

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LAUREL GREEN,

Plaintiff,

vs.

BROWN SHOW COMPANY, d/b/a/
FAMOUS FOOTWEAR,

Defendant.

Case No. 3:06-cv-00204 TMB

ORDER REGARDING
RECONSIDERATION

On August 31, 2006, Laurel Green, representing herself, filed an employment discrimination complaint under Title VII of the Civil Rights Act. An amended complaint was filed on October 10, 2006, and the defendant filed its answer on December 21, 2006. On August 10, 2007, the defendant filed a motion for summary judgment, which was denied in part on January 7, 2008. The defendant has now moved for reconsideration of that order, and the plaintiff has responded.¹

¹ See Docket Nos. 35, 38, 43, 44, 45, 46.

Racial Discrimination

The defendant claims that there were multiple reasons for Ms. Green's termination. However, Ms. Green has established a factual issue as to whether some of reasons given were pretextual. In her response, signed under declaration of penalty of perjury, Ms. Green states that white men in managerial positions were treated more favorably than she was, even upon termination, and were not "counseled for 'working off the clock' in regard to key exchange nor were they discharged for 'working off the clock.'"² In fact, Ms. Green did not perceive the exchange of keys as "working off the clock," since it was a common practice which was accepted in the workplace prior to her termination.³

Before May 25, 2004, Ms. Green declares, there are no records of performance problems, although she was fired only eighteen days after she was "counseled" about these issues.⁴ And she was terminated in spite of the fact that the previous year she had received a merit wage increase. As the Court explained in its order denying summary judgment as to the issue of race, the reasons given for Ms. Green's termination were actions that her supervisor either took herself

² Docket No. 44 at 3.

³ See Docket No. 22-2 at 58.

⁴ See Docket No. 44 at 2.

(involving breaching medical privacy), or asked that Ms. Green and other employees take (coming to work on non-working days to exchange keys).⁵

The defendant argues that Ms. Green could point to no specific evidence that her direct supervisor was a racist, and in fact, testified that she did not believe that she was.⁶ This testimony, however, appears to be a matter of semantics – the word “racist” being quite strong and derogatory – since Ms. Green filed both her administrative action and this suit, stating that she believes her termination to have been racially motivated.

The defendant raises the issue of the “same-actor” inference in this case, arguing that because the same person both hired and fired Ms. Green, there is a “strong inference” of non-discrimination.⁷ Ms. Green’s deposition testimony states that both Julie Knighton (her direct supervisor), and a regional or district manager, interviewed her for the job,⁸ but only that Julie Knighton fired her.⁹ Although the record is somewhat unclear as to whether Ms. Knighton actually hired Ms. Green,

⁵ See Docket No. 35 at 6.

⁶ See Docket No. 46 at 2, citing Docket No. 22-2 at 4.

⁷ See Docket No. 38 at 4, citing *Coghlan v. American Seafoods Co.*, 413 F.3d 1090, 1096 (9th Cir. 2005).

⁸ See Docket No. 22-2 at 2 (Deposition testimony at 9).

⁹ See *id.* at 9 (Deposition testimony at 58: In response to whether Julie counseled her about not clocking in when she came to the store for a key exchange, Ms. Green responded, “She fired me for it. Is that counseling?”).

or whether it was the decision of the regional/ district manager, or both, Ms. Green has overcome this inference with the evidence she has presented.¹⁰

The defendant also asserts, citing a 1993 Ninth Circuit case, that “a finding that one proffered reason was pretextual does not in itself support a finding of discrimination.”¹¹ The United States Supreme Court, in *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003), however, explained that an employer may still be liable under Title VII of the Civil Rights Act, when the employer may have had mixed motives (some discriminatory, and some non-discriminatory) for its conduct. In *Desert Palace*, the Court held that “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice,’ [b]ecause direct evidence of discrimination is not required in mixed-motive cases.”¹² This Court must, of course, follow the more recent United States Supreme Court case addressing mixed motive discrimination cases.

Based upon direct and/or circumstantial evidence, including the difference in the way Ms. Green was treated and the way other, white, employees have been

¹⁰ See, e.g., Docket No. 44 at 2 (“[When] a Caucasian male, Jim Renschen, was terminated by Knighton, a proper investigation was performed by Human Resources, and Knighton found Jim another job.”).

¹¹ Docket No. 46 at 4, citing in support, *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 600 (9th Cir. 1993).

¹² *Desert Palace*, 539 U.S. at 101-102, citing 42 U.S.C. § 2000e-2(m).

treated by the defendant, this self-represented plaintiff has created a question of fact as to her claims of discrimination based upon race.

Age and Parental Status

The Court also required Ms. Green to show that she fully exhausted her administrative remedies as to her claims based upon age and parental status.¹³ Ms. Green says that she brought these issues to the attention of the defendant, who told her that “it would channel all communication to and through the commission with respect to this matter until final resolution.”¹⁴ Because Ms. Green has not shown that

¹³ See Docket No. 35 at 9. The defendant claims that this issue was raised in its initial motion for summary judgment. See Docket No. 46 at 5-6. Although it was not raised in the body of the motion, the Court found mention the issue of exhaustion in a footnote. See Docket No. 21 at 10, n. 3 (“Ms. Green’s ASCHR and EEOC complaints did not include claims of discrimination on the basis of age or parental status. Therefore, she is not permitted to bring such claims before this court. Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002) (‘Incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are like or reasonably related to the allegations contained in the EEOC charge.’). Nonetheless, in the event that this Court determines that such allegations are related to the race discrimination claim, or that evaluation of such claims is necessary to address the wrongful termination claim, defendant refutes all claims here and requests summary dismissal thereof with prejudice.”). The defendant did not, however, cite any evidence in support of its contention that Ms. Green did not exhaust her administrative remedies, as required in a motion for summary judgment.

¹⁴ Docket No. 44 at 3.

she exhausted those claims administratively, however, they must be dismissed.¹⁵
Bringing those issues to the attention of her employer is not enough.

IT IS HEREBY ORDERED:

1. The defendant's initial motion for reconsideration at docket number 38 is stricken.¹⁶
2. The defendant's amended motion for reconsideration as to the issue of racial discrimination is DENIED.
3. The plaintiff's claims of discrimination based upon age and parental status are DISMISSED for failure to exhaust.

¹⁵ It was initially difficult for the Court to make a decision as to this issue, because Ms. Green apparently left out part of a sentence or statement regarding these claims, and attached no documentation to show that she exhausted her administrative remedies as to these issues. Therefore, Ms. Green was allowed to correct her response to the defendant's motion for reconsideration, and to include the full statement regarding any administrative exhaustion of her claims that she was discriminated against on the basis of age and/or parental status. See Docket Nos. 44 at 3 ("discrimination complaint on August 31, 2004 which included age and parental status," is a stand-alone statement), 47 (minute order allowing Ms. Green to correct her response to the defendant's motion for reconsideration, and include the full statement regarding any administrative exhaustion of her claims that she was discriminated against on the basis of age and/or parental status). Ms. Green's response and documentation, however, did not show that she raised these issues administratively. See Docket No. 48.

¹⁶ See Docket No. 45, requiring the defendant to file an amended motion with correct citations.

DATED this 1st day of April, 2008, at Anchorage, Alaska.

/s/TIMOTHY M. BURGESS
United States District Judge
