UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
- and -	)	**Case No. 03-CV-0657-CVE-PJC**
HERBERT PHILLIP WOODEND,	)	
Plaintiff-Intervenor,	)	
v.	)	
BANK OF OKLAHOMA, a National Banking Association and subsidiary of BOK FINANCIAL CORPORATION, an Oklahoma Corporation,	)	
Defendant.	)	

ORDER

Now before the Court is the Motion of Plaintiffs Equal Employment Opportunity Commission and Intervenor for Partial Summary Judgment (Dkt. # 44). Plaintiff Equal Employment Opportunity Commission ("EEOC") and Plaintiff-Intervenor Herbert Phillip Woodend ("Woodend") assert that, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*., defendant Bank of Oklahoma ("BOK") terminated Woodend's employment. In particular, plaintiffs assert that BOK terminated Woodend's employment because he supported a subordinate who claimed that she was subjected to gender harassment and a hostile work environment. BOK claims that it eliminated Woodend's position essentially because it was redundant and it made his superior's management of lower level managers less effective.

Woodend's position was eliminated on May 7, 2002. On June 24, 2002, Woodend filed a claim with the EEOC. On September 24, 2003, the EEOC filed this action in federal court. On

November 12, 2003, Woodend moved to intervene, and was permitted to do so on December 10, 2003.

The EEOC and Woodend (collectively "plaintiffs") seek summary judgment on the following affirmative defenses asserted by BOK: that plaintiffs' claims are barred in whole or in part by the applicable statute of limitations; that Woodend failed to properly exhaust his administrative remedies as a condition precedent to the filing of this action; that Woodend's employment was terminable at will; and that Woodend failed to mitigate his damages. Based upon discovery, BOK now agrees that the EEOC's claim is not barred by the statute of limitations and that Woodend has properly exhausted his administrative remedies. BOK also agrees that the at-will doctrine does not apply to Title VII claims, but it denies that it committed any violation of Title VII with regard to Woodend. It also denies that Woodend has adequately mitigated his alleged damages and it wants the ability to address the procedures in the EEOC's investigation of Woodend's Charge of Discrimination.

I.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 250 (1986); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 317. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but

rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garratt v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

II.

A successful Title VII plaintiff may be entitled to an award of back pay as an equitable remedy unless the defendant pleads and proves, as an affirmative defense, that the plaintiff has failed to use "reasonable diligence" to attain "substantially equivalent" employment and thereby mitigate his damages. See Daniels v. Loveridge, 32 F.3d 1472, 1478 (10th Cir. 1994); Eastman Kodak Co. v. Westway Motor Freight, Inc., 949 F.2d 317, 320 (10th Cir. 1991); 42 U.S.C. 2000e-5(g). A reasonable, honest, good faith effort to mitigate damages is required, but the charging party "is not held to the highest standards of diligence," and the duty to mitigate "does not require him to be successful . . . ." United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 938 (10th Cir. 1979);

see Spulak v. K Mart Corp., 894 F.2d 1150, 1158 (10th Cir, 1990). To prove this affirmative defense,

> "the defendant must establish (1) that the damage suffered by plaintiff could have been avoided, i.e. that there were suitable positions available which plaintiff could have discovered and for which he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such position."

EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980) (quoting Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978)).

Woodend began an extensive job search within one week from the date his employment with BOK ended. He mailed out hundreds of resumes, utilized BOK outplacement services, registered with recruiters, and registered with on-line job searches. One website made over 790 contacts with his resume. Woodend expanded his search to numerous other states outside Oklahoma, and talked with friends and acquaintances about possible job opportunities. He applied to more than 15 banks, and expanded his search to fields outside the banking industry. Eventually, he accepted employment with a bank in Colorado in November 2002 – approximately five months after his the termination of his employment at BOK.

