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

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED

JUL 30 2002

ROBERT H. SHEMWEILL, CLERK
BY *[Signature]*
DEPUTY

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

CIVIL ACTION NO. 00-2238

VERSUS

JUDGE ROBERT G. JAMES

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

MAG. JUDGE KAREN L. HAYES

OPINION

This is an action brought by the 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, 42 U.S.C. § 2000e *et seq.* (“Title VII”). The EEOC alleges that Rite Aid engaged in a discriminatory practice of hiring only males to work in the liquor department and that it denied Ms. Johnny L. Williams (“Williams”) a job based on this practice.

This matter came for trial before the Court on July 8 and July 9, 2002.

The Court hereby enters the following findings of fact and conclusions of law. To the extent that any finding of fact constitutes a conclusion of law, the Court hereby adopts it as such, and to the extent that any conclusion of law constitutes a finding of fact, the Court hereby adopts it as such.

I. Findings of Fact

On October 2, 1996, K & B hired Williams as a cashier. Williams worked at Store No.

(M)

7337, located at 3146 Louisville Avenue in Monroe, Louisiana. In November of 1996, William Longoria ("Longoria") became the manager of Store No. 7337. When Longoria began, there was a liquor manager at Store No. 7337. The liquor manager was responsible for purchasing liquor, unloading the liquor delivery trucks, and stocking the liquor. The liquor delivery trucks often contained cases of liquor weighing sixty or seventy pounds. Willie James ("James") was Store No. 7337's full-time liquor manager; Richard Wilson ("Wilson") worked part-time filling in for James.

In August of 1997, Rite Aid took over the operation of a number of K & B stores, including Store 7337. Under Rite Aid, there was no liquor manager position, *per se*. However, James and Wilson continued to be primarily responsible for unloading the liquor delivery trucks. If someone else was needed, Longoria preferred that a male help because he believed that the female employees were not capable of lifting some of the heavier cases of liquor. Longoria also preferred that male employees perform other manual tasks such as mopping or cleaning bathrooms. Longoria did not believe that the female employees were unable to perform these other tasks; rather, he believed that it was inappropriate to ask the female employees to perform them.

On March 8, 1998, Wilson assumed James' duties when James was severely injured and became unable to work.

On October 10, 1998, Rite Aid, as part of a reduction in force, laid off Williams and two other cashiers who worked at Store No. 7337. At that time, Rite Aid was in the process of building a new store on Desiard Street and moving Store No. 7337 to 1801 Louisville Avenue. Longoria was to be the manager of the Desiard Street store, and he told Williams and the other

cashiers that there was a possibility they might be rehired. Rite Aid also transferred two cashiers who worked at Store No. 7337 to another store in Monroe. One of these cashiers was Vanessa Bates ("Bates"). Bates was subsequently transferred back to Store No. 7337.

On December 12, 1998, Williams caused a disturbance at Store No. 7337. In front of a number of customers, Williams confronted Bates about being transferred back to Store No. 7337. Williams told Bates that she must be "the pet" and accused Bates of sleeping with Longoria to keep her job.

About this time, Wilson was hospitalized with an illness and died. In order to fill the vacancy left by Wilson's death, Longoria interviewed two men, one of whom was Fred Mitchell ("Mitchell"), and one woman. Rite Aid hired Mitchell as a cashier on January 12, 1999.

Soon after Mitchell was hired, Williams caused another disturbance at Store No. 7337. She came into the store, saw Mitchell working there, and loudly questioned him about his employment with Rite Aid. Williams also repeated her derogatory accusations to Bates. As with the first disturbance, a number of customers were in the store.

On June 19, 1999, Williams filed a Charge of Discrimination with the EEOC alleging that she was not rehired by Rite Aid because of discrimination based on her age, disability, and sex. As part of its investigation, the EEOC sent requests for information to Rite Aid regarding the reasons that Williams was not rehired. One of Rite Aid's attorneys prepared responses based on information obtained from Longoria. In Rite Aid's response to the EEOC's "Request for Information No. 3," Rite Aid explained that the reason it hired Mitchell was because Wilson and James were no longer able to work. "Both of these men worked mainly in the liquor department, constantly bending over to fill coolers and the hot set. Store No. 7337 felt it needed another male

to do these tasks, for it would have been almost impossible for a female to handle these duties on an everyday basis.” Response to Request for Information No. 3, Exhibit 4, p. 7.

