IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *

v. * Civil No. JFM-99-1670

LUCKY 9 CAR WASH *

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MEMORANDUM

The EEOC has brought this enforcement action on behalf of Lena Gaither against Lucky 9 Car Wash LP under the Age Discrimination In Employment Act. Discovery has been completed, and defendant has moved for summary judgment. The motion will be granted.

I.

Defendant purchased a car wash in February 1995. Prior to that time, Gaither had worked for 23 years for the previous owners of the car wash. After defendant purchased the car wash, it installed new equipment that improved productivity. The new equipment also directly affected Gaither's job. The cash register was replaced with a computer; Gaither was required to accept payment by credit card (not just cash as before); and it became her responsibility to balance her cash drawer daily. Moreover, the tracks on which the cars moved through the washing process were replaced, and the new processing equipment increased the number of cars processed per hour. Thus, enhanced speed at the cashier's counter was necessary.

On March 18, 1996, Gaither received a telephone call from a representative of defendant informing her that her employment was being terminated because she was too slow and that

customers complained about her service.[1] According to Gaither, she was shocked by this call because up to that time she had received only praise about her performance. She testified on deposition that Steve Harris, the owner of defendant, had observed her performing her duties three or four times a month and had told her on more than one occasion that she was doing a good job and should "keep up the good work." Gaither further testified that the manager of the location where she worked always told her she was doing a good job. Gaither also had received two $50 bonuses for having offered club card memberships to a "mystery shopper" defendant sent in to the car wash for quality control purposes.

Gaither was 50 years old when her employment was terminated. She had shared the position with Betty Thoma, another cashier who was in her 60's. Thoma quit her job in March 1996.[2] One of the persons replacing Gaither was Shawnta Sembly who was 19 years old.[3] Sembly herself was discharged by defendant for performance reasons before May 1996.

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[1]In its summary judgment papers defendant makes passing reference to the fact that Gaither experienced several shortages, at least on paper, in her cash drawer. However, there is no evidence, at least no evidence sufficient for summary judgment purposes, to suggest that Gaither was discharged for dishonesty.

[2]According to the EEOC's opposition memoranda, Thoma quit after a note had been left at her register stating "You're too old - quit." However, the portion of Gaither's deposition cited by the EEOC in support of this allegation does not so state. Similarly, the portion of the affidavit submitted by Gaither to the EEOC also cited in support of this allegation states only that Thoma "found a harassing note written by [the location manager]" without describing the contents of the note.

[3]Gaither also testified that another person who replaced her was named "Sarah," a 16 year old. The only person employed by defendant as a cashier with a similar name was "Sara Smuck" who was 47 years old. Smuck was discharged for performance reasons before May 1996.

II.

Viewing the evidence most favorably to the EEOC, it has demonstrated that (1) Gaither was a member of the protected age group, (2) she was discharged, (3) at the time of her discharge, she was performing her job at a level that met her employer's legitimate work expectations, and (4) following her discharge, she was replaced by someone of comparable qualifications outside the protected class. Thus, the EEOC has proved its prima facie case. See EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992).

Defendant, in turn, has articulated legitimate non-discriminatory reasons for Gaither's discharge: her slowness and customer complaints. Accordingly, the burden shifts to the EEOC to demonstrate that these articulated reasons are pretextual and that plaintiff's age was the reason for her discharge. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-08 (1993). The EEOC has not met this burden. The only legally competent evidence that the EEOC has produced in an attempt to meet its burden is Gaither's own testimony about the acceptable quality of her work performance and statements allegedly made to her by her supervisors that she was performing acceptably.[4] At most, this evidence casts doubt on the credibility of the reasons articulated by defendant for discharging Gaither. It is not sufficient to support any affirmative finding that Gaither's age was the reason for the termination of her employment.

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[4]The EEOC has submitted the affidavit of one of its investigators concerning notes of interviews she conducted of other employees of defendant who allegedly said that Gaither was a good worker. However, these statements are hearsay and cannot be properly considered in ruling on a summary judgment motion. See Fed. R. Civ. P. 56(e).

Put in the vernacular of employment discrimination law, the EEOC's evidence does not provide the "plus" necessary under the "pretext plus" test established by Hicks and its progeny.[5] See Vaughan v. Metroheath Co., 145 F.3d 197, 202 (4th Cir. 1998). Defendant's action in discharging Gaither may be suspect but suspicion alone does not create a viable cause of action. Summary judgment must be granted where the evidence proffered by a party is insufficient to meet its burden of proof, see, e.g., Celotex Corp. v. Catrett, 477 U.S. 321, 324 (1986), and that is the case here.

Date: April 26, 2000

J. Frederick Motz
United States District Judge

[5]Also absent in this case is any statistical evidence demonstrating that defendant unlawfully discriminates on the basis of age. Indeed, the evidence that has been presented might suggest to the contrary. Of the fifteen employees discharged by defendant during the period from February 1, 1995 to April 1, 1996, only four were over 40. Of course, although this seems to be a small percentage, without knowing the percentage of persons over the age of 40 employed by defendant during that period (which is not shown on the summary judgment record), the significance of that percentage cannot be ascertained.