IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Sanmina-SCI Corporation, a foreign corporation, Defendant.	No. CIV 04-2000-PHX-EHC **ORDER**

Pending before the Court is Defendant's Motion for Summary Judgment [dkt. 28]. Pending before the Court are Plaintiff's Motion to Strike the Declaration of Heather Cavin [dkt. 49] and Motion to Strike Defendant's Supplemental Separate Statement of Facts [dkt. 58].[1] The Motions are fully briefed.

Background

Plaintiff Equal Employment Opportunity Commission (EEOC) filed a claim under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., on behalf of Surinder Cheira.

[1] As the Court does not rely on the materials subject to the Motions to Strike, the Motions to Strike will be denied as moot.

Cheira was employed by Defendant Sanmina-SCI Corp.[2] in the manufacture of electronics components from October 15, 1995 to March 17, 2001. [Dkt. 51, ex. F]. On June 27, 2003, Cheira filed a charge with the EEOC, alleging that Defendant discriminated against her on the basis of her religion when she was not rehired in October 2002. [Dkt. 29, ex. A, attach.].

Cheira is a practicing Sikh. As part of her religion, Cheira wears a kirpan, or ceremonial sword. Her kirpan is similar to a letter opener, with a blade about three inches long and not particularly sharp. [Dkt 51, p. 2].

On February 9, 2001, Defendant issued Cheira a final written warning, advising Cheira that wearing the kirpan to work was a violation of Defendant's no-weapons policy. [Dkts. 29, Wallace Decl., ex. B; 51, p. 3]. Cheira did not file a timely charge with the EEOC regarding the issuance of the warning. A claim based on that discriminatory act is therefore time barred.[3]

In early 2001, Defendant decided to reduce its workforce, terminating first employees whose jobs were redundant, then all those who had active warnings, and finally those with the least seniority. [Dkt. 29, p. 2]. Defendant fired 328 employees: 12 with redundant jobs, 64 with active warnings, and 252 with minimal seniority. [Dkt. 29, p. 2]. On March 18, 2001, Cheira was terminated as one of the employees having an active warning. On March 20, 2001, Defendant's Vice President of Human Resources, Jim Sullivan, completed an Employee Data Change Form reporting that Cheira's last day of work was March 17, 2001

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[2] Defendant Sanmina-SCI Corp. is a national company with a division in Phoenix. The Phoenix division will be referred to as Defendant.

[3] The parties agree that Cheira did not file a timely charge related to the issuance of the warning and her subsequent termination. In fact, Plaintiff advises that "[t]his lawsuit was brought by the Commission based on Defendant's failure to hire Ms. Cheira in 2002, not on the past acts of discrimination." [Dkt. 50, p. 9]. Cheira's claims based on the issuance of the warning and her termination are time barred. See Nat'l. R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109, 122 S. Ct. 2061, 2070 (2002) ("A claim is time barred if it is not filed within [Title VII's] time limits.").

and that she was not eligible for rehire. [Dkt. 51, ex. F]. Cheira did not file a timely EEOC charge; a claim based on her firing is time barred.

In early 2002, Defendant began re-hiring former employees and others as temporary workers, using an employment agency, StaffMark, to handle the application process. [Dkt. 29, p. 2]. Defendant prohibited the rehire of former employees who had been terminated while having an active warning. [Dkt. 29, p. 2].

Cheira applied for rehire with Defendant at least two times in 2002. She was denied rehire in October 2002.[4] Cheira filed a timely EEOC charge related to the October 2002 denial of rehire; it is the only claim not time barred.

Legal Standard

Summary judgment is proper "only if no genuine issues of material fact remain for trial and the moving party is entitled to judgment as a matter of law." Block v. City of Los Angeles, 253 F.3d 410, 416 (9th Cir. 2001). Moreover, the Court must view evidence in a light most favorable to the nonmoving party. Id.

Discussion

The United States Supreme Court has held that, even though the effect is timely challenged, an effect of an untimely challenged discriminatory act is not an actionable violation of Title VII. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889 (1977). In that case, United forced the newlywed Evans to resign pursuant to a policy

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[4] Defendant alleges that Cheira applied for rehire on approximately January 18, 2002 and September 5, 2002. [Dkt. 29, p. 3]. Plaintiff alleges that Cheira decided to apply for rehire in 2002 [dkt. 51, p. 7], without providing application dates. At her deposition, Cheira testified that "I tried two, three times" to be rehired. [Dkt. 29, ex. A, p. 125]. The EEOC charge alleges a discriminatory failure to rehire occurring in October 2002.