On February 1, 2000, the EEOC issued a cause determination of sex discrimination. After conciliation failed, the EEOC filed this lawsuit on September 29, 2000. In an interrogatory served on Rite Aid, the EEOC asked for clarification of Rite Aid’s response to the EEOC’s “Request for Information No. 3.” Rite Aid responded that “it is Mr. Longoria’s belief that many woman (sic) might have difficulty unloading and handling deliveries of liquor and other products received by Rite Aid Store No. 7337 on a daily basis” Response to Interrogatory No. 14, Exhibit 8, p. 14.

Rite Aid has written policies which prohibit its employees from unlawfully discriminating in hiring, promoting, suspending, recalling, terminating, and transferring individuals. Rite Aid uses frequent training sessions to educate its managers in order to reinforce its anti-discrimination policies.

Since January of 1999, females have comprised eighty-three percent of Rite Aid’s employees in the market encompassing Store No. 7337.

II. Conclusions of Law

A. Standing

Rite Aid contends that the EEOC must prove that Williams was qualified for the position she sought in order to prove that Rite Aid discriminated against her, and Rite Aid contends that the EEOC cannot do so. According to Rite Aid, the EEOC, therefore, cannot recover on behalf of Williams and has no standing to proceed with this action.

Rite Aid bases its argument on the Court’s August 20, 2001 Ruling [Doc. No. 52] on Rite

Aid's first motion for summary judgment. In that ruling, the Court concluded that the EEOC is prohibited from denying that Williams was unable to work at the time that Rite Aid refused to rehire her. This conclusion was based on the fact that Williams had represented in applications for supplemental security income and disability insurance benefits that she was unable to work during that time period.¹ Further, the Court ruled that because the EEOC was precluded from denying that Williams was unable to work, the agency could not prove that Williams was qualified for the position she sought. The Court concluded that if Williams was not qualified for the position, she "suffered no injury, and Plaintiff cannot recover damages *or any other relief* on her behalf." August 20, 2001 Order [Doc. No. 53] (emphasis added).

The Court concludes that it was correct in ruling that the EEOC is estopped from denying that Williams was unable to work at the time Rite Aid refused to rehire her and that the EEOC is precluded from recovering *damages* on her behalf. However, the Court was incorrect in ruling that the EEOC is barred from recovering *any relief* on Williams' behalf. Because the EEOC attempts to prove its case using direct evidence of discrimination, the agency need not prove that Williams was qualified for the position she sought.

There are generally two ways to establish discrimination. A plaintiff can present direct evidence of discrimination or employ the inferential method of proof outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1216 (1995). Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of

¹On January 19, 1999, Williams applied for supplemental security income with the Social Security Administration and certified that she had been disabled since her layoff on October 10, 1998. The following month, on February 5, 1999, she applied for disability insurance benefits, again certifying that she had been disabled since October 10, 1998.

discrimination by showing that (1) she is a member of a protected class, (2) she was qualified for the position at issue, and (3) the position was filled with someone outside of the protected class. *See Rutherford v. Harris County*, 197 F.3d 173, 179 (5th Cir. 1999). Then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000). If the defendant satisfies this burden, the burden shifts back to the plaintiff, who must prove that “the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Id.* (citations omitted).

Direct evidence of discrimination is evidence which, if believed, proves discrimination without inference or presumption. *Brown v. East Mississippi Electric Power Assoc.*, 989 F.2d 858, 861 (5th Cir. 1993). When a plaintiff attempts to prove his or her case using direct evidence, the *McDonnell Douglas* framework does not apply. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Garcia v. City of Houston*, 201 F.3d 672, 676 n.1 (5th Cir. 2000); *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 762 (5th Cir. 1996). Instead, the Court applies the framework established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). First, the court must determine whether the evidence offered by the plaintiff is actually direct evidence of discrimination. *See, e.g., Mooney*, 54 F.3d at 1218-19; *Garcia*, 201 F.3d at 676-77. If the plaintiff's evidence is sufficient to prove discrimination without inference or presumption, the burden shifts to the defendant to demonstrate that it would have taken the same action in the absence of the impermissible motivating factor. *Id.*; *Brown*, 989 F.2d at 861.

