IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KARAHN KAROL	:	CIVIL ACTION
	:	
v.	:	
	:	
ROTO-ROOTER SERVICES CO.	:	No. 98-5754

M E M O R A N D U M

Ludwig, J. July 7, 1999

Defendant Roto-Rooter Services Co. moves for summary judgment. Fed. R. Civ. P. 56. Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1331, 1367.

This is an employment discrimination case under Title VII, 42 U.S.C. § 1981, and the Pennsylvania Human Relations Act. Plaintiff Karahn Karol, an African-American, contends that she was terminated because of her race. The facts are viewed from plaintiff's standpoint, as required in ruling on this motion.[1]

On August 19, 1996 plaintiff was hired as a customer service representative for the evening shift.[2] Karol dep. at 7; def. ex. E. In that capacity, plaintiff fielded calls from customers and logged information into a computer. Kukorlo aff. at 1. She was also required to treat white and minority customers

[1]"Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)).

[2]Plaintiff testified that she worked the night shift. Karol dep. at 33. The parties agree that she worked the evening shift. Pl. br. at 3; def. br. at 1.

differently. Karol dep. at 89-93. On November 1, 1996, Andrew Beto became the division manager. Plaintiff testified that he was excessively critical of her work because of her race. Karol dep. at 36-43.

On November 25, 1996, plaintiff received a ninety-day review, which ranked her performance in the next-to-bottom category. Karol dep. at 46, 61-62; def ex. B. A supervisor explained that she performed "about average" and that her score was hampered by insufficient computer training. Karol dep. at 55.

On December 4, 1996, plaintiff was fired on the basis of poor performance. Karol dep. at 11, 62-65. On February 27, 1997, Anthony Evans, an African-American, was hired as a customer service representative and dispatcher. Kukorlo aff. at 1-2; def. ex. E. Although hired for both the evening and night shifts, he primarily worked the evening shift.[3] Kukorlo aff. at 1.

Plaintiff's claims under Title VII, section 1981, and the PHRA are pretext claims, which are analyzed under the burden shifting analysis originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973).[4]

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[3]Plaintiff disputes this but does not cite to or present any contrary Rule 56 evidence.

[4]As an alternative to making out a prima facie case with indirect evidence, plaintiff may present a mixed-motives case by presenting direct evidence of discrimination. See Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998) (plaintiff must meet "high hurtle" of showing substantial reliance on discriminatory animus). Contrary to plaintiff's brief, this case does not fall under the mixed-motive rubric because plaintiff has pointed to no direct evidence that the "decisionmakers placed substantial negative reliance on [race] in reaching their (continued...)

See Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997) (pretext claims analyzed under McDonnell Douglas test); Stewart v. Rutgers, The State Univ., 120 F.3d 426, 432 (3d Cir. 1997); (McDonnell Douglas test applies to section 1981 claims); Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996) (McDonnell Douglas test applies to PHRA claims). McDonnell Douglas sets forth the basic allocation of burdens between employer and employee:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248, 253-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (citations omitted).

To make a prima facie showing, plaintiff must demonstrate that (1) she belongs to a racial minority; (2) she was qualified for the position; (3) she was discharged; and (4) other employees not in a protected class were treated more favorably, or she was ultimately replaced by a person outside the protected class. See Walton v. Mental Health Ass'n, 168 F.3d 661, 668 (3d Cir. 1999);

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[4](...continued)
decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 277, 109 S.Ct. 1775, 1805, 104 L.Ed.2d 268 (1989) (controlling opinion) (O'Connor, J., concurring). Rather, plaintiff relies on evidence from which pretext may be inferred.

Marzano v. Computer Science Corp., 91 F.3d 497, 503 (3d Cir. 1996); see also Matczak, 136 F.3d at 939-40 (explaining variations in fourth element).

Referring to the second element of the prima facie test, the parties dispute plaintiff's job performance. Counsel miss the mark. The proper inquiry at this stage is whether plaintiff is qualified to perform her job, not the quality of her work. See Matczak, 136 F.3d at 939 (proper inquiry focuses on qualifications, not performance). Defendant does not contend, nor does it appear, that plaintiff lacked the skills to perform her job — answering phones and recording information.

Defendant next argues that the fourth element of the prima facie test cannot be satisfied because it hired an African-American on the evening and night shifts after firing plaintiff. Defendant does not, however, argue that Evans replaced plaintiff. Whether Evans is plaintiff's replacement is a jury question because Evens was both a dispatcher and a customer service representative and at times worked a different shift. Also, notably absent from the record is any indication that plaintiff's work was reassigned to Evans, instead of other employees.

Moreover, plaintiff puts forth evidence that employees outside the protected class were treated more favorably. During her four months of employment, plaintiff was the only office worker to receive a ninety-day performance review. Def. ex. E. Shortly after plaintiff's termination, the only other black employees, Morris Aikens and Anthony Evans, were given ninety-day evaluations

and subsequently left defendant's employ.[5] Id. Most employees hired at approximately the same time as plaintiff did not receive ninety-day evaluations.[6] Id. Plaintiff has demonstrated that other employees not in a protected class were treated more favorably.

Defendant has articulated a legitimate, nondiscriminatory reason for plaintiff's dismissal. It maintains that her work performance was poor, especially with regard to handling customer complaints. Def. ex. I.

Because defendant has stated a legitimate, nondiscriminatory reason for its action, plaintiff, to defeat summary judgment, must "point to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Walton, 168 F.3d at 668 (quoting Lawrence v. National Westminster Bank, 98 F.3d 61, 66 (3d Cir. 1996)).

Here, albeit a close case, a fact-finder could conclude that defendant's reason for termination is unworthy of belief or

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[5]Defendant responds that it was acting pursuant to company policy, as expressed in a September 1996 memo from Roto-Rooter national headquarters, which reminded division managers that "all new hires are to receive a 90 day evaluation after three months on the job." Def. ex. D.

[6]Many employees parted with defendant before receiving scheduled ninety-day evaluations. Def. ex. E. Six-month evaluations were common. Id.

that racial animus led to plaintiff's termination.[7] Plaintiff testified at deposition that one supervisor, Joe Batezel, had told her she "was doing an excellent job" and that she had performed "about average" on her ninety-day evaluation. Karol dep. at 37, 55. Also, a jury could decide that defendant's contention that she abandoned her job is suspect. By letter of December 16, 1996 plaintiff was advised that she had "failed to report to work or call in" on December 5, 6, and 7, 1996, and was considered to have "voluntarily terminated" her relationship with defendant. Pl. ex. B. This contradicts plaintiff's testimony that she was fired on December 4, 1996 — the same day her employee health benefits ended. Pl. ex. D. Finally, defendant's race-based policies toward its customers suggests that such a policy could exist toward its employees.

Accordingly, defendant's motion for summary judgment will be denied.

Edmund V. Ludwig, J.

[7]Plaintiff's unsupported arguments that defendant manipulated and concealed evidence and engaged in racist litigation tactics are neither persuasive nor proper.

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O R D E R

AND NOW, this 7th day of July, 1999, the motion of defendant Roto-Rooter Services Co. for summary judgment is denied.

A memorandum accompanies this order.

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Edmund V. Ludwig, J.