FILED
AUG 13 2003
U. S. DISTRICT COURT
EASTERN DISTRICT OF MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	Case No. 4:02CV298 RWS
DILLARD'S, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Equal Employment Opportunity Commission ("EEOC") filed this action on behalf of Sharon Conway. Conway worked as a part-time sales associate for Defendant Dillard's, Inc., a retail department store. She resigned her employment with Dillard's when Dillard's declined to change her work schedule for the month of December, 2002. Conway wanted her schedule modified to so that should could attend functions at her church. EEOC alleges that Dillard's discriminated against Conway on the basis of her religion which resulted in her constructive discharge. Dillard's has moved for summary judgment. The Court will grant summary judgment because Conway failed to take affirmative steps short of resigning that a reasonable employee would take to make her conditions of employment more tolerable. Consequently, EEOC has failed to establish that Conway was constructively discharged.

Background

The undisputed facts of the case are as follows. Since 1995, Plaintiff Sharon Conway has been a member of the Full Gospel Baptist Church. During the time relevant to this case, she practiced her faith at a local church known as The New Mount Gideon West Baptist Church. In April 2000, Conway quit her full-time job to return to school. She decided that her commitments

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to her church and school schedule made working part-time at a department store a more flexible option for her employment. In July 2000, Conway applied for a part-time sales associate position at Defendant Dillard's. She interviewed with Corrine O'Dell, an Assistant Area Sales Manager. Conway told O'Dell that she could not work Tuesday's because she had to prepare for the youth ministry held on Tuesday evenings. She also could not work Wednesdays because after her school class she had to prepare for Bible study held on Wednesday nights. She was also not able to work Sunday mornings so that she could attend church service, nor could she work the evenings of the first and fifth Sunday of each month in order to attend church functions.

Conway began working for Dillard's at its Galleria store on July 19, 2000, as a sales associate on the third floor. Near the end of August 2000, the department in which Conway was employed moved to the second floor. At that time Conway came under the supervision of Lynn Adolph, the Area Sales Manager. In the fall of 2000, Adolph had approximately 40 sales associates under her supervision.

Dillard's uses a computer system to generate monthly work schedules for its sales associates. The work schedules are based on a combination of (i) default schedules for some sale associates which are usually set when the sales associates are hired and, (ii) the store's anticipated sales volume for that particular month. After the computer generates a schedule, the Area Sales Manager, like Adolph, may make certain changes prior to the schedules being closed and final. The schedules are deemed closed on the Friday before the month they are in effect. After the schedules are closed, any sales associate who wants to change their individual schedule must either find another associate to switch work times or get the Store Manager or Assistant Store Manager to authorize the change.

During the months of July, August, September, October, and November of 2000, Conway and Dillard's were able to reach an agreement on Conway's work schedule. Dillard's either did not schedule Conway to work on the days she requested to be off from work or, after the schedule was released, modified Conway's work schedule to accommodate many of her requests. Conway did work on some days which had she requested to be off.[1] In addition, on at least one occasion, Conway switched shifts with a co-worker.

On November 17, 2000, Adolph issued work schedules for the month of December. Scheduling for the month of December is more difficult than other months because Dillard's has its largest sales volume in December. Due to the large demand for work shift coverage by sales associates, December is deemed to be a "black out" month, meaning that no vacations can be scheduled and there are no guarantees regarding requests from sales associates to make changes to their work schedules.

Conway's December schedule had her slated to work on Sunday, November 26th, at 10:00 a.m.; Monday, November 27th (a day Conway had requested to have off); Sunday, December 3rd (the first Sunday of the month); one Tuesday and two Wednesdays.

