UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

SWENK-TUTTLE PRESS, INC.,

Defendant.

Case No. 97-70679

Hon. John Corbett O'Meara

OPINION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the court on Defendant's January 30, 1998 Motion for Summary Judgment. Plaintiff filed a response on February 25, 1998. Defendant filed a reply on March 9, 1998. Oral argument was heard on Friday, March 27, 1998. For the reasons set forth below, the court will grant Defendant's motion for summary judgment.

BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") has brought two claims in this action. First, the EEOC alleges that Defendant Swenk-Tuttle Press, Inc. ("STP") violated the Equal Pay Act when it paid higher wages to a male employee, Michael Loader ("Loader"), than it paid to the charging parties, Kristine Casper ("Casper"), Pamela Robinson ("Robinson"), and similarly situated female Betty Woods ("Woods"), for performing substantially equal work in STP's pre-press department. Second, the EEOC claims that STP retaliated against Kristine Casper for filing a claim with the EEOC by moving her to a different shift. Defendant has moved for summary judgment on both of Plaintiff's claims.

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Defendant STP is a commercial printing company located in Adrian, Michigan. Robinson, Casper, and Woods were employed in the pre-press department at STP. Several different types of work are done in the pre-press department, including plate making, camera, stripping and dyluxing. A "multi-skilled" employee is one who can perform all of the above functions.

1. The Parties

Pamela Robinson began her employment with STP in October, 1987 as a stripper in the pre-press department. In September 1991, Robinson became the pre-press department supervisor on the day shift. Robinson supervised the day shift until May 1992. Robinson was considered a multi-skilled employee in the pre-press department. When STP re-hired Loader in January, 1994, Robinson was earning $12.20 per hour.

Betty Woods has not filed a charge. The EEOC contends that she is a similarly situated party and is acting on her behalf. Woods began her employment with STP in 1965 as a press operator. Two years later, she moved into the pre-press department. In March 1986 Woods became department supervisor; she continued in that role until September 1991, when she moved to a different department. See Pl. Br. Ex. 14. In August 1993 Woods was asked to return to the pre-press department. When STP re-hired Loader in January 1994, Woods was considered multi-skilled in the pre-press department. At this time, Woods was earning $14.55 per hour. See Pl. Br. Ex. 15.

Kristine Casper first worked at STP from June 1986 through January 1989. Casper was not a multi-skilled during that period. Casper left STP in January of 1989 because she was pregnant. Casper was rehired at STP in 1993. Casper requested an hourly wage of $12.00, two weeks of vacation time her first year of employment, and that she be credited with seniority reflecting previous employment with STP. Defendant instead offered Casper $10.00 per hour, two weeks of

vacation after her first year, and no seniority retention. Casper accepted the offer. At the time of her re-hire, Casper was considered multi-skilled in STP's pre-press department.

Approximately one month after Casper was rehired, STP rehired Michael Loader as a multi-skilled employee for its second (afternoon) shift. Loader previously worked for STP in the pre-press department from January 1991 to August 1992. Characterized by STP management as a "superstar," Loader was hired again in January of 1994. Loader requested $15.50 per hour, personal and vacation time, and credit for his previous years of employment. STP agreed to pay Loader $15.50 per hour and offered him two weeks of vacation during his first year with no personal time. The EEOC has established Loader as the sole male comparator for its argument regarding STP's wage disparities.

2. Other Facts

In December 1994, STP managers held a meeting with pre-press department employees to discuss dissension in the department. At the meeting, Casper and Robinson complained about the unfairness of other employees in the department earning more for performing equal work. See Def. Br. Ex. B at 15. Approximately one month after the meeting, Casper received a $2.00 per hour increase, bringing her hourly wage rate to $12.25. See Def. Br. Ex. F. Robinson received a $1.50 per hour raise. See Pl. Br. Ex. 1. At this time, Loader earned $15.50 per hour. See Def. Br. Ex. L. On December 28, 1994, Casper and Robinson filed charges against STP for violations of the Equal Pay Act with the EEOC.

In the summer of 1995, STP created a "mid-shift" for the pre-press department that would run from noon to 8:00 p.m. The multi-skilleds on first shift as of August 1995, were Russell Smith (the supervisor), Woods, Robinson, and Casper. On August 8, 1995, Casper was advised of her assignment to the new mid-shift; she was told she was selected because, of the three people qualified

from the first shift, she had the least seniority in the department. See Pl. Br. Ex. 7 (Smith Dep.) at 68. Casper advised the supervisor that she would have difficulty working that shift due to her child care arrangements. See Def. Br. Ex. A (Casper Dep.) at 147; Smith Dep. at 68-69. On August 10, 1995, Casper tendered her resignation. See Def. Br. Ex. P.

LAW AND ANALYSIS

A. THE EQUAL PAY ACT CLAIM

To establish an Equal Pay Act claim, the Commission must show that Casper, Robinson and Woods were being paid less than Loader for work that requires equal skill, effort and responsibility and that is performed under similar working conditions. See 29 U.S.C. § 206(d)(1); see also EEOC v. Romeo Community Sch., 976 F.2d 985 (6th Cir. 1992). The Sixth Circuit has held that analysis of a claim of unequal pay for equal work is essentially the same under both the Equal Pay Act and Title VII. See Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981).

