UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INETTA BURNS,	)	
	)	
Plaintiff,	)	Case No. 15-cv-6163
v.	)	
	)	
WAL-MART STORES, INC.,	)	Judge John W. Darrah
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Inetta Burns filed a Complaint against Defendant Wal-Mart Stores, Inc. ("Wal-mart") for gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Defendant filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, Defendant's Motion for Summary Judgment [34] is denied in part and granted in part.

LOCAL RULE 56.1

Local Rule 56.1(a)(3) requires the moving party to provide "a statement of material facts as to which the party contends there is no genuine issue for trial." *Ammons v. Aramark Uniform Servs.*, 368 F.3d 809, 817 (7th Cir. 2004). Local Rule 56.1(b)(3) requires the nonmoving party to admit or deny every factual statement proffered by the moving party and to concisely designate any material facts that establish a genuine dispute for trial. *See Schrott v. Bristol-Myers Squibb Co.*, 403 F.3d 940, 944 (7th Cir. 2005). A nonmovant's "mere disagreement with the movant's asserted facts is inadequate if made without reference to specific supporting material." *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003). In the case of any disagreement, the nonmoving party must reference affidavits, parts of the record, and other materials that support his stance. Local Rule 56.1(b)(3)(B). To the extent that a response to a

statement of material fact provides only extraneous or argumentative information, this response will not constitute a proper denial of the fact, and the fact is admitted. *See Graziano v. Vill. of Oak Park*, 401 F. Supp. 2d 918, 936 (N.D. Ill. 2005). Similarly, to the extent that a statement of fact contains a legal conclusion or otherwise unsupported statement, including a fact that relies upon inadmissible hearsay, such a fact is disregarded. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). Pursuant to Local Rule 56.1(b)(3)(C), the nonmovant may submit additional statements of material facts that "require the denial of summary judgment."

A district court is entitled to expect strict compliance with Rule 56.1; substantial compliance is not enough. *Ammons*, 368 F.3d at 817. "When a responding party's statement fails to dispute the facts set forth in the moving party's statement in the manner dictated by the rule, those facts are deemed admitted for purposes of the motion." *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218 (7th Cir. 2015) (quoting *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 632 (7th Cir. 2009)).

BACKGROUND

As a preliminary matter, Defendant filed a Motion to Strike [59] Plaintiff's responses to Defendant's Statement of Facts and Plaintiff's Statement of Additional Facts. As noted above, substantial compliance with Local Rule 56.1 is not enough. To the extent that Plaintiff's responses to Defendant's Statement of Facts are not in strict compliance with Local Rule 56.1, the facts that are not properly disputed will be deemed admitted for the purposes of this Motion. To the extent that Plaintiff's Statement of Additional Facts relies on inadmissible hearsay or is not supported by the cited material, those additional facts will also not be admitted for the

purposes of this Motion.[1] Defendant also moves to strike several exhibits offered in support of Plaintiff's Statement of Additional Facts, arguing that the exhibits have not been authenticated or otherwise made admissible in evidence. As noted by Defendant in its Motion [60], these documents were produced to Plaintiff by Defendant in this case and, as such, are self-authenticating and constitute admissions of a party opponent. *See United States v. Brown*, 688 F.2d 1112 (7th Cir. 1982); *see also Architectural Iron Workers Local No. 63 Welfare Fund v. United Contractors, Inc.*, 46 F. Supp. 2d 769, 772 (N.D. Ill. 1999). Defendant's Motion to Strike [60] Plaintiff's exhibits is denied.

The following facts are taken from the parties' statements of undisputed material facts submitted in accordance with Local Rule 56.1. Plaintiff was a female employee of Wal-Mart, working as a training coordinator at a Wal-Mart store in North Carolina.[2] Plaintiff began her employment with Wal-Mart on or about January 10, 2005. (Dkt. 36 ¶ 1.) Prior to working at Wal-Mart, Plaintiff worked as a manager at K-Mart for over ten years. (*Id.* ¶ 4.) After Plaintiff was hired by Wal-Mart, she began the Management in Training ("MIT") program. (*Id.* ¶ 5.) While Plaintiff was in the MIT program, Wal-Mart was building a new store in Glenwood, Illinois. (*Id.* ¶ 6.) On March 14, 2005, Plaintiff contacted District Manager Jack Buser and requested to be placed at the Glenwood store as an Assistant Manager when she completed the MIT program. Plaintiff wanted to work at the Glenwood store because it was closer to her home.

[1] "A party may not rely on inadmissible hearsay to avoid summary judgment." *MMG Fin. Corp. v. Midwest Amusements Park, LLC*, 630 F.3d 651, 656 (7th Cir. 2011). With some exceptions, "hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial." *Eisenstadt*, 113 F.3d at 742.

[2] Plaintiff passed away on December 12, 2016. Plaintiff intends to bring a motion for substitution of a party pursuant to Federal Rule of Civil Procedure.

(*Id.* ¶ 13.) Plaintiff spoke to Buser about her desire to work in Glenwood on at least two occasions prior to sending her request. (*Id.* ¶ 8.)

When Plaintiff completed the MIT program, she was placed as an Assistant Manager in the Wal-Mart store in Matteson, Illinois. (*Id.* ¶ 9.) After an accident at the Matteson store, Plaintiff requested and received a transfer to the Bradley, Illinois store. (*Id.* ¶ 10.) Plaintiff's District Manager, J.D. Hacker, approved her transfer. (*Id.* ¶ 11.) On May 17, 2005, Plaintiff sent an email to Buser, asking to be transferred to the Glenwood store. Buser advised Plaintiff to speak to Hacker about her request. (*Id.* ¶ 12.) Plaintiff's request was denied, and she was not transferred to the Glenwood store as an Assistant Manager. (*Id.* ¶ 17.) Plaintiff alleges that Hacker told her that he would not transfer her to the Glenwood store because she was a new Assistant Manager and that he preferred to staff new stores with experienced managers. (*Id.* ¶ 15.) Hacker does not remember this conversation but testified that generally, Wal-Mart did not recommend placing new Assistant Managers in new stores. (*Id.* ¶ 15.) Wal-Mart does not have a written policy regarding placement of new Assistant Managers in new stores. (*Id.* ¶ 14.) Buser, Hacker and Market Manager Daniel Ketcham testified that new Assistant Managers are generally not placed in new stores because of the difficulties involved with opening a new store. (*Id.* ¶¶ 14, 16.) Plaintiff later stepped down from her position as Assistant Manager and transferred to the Glenwood store as an Associate on or about August 6, 2005. (*Id.* ¶ 17.)

While Plaintiff was working at the Glenwood store, Gewargis Tammo was working as an Assistant Manager in the Tire and Lube Express ("TLE") department. Plaintiff and Tammo completed the MIT program together. (*Id.* ¶ 18.) After Tammo completed the MIT program, he was placed as an Assistant Manager in the TLE department at the Glenwood store. (*Id.* ¶ 21.)

Plaintiff alleges she was discriminated against on the basis of her sex. After she stepped down from her position as Assistant Manager, Plaintiff alleges she applied for a Support Manager position in 2009. Plaintiff was not granted an interview for the position. Plaintiff overheard that the Support Manager position was given to a male employee. Plaintiff cannot name or describe the people she heard talking about the position and does not know who received the position. She did not verify that a male employee was hired as Support Manager. (*Id.* ¶ 25.) Plaintiff also alleges that she spoke to Tammo while she was completing the MIT program and discovered that Tammo was receiving more pay. Tammo stated in his deposition that he did not discuss his pay with Plaintiff at any time. (*Id.* ¶¶ 29-31.) Tammo and Plaintiff were paid the same salary as Assistant Managers. (*Id.* ¶ 31.) Plaintiff further alleges that she heard male employees discuss their pay and realized that they were making more money than she. (*Id.* ¶¶ 28, 29.)

LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Courts deciding summary judgment motions must view facts "in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party has the initial burden of establishing that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, "[t]he nonmoving

party must point to specific facts showing that there is a genuine issue for trial." *Stephens v. Erickson*, 569 F.3d 779, 786 (7th Cir. 2009). Factual disputes do "not preclude summary judgment when the dispute does not involve a material fact." *Burton v. Downey*, 805 F.3d 776, 783 (7th Cir. 2015). The evidence must be such "that a reasonable jury could return a verdict for the nonmoving party." *Pugh v. City of Attica, Ind.*, 259 F.3d 619, 625 (7th Cir. 2001) (quoting *Anderson*, 477 U.S. at 248).

ANALYSIS

Title VII prohibits employers from discriminating based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a). For employment discrimination claims, the question is "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). Proof of intentional discrimination "is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion." *Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049, 1052 (7th Cir. 2006). Plaintiff can also establish proof of discrimination through circumstantial evidence, "which suggests discrimination albeit through a longer chain of inferences." *Id.* "In adjudicating a summary judgment motion, the question remains: has the non-moving party produced sufficient evidence to support a jury verdict of intentional discrimination?" *David v. Bd. of Trustees of Cmty. Coll. Dist. No. 508*, No. 15-2132, 2017 WL 129114, at *4 (7th Cir. Jan. 13, 2017). Plaintiff may establish a triable issue of intentional discrimination through circumstantial evidence using the burden-shifting framework created by *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).

Disparate Pay

Plaintiff's Complaint alleges Wal-Mart discriminated against her by paying her less than similarly situated male employees. To show a *prima facie* case of gender discrimination under *McDonnell Douglas*, Plaintiff must show that: "(1) she is a member of a protected class; (2) she was meeting her employer's legitimate performance expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly-situated male employees." *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002).

