NOT DESIGNATED FOR PUBLICATION

SIMONE DUPLESSIS	*	**NO. 2001-CA-0325**
VERSUS	*	**COURT OF APPEAL**
CHILDREN'S HOSPITAL AND XYZ INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-9724, DIVISION "M-16"
Honorable Piper Griffin, Judge Pro Tempore
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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AFFIRMED

Plaintiff, Simone Duplessis, appeals the judgment of the trial court, finding for the defendant, Children's Hospital. The trial court found no evidence of racial discrimination, retaliation or intentional infliction of emotional distress. For the reasons outlined below, we affirm the ruling of the trial court.

FACTS AND PROCEDURAL HISTORY

Ms. Duplessis was employed as an insurance biller (also referred to as a commercial biller) in the patient's accounting department of Children's Hospital from October 25, 1991 through September 1, 1997. Rosie Grinstead, the Billing Coordinator Supervisor, was Ms. Duplessis' supervisor the entire time she was employed by Children's Hospital. In April 1993, Ms. Duplessis was verbally counseled by Ms. Grinstead regarding billing errors and received two written notifications concerning those errors. This prompted Ms. Duplessis to file a complaint with the EEOC

claiming that the consultations and written notifications constituted harassment and were motivated by racial animus. Ms. Duplessis and Ms. Grinstead are both African-American. The result of the EEOC complaint was a consent agreement in which Children's Hospital agreed not to disclose the notifications to outside sources, to reduce the written notification to a verbal counseling, and to follow a procedure which provided that Ms. Grinstead would verbally counsel Ms. Duplessis before issuing a written notification. Acknowledgment of the oral warning was to be signed by Ms. Grinstead and Ms. Duplessis.

Between May of 1993 and June 1996, Ms. Duplessis performed her duties without incident; in fact, she was regarded as a top insurance biller. After a short leave of absence, Ms. Duplessis returned to work in December 1996. That month, the position of log clerk became available in her department. There was an urgency to fill the position, so Ms. Grinstead, along with Tammy Reites, Director of Patient Accounts, and Carmen Keegan, Assistant Director of Patient Accounts, decided to promote someone to the position from within the department. According to the operating policies and procedures of Children's Hospital, promotions made

within a single department are not required to be posted. The log clerk position, accordingly, was not posted. Ms. Grinstead, Ms. Keegan, and Ms. Reites, after considering all of the billers in the department, chose Leslie Brown for the position. Ms. Brown is Caucasian. The decision was apparently based on Ms. Brown's extensive Medicaid billing experience, which was required for the position. Her experience included two years as a Medicaid biller. Ms. Brown was responsible for filing all claims for Medicaid. Ms. Duplessis did not have such experience.

On January 15, 1997, Ms. Duplessis was verbally counseled for failing to timely file a large cycle bill for patient A.J., in the amount of $115,475.00. Large cycle bills are bills for long-term patients that are due every thirty days. Shortly thereafter she filed a complaint with Wilson Williams, Vice President of Administration. Ms. Duplessis lodged three complaints, 1) regarding her inability to compete for the log clerk position; 2) that the billing computer was removed from her office to a common area; and 3) that she was denied vacation time.

On January 23, 1997, Ms. Reites issued a written response to those complaints in which she explained that Ms. Duplessis was not chosen for the

log clerk position because she lacked relevant Medicaid billing experience. Ms. Reites also stated that since there were more billers than billing computers available, the computers would be moved to a common area to promote efficiency. Ms. Reites further explained in the written response the reason that Ms. Duplessis' vacation request was not fully honored. She stated that the personnel shortage at the end of the year, compounded by an increased volume of vacation requests, made it virtually impossible to fully honor all vacation requests. Four people in Ms. Duplessis' department requested vacation time the same week. Two people were denied their requests, but Ms. Duplessis, along with another insurance biller, Ms. Turner, received two days of vacation time for that week. However, Ms. Duplessis and Ms. Turner called in sick on the same day during the week of their scheduled vacation. Since the Patient Accounts Department could not handle the loss of productive work hours, both women had their vacation time reduced by one day.

Ms. Duplessis received another verbal counseling on February 3, 1997, regarding a bill for patient G.G. in the amount of $68,943.05, which had not been filed with the insurance company. Ms. Grinstead, Ms. Keegan,

and Ms. Reites discussed the matter and decided to give Ms. Duplessis a formal written counseling. On February 12, 1997, Ms. Grinstead advised Ms. Duplessis, per the EEOC agreement, that she was being issued a written warning. After being asked to explain the problems with the two bills, Ms. Duplessis refused to sign the counseling form, in violation of the EEOC consent agreement.

