

FILED

AUG 21 2001

ROBERT H. SHEMPELL, CLERK

BY _____ DEPUTY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

**U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff**

CIVIL ACTION NO. 00-2238

VERSUS

DIST. JUDGE ROBERT G. JAMES

**K & B LOUISIANA CORPORATION d/b/a
RITE AID
Defendant.**

MAG. JUDGE JAMES D. KIRK

RULING

This is a lawsuit brought by Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") against Defendant K & B Louisiana Corporation d/b/a Rite Aid ("Rite Aid") for alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.* Specifically, the EEOC alleges that Rite Aid had a discriminatory practice of hiring only males as liquor cashiers and that it denied Ms. Johnny L. Williams ("Williams") a job based on this practice.

On June 28, 2001, Rite Aid filed a Motion for Summary Judgment [Doc. #42] asserting that it is entitled to judgment as a matter of law. Rite Aid contends that Williams signed statements under penalty of perjury in which she claimed to be disabled and unable to work at the time Rite Aid allegedly discriminated against her. Therefore, she did not suffer any injury from Rite Aid's refusal to employ her as a liquor cashier. Rite Aid further contends that the EEOC does not have standing to proceed with this lawsuit because it did not allege a pattern or practice of discrimination, but brought this lawsuit only on behalf of Williams.

On July 20, 2001, the EEOC filed a memorandum in opposition to Rite Aid's Motion for Summary Judgment contending that Williams could have performed the job of liquor cashier

(52)

with reasonable accommodations, and, therefore, this case should be permitted to proceed. The EEOC also contends that, even if Williams' individual claim fails, it has standing to proceed with its claim for injunctive relief.

For the following reasons, the Defendants' Motion for Summary Judgment [Doc. #42] is GRANTED IN PART AND DENIED IN PART.

I. FACTS

On October 2, 1996, Williams was hired by K & B as a cashier. In September 1997, Rite Aid began operating K & B stores, including the one where Williams worked, Store No. 7337, located at 3146 Louisville Avenue in Monroe, Louisiana. In November 1997, William Longoria ("Longoria") became the manager of Store No. 7337.

Almost one year later, on October 10, 1998, Rite Aid laid off¹ Williams and three other cashiers as part of a reduction in force. At that time, Rite Aid was in the process of building a new store on Desiard Street and of moving Store No. 7337 to another location at 1801 Louisville Avenue. Longoria was to be the manager of the Desiard Street store, and he told Williams and the other three cashiers to come see him about being re-hired once it opened.

On December 12, 1998, Williams came into Store No. 7337 to pick up prescriptions at the pharmacy. While there, she and a cashier, Vanessa Bates ("Bates"), who is also Williams' cousin, became involved in a disturbance. Williams alleges that Bates verbally attacked her. Bates alleges that Williams accused her of sleeping with Longoria to keep her job. After this incident, Longoria attests that he decided not to re-hire Williams because of the disturbance and

¹Rite Aid characterizes Williams' "lay off" as a termination, while the EEOC contends that she was temporarily laid off. For purposes of summary judgment, the Court views the evidence in the light most favorable to Williams and the EEOC.

Williams' "poor attitude."

By early January 1999, Williams notified Rite Aid of her interest in returning to Store No. 7337 and asked to be allowed to fill in one or two days a week for an employee in the liquor department, Richard Wilson ("Wilson"), who was in the hospital. Longoria allegedly refused to allow Williams to fill in for Wilson, telling her that he preferred to have a male work in the liquor department because of the heavy unloading and bending required. Longoria allegedly stated that these duties were "too difficult for the ladies to do."

On January 9, 1999, Longoria hired Fred Mitchell ("Mitchell") to work as a liquor cashier at the Desiard Street store. That store had not yet opened, so Mitchell began working as a liquor cashier at Store No. 7337 (the old store).² On January 16, 1999, Williams came into Store No. 7337, saw Mitchell working there, and questioned him about his employment with Rite Aid.

