

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

CASE NO: 8:99-cv-2218-T-26MSS

OUTBACK STEAKHOUSE, INC.,

Defendant.

_____ /

ORDER

This cause comes before the Court on Defendant’s Motion for Summary Judgment and supporting memorandum of law (Dkt. 41) and appendix of supporting exhibits (Dkt. 39). Also before the Court are Intervenor’s Response to the Motion for Summary Judgment (Dkt. 45) and supporting exhibits (Dkt. 47-51) and Plaintiff’s Response to the Motion for Summary Judgment. (Dkt. 55)

In February, 1995, Intervenor, Dena Zechella (“Zechella”), was hired to work for Defendant, Outback Steakhouse Inc. (“Outback”), at its headquarters in Tampa, Florida. Zechella’s initial salary was \$19,000.00. Zechella served as a site development assistant to Jamie Butler (“Butler”), who was Outback’s Site Development Manager. Butler reported to Steve Stanley (“Stanley”), who was the head of Outback’s Construction

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Department. During the first two years of her employment, Zechella's duties included ordering reports, transmitting bid packages to engineers, filing, typing, using a spreadsheet to track the progress of various contractors in fulfilling their commitments to Outback, and other duties assigned by Butler. By November 1996, Zechella was earning an annual salary of \$24,000.00.

On November 12, 1996, Steve Wilson ("Wilson") was hired by Outback to work at its headquarters. Wilson had played center for the Tampa Bay Buccaneers football team between 1976 and 1987. After his professional football career ended, he had been active in the Tampa community. Wilson had worked as a commercial real estate broker and had owned a water softener company that had done business with Outback. In 1994, Wilson was involved in a fatal automobile accident while he was intoxicated and ultimately he was convicted and incarcerated.

Prior to his conviction, Wilson had become acquainted with Florida State Senator John Grant ("Grant") through a Bible study group. When it came time for Wilson to be transferred to a work release program, Grant asked Outback's CEO, Chris Sullivan ("Sullivan"), if Outback would be willing to employ Wilson during the work release program. After speaking with the other Outback officers, Sullivan agreed to hire Wilson. On November 12, 1996, Wilson arrived at Outback for his first day of work. He met with Sullivan, who offered to pay him an annual salary of \$40,000.00 and then sent him to meet Stanley to determine how he could assist the Construction Department.

Upon joining the Construction Department, Wilson reported to Stanley. Wilson's

duties included helping Zechella with her job responsibilities, working on a lobster steamer project, working on water softener issues, and serving as a liaison to the Real Estate Department. By late 1997, Wilson had taken over full responsibility for installation of signage at Outback restaurants. As Wilson became more knowledgeable about the Department, more of Zechella's work was given to him. Zechella felt that she was being pushed out of her job. Meanwhile, Zechella had begun to focus her sights on getting promoted to a different position. She began to complain that there would not be enough work for both her and Wilson. However, Zechella never stopped giving work to Wilson.

In September 1997, Zechella was transferred to the position of Construction Coordinator. In this new position, Zechella reported to Tim Martin ("Martin") and David Chriss ("Chriss"), the Construction Department's two project managers, and kept some responsibilities with Butler. Zechella's annual salary was increased to \$26,460.00. Zechella grew unhappy with the new position, as it involved answering telephones and filing drawings prepared by Martin and Chriss. Zechella felt that the position was actually a demotion, despite the fact that she had received increased pay. Zechella contacted Rick Beach ("Beach"), the Project Manager for Carraba's, Outback's sister company, to inquire about obtaining a job with him. Zechella updated her resume and sent it out to prospective employers.

In early 1998, Zechella attended a lunch meeting with Kelly Braun ("Braun"), one of Outback's in-house attorneys. Zechella allegedly told Braun that she was unhappy,

that she felt she was being pushed out of her job, and that she wanted a recommendation for a lawyer to represent her against Outback. Braun suggested that Zechella meet with Sullivan. Soon after, Butler met with Zechella and allegedly advised her that her job performance had deteriorated and told her that he could not allow her performance to continue on the same course. Zechella allegedly told Butler that there was not enough work to sustain positions for herself and Wilson. She also allegedly advised Butler of her intention to meet with Sullivan. Butler allegedly warned Zechella not to go to Sullivan and added that if Sullivan could not help her find something new within the company, he would not be able to justify keeping her. In April 1998, Zechella met with Sullivan and discussed her unhappiness with her current job. Zechella gave Sullivan her resume and he told her that he would see what he could do to help her. Ultimately, Sullivan was unable to find a position suitable for Zechella and Butler terminated her on April 21, 1998.

