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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SUE E. ROSS,

Plaintiff,

v.

SUNSET & GREEN VALLEY, INC., dba
LEE'S DISCOUNT LIQUOR, a Nevada
corporation, DOES I through X, inclusive; ROE
CORPORATIONS I through X, inclusive,

Defendants.

Case No. 2:15-cv-0785-KJD-PAL

ORDER

Presently before the Court is a Motion for Summary Judgment (#21) filed by Defendants Sunset & Green Valley, Inc., dba Lee's Discount Liquor (Lee's). Plaintiff filed an opposition (#22) to which Defendants replied (#25).

I. Background

This case arises out of an employment dispute between Plaintiff, Sue E. Ross, and her former employer, Defendant, Lee's Discount Liquor. The undisputed facts are as follows: Lee's hired Ms. Ross in 1998 when Ross was 72 years old. Ms. Ross worked for Mr. Hae Un Lee at Lee's corporate office until 2015. Initially Lee's assigned Ms. Ross the clerical duties of an administrative assistant, including but not limited to opening mail, answering phones, and office errands. Eventually, Lee's entrusted Ms. Ross with additional responsibilities, including submitting property tax payments on behalf of various Lee's Liquor store locations.

With time, the parties' relationship became strained. In November 2013, Lee's held an

1 annual Wine Experience event. Ms. Ross worked at the event in addition to her standard 40-hour
2 work week, became ill, and fainted. At some point following the incident at the Wine Event,
3 Lee's reduced Ms. Ross's hours to part-time and moved her desk to a different location in the
4 office. The parties' relationship continued to deteriorate resulting in the termination of Ms.
5 Ross's employment on March 16, 2015.

6 **II. Legal Standards**

7 **A. Summary Judgment**

8 The purpose of summary judgment is to "pierce the pleadings and to assess the proof in
9 order to see whether there is a genuine need for trial." Matsushita Elec. Indus. Co. v. Zenith
10 Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment may be granted if the pleadings,
11 depositions, affidavits, and other materials of the record show that there is no genuine issue of
12 material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R.
13 Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

14 A fact is material if it might affect the outcome of the suit under the governing law.
15 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Uncorroborated and self-serving
16 testimony, without more, will not create a genuine issue of material fact. See Villiarimo v. Aloha
17 Island Air Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). Conclusory or speculative testimony is also
18 insufficient to raise a genuine issue of fact. Anheuser Busch, Inc. v. Natural Beverage Distribs.,
19 69 F.3d 337, 345 (9th Cir. 1995).

20 The moving party bears the initial burden of showing the absence of a genuine issue of
21 material fact. See Celotex, 477 U.S. at 323. Once that burden is met, the nonmoving party then
22 has the burden of setting forth specific facts demonstrating that a genuine issue exists. See
23 Matsushita, 475 U.S. at 587; Fed. R. Civ. P. 56(e). Mere "metaphysical doubt as to the material
24 facts" is not enough. Matsushita, 475 U.S. at 586. If the nonmoving party fails to make a
25 sufficient showing of an essential element for which it bears the burden of proof, the moving
26 party is entitled to summary judgment. See Celotex, 477 U.S. at 322-23.

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III. Analysis

Defendant petitions this Court for summary judgment on both of Plaintiff’s causes of action; (1) age discrimination and (2) retaliation, arguing there is no genuine issue of material fact for either cause of action.

1. Age Discrimination

The Age Discrimination in Employment Act (ADEA) makes it unlawful to terminate any individual due to their age. 29 U.S.C. § 623(a); Diaz v. Eagle Produce Ltd. Partnership, 521 F.3d 1201, 1207 (9th Cir. 2008). To determine whether Plaintiff has presented a prima facie discrimination case based on disparate treatment, the Court employs a three-step burden shifting test laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Diaz, 521 F.3d at 1207.

Once Plaintiff has demonstrated a prima facie claim, the burden then shifts to Defendant to produce a legitimate, non-discriminatory reason for its actions. Finally, if Defendant produces a legitimate, non-discriminatory reason for its conduct, the burden again shifts to the Plaintiff to prove Defendant’s actions were mere “pretext” for another discriminatory motive. Coleman v. Quaker Oats, Co., 232 F.3d 1271, 1281 (9th Cir. 2000). However, as a general matter, the Plaintiff in an employment discrimination matter need not produce overwhelming evidence to overcome the employer’s motion for summary judgment as such inquiry is more appropriate for the finder of fact. Chuang v. Univ. of Cal. Davis, Bd. Of Trs., 225 F.3d 1115, 1124 (9th Cir. 2000).

