IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

KELLY CUMMINGS
Plaintiff

V. NO. 2:96CV93-B-B

CIRCUS CIRCUS MISSISSIPPI, INC.,
and CIRCUS CIRCUS ENTERPRISES d/b/a
CIRCUS CIRCUS CASINO
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiff, a black female, began employment with the Circus Circus Casino in Tunica, Mississippi, on August 8, 1994. At the time of the events giving rise to this complaint, the plaintiff worked as a cage banker, which required her to frequently lift bags of coins weighing approximately twenty-five pounds. The plaintiff became pregnant in October of 1995. During her first trimester, she experienced problems with her pregnancy, which caused her to miss work from late-December to mid-January on the instructions of her doctor. She returned to work on or about January 15, 1996, with instructions from her physician not to lift more than fifteen pounds. The note from her doctor imposing the lifting limitation also stated that she would be fully recovered six weeks postpartum. Since the baby was not due until July 14, 1996, the note from the plaintiff's physician indicated that the lifting restriction would be imposed until approximately the first of September.

When the plaintiff returned to work, she was directed to the Human Resources Director, Sherri Ohanian, to determine what action should be taken in light of the fifteen pound lifting restriction. Ohanian told the plaintiff that there was nothing she could do because everyone would be lifting more than fifteen pounds. The plaintiff's job as a cage banker required the ability to lift twenty-five pounds, as stated in the job description. Ohanian showed the plaintiff a list of available jobs to which the plaintiff might transfer. The sheet was folded so that the plaintiff could not see the entire list. The plaintiff asked about available positions as a cocktail waitress and a housekeeper, but was told that both jobs required the ability to lift greater than fifteen pounds. The plaintiff also asked about a dealer position, and was told that there were no more dealer school openings.

The following day, the plaintiff was terminated. The day after her termination, the plaintiff was told by a co-worker that another dealer school had been started, and that Ohanian's husband was teaching the class. The plaintiff also looked at another transfer list and saw that where Ohanian had folded down the list there was an opening listed for a human resources data entry clerk, which would have been a sitting position that the plaintiff could have applied for.

The casino had a policy whereby employees were allowed a leave of absence for medical reasons for up to six months. The defendants' stated reason for terminating the plaintiff was that the casino was unable to accommodate an eight-month leave of absence, which is the length of time the doctor's note indicated that the plaintiff would be under a lifting restriction. It is undisputed that Ohanian asked the plaintiff if there was any chance her physician would lift the restriction before the end of eight months, to which the plaintiff responded in the negative.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the

absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "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 Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The plaintiff has asserted a cause of action under Title VII for race and disability discrimination, as well as for violation of the Family and Medical Leave Act ("FMLA"). To present a prima facie case of race discrimination under Title VII, a plaintiff may show: (1) that he belongs to a racial minority; (2) that he was qualified for the position; (3) that he was terminated from employment; and (4) that he was replaced by someone outside the protected class. Young v. City of Houston, Tex., 906 F.2d 177, 180 (5th Cir. 1990) (citing McDonnell-Douglas v. Green, 411 U.S. 792, 36 L. Ed. 2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207 (1981)). However, the necessary elements of a prima

facie case are not inflexible, but rather, they vary depending upon the facts of the particular case. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 641 (5th Cir. 1985). A plaintiff may also present a prima facie case of race discrimination by showing that he was within the protected class, that he was qualified for the position, and that employees outside the protected class were more favorably treated. Id., at 639; Waggoner v. City of Garland, Tex., 987 F.2d 1160, 1163-1164 (5th Cir. 1993);[1] see also Young, 906 F.2d at 180. Of course, a plaintiff may always present a prima facie case by offering direct evidence of discrimination. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982); see Young, 906 F.2d at 180.

The plaintiff's allegations of race discrimination apparently stem from the defendants' failure to accommodate her lifting restriction, rather than from her termination. Nevertheless, the court notes that the plaintiff has neither alleged nor offered any proof that she was replaced by someone outside of the protected class.

The plaintiff attempts to present a prima facie case of race discrimination by showing disparate treatment in that white employees with similar restrictions were accommodated. For a fellow employee to be similarly situated for purposes of showing disparate treatment, the circumstances must be substantially identical. See Barnes v. Yellow Freight Sys., Inc., 778 F.2d 1096, 1101 (5th Cir. 1985); Davin v. Delta Airlines, Inc., 678 F.2d 567, 570 (5th Cir. 1982). The plaintiff has offered the names of only two white employees who she contends were treated differently under similar circumstances. One employee, Patricia Lane, is a white female who injured her back while on the job. Upon her return from a nine-day leave of absence, Lane's doctor placed her on a temporary ten-pound lifting limitation. For approximately one week, her

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[1] Although Thornbrough and Waggoner involved claims of age discrimination under the ADEA, the rules of proof for an ADEA claim were adopted from the order of proof in Title VII claims, as developed in McDonnell-Douglas and its progeny. Thornbrough, 760 F.2d at 638 n.4.

co-workers voluntarily lifted her coin bags, as a courtesy among employees. The court finds that Lane is not a similarly situated employee in that she was not pregnant at the time of her restriction, and further, that her lifting restrictions were of a limited duration, as opposed to the eight-month duration of the plaintiff's limitations. In addition, the plaintiff has presented no evidence that the casino management directed Lane's co-employees to help her during her temporary disability or that the casino management has a policy whereby employees are to do the lifting for their injured co-workers.