Both the September 5, 2002 and the October 2002 dates are timely in relation to the EEOC charge Cheira filed on June 27, 2003. [See dkt. 30, p. 6 (Defendant states that it denied "her second application for rehire on September 5, 2002" and "[t]he only event that Ms. Cheira timely challenged was the second denial of rehire."].

Based on these facts, the Court finds that Cheira sought rehire at least twice and will refer to the actionable denial of rehire as the October 2002 denial of rehire.

against married female stewardesses; Evans did not file a claim based on her resignation. Id., 431 U.S. at 554-55, 97 S. Ct. at 1887. She was subsequently rehired, but was not given seniority credit for her prior service based on a policy not to give credit for employment periods ending in resignation. Evans filed a timely claim based on the denial of seniority credit. Id. First, the Court found that "United was entitled to treat [the forced resignation] as lawful after [Evans] failed to file a charge of discrimination within the 90 days then allowed." Id., 431 U.S. at 558, 97 S. Ct. at 1889 ("A discriminatory act which is not made the basis for a timely charge... is merely an unfortunate event in history which has no present legal consequences."). Second, although "United's seniority system does indeed have a continuing impact on her pay and fringe benefits," the Court found that "the [seniority] system is neutral in its operation" and thus Evans "has not alleged facts establishing a violation since she was rehired." Id., 431 U.S. at 558-59, 97 S. Ct. at 1889. The Court stated that "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." Id., 431 U.S. at 559, 97 S. Ct. at 1889.

The Ninth Circuit recently followed Evans in a published opinion addressing an untimely challenge to the calculation of pregnancy leave credit for purposes of retirement and benefits eligibility. Hulteen v. AT&T Corp., __ F.3d __, 2006 U.S. App. LEXIS 5776 (9th Cir. 2006). In determining whether there was a present violation of Title VII[5], the Court stated that "[t]he key is differentiating cause from effect," Id., 2006 U.S. App. LEXIS 5776 at *18-19, citing Evans as an example of a case where there was "no current violation of

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[5] The Court addressed the theory that "it is not the initial crediting of the leave period that is the offense, but the later- much later- award of retirement or other benefits," in the context of determining whether "the [statutory] requirement that pregnancy leaves be given full credit" applied retroactively. Hulteen, 2006 U.S. App. LEXIS 5776 at *16-17. The Court resolved the statute of limitations issue by reference to its retroactivity analysis: "The analysis also disposes of another issue in the case relating to the statute of limitations." Id., 2006 U.S. App. LEXIS 5776 at *27. The retroactivity analysis is therefore applicable to determining whether a plaintiff has a claim for a present violation when the plaintiff has not timely challenged an earlier discriminatory act relating to the alleged violation.

Title VII by the employer." Id., 2006 U.S. App. LEXIS 5776 at *21-22. The Court found that "[t]he effect of that initial accounting method is felt only at the end-point, when retirement and other specific benefits are finally calculated based on those initial actions." Id., 2006 U.S. App. LEXIS 5776 at *18-19; see Del. State Coll. v. Ricks, 449 U.S. 250, 257-58, 101 S. Ct. 498, 505 (1980) ("the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts become most painful" (quotation omitted)). That finding lead to the conclusion that there was no present violation. Id., 2006 U.S. App. LEXIS 5776 at *28 ("the filing of a complaint [based on the award of benefits] is clearly time-barred.").

Evans and Hulteen stand for the rule that, even though the effect is timely challenged, an effect of an untimely challenged discriminatory act is not a present violation of Title VII. The Ninth Circuit has provided guidance on how to apply that rule in cases alleging discrimination in rehiring.[6]

In Josephs v. Pacific Bell, 432 F.3d 1006, 1013-14 (9th Cir. 2005)[7], the Court recognized the rule that a discrimination claim based on denial of rehiring "simply seeks to redress the original termination and is, therefore, not separately actionable," citing Collins v. United Air Lines, Inc., 514 F.2d 594, 596 (9th Cir. 1975). The Court found an exception to that rule when "'new elements of unfairness, not existing at the time of the original violation, attached to denial of re employment.'" Id., 432 F.3d at 1013-14 (quoting Inda v.

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[6] Plaintiff argues that Lyons v. England, 307 F.3d 1092 (9th Cir. 2002) is the controlling case. That case, however, addressed a different issue: whether the continuing violation doctrine allowed a challenge to time barred failures to promote in the course of bringing timely challenges to subsequent failures to promote. Id., 307 F.3d at 1105-08.

