court's supplemental jurisdiction. The court declines to continue asserting jurisdiction over these claims. Accordingly, Plaintiff's counts III, IV, and VII are DISMISSED without prejudice. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

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JAMES D. TODD

UNITED STATES DISTRICT JUDGE

_____

DATE