Before the decision to terminate Zechella was announced, Stanley expressed a desire to pay Zechella two weeks' severance. Outback customarily pays severance only in exchange for a release of claims signed by the employee. Butler gave Zechella a release form along with two checks, her severance pay and her final paycheck. When presented with the release, Zechella sought advice on the meaning of some of the terms included therein from Braun. Braun explained to Zechella that the effect of the release would be to prevent her from suing Outback and Zechella decided not to sign the release.

Zechella filed a charge alleging sex discrimination with the EEOC on June 9,

1998. The EEOC filed suit against Outback on Zechella's behalf in this Court on October 1, 1999. Zechella sought leave to intervene on December 23, 1999, and the Court granted leave to intervene on December 28, 1999, subject to the restriction that Zechella could not intervene in the Equal Pay Act Claim. Zechella later sought leave to amend to add a retaliation claim based on her alleged complaints to her supervisors about unlawful employment practices. The Court granted leave to amend.

The EEOC sues Outback for violations of Title VII and the Equal Pay Act. Specifically, Plaintiff maintains that Defendant: (1) paid female employee Dena Zechella ("Zechella") lower wages than those paid to male employees performing the same or substantially equal work; (2) transferred and subsequently discharged Zechella because of her sex; (3) attempted to coerce Zechella into signing an unlawful release of her rights; and (4) retaliated against Zechella for her refusal to sign the release. Zechella sues Outback for violation of Title VII, including retaliation with respect to the terms and conditions of her employment, the release, and her discharge, and disparate treatment with respect to the terms and conditions of her employment, her pay, and her discharge.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (citation omitted). On a motion for summary judgment, the court must review the record, and all its inferences, in the

light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Equal Pay Act

“To establish a prima facie case under the Equal Pay Act of 1963, a complainant must show that an employer pays different wages to employees of opposite sexes ‘for equal work on the jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.’” Miranda v. B & B Cash Grocery Store, 975 F.2d 1518, 1532 (11th Cir. 1992) (citing Corning Glass Works v. Brennan, 417 U.S. 195 (1974)). “The jobs held by the employees of opposite sexes need not be identical; rather they need only be substantially similar.” Id. at 1533. “The prima facie case also focuses solely on the primary duties of each job, not duties that are incidental or insubstantial.” Id. “It is important to bear in mind that the prima facie case is made out by comparing the jobs held by the female and male employees and showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs.” Glenn v. General Motors, 841 F.2d 1567, 1569 (11th Cir. 1988). Once a plaintiff makes out a prima facie case, the burden shifts to the employer to prove that the difference in pay is justified by one of the four exceptions in the Equal Pay Act: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974) (quoting 29 U.S.C 106(d)(1)).

A review of the record reveals that Zechella and Wilson both performed site development responsibilities. While Zechella was still employed with Outback, Wilson claimed to have additional responsibilities. However, his equipment duty did not last long because steamers were folded into the equipment package sold by another department. (See Wilson Deposition, p. 129, l. 23-25, p. 130, l. 1-8.) Also, the water treatment work never became more than a small percentage of his job. (See id. at 78, l. 14-17. See also Deposition of Sharon Jenkins, p. 156, l. 3-15; Zechella Deposition, p. 109, l. 15-19.) Though Outback considered making Wilson a liaison between construction and real estate, the assignment never materialized. (See Wilson Deposition, p. 59, l. 1-9.) Defendant also contends that by late 1997 the bulk of Wilson's time was devoted to signage; however, Wilson testified that he had not assumed all of his signage responsibilities until three or four months into 1998. (See id. at 69, l. 9-20.) Zechella was terminated April 21, 1998. Because Wilson's additional duties do not appear to have been primary duties, this Court finds that a genuine issue of fact is in dispute as to whether the jobs are substantially similar for purposes of the EPA.