On January 19, 1999, Williams applied for Supplemental Security Income ("SSI") with the Social Security Administration ("SSA") and certified that she had been disabled since her lay-off on October 10, 1998. The following month, on February 5, 1999, she applied for disability insurance benefits ("DIB"), again certifying that she had been disabled since October 10, 1998. Above her signature on both documents, is a statement that "I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal Law by fine, imprisonment or both." Williams has since testified that she did not understand the forms from the SSA and that she recited her problems in order for

²Unfortunately, Wilson died from his illness, and Rite Aid needed another employee in the liquor department.

SSA to determine whether she was eligible to receive disability benefits.

On February 18, 1999, Williams completed a Pain Report in which she stated that she injured her back in 1991 and that the pain had become worse over the years. She also stated that she had to lean on the counter at work to take weight off her hips and that her hearing loss and difficulty dealing with people caused problems at work. The same month, Williams' primary physician, Euil E. Luther ("Luther"), stated that she had a history of depression.

Also in February, Williams contacted Rite Aid through its toll-free telephone number to find out if she needed to submit a formal application for re-employment. She alleges that Rite Aid told her that a formal application was unnecessary because she was laid off only temporarily.

According to the testimony at her first deposition, on March 1, 1999, Williams again contacted Longoria about returning to work, and he allegedly told her that he would not hire her back because he did not like the way she treated her fellow employees.

On March 5, 1999, Williams filled out an Application for Service at the Monroe Mental Health Center ("MMHC"), stating that she suffered from chronic back and knee pain, hearing loss, obesity, and depression. Although Williams admits that the statements in the Pain Report and Application for Service were made in her handwriting, she now denies that she suffered some of those problems.

The Desiard Street store opened in mid-March 1999. The EEOC alleges that Williams could have returned to work at that time with a reasonable accommodation.

On March 31, 1999, Williams told an interviewer at MMHC that she was not re-hired by Rite Aid because of her weight and because they could not "push her around."

On June 19, 1999, Williams filed a Charge of Discrimination with the EEOC alleging

that she was not re-hired because of discrimination based on her age, disability, and sex.

In August 1999, Williams was awarded SSI and DIB, dating back to January or February 1999.

On February 1, 2001, the EEOC issued a cause determination of sex discrimination. After conciliation failed, the EEOC filed this lawsuit on September 29, 1999. At the time the suit was filed, Williams was receiving benefits from the SSA.

II. LAW AND ANALYSIS

A. Motions for Summary Judgment

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of informing the court of the basis for its motion by identifying portions of the record which highlight the absence of genuine issues of material fact. *Topalian v. Ehrmann*, 954 F.2d 1125, 1132 (5th Cir.1992). A fact is “material” if proof of its existence or nonexistence would affect the outcome of the lawsuit under applicable law in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is “genuine” if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Id.* The moving party cannot satisfy its initial burden simply by setting forth conclusory statements that the nonmoving party has no evidence to prove its case. *Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993).

If the moving party can meet the initial burden, the burden then shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial. *Norman v. Apache*

Corp., 19 F.3d 1017, 1023 (5th Cir. 1994). The nonmoving party must show more than “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In evaluating the evidence tendered by the parties, the court must accept the evidence of the nonmovant as credible and draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Title VII

Title VII prohibits employers from “fail[ing] or refus[ing] to hire . . . any individual . . . because of such individual’s sex.” 42 U.S.C. § 2000e-2(a)(1).

In this case, the EEOC has produced direct evidence of sex discrimination by Rite Aid in the form of Longoria’s alleged statements to Williams. Nevertheless, “[b]eing qualified for the position sought is a *sine qua non* of a claim for . . . discrimination, both in direct and indirect evidence cases. A person who is not qualified, like a person who has not applied for the position or a person not of the protected class, does not have standing to complain of . . . animus.” *Peguese v. Borup*, 144 F. Supp.2d 743, 747-48 (S.D. Tex. 2001).

Rite Aid raises two related defenses. First, Rite Aid argues that Williams is judicially estopped from denying that she was unable to work at the time Rite Aid refused to re-hire her and, thus, she has suffered no injury. Second, Rite Aid argues that, because the EEOC has no standing to proceed with this lawsuit because it derives its standing from Williams’ claim and that claim fails. The Court addresses each of these arguments in turn.