This is known as the “mixed-motives” defense.² *Id.* Even if the defendant carries its burden, it is not absolved of liability. The plaintiff’s recovery is merely limited to injunctive and declaratory relief, costs, and attorney’s fees. *Garcia*, 201 F.3d at 676 (citing *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); 42 U.S.C. § 2000e-5(g)(2)(B)(i)).³

The Court concludes that because the EEOC attempts to prove its case using direct evidence, it need not prove that Williams was qualified for the position she sought. The EEOC need only offer direct evidence of discrimination, thereby showing that an impermissible factor played a part in Rite Aid’s decision not to hire Williams. The burden then shifts to Rite Aid, which must prove that it would not have hired Williams for reasons unrelated to her sex. If Rite Aid is successful, the EEOC’s recovery on behalf of Williams will be limited accordingly, but

²Unlike *McDonnell Douglas*, which merely involves a shifting of the burden of production, the *Price Waterhouse* framework involves a shift of the burden of persuasion to the defendant. *Mooney*, 54 F.3d at 1216-17; *Brown*, 989 F.2d at 862.

[I]n the *Price Waterhouse* framework . . . the evidence the plaintiff produces is so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case to shift the burden of production. Both the burden of production and the risk of nonpersuasion are shifted to the defendant who, because of the inference the overt evidence showing the employee’s bias permits, must persuade the factfinder that even if discrimination was a motivating factor in the adverse employment decision, it would have made the same employment decision regardless of its discriminatory animus.

Mooney, 54 F.3d at 1216 n.10 (citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3rd Cir.1994)).

³This was not always the case. The Supreme Court held in *Price Waterhouse* that if the defendant proved that it would have taken the same action in the absence of the impermissible factor, the plaintiff was barred from recovering *any* relief. *Price Waterhouse*, 490 U.S. at 242. This holding was expressly overruled by Congress in the Civil Rights Act of 1991. *Garcia*, 201 F.3d at 676 n.2.

the agency will not be completely prohibited from recovering on her behalf. The EEOC will be able to seek injunctive relief and costs.⁴

The Court concludes, therefore, that the EEOC has standing to recover on behalf of Williams, and the Court amends its August 20, 2001 Ruling [Doc. No. 52] on Rite Aid's first motion for summary judgment accordingly.⁵

B. Analysis of the EEOC's Claim

Title VII provides that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex” 42 U.S.C. § 2000e-2(a)(1). A plaintiff proves discrimination by showing that race, color, national origin, or sex was a motivating factor for the contested employment decision, even though other factors also motivated the decision. 42 U.S.C. § 2000e-2(m); *Garcia*, 201 F.3d at 676 (citing *Buchanan*, 85 F.3d at 200).

1. The EEOC's Evidence of Discrimination

The Court looks first to the EEOC's evidence to determine whether it proves, without inference, that an impermissible factor played a part in Rite Aid's decision not to hire Williams. The EEOC offers Rite Aid's response to the EEOC's “Request for Information No. 3,” in which Rite Aid explained that it hired Mitchell because there was no longer another male to help unload

⁴The EEOC does not seek attorney's fees or declaratory relief.

⁵The Court's ruling and order on Rite Aid's first motion for summary judgment were interlocutory and, therefore, the Court “at any time before final decree [can] modify or rescind [them].” *Zimzores v. Veterans Administration*, 778 F.2d 264, 266 (5th Cir. 1985) (quoting *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88 (1922)).

the liquor delivery trucks. Response to Request for Information No. 3, Exhibit 4, p. 7. The EEOC also offers Rite Aid's response to its "Interrogatory No. 14," in which Rite Aid explained that Longoria believed that "many woman (sic) might have difficulty unloading and handling deliveries of liquor" Response to Interrogatory No. 14, Exhibit 8, p. 14. Finally, the EEOC offers Longoria's trial testimony that he preferred that male employees unload the trucks.

The Court concludes that Rite Aid's "Response to Request for Information No. 3" is direct evidence of discrimination. The document shows, without inference, that Longoria set out to hire a man to replace James and Wilson. Therefore, Rite Aid took Williams' sex into account when it decided not to rehire her.

Longoria testified at trial that Rite Aid's "Response to Request for Information No. 3" was not a completely accurate representation of what he told the lawyer who prepared it. According to Longoria, he preferred that male employees unload the liquor delivery trucks and perform other manual tasks at Store No. 7337, but his preferences did not come into play when he hired Mitchell. The Court finds Longoria's explanation unpersuasive. Having expressed his preference on a number of occasions, and having admitted that while he was at the store, no female employee ever unloaded a liquor delivery truck, it would be unreasonable to believe that Longoria's bias did not play a part in his decision to hire Mitchell.

