UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

VULCAN MATERIALS CO. d/b/a CALMAT CO.,

Defendant.

CIV. NO. 00CV0779-B (RBB)

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff EEOC's Motion for Partial Summary Judgment on Defendant's Affirmative Defenses came before the Court on May 14, 2001. Dana C. Johnson, Esq. appeared on behalf of Plaintiff EEOC. Shawna M. Swanson, Esq. and Christopher Scanlan, Esq. appeared on behalf of Defendant Vulcan Materials Co. Plaintiff argued that Defendant's laches, waiver/estoppel, and failure to mitigate affirmative defenses are either legally or factually devoid of merit. For the reasons explained herein, Plaintiff's Motion is DENIED.

II. BACKGROUND

A. Ms. Adamo's Application and Interview.

Plaintiff EEOC alleges that Ms. Adamo was not hired by Defendant Vulcan Materials

Co.[1] because of her sex, in violation of Title VII, as amended, 42 U.S.C. §§ 2000-e et seq. and the 1991 Civil Rights Act.

CalMat produces concrete and other construction materials. On June 25, 1996, Ms. Adamo visited CalMat's Mission Valley facility seeking employment as a truck driver. Def. Mem. for Summ. J. at 2.[2] Ms. Adamo alleges that she applied for two truck driver positions: cement mixer driver and plant/pit driver. Ms. Adamo told the woman who greeted her, Christina Hall, that she was interested in the "production driver" position. Hall Decl.¶ 12. Ms. Hall told Ms. Adamo that no such a position was available, but there was a mixer driver position available and gave Ms. Adamo an employment application. Id.

Ms. Adamo filled out the application, then met with Benny White Sr., the manager of CalMat's Mission Valley Transportation Department. Adamo Dep. 61:11-63:3. Mr. White claims that Ms. Adamo refused the mixer driver position when he told her that the starting salary was $12.22/hour because Ms. Adamo was earning $19.50/hour at her current job. White Dep. 88:10-24; 89:10-16. Mr. White's contemporaneous notes say that Ms. Adamo rejected the position based on pay. White Dep. 101:2-7 and Ex. 14 thereto. In addition, Mr. White told two other employees, one immediately after the interview, that Ms. Adamo turned down the position. White Dep. 104:6-10; Dyer Dep. 104:4-6, 11-13; Hall Decl. ¶ 15.

Ms. Adamo claims that she never rejected the position. Rather, she says that she explained to Mr. White several reasons why she was willing to take the pay cut including that her current employer was scheduled to close, she believed overtime pay would close the pay gap, and she wanted steady employment. Adamo Decl. ¶ 11. Ms. Adamo also claims that Mr. White discouraged her from taking the job by telling her that the governing collective bargaining agreement was due to expire, causing uncertainty as to whether there would be a strike and the future amount of pay. Ms. Adamo contends that no male applicants were told about the expiration of the collective bargaining agreement.

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[1]Vulcan acquired CalMat Co., now a wholly owned subsidiary, in 1999. Plaintiff applied for employment at CalMat and her allegations regard CalMat.

[2]Defs. Mem. contains the typographical error that Ms. Adamo applied in July, 1996.

There is conflicting evidence regarding how the interview ended. Mr. White contends that the interview ended when Ms. Adamo said she could not accept the pay cut and Mr. White said that he was sorry that she could not accept the position and thanked her for filling out an application. White Dep. 88:10-24. Ms. Adamo testified that Mr. White discouraged her throughout the interview by telling her about the potential strike, the pay rate, and saying that he really wanted an experienced driver. Adamo Dep. 77:14-16. Ms. Adamo testified that the last words she recalled saying were, "If you keep my name on record, if you need a driver, call me." Id. at 85:16-17. She testified further that she believed the next step in the interview process would be that Mr. White would call Ms. Adamo, but that he never called and she never received a letter. Adamo Dep. 87:1-11. By declaration submitted by the EEOC, Ms. Adamo testified that "White kept stressing that he wanted only experienced mixer drivers, and terminated the interview." Adamo Decl. in Support of EEOC's Opp. to Def. Mot. for Summ. J. at ¶ 12.