1. Judicial Estoppel

Rite Aid produces evidence that Williams signed written statements to the SSA in which she alleged that she was disabled and unable to work because of a number of health conditions,

including obesity, depression, back and knee pain, and hearing problems. Based on these statements, Rite Aid argues that Williams should be judicially estopped from denying that she is disabled and unable to work at the time Rite Aid allegedly discriminated against her. Therefore, Rite Aid contends that Williams has no standing because she was disabled and, therefore, unable to work as a liquor cashier and suffered no injury from its alleged discrimination against her.

The equitable doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding contrary to a position taken previously in the same or some earlier proceeding. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996). “The purpose of the doctrine is ‘to protect the integrity of the judicial process’ by ‘preventing parties from playing fast and loose with the courts to suit the exigencies of self interest.’” *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999)(quoting *Brandon v. Interfist Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). Further, the doctrine is not limited to proceedings before courts of law; it also extends to quasi-judicial administrative proceedings. *See Harris v. Marathon Oil Co.*, 948 F. Supp. 27, 28 (W.D. Tex. 1996), *aff'd*, 108 F.3d 332 (5th Cir. 1997); *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority*, 731 F. Supp. 747, 749 (E.D. La. 1990); *Muellner v. Mars, Inc.*, 714 F. Supp. 351, 358 (N.D. Ill. 1989).

The Supreme Court has examined whether a statement made in the context of administrative proceedings before the SSA can serve as judicial estoppel in a subsequent employment discrimination case. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999). In *Cleveland*, the Supreme Court considered the apparent conflict that arises when a plaintiff asserts to the SSA that she is disabled under the Social Securities Act, 42 U.S.C. §423(a), but then files an employment discrimination lawsuit under the Americans with

Disabilities Act (“ADA”), 42 U.S.C. §12111, asserting that her former employer failed to reasonably accommodate her disability. *Id.* The Fifth Circuit applied a rebuttable presumption to ADA plaintiffs who had previously applied for or received benefits through the SSA and found that they were judicially estopped from bringing a lawsuit under the ADA except in some “limited and highly unusual circumstances.” *Id.* at 805. The *Cleveland* Court rejected this rebuttable presumption and, instead, held that “an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier . . . [claim] of total disability . . . [to the SSA] . . . [, but] must proffer a sufficient explanation.” *Id.* at 806. “[A] party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement.” *Id.* Rather, he or she must offer an explanation “sufficient to warrant a reasonable juror’s concluding that, assuming the truth of, or the plaintiff’s good-faith belief in, the earlier statement, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with or without ‘reasonable accommodation.’” *Id.* at 807.

The Court concludes that *Cleveland* should be applied to Title VII cases when the employee’s ability to perform the job is brought into issue. Whether or not an employee alleges disability discrimination, employers are obliged to comply with the ADA’s requirements. If, as the EEOC asserts, Longoria refused to re-hire Williams because he believed that the unloading and bending required for the liquor cashier position were “too difficult for the ladies to do,” then Williams never had the opportunity to ask for a reasonable accommodation or show that she could perform the job without one. Employers should not be permitted to circumvent the requirements of the ADA by discriminating against an employee on another protected basis. Therefore, the Court finds that the purposes of the anti-discrimination laws are properly served

by applying *Cleveland* to Title VII cases when applicable.

Williams asserted to the SSA that she had been disabled since the day of her lay-off, on October 10, 1998.³ Further, she did receive and, apparently, continues to receive disability benefits. Therefore, *Cleveland* requires the EEOC, on Williams' behalf, to proffer a sufficient explanation for the apparent contradiction.

As did the plaintiff in *Cleveland*, the EEOC argues that the SSA's definition of "disabled" does not contemplate the opportunity for reasonable accommodation required by the ADA. While Williams was determined to be disabled under the SSA's definition, the EEOC argues that she was also "qualified" for the liquor cashier job because she could have fulfilled its essential functions with a reasonable accommodation.