Having found direct evidence of discrimination, the Court must now examine Rite Aid's mixed-motives defense.

2. Rite Aid's Mixed-Motive Defense

Although Rite Aid couches its argument in terms of pretext, it essentially argues that it would have made the same decision not to rehire Williams regardless of her sex because (1) it

believed she was physically unable to perform the job and (2) she had been involved in two disturbances at Store No. 7337.

The Court notes that Rite Aid's argument regarding its perception of Williams' inability to do the job is based in large part on Williams' applications for and receipt of supplemental security income and disability insurance benefits. However, Rite Aid was not aware of Williams' applications when it decided not to hire her. Thus, such evidence is irrelevant regarding Rite Aid's motivation for that decision. Rite Aid, however, presents other evidence that it believed Williams was physically unable to do the job: Longoria testified at trial that he did not believe that Williams was physically able to do the job because she was obese, often short of breath, and occasionally complained of back pain and other health problems.⁶

Rite Aid also offers evidence that it would have made the same decision not to rehire Williams because of her behavior during and after her employment at Rite Aid. Specifically, Rite Aid alleges that it refused to rehire Williams because she caused two disturbances in Store No. 7337. On December 12, 1998, Williams told Bates that she must be "the pet" and accused Bates of sleeping with Longoria to keep her job. Soon after Mitchell was hired in January 1999, Williams loudly questioned him about his employment with Rite Aid and repeated her derogatory statements to Bates. A number of customers witnessed both of these disturbances. Additionally, Douglas Self, Barbara Wheaton, and Patricia Anne Jacobs, who all worked at Rite Aid with Williams, testified at trial that Williams was rude to customers and co-workers. The Court concludes that this evidence is sufficient to show that Rite Aid would not have rehired

⁶As noted above, the Court has ruled that the EEOC is estopped from denying that Williams was unable to work. Thus, Rite Aid's evidence regarding its perception of Williams' physical ability to do the job is uncontroverted.

Williams regardless of her sex.

Accordingly, the EEOC is precluded from recovering all but injunctive relief and costs.

C. Appropriate Relief

“If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate” 42 U.S.C. § 2000e-5(g)(1). “Ordinarily, a court may not enjoin conduct that is neither threatened nor imminent.” *Walls v. Mississippi State Dept. of Public Welfare*, 730 F.2d 306, 325 (5th Cir. 1984) (citing *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 100 (5th Cir. 1963)). “While the court’s power to grant injunctive relief may survive discontinuance of the illegal conduct in order to prevent future wrongdoing, the necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility.” *Walls*, 730 F.2d at 325 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Thus, to obtain the injunctive relief that it seeks, the EEOC must show that there is a cognizable danger that Rite Aid will in the future take sex into account in making an employment decision. The Court concludes that the EEOC has failed to do so.

The Court is satisfied that, regardless of what may have happened in the past, Longoria is well aware that his personal biases cannot be taken into account when making hiring decisions. Rite Aid has in place a discrimination prevention policy which reinforces through training and education the idea that the best person for the job should be hired, regardless of sex. Further, there is no evidence of a broad employment practice involving discrimination against females,

and Rite Aid presented evidence to the contrary.⁷ Under these circumstances, injunctive relief would be inappropriate.

D. Rite Aid's Counterclaim

Rite Aid seeks attorney's fees in the event that it is found to be the prevailing party. Having found direct evidence that Rite Aid discriminated against Williams by taking her sex into account when it decided not to rehire her, the Court concludes that Rite Aid is not a prevailing party. Accordingly, Rite Aid cannot recover attorney's fees.

III. Conclusion

For the foregoing reasons, the Court finds that the EEOC has presented direct evidence that Rite Aid engaged in an unlawful employment practice when it refused to rehire Williams based in part on her sex. Rite Aid has presented compelling evidence that it would have made the same decision not to rehire Williams regardless of her sex because it felt she was physically unable to do the job and because of her behavior during and after her employment with Rite Aid. Therefore, the EEOC is limited to recovering injunctive relief and costs. Because the Court concludes that the EEOC has failed to prove that a cognizable danger exists that Rite Aid will in the future take sex into account in making an employment decision, injunctive relief is inappropriate, and the Court, exercising its discretion, concludes that each party should bear its own costs.

MONROE, LOUISIANA, this 26 day of July, 2002.

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ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

⁷Since January of 1999, females have comprised eighty-three percent of Rite Aid's employees in the market encompassing Store No. 7337.