On Sunday, November 19th, Conway wrote a memorandum to Adolph alerting her to

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[1] Conway's August schedule had her slated to work on days which she requested to be off. Dillard's changed the schedule to accommodate Conway. In September Dillard's changed the schedule so Conway did not have to work on Sunday, September 10, but Conway's records indicate that she may have worked on Monday, September 25th, a day that she had requested to be off. The October schedule had Conway slated to work on the fourth Sunday and the fifth Monday of the month, days which she had requested to be not scheduled to work. Conway worked on the evening of that Sunday and the afternoon and evening of that Monday. In November, Conway was scheduled to work on the afternoon of Sunday, September 5th and two Tuesdays, the 7th and 14th. Conway agreed to work the afternoon shift on Sunday the 5th and Dillard's removed her from the work schedule for the 7th and 14th.

Conway's scheduling conflicts. Conway did not receive a response from Adolph so Conway gave Adolph a note listing the days and times that she was available and unavailable to work during the December calendar schedule. Conway spoke to Adolph on Friday, November 24th, and said that she could not work on Sunday mornings and Wednesdays. Adolph told Conway that she would discuss Conway's schedule with the Store Manager.

On Saturday, November 25th, Conway was working at Dillard's. Adolph called her into the office and informed her that she had spoken with the Store Manager and that they would not be able to accommodate Conway's schedule change requests for the month of December. Conway told Adolph that she was unable to work on Sunday mornings. She told Adolph "I don't know what we are going to do, because I won't be here tomorrow" (Sunday, November 26th). Adolph suggested that she could take unexcused absences which could lead to her termination. (Sales associates receive a written warning for each of the first three unexcused absences in any six month period and will be terminated on the fourth unexcused absence.) Conway replied "Why would I do that and mess up my work record?" Conway reiterated that she would not come to work the next day. Adolph told her that another option was that she could resign. Conway chose to resign that day.

Dillard's records indicate that there were sales associates in Conway's department who were not scheduled to work on Sunday, November 26th and on the two Wednesdays in December that Conway was scheduled to work. Sales associates do not have access to each other's work schedules. However, they are free to switch shifts and did so by directly asking other associates or posting a note on the bulletin board.

Conway did not attempt to contact other associates or post a notice in an effort to switch

shifts for November 26th and the other dates that she desired to be off of work in December. Conway stated in her deposition that Adolph had tried to accommodate Conway's schedule requests until the December scheduling conflict.

After her resignation from Dillard's, Conway filed a charge of religious discrimination with EEOC. EEOC filed this case on Conway's behalf alleging that Dillard's had discriminated against Conway on the basis of her religion in violation of Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000e *et seq.*

Legal Standard

In considering whether to grant summary judgment, a district court examines the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any ...." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Lynn v. Deaconess Medical Center, 160 F.3d 484, 486 (8th Cir. 1998)(citing Fed. R. Civ. P. 56(c)). The party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying those portions of the affidavits, pleadings, depositions, answers to interrogatories, and admissions on file which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When such a motion is made and supported by the movant, the nonmoving party may not rest on his pleadings but must produce sufficient evidence to support the existence of the essential elements of his case on which he bears the burden of proof. Id. at 324.

Analysis

An employee establishes a prima facie case of religious discrimination by showing that: (1) the employee has a bona fide religious belief that conflicts with an employment requirement; (2) the employee informed the employer of this belief; (3) the employee suffered an adverse employment action for failing to comply with the conflicting employment requirement. Wilson v. U.S. West Communications, 58 F.3d 1337, 1340 (8th Cir. 1995). Once the employee has established a prima facie case of discrimination, the burden shifts to the employer to show either that it reasonably accommodated the religious practice, or that any accommodation would have resulted in undue hardship. Baz v. Walters, 782 F.2d 701, 706 (7th Cir. 1986). If the defendant successfully rebuts the prima facie case, the plaintiff, who has the ultimate burden of persuasion, must show that the employer's proffered reasons for failure to accommodate are a pretext for discrimination. Id.

Plaintiff EEOC alleges that Dillard's discriminated against Conway by scheduling her to work on days that she had religious obligations. Defendant Dillard's claims that EEOC failed to establish two elements of a prima facie case. First, Dillard's claims that Conway did not establish that she had a bona fide religious belief based on questions asked of Conway in her deposition. Dillard's inquired whether Conway would find it acceptable to listen to tapes of Bible study class and Sunday religious service if for some reason she was unable to attend personally. Conway responded that it would be acceptable. (Conway Dep. at 96) Dillard's concludes from this that personal attendance at Conway's religious functions was merely a personal preference and not a requirement of Conway's bona fide religious belief. Dillard's concludes that any tension between its work schedules and Conway's desire to have off does not

create a conflict with a bona fide religious belief. This conclusion, based on the record before the Court, is unwarranted.

In her deposition, Conway also stated that a failure to regularly attend Bible study jeopardized a person's spiritual growth and amounted to sinning. (Conway Depo. at 225-226) The Court concludes that at a minimum Conway's deposition testimony creates a genuine issue of material fact as to the issue of whether her desire to attend Bible study and other church services is part of her bona fide religious belief. Summary judgment on this point is not appropriate.

Dillard's second point is that Conway failed to establish that she suffered an adverse employment action for her failure to comply with Dillard's December work schedule. EEOC asserts that Conway was constructively discharged based of Dillard's consistent unwillingness to defer to all of Conway's requests for time off to pursue her religious functions and obligations. The straw that broke the camel's back was Dillard's unwillingness to change Conway's December work schedule. It is undisputed that Conway quit her employment with Dillard's after her supervisor refused to alter the December work schedule. The adverse employment prong of Conway's prima facie case of discrimination is Conway's alleged constructive discharge.

To establish that she was constructively discharged, Conway must show that Dillard's deliberately created an objectively intolerable working conditions with the intention of forcing her to resign and Conway actually resigned as the result of those conditions. Moisant v. Air Midwest, Inc., 291 F.3d 1028, 1032 (8th Cir. 2002). The question of the intolerability of working conditions is judged by an objective standard, not the plaintiff's subjective feelings. Phillips v. Taco Bell Corp., 156 F.3d 884, 890 (8th Cir. 1998). Conway must demonstrate that a

reasonable person would find the working conditions at Dillard's intolerable. "To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem." Jackson v. Arkansas Dept. of Educ., Vocational and Technical Educ. Div., 272 F.3d 1020, 1027 (8th Cir. 2001). "A plaintiff must take affirmative steps short of resigning that a reasonable employee would take to make her conditions of employment more tolerable." Jones v. Fitzgerald, 285 F.3d 705, 716 (8th Cir. 2002).

The basis of Conway's religious discrimination claim is that Dillard's scheduled her to work on days that Conway had religious obligations. In particular, the schedule for the month of December create a conflict that resulted in Conway's resignation.

The record clearly establishes that from her hiring in July 2000 through the November schedule, Dillard's and Conway had worked out scheduling issues. Dillard's either scheduled Conway off on days she requested or changed the schedule to accommodate most of Conway's requests. On several occasions Conway worked on days that she had asked to be off but was scheduled to work. She also took advantage of Dillard's work policy by switching at least one shift with another sales associate in October 2000.

Then came the posting of the work schedule for the month of December 2000, the busiest month of the year for the store. Conway was scheduled to work six days which she requested to have off including Sunday, November 26th. Conversely, Conway was scheduled to be off on the majority of days that she requested. Conway received her December schedule by November 19th and alerted her supervisor, Adolph, about the scheduling conflict. A decision about Conway's schedule was not finally reached by Dillard's until Saturday, November 25th. On that date Adolph told Conway that her schedule would not be changed. Conway told Adolph that she was

not sure what they were going to do because Conway would not be coming to work the next day on the 26th because it was a Sunday and she needed to attend the service at her church. Adolph suggested that she could take an unexcused absence. Conway rejected that suggestion and reiterated that she would not come to work the next day. Adolph told her that another option was that she could resign. Conway chose to resign.

The issue before the Court whether Conway's evidence can meet the threshold requirements of a constructive discharge as a matter of law. Were the working conditions that Conway was subjected to intolerable as judged by an objective standard? No. The fact that Dillard's had made accommodations in the months preceding the December schedule and that Conway had otherwise resolved all other conflicts is not sufficient to give rise to an inference that Dillard's deliberately created an objectively intolerable working conditions with the intention of forcing Conway to resign. December is the busiest sales month for the store with a greater demand placed on all sales employees and their work schedules. Dillard's unwillingness to change December's work schedule did not create an intolerable working condition.

Conway had several options to attempt to resolve her conflict. The most immediate need was to cover her shift on Sunday, November 26th, the day after Conway received a final decision that the December schedule would not be changed. Conway did not attempt to get another sales associate to cover the shift either by asking someone or posting a notice on the bulletin board. She knew a week earlier of the scheduling conflict but she did not attempt to make a backup plan in case Dillard's declined to change the schedule. Nor did she attempt to find a replacement at the last minute. Another option was to take an unexcused absence for that shift (she only had one previous unexcused absence in the six-month period and an employee could accrue four such

absences before termination). Then she could have tried to switch her conflicted December shifts with other sales associates. Conway never even attempted to resolve her conflict in this manner. Instead, Conway chose to resign.

In determining whether Conway's working conditions were intolerable under an objective standard, the duty of the employee to the employer is an issue not to be overlooked. Although such an issue is frequently discussed regarding an accommodation defense asserted by an employer, it also lends its self to a determination of whether an employee acted reasonably in a constructive discharge claim. The Eighth Circuit has stated that,

> [a]n employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible. In such a case, the employee himself is responsible for any failure of accommodation and his employer should not be held liable for such failure. ... Nor do we think that an employer should have to adjust its entire work schedule to accommodate individual religious preferences and practices, particularly where procedures and scheduling already provide a measure of elasticity in switching work shifts and in allowing excused absences.

Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977). In considering the reasonableness of an employee's action, the Court is also mindful of the Eighth Circuit's admonition in a constructive discharge case that a plaintiff must take affirmative steps short of resigning that a reasonable employee would take to make her conditions of employment more tolerable. Jones, 285 F.3d at 716.

In the present case, Conway unreasonably placed the entire burden of dealing with her December work schedule conflicts on her employer. EEOC claims that Dillard's decision to not change the work schedule on November 25th came too late for Conway to make any reasonable

effort to cover her shift. The facts of the case show that Conway did not make any effort to deal with her December work schedule conflicts aside from requesting that Dillard's make shift changes. The Court has already noted that Conway could have attempted to switch shifts with other employees or, as an immediate fix, take an unexcused absence from work on November 26th. She could then have tried to switch shifts for the remaining days that she wanted off. She did not attempt to do so. Under such circumstances the Court concludes that Conway did not take affirmative steps short of resigning that a reasonable employee would take to make her employment more tolerable. It follows that, as a matter of law, the working conditions at Dillard's was not intolerable as seen from an objective standard. Consequently, EEOC has failed to establish the third element of a prima facie case of religious discrimination, that is, an adverse employment action.

Finally, Dillard's asserts that even if EEOC establishes a prima facie case of discrimination its policies and procedures created an effective accommodation to Conway's bona fide religious beliefs. Because the Court has determined that EEOC has failed to establish a prima facie case the Court will not address the merits of Dillard's accommodation argument.

Accordingly,

IT IS HEREBY ORDERED that Defendant Dillard's Inc.'s Motion for Summary Judgment [#24] is **GRANTED**.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 13th day of August, 2003.

AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED, FAXED AND/OR MAILED TO THE FOLLOWING INDIVIDUALS ON 08/14/03 by doleary

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42:2000e Job Discrimination (Employment)

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