It is undisputed that Plaintiff is a member of a protected class and that she met Wal-Mart's legitimate job expectations. (Dkt. 35.) Defendant argues that Plaintiff cannot show that she was being paid less than similarly-situated male employees. Whether employees are similarly situated is a "flexible, common-sense, and factual" inquiry. *Coleman v. Donahoe*, 667 F.3d 835, 841 (7th Cir. 2012). Relevant factors include "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications− provided the employer considered these latter factors in making the personnel decision." *Warren v. Solo Cup Co.*, 516 F.3d 627, 631 (7th Cir. 2008). "Whether a comparator is similarly situated is usually a question for the fact-finder, and summary judgment is appropriate only when no reasonable fact-finder could find that plaintiffs have met their burden on the issue." *Id.* at 846-47.

Plaintiff names five male employees that she alleges are similarly situated but earned a higher rate of pay than Plaintiff or were less qualified but earned an equal rate of pay as

Plaintiff.[3] Two of the employees, Tammo and Jesus Valdez, were trainees in the MIT program at the same time as Plaintiff. Defendant admits that Valdez and Tammo worked as Assistant Managers in the TLE department and that TLE Assistant Managers received a lower rate of pay than Assistant Managers within the Wal-Mart Stores. However, Tammo, Valdez, and Plaintiff all received the same pay as Assistant Managers. Defendant alleges that Plaintiff did not share a common supervisor with any of her proposed comparators. While this is relevant to a determination of whether these employees are similarly situated to Plaintiff, it is not the only relevant factor to consider. At least two of the employees that earned a higher rate of pay than Plaintiff were also employed as Assistant Managers, one with similar tenure at Wal-Mart. As Assistant Managers subject to the same policies and procedures, these employees were presumably subject to the same standards and held the same job description as Plaintiff. A reasonable fact-finder could find that Plaintiff established a *prima facie* case of discrimination under Title VII; thus, summary judgment of Plaintiff's disparate-pay claim would be inappropriate.

Refusal to Transfer

Plaintiff asserts that Wal-Mart discriminated against her on the basis of her sex when she was not transferred as an Assistant Manager to the Glenwood store, allegedly due to her

[3] Defendant argues that Plaintiff cannot use three of the five named employees as comparators because she failed to name them in her Complaint, answers to interrogatories, or any of her disclosures. Plaintiff's Complaint does not name these employees; however, it does refer to other trainees in the MIT program, other male associates at the "Beavercreek location," and Plaintiff's "male counterparts." This matter was previously part of a larger class-action lawsuit against Defendant that was decertified in 2011. It is clear that Plaintiff developed evidence of these other comparators through the discovery process. The previous lawsuit, the discovery process, and the references in Plaintiff's Complaint were sufficient to provide notice to Defendant of Plaintiff's possible other comparators.

inexperience. Plaintiff notes that one of her fellow male trainees was selected as an Assistant Manager for that location, despite the fact that he was equally inexperienced. Defendant argues that Plaintiff did not suffer an adverse employment action when she was not granted a transfer to the Glenwood store because it would have been a lateral transfer with no additional benefits, increase in salary, or different job duties. A "purely subjective preference for one position over another" does not "justify trundling out the heavy artillery of federal antidiscrimination law." *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002). Other than an easier commute to and from work, Plaintiff does not allege that the Assistant Manager position at the Glenwood store would have provided any further benefits. Thus, Defendant's failure to select Plaintiff for that position is not an actionable adverse employment action under Title VII.

Failure to Promote

Plaintiff contends that she was discriminated against when she was not granted an interview or a promotion to the Support Manager position in 2009 and when a male employee was selected for the promotion instead. In order to establish a *prima facie* case in a failure-to-promote context, the plaintiff must show that: (1) he belongs to a protected class, (2) he applied for and was qualified for the position sought, (3) he was rejected for that position, and (4) the employer granted the promotion to someone outside of the protected group who was not better qualified than the plaintiff. *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir. 2003). Defendant argues that Plaintiff cannot establish a *prima facie* case for failure to promote because she did not apply for the Support Manager position in 2009. However, Plaintiff asserts that she passed the required management assessment and indicated, through Wal-Mart's Career Preferences system, that she wanted to transfer to a Support Manager position. The parties

disagree on what qualifies as an "application," and neither party provides any further information on the application process for Support Managers. Whether or not Plaintiff applied to the position is material to her claim and presents a genuine issue for trial.

Defendant's Motion for Summary Judgment [34] is denied as to Plaintiff's disparate pay and failure to promote claims. To the extent that Plaintiff's discrimination claims are based on Defendant's failure to transfer Plaintiff to a different store location, Defendant's Motion is granted.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment [34] is granted in part and denied in part.

Date: February 28, 2017

/s/ John W. Darrah
JOHN W. DARRAH
United States District Court Judge