BOK does not dispute that Woodend applied for jobs after his BOK position was eliminated; however, BOK points out that Woodend was unable to recall, at his deposition, whether and how many job offers he received after he left BOK and before he accepted his current job. Further, of the offers that he could recall, it appears that he may have rejected them either because the salary was too low, or the job was "too small," not "a good fit" for him, or not "a good match." See Def. Resp. Br. (Dkt. # 50) at 2-3. Thus, BOK has shown that a genuine issue of material fact exists as to (1) whether the positions he rejected were substantially similar, or suitable, and that he was

qualified for them; and (2) whether he used "reasonable" care and diligence by rejecting them. Summary judgment is not appropriate as to this affirmative defense at this time.

III.

BOK does not deny that Woodend exhausted his administrative remedies, but argues that it should have the ability to address the procedures in the EEOC's investigation of Woodend's Charge of Discrimination. On August 11, 2004, the Court issued an order granting the EEOC's motion for a protective order to prevent the deposition of the EEOC investigator on Woodend's charge of discrimination, but it required the EEOC to identify the individual that the investigator interviewed. BOK contends that the EEOC investigator failed to interview the two individuals who made the decision to eliminate Woodend's position and, thus, BOK should not be permitted to assert the affirmative defense that Woodend failed to exhaust his administrative remedies.

The Court finds that the EEOC's challenge to the EEOC's investigation is not relevant to whether Woodend failed to exhaust his administrative remedies. It may present issues related to the admissibility of evidence, but it is not related to the assertion of an affirmative defense. The trial of this matter, a federal Title VII suit, is *de novo*. See, e.g., Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 838 (10th Cir. 1979). Although the Tenth Circuit has not spoken directly to the issue of whether a Title VII defendant may challenge the sufficiency of an EEOC investigation, it has recognized that no cause of action against the EEOC exists for challenges to its processing of a claim. Scheerer v. Rose State College, 950 F.2d 661, 663 (10th Cir.1991).

Other courts have spoken directly to the issue and held that allowing a Title VII defendant to challenge the sufficiency of the EEOC's investigation would significantly increase the potential for delay and divert the attention of the Court and the parties from the merits of the case. EEOC v.

Keco Industries, Inc., 748 F.2d 1097, 1100 (6th Cir. 1984) (citing EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 975 (N.D. Ill. 1981) (allowing such challenge "would effectively make every Title VII suit a two-step action" -- first as to the EEOC's determination and then to the merits); EEOC v. E.I. Dupont de Nemours & Co., 373 F. Supp. 1321, 1338 (D. Del. 1974) ("It is one thing for courts to insist upon procedural compliance with the Act and quite another for them to test the factual basis for Commission action.") As explained in Keco Industries, Inc.:

> The purpose of the EEOC's investigation of a discrimination charge is to determine if there is a basis for that charge. The reasonable cause of determination issued as a result of the investigation is designed to notify the employer of the EEOC's findings and to provide a basis for later conciliation proceedings.

748 F.2d at 1100. It is not designed to serve as an adjudication on the merits of the case.

The Court agrees with those cases prohibiting a "mini-trial" into the adequacy of the EEOC investigation. That is not to say that BOK cannot challenge the evidence underlying the determination or impeach the testimony of EEOC witnesses who may seek to rely upon the EEOC determination, as opposed to the underlying evidence, as probative of the plaintiffs' claims. The BOK simply cannot challenge the adequacy or sufficiency of the EEOC investigation itself. More to the point, there is no genuine issue of material fact as to whether BOK may rely upon an affirmative defense that Woodend failed to properly exhaust his administrative remedies.

IV.

IT IS THEREFORE ORDERED that the Motion of Plaintiffs Equal Employment Opportunity Commission and Intervenor for Partial Summary Judgment (Dkt. # 44) is hereby **GRANTED in part and DENIED in part.** It is granted as to the defendants' affirmative defenses that: (1) plaintiffs' claims are barred in whole or in part by the applicable statute of limitations; (2) Woodend failed to properly exhaust his administrative remedies as a condition precedent to the

filing of this action; and (3) Woodend's employment was terminable at will. It is denied as to the defendant's affirmative defense that Woodend failed to mitigate his damages.

DATED this 14th day of January, 2005.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE