
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

CATHERINE L. ORTEGA,

Plaintiff,

v.

OGDEN CLINIC PROFESSIONAL
CORPORATION

Defendants.

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Case No. 1:13-cv-00066-CW

Judge Clark Waddoups

Before the court is Defendants' Motion for Summary Judgment (Dkt. No. 19). The court heard oral argument on the motion on November 6, 2014, taking the matter under advisement. For the reasons discussed below, the court GRANTS Defendant's Motion (Dkt. No. 19) and dismisses Plaintiff's Complaint (Dkt. No. 2) in its entirety.

BACKGROUND

Plaintiff Catherine Ortega is suing Defendant Ogden Clinic P.C. for age and gender discrimination for her termination in 2011. Ortega is a licensed physician assistant and continued to meet all required certifications to maintain her license. Ortega entered into an employment agreement with Ogden Clinic in late 2004, which allowed Ogden to terminate Ortega without cause upon ninety days written notice. Ortega was hired by and worked under the supervision of Dr. Mindy Boehm throughout her entire employment. Dr. Boehm is a woman and older than Ortega.

Ortega worked at the Canyon View location of Ogden Clinic. In June 2009, Ogden Clinic hired Dustin Havey as a physician assistant, although Havey worked at a different location than

Ortega. Havey had shadowed Dr. Boehm while he was in training to become a physician assistant. Dr. Boehm expressed that she thought that Havey was a “nice young man” and that she hoped he would be successful in his career. (Dkt. No. 19-2, at 71.) The time at which Dr. Boehm made this statement is not clear from the record.

Ortega’s primary job was to see patients. Ortega worked Mondays through Thursdays. In January of 2010, Dr. Boehm received a report from Clinical Services Manager Ken Whipple indicating that her income had declined by \$55,000 from the prior year, despite her patient visits having increased by 359. Whipple told Dr. Boehm that the primary reason for the decrease was that Ortega had 489 fewer patient visits than she had had in 2009. Since Dr. Boehm received a percentage of the revenue received from Ortega’s patient visits, the decline affected Dr. Boehm’s income. Whipple encouraged Dr. Boehm to have a physician assistant work on Fridays to make up for the decrease. (Dkt. No. 19-4 ¶¶ 4-10.) In response, Dr. Boehm hired Havey to work for her on Fridays beginning in April 2010. He continued working at a different location the other four days of the week. Dr. Boehm testified that she asked Ortega if she would be willing to work Fridays, but she declined. (Dkt. No. 19-4 ¶ 10.) Ortega denies being asked to work Fridays, but acknowledges that Dr. Boehm allowed her to “bump” Havey to work the Friday shift when she wanted to do so, which happened about a dozen times. (Dkt. No. 19-2, at 71-72.)

In February 2010, Whipple and Dr. Boehm met with Ortega to discuss her job performance. They told Ortega that her production was declining and Dr. Boehm believed patients were not returning to the clinic because of Ortega. They gave Ortega specific recommendations on how to improve. (Dkt. Nos. 19-4, ¶ 9; 19-1, at 28; 19-2, at 41-42.) In 2010, Ogden Clinic retained a third-party health care consulting company to conduct a patient survey. Ortega performed poorly on those surveys and, when compared to Havey, was worse on every

measure. (Dkt. No. 19-6; 19-7.) In March 2011, the Ogden Clinic gave Ortega 90-day notice that she was being terminated. It is undisputed that Dr. Boehm made the decision to terminate Ortega. Dr. Boehm and the Ogden Clinic state that the reasons for her termination were Dr. Boehm's concerns about Ortega's interactions with patients and the overall declining trend in her production. Following Ortega's termination, Havey transferred to work full-time as an assistant to Dr. Boehm.

Ortega has pleaded causes of action against Ogden Clinic for age and gender discrimination. Ogden Clinic seeks summary judgment on both claims, asserting that Ortega cannot establish a prima facie case for either claim, that it has offered nondiscriminatory reasons for the termination, and that Ortega has failed to sustain her burden of offering sufficient evidence that the reasons are a pretext.

ANALYSIS

I. Legal Standard

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex v. Corp v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. *See Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); FED. R. CIV. P. 56(e).

All justifiable inferences must be viewed in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. The nonmoving party, however, may not rest upon the

mere allegations or denials of his or her pleadings, but must produce specific facts, by affidavit or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The court need only resolve factual issues of controversy in favor of the non-moving party where the facts specifically averred by that party contradict facts specifically averred by the movant. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *See also Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 345 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment).

Summary judgment shall be entered “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*, 477 U.S. at 322. Summary judgment shall not be granted if a reasonable jury could return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. However, “[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* (internal citations omitted).

II. ADEA Age Discrimination Claim

An age discrimination claim under the ADEA can be proven through either direct evidence of the employer’s discriminatory intent or by presenting circumstantial evidence creating an inference of a discriminatory motive. *Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002).

A. Direct Evidence

Direct evidence is evidence, which if believed, proves the existence of a fact at issue without inference or presumption. *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). A plaintiff may rely on age related statements, if the plaintiff can “show that [the

statements] were made by a decision maker, and that there was a nexus between the discriminatory statements and the decision to terminate.” *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998). However, “if the content and context of a statement allow it to be plausibly interpreted in two different ways – one discriminatory and the other benign – the statement does not qualify as direct evidence. *Riggs v. AirTrain Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007). *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000) (holding that age-related comments about plaintiff can support inference of age discrimination but isolated, ambiguous comments may be too abstract).

The only “direct evidence” Ortega offers to support a claim of age discrimination is that that Dr. Boehm referred to Havey as a “nice young man” who she wanted to succeed. The statement fails to qualify as direct evidence. Although the statement was made by Dr. Boehm, who made the decision to terminate Ortega, it can be interpreted in several ways. Ortega argues that the court should interpret the statement as evidence of intent to discriminate based on age. Another plausible, and frankly more likely, interpretation is that the statement was simply an expression that Havey was a pleasant person and Dr. Boehm liked him and wished him success. As such the statement must be viewed as benign. Moreover, without evidence of when the statement was made and the context in which it was said, it is impossible to reasonably infer that there was any connection between the statement and the decision to terminate. The statement, without more, is insufficient to support a jury verdict that Dr. Boehm made the decision to terminate Ortega with discriminatory intent. It is an isolated, ambiguous comment with multiple reasonable interpretations.

B. Circumstantial Evidence

If the plaintiff makes a claim for age discrimination under the ADEA using circumstantial evidence, the plaintiff must satisfy a three step burden shifting analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). First, the plaintiff must prove a prima facie case of prohibited employment action. *Id.* at 802. If the employee makes a prima facie showing, the burden then shifts to the employer to state a legitimate, non-discriminatory reason for its action. *Id.* The burden then shifts back to the plaintiff to show that the stated reason was merely a pretext for discrimination. *Id.* at 804.

1. Prima Facie Case

“The critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination.” *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012). “[T]he articulation of a plaintiff’s prima facie case may well vary, depending on the context of the claim and the nature of the adverse employment action alleged.” *Poltke v White*, 405 F.3d 1092, 1101 (10th Cir. 2005). However, “there must be at least a logical connection between each element of the prima facie case and the illegal discrimination” *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996). The purpose of these elements is to establish “an initial inference of unlawful discrimination warranting a presumption of liability in plaintiff’s favor.” *Adamson v. Multi Cmty. Diversified Servs.*, 514 F.3d 1136, 1146 (10th Cir. 2008). To prove a prima facie case under the ADEA for age discrimination based on job termination, the plaintiff is required to bring forth evidence “to prove that [s]he (1) was forty years of age or older; (2) performed satisfactory work; (3) was terminated; and (4) was replaced by someone younger.” *Id.*

It is undisputed that Ortega was forty years of age or older, that she was terminated and was replaced by a younger person. Ogden Clinic does, however, dispute that Ortega performed satisfactory work. The Clinic argues that it is undisputed that Ortega's production was declining year-to-year, that her patient retention rate was 32% and that its customer reviews indicated that she had not been interacting well with patients. The Clinic asserts that in light of these facts, Ortega has failed to offer sufficient evidence to prove a prima facie case.

Ortega does not offer evidence to dispute these facts, but offers additional evidence that even with the decline in the number of patients seen; she still had the highest patient visit average of all the physician assistants that worked for Ogden Clinic. Ortega also notes that she increased the time of her patient visits from 10 minutes to 15 minutes in duration to have better interactions with her patients. Additionally, Ortega notes that at the time of her termination, she had no patient complaints in her file. Ortega argues that this evidence is sufficient to satisfy her burden, which is slight, that her performance was satisfactory. Because Ortega is the nonmoving party, the court must draw the inferences in the light most favorable to her at the summary judgment stage. Thus, the court finds that on summary judgment, Ortega has offered evidence from which a jury could infer that her performance was satisfactory. Ortega has articulated a satisfactory prima facie case.

2. Non-Discriminatory Reason

Once Ortega makes a prima facie showing, the burden shifts to the Ogden Clinic "to articulate some legitimate, nondiscriminatory reason" for its decision to terminate. *McDonnell Douglas* 411 U.S. at 802. The Tenth Circuit has noted that for a reason to be non-discriminatory, it must at least be based on objective criteria. *Cortez v. Wal-Mart Stores, Inc.* 460 F.3d 1268, 1273–74 (10th Cir. 2006).

The Clinic asserts that the reason for terminating Ortega was because the number of her patient visits had declined substantially, her patient retention rate was 32%, and Dr. Boehm believed that the patients were not returning because of Ortega. Ortega does not dispute these facts, but argues they are not the honest reasons for her termination. She further argues that these reasons are not objective reasons. The decline in the number of patient visits, however, is not subjective, and Ortega has not argued that the number of patient visits was incorrect. Additionally, Ortega had a downward trend in patient visits, whereas most of the other assistants had a significant upward trend. Further, in her deposition, Ortega acknowledged that the reason stated for her termination was the patient retention rate, the lower patient visits, and her patient interactions leading to the low retention rate. The lack of patient satisfaction was supported by third party surveys, not just Dr. Boehm's impressions. Finally, the decline in revenue to Dr. Boehm was objective, articulated in dollars and cents, not just Dr. Boehm's impression, and the facts supported that the decline was attributable to Ortega's declining patient visits, not to Dr. Boehm's own performance, whose patient visits had increased. All of these reasons had been brought to Ortega's attention more than a year before Dr. Boehm made the decision to terminate her. None of the reasons given for her termination are related to her age. Thus, Ogden Clinic stated sufficient non-discriminatory reasons for the termination.

3. Pretext

Once the employer articulates a non-discriminatory reason, the burden shifts back to the plaintiff to identify evidence "that could support a reasonable jury's concluding that the employer's proffered rationale is mere pretext for discrimination." *Roberts v. IBM Corp.*, 733 F.3d 1306, 1309 (10th Cir. 2013). "To establish pretext under the ADEA, [a plaintiff] must show

there is enough inconsistency or implausibility in [the] employer's stated explanation for the firing that a reasonable trier of fact could find it unworthy of belief." *Id.*

To suggest pretext based on criticisms of job performance, the plaintiff must "advance evidence that [the employer's] changed evaluation of his performance, whether wise or mistaken, wasn't honestly arrived at." *Id.* "But changes in an employer's estimation of its employee's job performance, without more, cannot establish pretext as a matter of law. After all, the quality of the employee's job performance is itself capable of change and an employer isn't prohibited from acting on honestly held beliefs about those changes." *Id.* See *Billet v. CIGNA Corp.*, 940 F.2d 812, 826 (3d Cir. 1991) ("Prior good evaluations cannot establish that later unsatisfactory evaluations are pretextual. To hold otherwise would be to hold that things never change, a proposition clearly without basis in reality.") The court's role is "to prevent intentional discriminatory . . . practices, not to act as a 'super personnel department,' second guessing employers' honestly held (even if erroneous) business judgments." *Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006).

In an attempt to show pretext, Ortega first argues that it is evident that the Ogden Clinic's explanations were not honest by the fact that Dr. Boehm had had a sudden change of opinion about Ortega's job performance. Ortega had worked a number of years for the Clinic without complaint and had been a top performer. She also claims pretext is evident by the fact that other individuals in the Clinic told her they were shocked by her termination because she had no patient complaints against her. Ortega ignores, however, that she had been warned about her job performance in February of 2010 and had been given an entire year to change her behavior. After the year had passed, Ortega's patients visits were still significantly below her historic average,

and Dr. Boehm had received preliminary results from the subsequent patient survey indicating dissatisfaction with Ortega's patient interactions.

Ortega also claims that the reasons given by the Ogden Clinic are implausible explanations for the termination. First, Ortega claims that the patient survey was a post-hoc rationalization for the termination. The patient survey, however, merely substantiated Dr. Boehm's belief that patients were not being retained by the practice, a belief which was supported by Ortega's 32% patient retention rate. Ortega further argues that patient visits were declining across the practice, but that after she had been made aware of her declining numbers, the next year her numbers actually increased an average of 29 patients per month. Ortega's saw 334 patients per month in 2009, 308 in 2010, but then saw 337 in 2011. Ortega further argues that she was not the only physician assistant who had a down year. Physician Assistant Ryan had 249 patient visits per month in 2009, which decreased to 233 in 2010, and then increased again in 2011 to 273. Additionally, Ortega argues that even though her numbers were down, she was still the highest, or second highest performing physician assistant and that it would be implausible for an employer who was trying to increase business to terminate one of its top performing employees. The court's role, however, is not to second guess an employer's business judgment, even if it is erroneous. The court's role is only to decide whether the stated reasons are not worthy of belief. The court finds that Ortega has failed to come forward with sufficient evidence for a jury to find that Ogden Clinic's stated reasons are unbelievable. On those same facts, a different employer may have made a different decision, but that does not support a finding that the reasons were dishonest and the real reason for the decision was Ortega's age. Ortega has failed to meet her burden of proving the reasons pretextual. Therefore, summary judgment is

granted in favor of Defendants and Ortega's age discrimination claim is dismissed with prejudice.

III. Gender Discrimination

Similar to an age discrimination claim, a plaintiff can prove that her employer discriminated against her based on gender by providing either direct evidence of the employer's discriminatory intent or by presenting circumstantial evidence creating an inference of a discriminatory motive. *Danville*, 292 F.3d at 1249. In this case, the only claimed "direct" evidence Ortega offers that the decision to terminate her employment was based on her gender is Dr. Boehm's statement that Havey was a "nice young man." The same analysis applies for proving gender discrimination based on direct evidence as discussed above for age discrimination and the claim fails for the same reasons.

A. Circumstantial Evidence

To determine whether circumstantial evidence supports a gender discrimination claim, the court applies the same three step burden shifting analysis found in *McDonnell Douglas*. 411 U.S. at 802-04. The sole difference in the *McDonnell Douglas* analysis between age and gender discrimination claims is at the first step. To establish a prima facie case based on gender discrimination, the plaintiff must show "that: (1) [s]he belongs to a protected class; (2) [s]he was qualified for [her] job; (3) despite [her] qualifications, [s]he was discharged; and (4) the job was not eliminated after [her] discharge." *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1229 (10th Cir. 2000).

Under this formulation, drawing all inferences most favorably to Ortega, the court concludes Ortega has established a prima facie case. Ortega belongs to a protected class. Ortega

is qualified for her job. She was a physician assistant and received all the necessary certifications to maintain her position. Ortega was discharged and her job was not eliminated.

The rest of the burden shifting analysis is identical to that previously discussed for age Ortega's age discrimination claim. The reasons given by Dr. Boehm for deciding to terminate Ortega were objective and allowed no inference that the real reason was because Ortega was a woman. To suggest otherwise would be to ignore that Dr. Boehm herself is a woman. The evidence Ortega proffered is not sufficient to support a finding by a jury that Ortega's gender played any role in the decision. Therefore, for the reasons stated previously, the court grants summary judgment in favor of the Defendants and Ortega's age discrimination claim is dismissed with prejudice.

CONCLUSION

The court GRANTS Defendants' Motion for Summary Judgment (Dkt. No. 19) for the reasons discussed above and dismisses Plaintiff's Complaint with prejudice (Dkt. No. 2) in its entirety. This case is closed.

SO ORDERED this 1st day of December 2014.

BY THE COURT:



Clark Waddoups
United States District Judge