The Court agrees that the EEOC has offered an adequate legal explanation of Williams' inconsistent positions to the SSA and in this lawsuit. However, the explanation must also be supported by competent summary judgment evidence. As Rite Aid's memorandum points out, in her two depositions, Williams (1) claimed that she does not have some of the health problems listed on the forms; (2) claimed that she did not understand the form; (3) claimed that she just listed her health problems with the idea that the SSA would make the determination whether she was disabled; and (3) claimed that some of the statements on the forms were false, even though she admitted that the forms appeared to be in her handwriting and that she had signed them. Williams' testimony does not support the argument made on her behalf by the EEOC. She never

³Although the EEOC has attempted to make an issue out of the fact that Williams applied for benefits after Rite Aid refused to re-hire her, she asserted to the SSA that she had been disabled *prior to* the refusal. She is held to her statement, unless she can offer an explanation for the inconsistency.

asserts that she could have performed the job of liquor cashier with a reasonable accommodation, but simply contradicts her previous statement. The *Cleveland* Court made clear that this type of testimony will not suffice to raise a genuine issue of material fact for trial. Accordingly, the Court finds that application of the judicial estoppel doctrine is appropriate.

Rite Aid's Motion for Summary Judgment on the issue of judicial estoppel is GRANTED, and the EEOC is prohibited from denying that Williams was disabled at the time she applied for the liquor cashier position. Further, because Williams was not qualified for the position at the time of the alleged discrimination, she suffered no injury. The Court must now determine whether the EEOC has standing to proceed with its claim for injunctive relief.

2. EEOC's Standing

"Congress gave the EEOC broad discretion to determine which suits it will bring [against private employers] under § 706 (and § 707) of Title VII, and which it will leave to be brought by private parties." *United States v. Allegheny-Ludlum Indus., Inc.*, 512 F.2d 826, 868 (5th Cir. 1975). Under § 706, if the EEOC has been unable to negotiate a conciliation agreement acceptable to it, then it has standing to bring a civil action to the same extent as individuals aggrieved by discrimination in employment. *See* 42 U.S.C. § 2000e-5(f)(1). In a § 706 case, the EEOC "seeks to vindicate, sometimes on a class-wide basis, the rights of aggrieved individuals who are challenging an unlawful employment practice by an employer." *Equal Employment Opportunity Commission v. Mitsubishi Motor Mnf. of America, Inc.*, 990 F. Supp. 1059, 1084 (1998).

Under § 707, the EEOC may bring a civil action "[w]henever [it] has reasonable cause to believe that any person . . . is engaged in a pattern or practice of [discrimination]." 42 U.S.C. §

2000e-6(1). To do so, however, the EEOC must file a complaint “setting forth facts pertaining to such pattern or practice, and . . . requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as . . . necessary” *Id.* In a § 707 action, the EEOC “challenges systemic, wide-spread discrimination by an employer.” *Mitsubishi*, 990 F. Supp. at 1084.

Rite Aid asserts that the EEOC brought a § 706 lawsuit in this case because the agency seeks relief only on behalf of Williams and describes only those facts regarding a specific instance of alleged discrimination against her. Rite Aid argues that the EEOC cannot proceed with this lawsuit under § 706 because its standing is derived solely from the alleged discrimination against Williams and she has suffered no “injury.” Further, Rite Aid also argues that the EEOC cannot now proceed under § 707 because it never alleged a pattern or practice of systemic discrimination, never filed charges of systemic discrimination, never investigated whether the company engaged in systemic discrimination, and never issued a cause determination of or attempted to conciliate systemic discrimination.

The EEOC responds that its standing is not derivative, but independent. The EEOC points out that even if Williams had settled with Rite Aid, it could continue its action against the company for the benefit of the public interest. Its charge is to vindicate public policy, not merely to enforce private rights. Accordingly, the EEOC argues that its lawsuit may proceed whether or not Williams herself has standing.

Sections 706 and 707 are separate provisions of Title VII which give the EEOC authority to bring lawsuits in its own name. The EEOC cites only § 706 in its Second Amended Complaint and never uses the term “pattern or practice” or otherwise alleges systemic

discrimination. However, the EEOC does characterize the nature of its action as one “to correct unlawful employment practices *and* to provide appropriate relief to . . . Williams.” Second Amended Complaint, p. 1 (emphasis added). Further, the EEOC sets forth facts alleging that Rite Aid’s manager “felt he needed a male to meet the physical demands of the liquor department” and that this is a discriminatory “practice” constituting sex discrimination.