[7] Although Josephs involved claims under the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (CFEHA), the Evans rule applies to both of those Acts. The ADA borrows Title VII's statute of limitations. 42 U.S.C. § 12117(a) (ADA uses the procedures of Title VII). California recognizes the Evans rule. See Valdez v. City of Los Angeles, 231 Cal. App. 3d 1043, 1053-54 (1991) (distinguishing Evans).

United Air Lines, Inc., 565 F.2d 554, 561-62 (9th Cir. 1977)). A brief analysis of those cases will illustrate the application of the rule and the exception thereto.

Collins involved a United stewardess who was forced to resign pursuant to United's policy prohibiting married stewardesses. 514 F.2d at 595. In 1968, United agreed to discontinue the policy and reinstate all stewardesses who had resigned under the policy and had filed a union grievance or EEOC charge. Id. When the plaintiff sought reinstatement in 1971, United refused her reinstatement because she had not filed a grievance or charge. She subsequently filed an EEOC charge. The Ninth Circuit rejected the plaintiff's argument "that United's denial of her request for reinstatement during the [statutory] period preceding her filing of charges was a new and separate discriminatory act," finding that the plaintiff "seeks to redress the original termination." Id., 514 F.2d at 596. The Court affirmed dismissal of the case based on failure to file a timely charge with the EEOC. Id., 514 F.2d at 597.

Inda, 565 F.2d at 561, also involved a United stewardess in the same circumstances as the plaintiff in Collins. The plaintiff in Inda, however, produced evidence that United represented to her "that should the no-marriage rule be terminated those stewardesses who had, because of the rule, resigned would be re-employed." 565 F.2d at 562. The Court found that this representation presented "new elements of unfairness" such that "[i]t was the company's failure to re-employ... that constituted the violation." Id., 565 F.2d at 561-62.

In Josephs, the Court recognized a "new element of unfairness" in the refusal of reemployment because "the jury found that PacBell's denial of reinstatement was based on... the perception that [the plaintiff] was mentally ill." Id., 432 F.3d at 1014. The defendant had expressed that perception during a reinstatement hearing, where the general manager of its labor force testified that he was concerned "about employing someone with Josephs' 'background' to work in people's homes because he might 'go off' on a customer... [and defendant] had an image to uphold." Id., 432 F.3d at 1011.

Cheira was denied rehire pursuant to Defendant's policy against rehiring former employees who were terminated with active final warnings. Defendant's Position Statement submitted to the EEOC during conciliation efforts stated that "[o]nly former employees in good standing at the time of separation were considered for [re hire in] a temporary position." [Dkt. 36, Hartman Decl., ex. B, p. 3]. Compare Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564, 569 (9th Cir. 2004) (no policy where employer initially explained to the EEOC it refused to rehire plaintiff based on a history of substance abuse and only mentioned the policy once suit was filed).

All of Defendant's employees whose depositions or declarations were provided to the Court described the policy preventing the rehire of employees who were terminated with active warnings. Defendant's Human Resources Manager, Judy Hartman, provided a declaration stating that Defendant had "a policy that categorically prohibited employees whose initial employment with [Defendant] terminated while they were on active warnings from being rehired." [Dkt. 29, Hartman Decl., p. 2]. Defendant's Senior Human Resources Representative, Marjorie Wallace, testified at her deposition that "Decisions were made on the criteria of rehiring individuals, one of those being individuals who were on an active warning at the time of termination whether voluntary or involuntary." [Dkt. 51, ex. D, p. 27]. Steve Lach[8] testified at his deposition that "I was aware that we didn't typically rehire people that had written warnings." [Dkt. 51, ex. E, p. 22]. Defendant's Human Resources Representative, Heather Cavin, provided a declaration stating that Defendant "maintains a policy that prohibits employees from being rehired if their initial employment with Sanmina terminated while the employees were on active warnings." [Dkt. 29, Cavin Decl., p. 1]. Although the policy was unwritten, this evidence establishes that Defendant had a policy not to rehire employees terminated while having active warnings.

[8] Steve Lach's position is not identified in the excerpts of the depositions provided to the Court. Hartman described him as "the president of the division or the general manager of the Phoenix division." [Dkt. 51, ex. C, p. 25].