On February 13, 1997, Ms. Duplessis requested a meeting with Ms. Reites to discuss the written counseling. At that meeting, with Ms. Grinstead, Ms. Keegan, and Ms. Reites present, she claims that they yelled at her and spoke down to her. The three women deny this accusation. After the meeting Ms. Duplessis went directly to Doug Mittelstaedt, Vice President of Human Resources. She explained her displeasure and asked for a transfer. When informed that she was not eligible for a transfer, Ms. Duplessis left Children's Hospital. She contends that at the meeting with Mr. Mittelstaedt he told her that she might as well quit. He denies this allegation.

On June 3, 1997, Ms. Duplessis filed an action against Children's Hospital. Ms. Duplessis asserted: 1) she was denied a promotion

opportunity because of her race, a violation of La. R.S. 23:331; 2) she was harassed and retaliated against for complaining about the denied promotion; and 3) Children's Hospital intentionally inflicted emotional distress upon her. Ms. Duplessis formally resigned from Children's Hospital on September 1, 1997.

Following a bench trial, the trial court found in favor of Children's Hospital. It is from this decision that Ms. Duplessis takes the instant appeal.

Ms. Duplessis now asserts three assignments of error: 1) the court failed to award damages on the discrimination claim; 2) the trial court failed to award damages for the claim of intentional infliction of emotional distress; and 3) the court failed to award contractual damages for breach of the EEOC consent agreement.

STANDARD OF REVIEW

The Louisiana Supreme Court announced a two-part inquiry for the reversal of the trier of fact's determinations: 1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the fact finder, and 2) the appellate court must also determine that the record establishes that the finding is clearly wrong or manifestly erroneous.

Duncan v. Kansas City Southern Railway Co., 2000-0066, p. 3 (La. 10/30/00), 773 So.2d 670, 675 (citing *Stobart v. State, Through DOTD*, 617 So.2d 880, 882 (La.1993)).

DISCUSSION

In Ms. Duplessis' first assignment of error, she asserts that the trial court erred in not awarding damages on the claim of racial discrimination and retaliation.

Because the Louisiana statute is similar in scope to the federal anti-discrimination prohibitions in Title VII of the Civil Rights Act of 1964, Louisiana courts have routinely looked to the federal jurisprudence for guidance in determining whether a claim has been properly asserted. *Plummer v. Marriott Corp*., 94-2025, p. 6-7 (La.App. 4 Cir. 4/26/95), 654 So.2d 843, 848. The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). To do this, the plaintiff must show: 1) that he belongs to a racial minority; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained open and the employer continued to seek applicants from

persons of complainant's qualifications. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 n. 6, 101 S. Ct. 1089, 1094 n. 6, 67 L.Ed.2d 207 (1981). The plaintiff must make a positive showing on all four prongs of the test in order to establish a prima facie case.

From our reading of the record, we find that Ms. Duplessis did not establish a prima facie case for racial discrimination. She is a member of a racial minority; however, Ms. Duplessis did not show that she was qualified for the position. In fact, evidence was produced to show that she was not qualified for the position. The log clerk position called for extensive experience in Medicaid billing. Ms. Brown had two years of Medicaid billing experience. Plaintiff, by her own admission, had only been "introduced" to Medicaid billing. In essence, she did not have the requisite experience for the log clerk position. The evidence shows that she was not qualified for the log clerk position; therefore, she was unable to satisfy all four prongs of the test.

Assuming that a prima facie case is established, a presumption is created that the employer has unlawfully discriminated against the employee. *Plummer*, 94-2025 at p. 8, 654 So.2d at 848. The burden then shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Should the defendant carry this burden,

the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Burdine*, 450 U.S. at 252-253, 101 S.Ct. at 1093. To prove that discrimination was the real reason for the adverse action the plaintiff must show the action would not have been taken but for the discriminatory animus. *Plummer*, 94-2025 at p. 8, 654 So.2d at 848. If we assume arguendo, that Ms. Duplessis established a prima facie case, our review of the record reveals that she is unable to demonstrate that Children's Hospital's reasons for denying her the position were a pretext for discrimination.