B. Procedural History.

Ms. Adamo filed her discrimination charge with the EEOC on September 30, 1996. The EEOC notified the Defendant of the charge within 10 days. Aronberg Decl. ¶ 4. An investigator sent a request for information to Defendant on January 16, 1997. Id. ¶ 5. The investigator claims that Defendant did not timely respond and he called Defendant, as well as mailed a pre-subpoena letter, requesting a response by June 8, 1997. Id. ¶ 6. The EEOC contends that Defendant provided an incomplete response on July 21, 1997, and there were follow-up phone calls and requests made to the Defendant. At an unspecified time, Defendant provided the information requested. Id. ¶¶ 7-9. The investigator then contacted Ms. Adamo on December 9, 1997 for her response to Defendant's information. When Ms. Adamo did not respond within 10 days, her charge was dismissed on December 19, 1997. Id. ¶ 19. The letter dismissing the charge notified Ms. Adamo of her right to sue within ninety days. Scanlan Decl. Ex. J (EEOC Dismissal and Notice of Rights).

On or about May 20, 1998, Ms. Adamo submitted additional evidence and requested that the EEOC reopen the investigation. Id. ¶ 11. On June 6, 1998, the EEOC reopened the

charge. Id. ¶ 12. on August 28, 1998, the Commission issued a letter of determination to the parties, finding that Ms. Adamo's charges were true. Id. ¶ 13. In February 1999, the final conciliation meeting failed.

The EEOC filed this lawsuit on April 18, 2000.

III. STANDARD OF LAW FOR SUMMARY JUDGMENT AND SUMMARY ADJUDICATION

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate 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." In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

Summary judgment must be granted if the party responding to the motion fails "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The evidence offered need not be in a form admissible at trial to avoid summary judgment. Id. at 324. When the moving party does not bear the burden of proof, summary judgment is warranted by demonstration of an absence of facts to support the nonmoving party's case. Id. at 325.

The Court must determine whether evidence has been presented that would enable a reasonable jury to find for the nonmoving party. Liberty Lobby, 477 U.S. at 249-252. If the Court finds that no reasonable fact-finder could, considering the evidence presented by the nonmoving party and the inferences therefrom, find in favor of that party, summary judgment is warranted.

If the Court is unable to render summary judgment upon an entire case and finds that a trial is necessary, it shall if practicable grant summary adjudication for any issues as to which, standing alone, summary judgment would be appropriate. See Fed. R. Civ. P. 56(d); see also California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998), cert. denied (Oct. 5, 1998).

IV. LACHES

A. The EEOC Argues that Defendant Cannot Show a Lack of Diligence or Resulting Prejudice.

The EEOC argues that there is no evidence to support the laches defense. The elements of laches are a lack of diligence and resulting prejudice. Costello v. United States, 365 U.S. 265, 282 (1961). The EEOC contends that there was no inexcusable delay because Defendant was responsible for a ten-month delay in its responses to the EEOC, five months passed between the dismissal of Ms. Adamo's claim and her request to reopen, and six months were spent on conciliation. To account for the fifteen months between the final conciliation meeting and service of the complaint, the EEOC states that both the Los Angeles and Washington, D.C. offices reviewed the charge. The EEOC also cites its staffing shortages and a high staff turnover.

The EEOC also argues that there was no resulting prejudice because the EEOC was able to contact and depose every witness identified by Defendant. While the EEOC recognizes that several witnesses testified they could no longer remember certain facts, the EEOC says that there is no evidence that the memories faded due to the EEOC's delay and there is other evidence that can fill in the gaps in the witnesses' memories.

B. Defendant Argues That it Was Blocked in Discovery from Learning Whether the EEOC Was Diligent, the EEOC Offered No Proof That it Was Diligent, and Defendant Has Been Prejudiced.

As a threshold matter, the Defendant begins by questioning the discovery upon which Plaintiff's motion relies. Defendant requests additional discovery that relates to its opposition. While this request is improperly made in opposition briefing, Defendant makes the point that the EEOC has not provided discovery regarding its deliberative processes, particularly the delay. Defendant argues that it is now improper for the EEOC to move for summary adjudication on a defense related to its delay when there has been no relevant discovery.

Defendant also points out that the EEOC's argument that certain interrogatory responses demonstrate a lack of supporting evidence fails in light of the fact that Magistrate Judge Brooks refused to compel further interrogatory responses as excessive under the

Federal Rules of Civil Procedure. The particular interrogatory cited by the EEOC was found improper. Thus, the Defendant had no duty to supplement its initial responses.

As to the merits of the laches defense, Defendant argues that the EEOC's delay was presumptively unreasonable because Ms. Adamo's right to sue expired 90-days after the initial determination letter. Defendant acknowledges that the EEOC is not barred by the same statute of limitations, but argues that the expiration of the statute of limitations on Ms. Adamo's claim is evidence that the EEOC did not bring suit within a reasonable period of time. Defendant cites a Southern District of Indiana case finding that filing suit past the analogous statute of limitations is a strong indication that the EEOC's delay was unreasonable. EEOC v. Indiana Bell Tel. Co., 641 F.Supp. 115, 123 (S.D.Ind. 1986) (finding inexcusable a nine-year delay between filing of charge and lawsuit, and three-and-a-half-year delay after the final letters of determination, resulting in the loss of testimony of crucial witnesses).

In the alternative, Defendant argues that there are triable issues of fact regarding whether the delay was unreasonable, even if not presumptively so. Defendant contends that a high caseload has been rejected as an excuse by the Ninth Circuit. EEOC v. Alioto Fish Co., 623 F.2d 86, 99 (9th Cir. 1980) ("The agency's workload has been rejected as an excuse for unreasonable delay."). Defendant complains that the EEOC offered no excuse for its delay of fourteen months in filing this lawsuit following the failure of conciliation and Ms. Adamo offers no excuse for waiting five months to ask the EEOC to reopen the charge, after the statute of limitations expired on her ability to bring an individual claim.

Finally, Defendant argues it has experienced severe prejudice. Defendant complains of missing witnesses and documents (without citation to evidence), witnesses' testimony that they could not recall key events, the accrual of back pay damages, and that the parent company being sued now bought CalMat well after the events in question.

With respect to the EEOC's argument that Defendant should be barred from arguing laches because of the doctrine of unclean hands and Defendant's contribution to the delay, Defendant denies that it is responsible for the ten-month delay ascribed to it and says that the

ten-month delay did not impede the lawsuit in any event, because at the close of the investigation period the EEOC concluded that there was no discrimination against Ms. Adamo.

C. The EEOC Did Not Show That There Are No Triable Issues of Fact Regarding Whether it Was Diligent and Whether Defendant Has Been Prejudiced.

As a threshold matter, there is no authority providing for a presumption of unreasonableness against the EEOC because the statute of limitations expired on Ms. Adamo's ability to bring an individual lawsuit. Defendant's authority, Indiana Bell Tel. Co., 641 F.Supp. 115, looked to Sections 1981 and 1983 for the analogous statutes of limitations. The Southern District of Indiana did not consider whether the expiration of the statute of limitations on the complainant's individual claim precluded an EEOC lawsuit. There is simply no statute of limitations governing the EEOC's ability to bring a claim.

However, the EEOC did not meet its burden of showing that it was diligent. It simply offers as explanation that it has a high caseload, high staff turnover, and that two offices reviewed the charge before filing. It provided no evidence to support its explanation. Given the age of the case at the time the final conciliation failed, it is hard to understand why the EEOC waited another fourteen months before filing the lawsuit. For purposes of this motion, it is the EEOC's burden to show the absence of any material issues of fact, and it has not done so.

Similarly unpersuasive is the EEOC's argument that there are no issues of fact whether Defendant was prejudiced by the witnesses' fading memories. Defendant provided many deposition citations where witnesses testified they could not recall important information. The EEOC's argument that it has evidence to fill in the gaps in witnesses' memories is unavailing. Because the witnesses' memories have faded, they cannot testify whether the evidence supports what they believed at the time of the alleged discrimination. Moreover, the EEOC did not provide any evidence that the faded memories may not be attributable to its delay. Thus, the EEOC did not carry its burden and summary adjudication on the laches defense is denied.

V. WAIVER/ESTOPPEL

A. The EEOC Argues That Defendant Cannot Show That the EEOC Acted Inappropriately.

The EEOC argues that Defendant cannot show the heightened misconduct required to assert estoppel against the government. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978). The EEOC further argues that public policy militates against applying estoppel to the EEOC.