Defendant's Phoenix division developed its own policies governing layoffs and rehirings. [Dkt. 51, ex. C, pp. 25, 28-29]. The March 2001 layoffs involved 328 employees, 64 who were on active warnings- including Plaintiff. [Dkt. 29, ex. C, attach. 1]. Defendant also laid off employees in May 2001 and October 2001, using active warnings as a criteria for termination. [Dkt. 51, ex. C, p. 39]. This evidence indicates that at least 64- perhaps more- former employees were ineligible for re hire based on the policy prohibiting such rehires. Given Defendant's ability to set layoff and rehiring policy and the number of people affected by this policy, the policy is bona fide even though it is not a policy enacted by Defendant's corporate human resources department.

Defendant used a staffing service, StaffMark, to hire temporary employees in 2002. To implement the policy regarding former employees, StaffMark was instructed to determine whether a former employee was applying and to contact Defendant's human resources department to determine if the former employee was eligible for rehire. [Dkt. 51, ex. C, p. 27]. While the number of former employees who sought reemployment is not provided, Defendant prepared a document listing 43 former employees who applied for employment from January 2002 to August 12, 2003 and were denied rehiring because they were not in good standing. [Dkt. 29, ex. C, attach. 2]. Of those 43, 31 former employees were denied rehiring because they were terminated with active warnings. [Dkt. 29, ex. C, attach. 2].

Plaintiff argues that there were exceptions to the policy, citing Hartman's deposition. At her deposition, Hartman was handed the document listing the 43 former employees who were denied rehiring. [Dkt. 51, ex. C, p. 49]. Hartman testified regarding the former employees on the list as follows:

> I know that they did all reapply and they were all not rehired.
>
> You will note the bullet down below, there were a couple of exceptions to that, one was rehired but had poor attendance as a temporary so then he tried to come back and he was not rehired again.

[Dkt. 51, ex. C, p. 50]. The document included two employees whose entries are highlighted and explained in footnotes. The footnote for the first, as Hartman testified, stated that he

was "Rehired as temporary; had poor attendance; no longer eligible for re hire." [Dkt. 29, ex. C, attach. 2]. The footnote for the second employee stated "On March 2001 lay off list; was no call no show prior to execution of layoff." [Dkt. 29, ex. C, attach. 2]. These footnoted explanations, of the reasons why two former employees were on the list, do not create a genuine issue regarding whether Defendant made exceptions to its policy prohibiting the rehire of employees who were terminated with active warnings. Rather, the evidence demonstrates that Defendant applied the policy in an eutral manner, refusing to hire all former employees who were terminated with active warnings.

Plaintiff argues that there were "new elements of unfairness" in failing to rehire Cheira because, as Defendant admits, all of Defendant's "employees who were involved in the decision not to rehire Surinder Cheira knew that the warning in her file was regarding the wearing of her Kirpan, which [they] knew was a religious requirement, before they decided not to rehire her." [Dkt. 50, p. 15]. This argument focuses on the issuance of the final warning, which Plaintiff did not timely challenge. Even if the final warning was discriminatory, Defendant was entitled to treat the issuance of the warning as lawful. See Evans, 431 U.S. at 558, 97 S. Ct. at 1889 (defendant could treat discriminatory forced resignation as lawful because plaintiff did not timely challenge it). Plaintiff's argument demonstrates that the denial of rehiring was not based on a new element of unfairness, but was based on the final warning contained in Cheira's personnel file.

Cheira was terminated with an active warning, issued for violating Defendant's policy against weapons in the workplace by wearing her kirpan to work. The denial of rehire was pursuant to Defendant's policy prohibiting the rehire of former employees terminated with active warnings. See Hulteen, 2006 U.S. App. LEXIS 5776 at *18-19. As such, the denial of rehire is not a separately actionable violation of Title VII. See Collins, 514 F.2d at 596. As deserving as Plaintiff may be, Defendant is not required to make an exception treating her differently than others terminated with active warnings. See Hulteen, 2006 U.S. App. LEXIS 5776 at *18-19 ("Deserving as these plaintiffs would seem to be of

some accommodation..., the question before us is not whether the employer owes these plaintiffs an accommodation, but whether the law compels it.").

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment [dkt. 28] is **GRANTED**; the Clerk of Court shall enter judgment for Defendant and against Plaintiff.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike the Declaration of Heather Cavin [dkt. 49] and Motion to Strike Defendant's Supplemental Separate Statement of Facts [dkt. 58] are **DENIED** as moot.

DATED this 28th day of March, 2006.

Earl H. Carroll
United States District Judge