The other employee whom the plaintiff asserts was treated differently was Christine Benson. Benson, a white female, was a pit cashier at the time that she became pregnant. During the course of her pregnancy, she was transferred to another position when the position of pit cashier was eliminated. The plaintiff has failed to offer any evidence to contradict the defendants' assertion that Benson was permanently transferred as a result of job elimination. The plaintiff has not presented any evidence that Benson was placed on any work restrictions by her physician, or that Benson's transfer was related in any way to her pregnancy.

The plaintiff attempts to offer direct evidence of discrimination by showing that the defendant allowed a work environment that was permeated with racial hostility. The plaintiff cites a few instances in which co-workers were said to have uttered racial slurs toward the plaintiff and a white co-worker. Some of these slurs were allegedly spoken in the presence of a supervisor, who failed to take any action in response to the slurs. The plaintiff asserts that by allowing other employees to use racial slurs, the casino management concurred in the racist philosophy of some of its employees, and thus, the casino management was itself racist.

The plaintiff has failed to show whether the racial slurs were made by white or black

employees.[2] Furthermore, the plaintiff has failed to cite the court to any case which supports her theory that racial slurs spoken by co-workers constitutes evidence of discriminatory intent by management in terminating and/or refusing to accommodate the needs of a member of a protected class. However, some courts have held that when members of management make racially disparaging remarks which are held to be merely "stray remarks," that in itself is insufficient to present a prima facie case of race discrimination. See Young, 906 F.2d at 180-181; Lo v. F.D.I.C., 846 F. Supp. 557, 564 (S.D. Tex. 1994), aff'd, 52 F.3d 1066 (5th Cir. 1995). Upon careful consideration of the facts presented, the court finds that the plaintiff's evidence regarding racial slurs does not constitute evidence of racial discrimination in the defendants' termination of and/or refusal to accommodate the plaintiff.

To assert any claim under Title VII for violation of the Americans with Disabilities Act ("ADA"), the plaintiff must first file a charge of discrimination with the EEOC, and receive notice of right to sue. Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 449 (5th Cir. 1983), cert. denied, 464 U.S. 828, 78 L. Ed. 2d 106 (1983). The plaintiff did file a claim with the EEOC prior to filing this lawsuit, but said claim only raised allegations of race discrimination. The plaintiff asserts that she did raise disability discrimination on her EEOC charge by stating that "whites have been pregnant and were accommodated." A cause of action for discrimination may be based not only upon the specific allegations raised in the EEOC charge, but also upon any kind of discrimination related to the allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial allegations. Id., at 450-451; Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995). However, the statement that "whites

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[2] Although the plaintiff states in her brief that white employees were making the racial slurs, there is no evidence to support such an assertion in the record.

have been pregnant and were accommodated" logically focuses on race discrimination and could not reasonably lead to an investigation of disability discrimination, especially considering that pregnancy and related medical conditions are not considered to be a disability under the ADA. Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995). The court finds that the aforementioned statement on the EEOC charge would not give rise to an investigation of any disability discrimination claims, and thus the plaintiff has failed to raise a violation of the ADA on her EEOC charge.[3]

Finally, the plaintiff's complaint asserts a claim for violation of the FMLA. The plaintiff has failed to address the FMLA in her response to summary judgment, thus implicitly conceding summary judgment on this claim. The court further notes that the plaintiff has neither alleged nor presented any evidence that she ever requested benefits under the Act. The FMLA allows employees up to twelve weeks of medical leave for a serious health condition that renders the employee unable to perform the functions of his position. 29 U.S.C. § 2612(a)(1)(D). The FMLA further provides that upon return from such leave, the employee is entitled to be restored to his same position, or to a position with equivalent pay, benefits, and conditions of employment. 29 U.S.C. § 2614(a)(1). Ohanian stated in her affidavit that the plaintiff requested a leave of absence to last throughout the period that she was limited by the lifting restriction. The plaintiff's note from her physician indicated that the plaintiff would not be able to return to unrestricted full duty until six weeks after the birth of her child. When asked by Ohanian

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[3] Even if the plaintiff had made a claim for disability discrimination on her EEOC charge, she has failed to offer any evidence to support a violation of the ADA. As stated, pregnancy and related medical conditions are not considered to be a disability under the ADA. Villarreal, 895 F. Supp. at 152. The plaintiff asserts that she was perceived as having a disability, thus triggering the provisions of the Act. See 42 U.S.C. § 12102(2)(C). However, the plaintiff has failed to present any evidence to show that she was "regarded as having such an impairment" as defined in 29 C.F.R. § 1630.2(l).

whether there was any chance that her doctor might lift the restriction sooner, the plaintiff answered that there was not. Thus, the only evidence before the court is that the plaintiff requested an eight-month leave of absence. The plaintiff's complaint asserts a cause of action for violation of the FMLA; however, the plaintiff does not state in her complaint, nor has she submitted any affidavit or deposition testimony, that she requested benefits under the Act. Thus, it appears that the plaintiff has filed a claim under the FMLA only as an afterthought. To assert a claim for a violation of the FMLA, the court finds it only reasonable that the plaintiff actually request benefits under the Act.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion for summary judgment should be granted. An order will issue accordingly.

THIS, the ____ day of July, 1997.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE