

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEAN FORD : CIVIL ACTION  
 :  
 v. :  
 :  
 SKIPPING STONE, INC. : NO. 02-8906

**Padova, J.**

**April 8, 2003**

Plaintiff Jean Ford has brought suit under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, alleging that she was subjected to discrimination based upon her gender while employed with Defendant, Skipping Stone, Inc., an energy consulting firm. Defendant has filed a motion for partial summary judgment on Counts One, Three and Six of Plaintiff's Complaint. For the reasons that follow, Defendant's Motion will be denied in its entirety.

**I. Relevant Background**

Plaintiff Jean Ford was employed by Defendant as a senior consultant/project manager from February 25, 2000 to March 7, 2001, when she was terminated from the company for the stated reason that there was inadequate work available for her. Plaintiff asserts that, while employed with Defendant, she was paid less than two other employees, Matthew Rose and Brian Barrett, who performed equal work. Plaintiff further asserts that she was sexually

harassed by one of her supervisors, Andy Zetlin. Specifically, Plaintiff asserts that Mr. Zetlin attempted to hug and kiss her in an inappropriate manner on two separate occasions, and further asserts that Mr. Zetlin removed her from a business project soon after she rejected these advances.

Plaintiff failed to receive a promotion to the Position of Director of Fulfillment in the fall of 2000. Instead, the position went to Dennis Gaushall, a male candidate who was recruited from outside the company to fill the position. Plaintiff asserts that she was at least as qualified as Mr. Gaushall for the Director of Fulfillment Position.

After receiving a right to sue letter from the EEOC, Plaintiff filed a timely complaint in this matter on November 8, 2001, in the District of Maryland. The case was subsequently transferred to this district upon motion of the Plaintiff on December 6, 2002. On February 21, 2003, Defendant filed a Motion for Partial Summary Judgment seeking to dismiss Counts One, Three and Six of Plaintiff's Complaint. On March 7, 2003, Plaintiff filed a reply asking the Court to strike Defendant's Motion for Partial Summary Judgment for failure to comply with the Court's scheduling order, or, in the alternative, asking the Court to deny the Motion on the merits. On March 31, 2003, Defendant filed a Reply Brief in

further support of its motion for partial summary judgment.<sup>1</sup>

## II. Discussion

### A. Count One

Count One of the Complaint alleges that Defendant subjected Plaintiff to disparate treatment on the basis of her gender by failing to promote her to the position of Director of Fulfillment of the Technology Solutions Group, and instead hiring a male candidate, Dennis Gaushall, for the position. (Compl. ¶¶ 33-39). The Complaint alleges that Plaintiff was at least as qualified as Mr. Gaushall for the position. (Id.)

Claims of disparate treatment under Title VII are analyzed under the test developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Briefly summarized, the McDonnell Douglas analysis proceeds in three stages. First, the plaintiff must establish a prima facie case of discrimination. If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to 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. Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir.

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<sup>1</sup>Because this reply brief corrected the deficiencies in Defendant's original motion and rendered Defendant in compliance with the Court's Scheduling Order, Plaintiff's Motion to Strike will be dismissed as moot.

1999) (citing McDonnell Douglas, 411 U.S. at 802). In order to establish a prima facie case of discrimination in a failure to promote claim, Plaintiff must show: 1) that she is a member of a protected class; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas, 411 U.S. at 802.

Defendant asserts that Plaintiff cannot establish a prima facie case of discrimination, because she has failed to present any evidence from which a jury could determine that she was qualified for the position of Director of Fulfillment. The record contains no written description of the responsibilities and duties of the Director of Fulfillment position. It is not clear whether a written job description was ever created. (Def's Mem. Ex. C at p. 31). Defendant points to the testimony of Andy Zetlin and Peter Weigand, both principals of Defendant. In their depositions, Weigand and Zetlin assert that the Director of Fulfillment Position required an in-depth understanding of software used in the energy industry, and particularly of "software development, integration, [and] coding." (Pl's Mem. Ex. 16 at p. 101; Def's Mem. Ex. C at p. 31). Defendant asserts that, by her own admission, Plaintiff had no experience in developing and programming computer software. (See Def's Mem. Ex.

B at pp. 96 and 124-25). Defendant also asserts that the Director of Fulfillment Position required a candidate who could generate new business. (Def's Mem. Ex. C at p. 31).

Plaintiff asserts that she was qualified for the Director of Fulfillment position because she had over twenty years experience in the power industry. (Pl's Mem. Ex. 2 at ¶ 7). Furthermore, Plaintiff asserts that she had already led multiple software implementation projects during her previous employment, and therefore had sufficient experience with software implementation to qualify her for the position. (Pl's Mem. Ex. 2 at ¶¶ 7, 8). Plaintiff asserts that she had significant experience with technology used in the energy industry, and had been featured in several industry trade publications for her work on the Internet. (Id.) Finally, Plaintiff asserts that her "network within the energy industry was extensive and had the full capacity to generate future business for Skipping Stone." (Id.) Furthermore, while Plaintiff admits that she was not a computer programmer, there is nothing in the record, besides the self-serving assertions of Mr. Weigand, which states or implies that computer programming skills were necessary in order to successfully perform the role of Director of Fulfillment. There are also inconsistencies in the record which could cause a jury to question the validity of Weigand and Zetlin's assertions that Plaintiff was not qualified for the position. Specifically, while Mr. Weigand testified that he

discussed Ms. Ford's interest in the Director of Fulfillment position with Mr. Zetlin before the position was filled and informed Mr. Zetlin that he did not think that Plaintiff was qualified, Mr. Zetlin testified that he did not learn of Ms. Ford's interest in the position until after the position had already been filled. (Pl's Mem. Ex. 5 at p. 42, Ex. 16 at pp. 116-17). Thus, a jury could find based upon the evidence in the record that Plaintiff was qualified for the Director of Fulfillment position. Furthermore, the only legitimate, non-discriminatory reason offered by Plaintiff for hiring Mr. Gaushall over Plaintiff is that Mr. Gaushall was better qualified than Plaintiff for the position. Given the inconsistencies in the record, a reasonable jury could find that this stated reason was pretextual. Defendant's Motion for Summary Judgment with respect to Count One of Plaintiff's Complaint is therefore denied.

#### B. Count Six

Count Six, brought under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), alleges that Defendant was paid less than male employees at the company who were performing equal work. In order to establish a claim under the Equal Pay Act, Plaintiff bears the initial burden of establishing that a Defendant pays different wages to employees of different genders for work which requires

equal skill, effort and responsibility. Klimiuk v. ESI Lederle, Inc., No. 99-CV-3315, 2000 WL 1599251, at \*6 (E.D. Pa. Oct. 25, 2000). This inquiry must consider job content, not job titles or descriptions. Fugitt v. Certainteed Corp, Civ. A. No. 92-5083, 1993 WL 14728, at \*3 (E.D. Pa. May 6, 1993)(citation omitted). This is especially so in a case such as this, where there is evidence that Defendant's job titles are "simply meaningless." (Pl's Mem. Ex. 9 at p. 19). Furthermore, "Equal work is guided by a 'determination of whether the jobs compared have a 'common core' of tasks, i.e., whether a significant portion of the two jobs is identical.'" Klimuk, 2000 WL 1599251, at \*6 (citing Byrnes v. Herion, Inc., 764 F. Supp. 1026, 1030 (W.D. Pa. 1991)). If the plaintiff meets this burden, the defendant must offer a legitimate reason for the pay disparity. Id. The burden then shifts back to the plaintiff to establish that the stated reason is pretextual. Id. Defendant asserts that Plaintiff cannot establish her initial burden, because she was the highest paid employee in the position of project manager, and was paid at a rate equal to that of the highest paid senior consultants.

Plaintiff argues that her job responsibilities were equal to those of two directors at Defendant company, Matthew Rose, Director of Regulatory Consulting, and Brian Barrett, Director of Strategic Consulting. This is supported by record evidence. (See Pl's Mem. Ex. 23). Defendant responds that Plaintiff cannot maintain an

Equal Pay Act claim based upon these two male comparators, because she has not submitted any evidence which could indicate that either Mr. Barrett or Mr. Rose earned more money than she did while working for Defendant. (Def's Reply Mem. at p. 3-4). The record is not clear in this regard, as Plaintiff has only submitted a undated spreadsheet listing current salaries of Skipping Stone employees. (Pl's Mem. Ex. 1). While this spreadsheet does indicate that Mr. Rose and Mr. Barrett were earning approximately \$120,000 and \$125,000 per year, respectively, at the time the document was generated, it is not clear whether they were earning this salary during the time when Plaintiff was working for the company, or whether their salaries were raised to this level after Plaintiff's relationship with Defendant was terminated. However, according to the testimony of Mr. Weigand, Mr. Rose was hired in March of 2000 at a starting salary of \$100,000 per year. (Def's Reply Mem. Ex. H). Plaintiff, by contrast, was hired in February of 2000, at a starting salary of \$85,000 per year. Her salary was raised to \$100,000 per year at some point at least 90 days subsequent to her starting date. (Pl's Mem. Ex. 16 at pp. 64-66). Thus, for a period of at least two months, Plaintiff was earning substantially less than a male counterpart whom she alleges was performing work of equal skill, effort and responsibility. Accordingly, Defendant's Motion for Summary Judgment will be denied with respect to Plaintiff's Equal Pay Act claim.

### C. Count Three

Count Three of Plaintiff's Complaint alleges that Plaintiff was subjected to sexual harassment during her employment with Defendant. Plaintiff's allegations are mainly grounded upon the behavior of Principal Andrew Zetlin toward Plaintiff during Plaintiff's employment. Specifically, Plaintiff alleges that, on two separate occasions, Mr. Zetlin attempted to hug and kiss Plaintiff as they were parting ways at the end of business meetings. On the first occasion, which occurred in October of 2000, Mr. Zetlin and Plaintiff were saying goodbye after a trade show in Houston, Texas, when Mr. Zetlin hugged Plaintiff and "attempted a kiss." (Pl's Mem. Ex. 8 at pp 198-99). According to Plaintiff, had she not moved her cheek, Mr. Zetlin would have kissed her on the lips. (Id.) During the second incident, which occurred in a hotel lobby in Virginia on November 16, 2000, Mr. Zetlin again attempted to hug and kiss Plaintiff, whereupon Plaintiff backed away from his hug. (Id. at p. 203). Neither Mr. Zetlin nor Plaintiff said anything to each other immediately following this incident. However, Mr. Zetlin did look shocked. (Id.) Besides these two incidents, Plaintiff does not allege that Mr. Zetlin or any other employee of Defendant engaged in any kind of inappropriate physical contact with Plaintiff. Plaintiff further alleges that, prior to the first physical contact between

her and Mr. Zetlin, while she and Mr. Zetlin were driving to a restaurant in Houston, Mr. Zetlin informed her of his failed marriage and indicated to her that he saw nothing wrong with extra marital affairs. (Id. at 197-98). However, Plaintiff concedes that, while she felt that this conversation was inappropriate, she did not believe it to be harassing. (Pl's Mem. ¶ 36). Plaintiff does not allege that any other employee of Defendant engaged in behavior which Plaintiff felt amounted to sexual harassment. (Pl's Mem. Ex. 16 at p. 220).

Defendant argues that Plaintiff cannot maintain a cause of action for sexual harassment, because she has not alleged sufficient facts which would allow a jury to find that she was subject to a hostile work environment. Hostile work environment causes of action "afford[ ] employees the right to work in an environment free from discriminatory intimidation, ridicule and insult," even where such conduct does not have a direct economic impact upon the employee. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-66 (1986). To establish a hostile work environment claim, Plaintiff must show that she was subjected to intentional discrimination because of her gender; that the discrimination was pervasive and regular; that the discrimination would detrimentally affect a reasonable person of the same gender in her position; and the presence of respondeat superior liability. Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999). Defendant argues

that Plaintiff has not alleged sufficient facts for a jury to find that the harassment she was subjected to was pervasive and regular. In making this determination, the Court must consider the totality of the circumstances, including the frequency of the harassing conduct, whether it was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance. Meritor, 477 U.S. at 67. The United States Supreme Court has clearly held that isolated incidents of harassment, unless extremely serious, do not alter the conditions of one's employment and therefore do not create a hostile work environment. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

However, regardless of whether Plaintiff's submissions would support a sexual harassment claim based upon a hostile work environment, Plaintiff's submissions are clearly sufficient to support a sexual harassment claim based upon quid pro quo sexual harassment.<sup>2</sup> Specifically, Plaintiff asserts that Mr. Zetlin responded to her rejection of his advances by deliberately dropping her from an assignment, the ACN Energy Project. Plaintiff states

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<sup>2</sup> Count Three of the Complaint is simply titled "Sex Harassment," and does not indicate the specific theory of sexual harassment that Plaintiff intended to rely upon. Furthermore, Paragraph Eleven of the Complaint alleges that Mr. Zetlin "Made inappropriate advances toward [Plaintiff], telling her that it would be advantageous for her career to comply with his advances." (Compl. ¶ 11). Thus, the Court reads the Complaint as alleging both quid pro quo and hostile work environment sexual harassment.

in her deposition that Mr. Zetlin "retaliated by taking me off the project," after she rejected his advances. (Pl's Mem. Ex. 8 at p. 204). In order to establish a claim of quid pro quo sexual harassment, a plaintiff must show that her response to a harasser's sexual advances was subsequently used as a basis for a decision regarding the plaintiff's terms and conditions of employment. Ferrell v. Harvard Indus., Inc., Civ. A. No. 00-2707, 2001 WL 1301461, at \*8 (E.D. Pa. Oct. 23, 2001) (citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281-82 (3d Cir. 2000)). Importantly, "our law contains no requirement that the plaintiff show that the employer implicitly or explicitly threatened retaliation when making the advance." Farrell, 206 F.3d at 282. Rather, the Court may make a broad inquiry into the surrounding circumstances, including the timing of the rejection in relation to the adverse action and the demeanor of the employer. Id. at 283. In this regard, the analysis is similar to that used in a retaliation claim. Id. In this case, Plaintiff has testified that Mr. Zetlin was visibly shocked by her rejection of his attempted hug. (Pl's Mem. Ex. 8 at p. 204). Furthermore, this incident and Plaintiff's removal from the ACN Energy project occurred within two weeks of one another. (See Pl's Mem. Ex. 8 at p. 202; Ex. 4 at p. 17-18). Thus, based upon the record, a reasonable jury could find that Plaintiff had established a claim of sexual harassment. Defendant's Motion for Summary Judgment with respect to Count Three

of the Complaint is therefore denied. An appropriate order follows.

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**ORDER**

**AND NOW**, this 8th day of April, 2003, upon consideration of Defendant's Motion for Partial Summary Judgment (Docket # 9), Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment and Motion to Strike (Docket #'s 12 and 13), Defendant's Reply Brief in Support of its Partial Motion for Summary Judgment (Docket # 19), and all related submissions, it is hereby ordered as follows:

- 1) Plaintiff's Motion to Strike Defendant's Motion for Partial Summary Judgment for failing to comply with this Court's Scheduling Order is **DISMISSED**;
- 2) Defendant's Motion for Partial Summary Judgment is **DENIED** in its entirety.

BY THE COURT:

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John R. Padova, J.