a. Prima Facie Discrimination Claim

Defendant petitions the Court for summary judgment on the grounds that Plaintiff cannot establish an age discrimination claim based on disparate treatment as a matter of law. To establish a prima facie disparate treatment discrimination claim as enumerated in the ADEA, Plaintiff must demonstrate the following elements: (1) she was at least 40 years of age, (2) she was performing her job satisfactorily, (3) she was discharged, and (4) she was replaced by a

1 substantially younger employee who held inferior qualifications or that she was dismissed under
2 circumstances that would give rise to the inference of discrimination. Diaz, 521 F.3d at 1207
3 (citing Coleman, 232 F.3d at 1281). The parties do not dispute Plaintiff was over 40 years of age
4 or that she was discharged. However, Defendant argues Plaintiff was not performing her job
5 satisfactorily and thus its actions do not give an inference of discrimination.

6 Defendant points to several factors to demonstrate Plaintiff was not performing her job
7 duties satisfactorily. For example, Defendant submits evidence that Plaintiff's attendance began
8 to decline leading to multiple "no-call no-show" absences. (#21 Ex. 3). Additionally, Defendant
9 submits Plaintiff's failure to timely submit property tax payments on behalf of various Lee's
10 locations, which resulted in costly penalties, evinces unsatisfactory performance. (#21 Ex. 3 &
11 7). In response, Plaintiff provides deposition evidence that she notified Mr. Lee whenever she
12 took unscheduled time off, which is contrary to the evidence submitted by Defendant. (#21 Ex.
13 1). Further, Plaintiff provides evidence to support her assertion that the late property tax
14 payments involved other employees and agents, who, she claims, caused the late payment. (#21
15 Ex. 1). As a result, the Court finds there are genuine issues of material fact as to whether Plaintiff
16 satisfactorily performed her job duties.

17 Evidence presented by Defendant shows Plaintiff was not replaced by a significantly
18 younger employee nor was Defendant's conduct indicative of discrimination. The parties agree
19 that Plaintiff was not replaced with a younger employee. In fact, following Plaintiff's
20 termination, Lee's eliminated the position altogether. (#21, Ex. 2, at ¶ 15). Plaintiff submits
21 evidence that a pattern of discriminatory conduct regarding her advanced age is the true reason
22 for her termination. This assertion is supported by the statements of other employees. (#22, Ex.
23 B at ¶ 12-13). Viewing the evidence in favor of the non-moving party, the Court finds Plaintiff
24 has submitted sufficient evidence to demonstrate a genuine issue of material fact as to whether
25 Defendant's conduct creates an inference of discrimination.

1 **b. Burden Shifts to Defendant to Prove its Conduct is Legitimate**

2 Once Plaintiff has demonstrated a prima facie discrimination claim, the burden shifts to
3 the Defendant to prove the discharge was legitimate. McDonnell Douglas Corp., 411 U.S. 792;
4 Diaz, 521 F.3d at 1207. To satisfy this element, Defendant must provide a legitimate, non-
5 discriminatory reason for the termination. Diaz, 521 F.3d at 1211; Davis v. Team Electric Co.,
6 520 F.3d 1080, 1094 (9th Cir. 2008). The Defendant’s justification must be specific to that
7 particular employee. See Diaz, 521 F.3d at 1211 (holding a “general reduction” in workforce is
8 not a sufficient justification).

9 Here, Defendant asserts the reason for Plaintiff’s termination was frequent absence from
10 work and unsatisfactory job performance. According to evidence submitted by Defendant,
11 Plaintiff began to miss work frequently and without providing notice. In fact, at one point,
12 Defendant sent an employee to Plaintiff’s residence to check on her wellbeing. (#21, Ex. 2 at ¶
13 8). In addition, Defendant presents evidence that Plaintiff’s failed to perform her job duties
14 satisfactorily. Specifically, on two occasions, Plaintiff failed to timely submit property tax
15 payments to the assessor’s office resulting in costly penalties. (#21, Ex. 3, & 7). Accordingly,
16 the Court finds Defendant has met its burden to provide a sufficient explanation that its conduct
17 was legitimate and facially non-discriminatory.

18 **c. Burden Shifts to Plaintiff to Demonstrate Discriminatory Purpose**

19 The final stage of the ADEA claim analysis requires Plaintiff to raise a genuine issue of
20 material fact to demonstrate that a discriminatory purpose motivated Defendant’s otherwise
21 legitimate act. Diaz, 521 F.3d at 1212; Coleman, 232 F.3d at 1281. Plaintiff argues Lee’s
22 repeated comments regarding her age reflect Defendant’s desire that Plaintiff retire. These
23 statements are corroborated by the statements of other employees. (#22, Ex. B, at ¶ 12-13). The
24 Court finds there is a genuine issue of material fact regarding whether Defendant’s conduct was
25 done with a discriminatory purpose.

26 In sum, viewing the evidence in the light most favorable to the non-moving party, the

1 Court finds that Plaintiff has submitted sufficient evidence to demonstrate genuine issues of
2 material fact regarding her claim for age discrimination based on disparate treatment. Therefore,
3 the Court denies Defendant's motion for summary on Plaintiff's claim for age discrimination.

4 **2. Retaliation & Hostile Work Environment**

5 Plaintiff has not exhausted the available administrative remedies regarding her claim for
6 retaliation. Therefore, the Court dismisses Plaintiff's claim for retaliation without prejudice,
7 pending evaluation by the Equal Employment Opportunity Commission (EEOC). Defendant
8 also moves for summary judgment on Plaintiff's claim for hostile work environment. Although
9 Plaintiff seemingly bootstraps this claim within her claim for retaliation, the Court will examine
10 whether there is a genuine issue of material fact for hostile work environment.

11 To evaluate a claim for hostile work environment, the Court looks to "all of the
12 circumstances," including: the frequency of the conduct, its severity, and whether the conduct is
13 physically threatening, humiliating, or merely offensive. National R.R. Passenger Corp. v.
14 Morgan, 122 S.Ct. 2061, 2074 (2002). To overcome a motion for summary judgment, Plaintiff
15 must demonstrate a genuine issue of material fact for each of the following elements: (1) she was
16 subjected to verbal or physical conduct, (2) the conduct was unwelcome, and (3) the conduct was
17 sufficiently severe and pervasive to alter the conditions of her employment and create an abusive
18 work environment. Porter v. California Dep't of Corr., 419 F.3d 885, 892 (9th Cir. 2005) (citing
19 Vasquez v. City of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003)).

20 Ms. Ross was subjected to verbal conduct. Her statement, corroborated by other
21 employees, details Mr. Lee calling her "granny" and mentioning how "good she looks for her
22 age." (#21, Ex. 1); (#22, Ex. 1). Defendant claims Ms. Ross's failure to complain or inform the
23 Lee's that the conduct offended her is evidence that the conduct was welcome. As a result, the
24 Court finds there is a genuine issue of material fact regarding whether Plaintiff welcomed
25 Defendant's conduct.

26 In order to establish whether Defendant's conduct was sufficiently severe or pervasive as

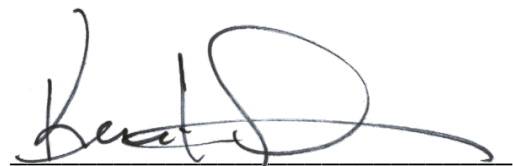
1 to alter the conditions of Plaintiff's employment or create an abusive environment, Defendant's
2 conduct must be more than "merely offensive," and must create an objectionably hostile work
3 environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Merely offensive
4 comments, teasing, and isolated incidents are not sufficient to create a hostile work environment.
5 Id. at 21-22; see also Garrity v. Potter, 2008 WL 872992, *4-5 (D. Nev. 2008) (finding rude,
6 insensitive, or unpleasant conditions are not sufficient to create a hostile work environment); see
7 also Crawford v. Medina General Hosp., 96 F.3d 830, 836 (5th Cir. 1996) (finding, although the
8 severity and pervasiveness of Defendant's conduct is typically a question of fact, comments such
9 as, "women over 55 shouldn't be working" and "old people should be seen and not heard" do not
10 rise to the level of hostile work environment)).

11 Here, Plaintiff asserts her hostile work environment claim based on Defendant's
12 comments about her "looking good for her age," and calling her "granny." Plaintiff does not
13 submit any evidence to support her claim that these comments rise to the level of severity or
14 pervasiveness to establish a claim for hostile work environment. The Court finds Defendant's
15 conduct merely offensive at worst. Therefore, the Court grants Defendant's motion for summary
16 judgment on Plaintiff's claim for hostile work environment.

17 **IV. Conclusion**

18 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Summary
19 Judgment (#21) is **GRANTED in part**, and **DENIED in part**.

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21 DATED this 20th day of June 2014.

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25 Kent J. Dawson
26 United States District Judge