As for waiver, the EEOC argues that it cannot waive its right to reopen a case because 29 C.F.R. 1061.21 permits the EEOC to reconsider prior determinations and provides no time limit in which to do so.

B. The Defendant Argues That Waiver and Estoppel Are Applicable Because of the Delay.

The Defendant responds that it is not arguing that the EEOC's ability to reconsider matters is invalid. Rather, Defendant is arguing that the EEOC's slow reconsideration, followed by the delay in prosecution and the addition of a new claim in this litigation for the plant/pit truck driver position, waived the EEOC's right to file this lawsuit.

The Defendant also contends that estoppel is available here to foreclose the EEOC from prosecuting an untimely action in which the EEOC has twice changed its theory of the case. Defendant argues that in the event estoppel is not applicable to the entire case, it is at least applicable to the plant/pit truck driver claim because the EEOC investigation only focused on the mixer driver claim.

C. The EEOC Did Not Provide Evidence to Prove the Absence of Any Material Facts.

The EEOC is correct that estoppel should be applied against the government with hesitation. The EEOC is also correct that the governing regulations permit it to reopen investigations and do not provide any time bar.

However, it was the EEOC's burden on this motion to bring forward evidence that its conduct was appropriate under the circumstances. The EEOC did not bring any evidence. Beyond stating that the investigator had 70 cases and that two offices reviewed the charge, there is simply no evidence regarding what occurred during the fourteen month delay in

filing the lawsuit. Further, the EEOC provided no authority that the affirmative defenses of waiver and estoppel may not be applied against it for unreasonable delay. Summary adjudication for Plaintiff is denied on Defendant's waiver and estoppel defenses.

VI. FAILURE TO MITIGATE

A. The EEOC Contends That Ms. Adamo Took Every Available Job.

To prove that Ms. Adamo failed to mitigate her damages, Defendant must prove that there were substantially equivalent jobs available that Ms. Adamo could have obtained and that she failed to use reasonable diligence in seeking one. EEOC v. Farmer Bros. Co., 31 F.3d 891, 906 (9th Cir. 1994). Ms. Adamo contends that she worked at Roy E. Ladd until it closed in mid-December, 1996. The next day, she reported to the Teamsters' Union hiring hall for another work assignment and that she signed the "out of work" list each month until she received an assignment. She worked as a rock truck driver at Granite from March to October 1997. In October 1997, Ms. Adamo worked at Rasmussen. From December 1997, through January 1998, she drove for Erreca's. From April through October 1998, she drove for Granite. From November 1998 through January 1999, and again from February 1999 to the present, she drove for Yeager. Thus, Plaintiff contends that Defendant cannot prove that Ms. Adamo failed to diligently seek comparable work.

B. Defendant Contends That Ms. Adamo Did Not Seek Comparable Work.

Defendant responds that Ms. Adamo did not seek comparable work through reasonable diligence. Ms. Adamo is currently on the "AGC" union contract, which covers jobs like the plant/pit driver, but not mixer driver positions. Defendant's expert on labor market statistics and economics, Dr. Amy Aukstikalnis, states that it is unlikely Ms. Adamo could not have found comparable employment, based on an analysis of jobs available in the San Diego Region. Defendant also complains that Ms. Adamo claims she was willing to take the mixer driver job because of overtime pay, but did not seek out jobs with similar salary/overtime opportunities.

C. There Is a Triable Issue of Fact Whether Ms. Adamo Sought Comparable Work.

The EEOC did not refute that Ms. Adamo's contract did not include jobs like the

mixer driver position. Further, the EEOC did not provide evidence that it was reasonable for Ms. Adamo to only seek employment through the Union. The EEOC did not carry its burden of showing that Ms. Adamo sought comparable jobs and its motion for summary adjudication on the defense of failure to mitigate is denied.

VI. CONCLUSION

There are triable issues of fact on Defendant's laches, waiver/estoppel, and failure to mitigate affirmative defenses. Plaintiff's Motion for Partial Summary Judgment on Defendant's Affirmative Defenses is hereby DENIED.

IT IS SO ORDERED.

DATED: 5-16-01

UNITED STATES SENIOR DISTRICT JUDGE

cc: All Parties
Magistrate Judge