Defendant asserts the fourth exception, that the pay differential was based on a factor other than sex, as its affirmative defense to the EEOC's EPA claim. The Eleventh Circuit Court of Appeals narrowly construed this defense in Glenn v. General Motors, 841 F.2d 1567 (11th Cir. 1988):

The legislative history thus indicates that the "factor other than sex" exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from

special exigent circumstances connected with the business.

841 F.2d at 1571. Defendant contends that the factors accounting for the disparity were: (1) Outback's wish to show compassion for Wilson and his family as he tried to redeem his life from a terrible error in judgment; (2) Outback's desire to respond to an appeal from a member of the community on Wilson's behalf; (3) Outback's desire to help someone who had been a former business partner and an active member of the community. These factors do not appear to be business related. Further, Sullivan conceded that the \$40,000.00 salary paid to Wilson was subjective inasmuch as it was based upon how much the man needed to support his family. (See Sullivan Deposition, p. 63, l. 12-13.) At this juncture, Defendant has not met its heavy burden of showing that the factor of sex provided no basis for the wage differential. See Passmore v. Kindercare Learning Centers, Inc., 979 F.Supp. 1413, 1420 (M.D. Ala. 1997)(citing Irby v. Bittick, 44 F.3d 949, 954 (11th Cir. 1995). The Court finds that Defendant's Motion for Summary Judgment must fail as to the EEOC's EPA claim.

Title VII

Title VII prohibits employers from discriminating against an individual in "the terms, conditions, or privileges of employment" because of that person's sex. 42 U.S.C. § 2000e-2(a)(1). "The Plaintiff establishes a prima facie case of sex discrimination under Title VII by demonstrating that she is female and that the job she occupied was similar to higher paying jobs occupied by males." Miranda, 975 F.2d at 1529. "Under the

disparate treatment approach of Title VII, however, there is a relaxed standard of similarity between male and female occupied jobs” Id. at 1527. “Clearly, if plaintiff makes a prima facie case under the EPA, she simultaneously establishes facts necessary to go forward on a Title VII claim.” Mulhall v. Advance Security, Inc., 19 F.3d 586, 598 (11th Cir. 1994). The Court previously determined that a genuine issue exists as to whether Zechella and Wilson’s job responsibilities were similar for purposes of satisfying the EPA. Likewise, the Court finds that a genuine issue exists as to whether the relaxed standards of Title VII have been met.

Defendant has the burden of production in rebutting the prima facie case with a legitimate non-discriminatory motive, i.e., showing that the disparity in wages was not based on sex. See Miranda, 975 F. 2d at 1529. Sullivan’s explanation for the pay differential is that it was based on how much Wilson needed to support his family. At this time, the Court is not convinced that Defendant has adequately rebutted the prima facie case with a legitimate, nondiscriminatory motive. “In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from stereotypes.” See id. at 1528.

Defendant also attempts to legitimize the salary disparity by asserting that the salaries were decided by different decisionmakers, both of whom lacked knowledge of the disparity. However, the testimony of Sullivan reveals that Stanley was involved in the decision to hire Wilson and in a discussion of Wilson’s salary. The record also

demonstrates that Stanley set Zechella's salary. Further, the record shows that between September 1996, and November 1996, Stanley signed off on merit pay increases for Zechella and Wilson. (See EEOC's Exs. 1 & 2.) For all of the foregoing reasons, the Court finds that Defendant's Motion for Summary Judgment should be denied as it relates to the Title VII disparate treatment claims.

To establish a prima facie case of unfavorable transfer, one must show (1) that she was a member of a protected class; (2) that she was qualified for the job; (3) that she suffered an adverse employment action; and (4) that she was replaced by someone outside the protected class. Hinson v. Clinch County, Georgia Board of Education, 231 F.3d 821, 828 (11th Cir. 2000). A transfer to a different position can be adverse if it involves a reduction in pay, prestige, or responsibility. Id. at 829. However, it is not necessary to prove a reduction in pay for an adverse transfer case if either a reduction of prestige or responsibilities is present. See Hinson, 231 F.3d at 828-29. Courts have found that it is job responsibilities, not job title, that are the controlling factor. See Miranda, 975 F.2d at 1532. The test is whether a reasonable person in the plaintiff's position would view the transfer as adverse. Id.