The Court agrees with Rite Aid that the EEOC’s lawsuit was brought pursuant to § 706, not § 707. Nevertheless, the EEOC “is not merely a proxy for the victims of discrimination[,] and . . . the EEOC’s enforcement suits [pursuant to § 706] should not be considered representative actions” subject to the requirements for a class action. *General Tel.*, 446 U.S. at 326. “When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.” *Id.*

In *EEOC v. Brookhaven Bank & Trust Co.*, 614 F.2d 1022 (5th Cir. 1980), the Fifth Circuit considered whether the EEOC could proceed with a lawsuit under § 706 when the charging party’s original complaint was determined to be untrue. In that case, the charging party alleged that the defendant refused to hire her because of her race. *Id.* at 1023. Although the EEOC found no reasonable cause to believe the charging party was discriminated against, the agency did find that the defendant maintained segregated job classifications in violation of Title VII. *Id.* The district court dismissed the case, in part, on the basis of standing because “the charging party suffered no injury and is not a member of the class [the EEOC] is seeking to represent, [and, thus,] it follows without question that the EEOC has no derivative ‘injury’ or ‘membership’ in the class.” *Id.* at 1024.

However, the Fifth Circuit rejected the district court’s analysis and explained:

Employment discrimination has been interpreted to be, by its nature, class discrimination, permitting investigation aimed at determining an employer's handling of the class . . . [42 U.S.C. § 2000e-5(f)(1)] gives EEOC standing to sue under Title VII to the same extent as individuals aggrieved by discrimination in employment . . . More significantly, however, the court held that the EEOC was itself a member of the class . . . [T]he authority of the EEOC to represent a Title VII class stems not from derivative class membership, but from congressional act. Therefore, it should not be fatal to the EEOC's action that the original complaining party has failed to qualify for class membership.

Id. (citations omitted).⁴ The *Brookhaven* Court further explained that the purpose of a charge of discrimination is “to trigger investigatory and conciliatory procedures of the EEOC,” and a subsequent civil action is limited only by the “scope of the EEOC investigation which can reasonably be expected to grow out of the charge.” *Id.*

Williams filed a charge of sex discrimination, which the EEOC investigated. After finding direct evidence of sex discrimination by Rite Aid's manager, Longoria, the EEOC tried to conciliate this case with Rite Aid, but that conciliation failed. When it filed this lawsuit, the EEOC sought to obtain damages for Williams, but it also requested a permanent injunction and other equitable relief, all on the basis of Rite Aid's discriminatory hiring practices. While the EEOC may not recover damages for Williams, it may proceed with its lawsuit for injunctive and other equitable relief designed to prevent Rite Aid from allegedly continuing to engage in a practice of refusing to hire females as liquor cashiers.

III. CONCLUSION


For the foregoing reasons, Rite Aid's Motion for Summary Judgment [Doc. #42] is

⁴The *Brookhaven* Court relied in part on an earlier Fifth Circuit decision, *EEOC v. D.H. Holmes*, 556 F.2d 787 (5th Cir. 1977), which had held that the EEOC must comply with the class requirements under Fed. R. Civ. P. 23. This holding was overturned by the Supreme Court in *General Tel.*, *supra*. However, the rationale expressed in *Brookhaven* is bolstered by the Supreme Court's decision that the EEOC is *not* required to comply with Rule 23.

GRANTED IN PART AND DENIED IN PART. Plaintiff is judicially estopped from denying that Williams was disabled and unable to work at the time she sought re-employment with Rite Aid. Accordingly, Williams suffered no injury, and the EEOC cannot recover damages or any other relief on her behalf. To this extent, Rite Aid's Motion for Summary Judgment is GRANTED.

However, the EEOC has standing to proceed with its claim for injunctive and other equitable relief under 42 U.S.C. § 2000e-5(f)(1). To this extent, Rite Aid's Motion for Summary Judgment is DENIED.

MONROE, LOUISIANA this 20 day of August, 2001.



ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE: 8/23/01
BY: DB
TO: Butler
Jagan
Carter