Children's Hospital cites Ms. Brown's extensive Medicaid billing experience and the urgency to fill the position as their reasons for giving her the log clerk position. These are legitimate non-discriminatory reasons. Plaintiff did not put forth any evidence at trial to show that these reasons were a pretext. She asserts repeatedly that the reason she was passed over for the position was because she was African-American and Ms. Brown was Caucasian, even though she stated at trial that she could point to no facts to demonstrate that the decision was based on race. Mere conclusory statements or personal beliefs by an employee that he was discriminated against are not sufficient to prove his employer discriminated against him.

Little v. Republic Refining Co. Ltd., 924 F.2d 93, 96 (5th Cir.1991).

Ms. Duplessis claims that Children's Hospital retaliated against her for complaining that she was not considered for the log clerk position.

A retaliation claim has three elements: 1) the employee engaged in activity protected by Title VII; 2) the employer took adverse employment action against the employee; and 3) a causal connection exists between that protected activity and the adverse employment action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir.1997). The ultimate determination is whether, "but for" the protected conduct, the employer would not have engaged in the adverse employment action. *Douglass v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir.1998) (citing *Long v. Eastfield College*, 88 F.3d 300, 305 n. 4 (5th Cir.1996)).

Here, Ms. Duplessis cannot satisfy prongs two and three of the test. Contrary to her argument, the verbal and written notifications are not considered an adverse employment action. Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions. *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.1995). Examples of ultimate employment decisions include hiring, granting leave, discharging, promoting, and compensating. *See Id*. (citing *Page v. Bolger*,

645 F.2d 227, 233 (4th Cir.1981)). In the instant case, Ms. Duplessis received notifications of billing errors that she made; they had no ultimate effect on her employment status.

Ms. Duplessis asserts that the verbal and written counselings she received in early 1997 were prompted by her complaints about the log clerk position. Even if we presumed that the verbal and written counselings were to be considered an adverse employment action, Ms. Duplessis' claim is undermined by the fact that the first consultation occurred before her meeting with Wilson Williams, where she complained about not being given the log clerk position. Both the verbal and written counselings were in response to billing errors made by Ms. Duplessis. They occurred both before and after she complained about not receiving the log clerk position. Ms. Duplessis failed to present any evidence to support a claim of retaliation. She made the billing errors and Ms. Grinstead responded accordingly. Therefore the court was reasonable in its finding.

In Ms. Duplessis' second assignment of error, she asserts the trial court committed reversible error by not awarding damages for the claim of intentional infliction of emotional distress.

In *White v. Monsanto Co.*, 585 So.2d 1205 (La.1991), the Supreme Court set forth the criteria for making a claim of intentional infliction of

emotional distress. In order to recover for intentional infliction of emotional distress, a plaintiff must establish: 1) that the conduct of the defendant was extreme and outrageous; 2) that the emotional distress suffered by the plaintiff was severe; and 3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *Id.* at 1209. The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id*. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id*.

In *White*, the Supreme Court held that the one-minute tirade of profanity directed at three employees for poor performance was not so extreme as to warrant a finding of intentional infliction of emotional distress. In the instant case, Ms. Duplessis states that her supervisors merely spoke down to her, yelled at her, and advised her to quit. There is no evidence other than her own assertion that these events took place, but even if we assume the accusations to be true, they do not rise to the high standard outlined in *White*. The conduct described by Ms. Duplessis might be considered rude, but hardly qualifies as extreme, outrageous, or outside the

bounds of decency. She asserts that she was harassed when the billing computer in her office was moved to a common area. However, a change in the work style of the department that allows all billers equal access to the computers is not a personal attack. She goes further to assert that the denial of her vacation requests were an attempt to inflict emotional harm. It was shown at trial that everyone in the department had to sacrifice vacation time at that point in the year because the department was shorthanded. Evidence was presented at trial that Ms. Duplessis was not the only employee denied vacation time. Furthermore, Ms. Duplessis was unable to demonstrate that the limitation on her vacation time was unfair and was intentionally done to inflict emotional distress upon her. Astonishingly, she pursues this claim even though at trial she testified that she knew of no facts to support her claim of intentional infliction of emotional distress.

Ms. Duplessis did not present the evidence required to sustain this claim, therefore, the trial court appropriately found no intentional infliction of emotional distress by Children's Hospital.

Ms. Duplessis' third assignment of error is that the trial court should have awarded damages for breach of contract of the EEOC settlement agreement.

Ms. Duplessis did not bring this as an issue at trial. As such it is

inappropriate for us to consider it at the appellate level.

CONCLUSION

Our review of the record shows that Ms. Duplessis did not put forth evidence sufficient to support her claims. Therefore, we affirm the trial court's findings.

AFFIRMED.