In September 1997, Zechella was transferred to the position of Construction Coordinator. In this new position, Zechella reported to Tim Martin and David Chriss, the Construction Department's two project managers, and kept some responsibilities with Butler. Zechella's annual salary was increased to \$26,460.00. Zechella apparently grew unhappy with the new position, as it involved answering telephones and filing drawings

prepared by Martin and Chriss. Zechella felt that the position had turned out to be a demotion, despite the fact that she had received increased pay. The record reveals that Zechella's previous position had allowed for increasing responsibilities and discretion. A transfer involving the loss of independence creates a genuine issue of fact as to whether the new job offered less prestige and responsibility. Id. The EEOC submits that a reasonable person in Zechella's shoes would view the transfer as adverse, or alternatively there is a genuine issue of fact in dispute on this issue. The Court agrees.

To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in a statutorily protected expression; (2) she suffered an adverse employment action; and (3) there is some causal connection between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997). To recover for retaliation, the plaintiff "need not prove the underlying claim of discrimination which led to her protest," so long as she had a reasonable good faith belief that the discrimination existed. Meeks v. Computer Assocs. Intern., 15 F.3d 1013, 1021 (11th Cir. 1994) (citation omitted). The EEOC and Zechella assert that the first element of the prima facie case was met by Zechella's statements to Braun, Butler, and Sullivan. The Court finds that at a minimum a genuine issue of fact exists as to this issue. An employee who is perceived to have engaged in protected activity when she did not actually take such action is still protected as if the employee had voiced a complaint or filed a charge alleging an improper practice. See San Bernardino Public Employee's Ass'n v. Stout, 946 F.Supp. 790 (C.D. Cal. 1996). The second element of retaliation, an adverse action, would certainly be fulfilled by

Outback's termination of Zechella. In order to establish the third element, the causal link, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action. Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). Defendant's awareness of the protected statement may be established by circumstantial evidence. Id. Further, evidence of awareness combined with proximity in time between the protected activity and the adverse action are proof of a causal link. Id. at 1163-64. In light of Zechella's discussions with Braun, Butler, and Sullivan and the timing of those statements in relation to her discharge, the Court finds that a genuine issue exists as to whether there is a prima facie case for retaliation. Finally, Outback has explained, as its basis for Zechella's discharge, that Zechella was unhappy and Outback had nowhere to grow. At this point, it appears that there is at least a genuine issue as to whether this explanation is a pretext for discrimination.

The EEOC also alleges, in its retaliation claim, that Outback used or attempted to use an illegal release in violation of Title VII. The EEOC asserts that the release offered to Zechella was illegal because it asked Zechella to agree (1) not to file a charge of discrimination and (2) not to participate in an EEOC investigation. The record shows that when Butler discharged Zechella, he showed her the release and presented two checks on the table, her severance pay and her last pay check. When Zechella stated that she would like to show the release to a lawyer, Butler took back both checks. Zechella ultimately received her last pay check from Outback after she demanded it. In making its

argument for retaliation, the EEOC cites to EEOC Enforcement Guidance, Order No. 915.002 (April 10, 1997), which states that:

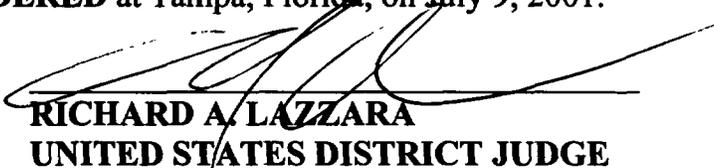
Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission. By their very existence such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.

The Eleventh Circuit recently held that “it is axiomatic that the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility ... need only be reasonable to be entitled to deference.” Equal Employment Opportunity Comm’n v. W & O d/b/a The Rustic Inn, 213 F.3d 600, 613 (11th Cir. 2000) (citing EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 116 (1988)). The EEOC’s position that waivers seeking to bar the right to file a charge or participate in an investigation hinder the EEOC’s ability to enforce its statutes is reasonable. Thus, it appears at this point a genuine issue exists as to whether Outback’s release illegally attempts to bar Zechella and other similarly situated employees from filing charges or participating in EEOC investigations.

ACCORDINGLY, it is ORDERED:

That Defendant’s Motion for Summary Judgment (Dkt. 41) is **denied**.

DONE AND ORDERED at Tampa, Florida, on July 9, 2001.



RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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