Defendant concedes that Plaintiff can establish a prima facie Equal Pay Act claim. As in Title VII cases, once a prima facie case is established, the burden shifts to the Defendant to prove that the wage differential is justified by one of the four exceptions set forth in 29 U.S.C. § 206(d)-- "payment made pursuant to 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) a differential based on any other factor other than sex." See id.; see also Romeo Community Sch., 976 F.2d at 988 (citing Corning Glass Works v. Brennan, 417 U.S. 188 (1974)); Bence v. Detroit Health Corp., 712 F.2d 1024, 1029 (6th Cir. 1983).

STP argues that the pay differential between Casper, Robinson, Woods and Loader is based on "any other factor other than sex." Under Sixth Circuit law, the "factor other than sex" defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a

legitimate business reason. See EEOC v. J.C. Penney Co., 843 F.2d 249, 252 (6th Cir. 1987).

Defendant cites several factors other than sex that contributed to its decision to pay Loader more. First, Defendant argues that Loader was a "superstar" who was recruited to help turn the business around. See EEOC v. City Council of the City of Cleveland, 1989 WL 54252, *7 (6th Cir. 1989) (noting that the male comparator was a "superstar" and that his "'unique employment history and the evidence that he had carved out for himself a special niche . . . justified the disparity in salaries"); see also Strag v. Board of Trustees, 55 F.3d 943, 951 (4th Cir. 1995).

Second, Defendant claims it intended to begin electronic pre-press operations, and that it was looking for individuals with strong traditional skills, like Loader, to train. When STP learned that Loader was available, STP's pre-press supervisor, Koerber, was directed to recruit Loader and pay him "whatever" it took to get him to STP. See Koerber Dep. at 43.

Finally, Defendant contends that Loader would not return to STP unless offered more money than he made at his former job. In Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995), the court held:

> While an employer may not overcome the burden of proof on the affirmative defense of relying on "any factor other than sex" by resting on prior pay alone, as the district court correctly found, there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience. This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense.

Id. at 955. In combination with STP's assertion that Loader was a superstar, the fact that he was paid $15.00 per hour by his prior employer is a valid justification for paying him more at STP.

The court concludes that Defendant has articulated several factors other than sex that contributed to the disparity in wage rates between Loader and Casper, Robinson and Woods. The EEOC has failed to point to any evidence that the wage disparity was based on sex. Accordingly,

the court further concludes that there are no genuine issues of material fact precluding summary judgment for Defendant on the Equal Pay Act Claim.

B. THE RETALIATION AND CONSTRUCTIVE DISCHARGE CLAIM

The EEOC claims that Casper was constructively discharged when she was moved to the new mid-shift. The EEOC does not challenge STP's creation of the mid-shift as discriminatory. Instead, the EEOC contends that STP's assignment of Casper to this shift, when it knew she could not work the hours, constituted retaliation for her filing of EEOC charges and led to her constructive discharge.

In order to establish a prima facie claim of retaliatory discharge, a plaintiff must show: 1) that she engaged in activity protected by Title VII; 2) that she was the subject of adverse employment action; and 3) that the is a causal link between her protected activity and the adverse action of her employer. See EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993); Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986). Defendant disputes the EEOC's establishment of the second and third prima facie elements.

1. Adverse Employment Action

The EEOC asserts that the decision to place Casper on the mid-shift was made by individuals who knew that Casper had filed a discrimination charge. See Def. Br. Ex. N at 65-66. The EEOC also asserts that it was common knowledge that Casper needed to work the day shift because of her child care arrangements. The EEOC claims that reassigning Casper to the mid-shift, knowing of Casper's child care difficulties, was a materially adverse employment action.

The court concludes that STP's transfer of Casper to the mid-shift was not an adverse employment action. The company simply created a new shift; there was no decrease in pay,

responsibility or benefits. Of the qualified people on the earlier shift, Casper had the least seniority. See Kocsis v. Multi-Care Management, Inc., 87 F.3d 876, 885-86 (6th Cir. 1996) (holding that an employment action was "materially adverse" where a plaintiff received "significantly diminished material responsibilities," including "termination of employment, demotion evidenced by a decrease in wage or salary, less distinguished title, material loss of benefits, or other indices that might be particular to a particular situation"); see also Darnell v. Campbell County Fiscal Ct., 731 F. Supp. 1309, 1313 (E.D. Ky. 1990), aff'd, 924 F.2d 1057 (6th Cir. 1991) (holding that a lateral transfer was not an adverse employment action and noting that "[b]arring unusual circumstances . . . a transfer at no loss of title, pay, or benefits does not amount to a constructive discharge or adverse employment action").

2. Causal Connection

The court concludes that there is no causal connection between STP's transfer of Casper to the mid-shift and Casper's filing of charges with the EEOC. The mid-shift was created eight months after Casper filed the charges. See Booker v. Brown & Williamson, 879 F.2d 1304, 1314 (6th Cir. 1989) (noting that the "mere fact that an adverse employment decision occurs after a charge of discrimination is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the discrimination claim").

The EEOC cannot establish a prima facie case of discriminatory retaliation because there was no adverse employment action. Even if the employment action was adverse, the EEOC cannot establish a causal connection between Casper's filing of charges and Defendant's decision to assign her to the mid-shift. The court will grant Defendant's motion for summary judgment on the retaliation claim.

ORDER

It is hereby **ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED.**

It is further **ORDERED** that Plaintiff's complaint is **DISMISSED.**

John Corbett O'Meara
United States District Judge

Date: APR 1 1998