

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

MARY ANN COOPER,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
CITY OF PHILADELPHIA, et . al.,	:	No. 97 - 4337
	:	
Defendants.	:	
	:	

MEMORANDUM

Before me is Plaintiff's Motion for Reconsideration and Relief from Judgment of my Order dated February 28, 1998, wherein I granted Defendants' Motion for Summary Judgment after Plaintiff failed to file a timely response. For the reasons set forth below, Plaintiff's motion will be denied.

I. BACKGROUND

Plaintiff filed the present action on June 27, 1997 alleging racial and sexual discrimination by the defendants in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), the Pennsylvania Human Relations Act (43 P.S. Section 951 et seq.), and 28 U.S.C. Section 1981. As set forth in my Order dated February 26, 1998, defendants filed a Motion for Summary Judgment on January 28, 1998 together with a certification by defendant's counsel that a copy of the motion was served on plaintiff's counsel by first class mail on January 30, 1998.

Under Local Rule 7.1, an answer, response, or other pleading was due to be filed on or before February 16, 1998. Plaintiff failed to file an answer, response, or other pleading by this date. After an inquiry by defense counsel as to the status of the motion, my court room deputy

clerk telephoned plaintiff's counsel and was advised that an answer would be filed the following day. No such filing was made.

For the reasons set forth in my Order dated February 28, 1998, I granted Defendants' Motion for Summary Judgment as to each claim asserted by the Plaintiff following an independent review of the complaint, answer and the Motion for Summary Judgment. Plaintiff then filed the instant Motion.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b)(1) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b)(1).

In determining whether relief should be granted under Rule 60(b)(1), Third Circuit law requires a court to analyze the following factors: (1) whether the [prevailing party] will be prejudiced if the default is lifted; (2) whether the [petitioner] has a meritorious defense; and (3) whether the default was the result of the [petitioner's] culpable conduct. Lorenzo v. Griffith, 12 F.3d 23, 27 (3d Cir. 1993), quoting Zawadski De Bueno v. Bueno Castro, 822 F.2d 416, 419 (3d Cir. 1987).

III. ANALYSIS

A. Prejudice to the Defendants

The Defendants have vigorously defended this matter and asserted compelling arguments in its Motion for Summary Judgment entitling them to judgment as matter of law. The Defendants will be prejudiced if the instant motion is granted by being burdened with the further

costs of defending this action.

B. Merits of Plaintiff's Defense

Plaintiff has also failed to meet the second prong of the Lorenzo analysis. The Defendants have asserted compelling arguments that they are entitled to summary judgment. The Defendants have consistently taken the position that the reason that plaintiff was not promoted was the untimeliness and poor quality of her work.

The plaintiff has the initial burden of establishing a prima facie case of employment discrimination. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Once the plaintiff does so, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment decision. Id. The plaintiff may then discredit the employer's articulated reason and show that it was pretextual from which the factfinder may infer that the real reason was discriminatory. Id. In order to discredit an employer's articulated reason, a plaintiff must present evidence that the factfinder could reasonably conclude is incredible and unworthy of belief. Id. at 364-65. The ultimate burden of proving that a defendant engaged in intentional discrimination against the plaintiff remains with the plaintiff at all times.

For purposes of this motion, plaintiff focuses her argument on discrediting defendants' stated legitimate reasons for failing to promote her.¹ The defendants have articulated that the

¹ Plaintiff also argues that she should be permitted to maintain a Section 1981 claim against the defendants based on an implied contractual relationship. Plaintiff asserts that a contractual relationship exists between herself and the City of Philadelphia based on her union's collective bargaining agreement with the City. Clearly, no such contractual relationship exists. Although plaintiff's collective bargaining agreement covers issues such as promotion, individual union employees lack standing to sue for violations of a collective bargaining agreements. Such grievances may only be raised by the union itself through negotiated grievance proceedings. Ziccardi v. Commonwealth of Pennsylvania Dept. of General Services, 456 A.2d 979, 982 (Pa. 1982). Because plaintiff failed to avail herself of the remedies that may have been available to

reason plaintiff was not promoted was the untimeliness and poor quality of her work. Plaintiff has wholly failed to provide any evidence that this legitimate nondiscriminatory reason is pretext or the product of discriminatory intent. Plaintiff fails present any evidence that this assessment of plaintiff's work is inaccurate, much less the result of discriminatory intent. In resisting summary judgment, plaintiff appears to assert that pretext or discriminatory intent may be found from "statistics" that white and/or male employees were promoted more frequently than black and/or female employees. For example, in support of this contention, plaintiff points to the deposition testimony of Joyce Hobbs, a data entry operator for the City of Philadelphia and co-worker of the plaintiff, who testified that white males were promoted more frequently than black females. A careful examination of Ms. Hobbs deposition reveals, that no factual basis for her assertions exists. Ms. Hobbs is unable to identify any similarly situated employees that were treated more favorably than the plaintiff. Ms. Hobbs concedes that she is unfamiliar with the qualifications of the non-minority candidates that she believes were treated favorably and unfamiliar with the requirements of the positions for which they applied for promotion.

While a party may certainly present statistical evidence in a disparate treatment action, plaintiff has failed to present any statistical evidence that rebuts the defendants' stated legitimate nondiscriminatory reasons for its decision not to promote the plaintiff. At best, the statistical evidence plaintiff has presented, if it can properly be called statistical evidence at all, is merely the personal observations and conclusory assertions of several co-workers that non-minority employees were treated more favorably than minority employees. Further, plaintiff has presented absolutely no evidence that any such persons were similarly situated to her.

her under the collective bargaining agreement, there is no basis for her Section 1981 claim.

Inadequate job performance is a legitimate nondiscriminatory reason for not promoting an employee. Defendant has consistently maintained that plaintiff was not promoted because of the untimeliness and poor quality of her work. Plaintiff has simply not presented any evidence from which one could reasonably find that the defendants' stated reason is pretext and unworthy of belief or that race or gender played any role in the decision not to promote her. Movant has failed to establish the existence of a meritorious defense.

C. Plaintiff's Culpability

The final element that I must consider under the Lorenzo test is whether the failure of respond to defendants' Motion for Summary Judgment was the result of plaintiff's and her counsel's culpable conduct. Plaintiff's counsel has offered several excuses for the failure to respond to defendants' motion: (1) the lack of secretarial assistance at his office; (2) the absence of an associate at his office; and (3) the substitution of lead defense counsel which resulted in supposed delays in discovery.

Clearly, the first two excuses offered by plaintiff do not constitute excusable neglect. Both excuses amount to nothing more than routine administrative problems that arise at a law practice, or any business for that matter. If routine administrative problems were to constitute excusable neglect and exempt a party from filing a timely response, the Federal Rules of Civil Procedure would be of no consequence at all. At no time did plaintiff's counsel request additional time to respond to defendants' motion or even apprise the court of any potential delay. Under Local Rule 7.1, plaintiff's response was due to be filed on or before February, 16, 1998. Not only did plaintiff fail to file a response by this date, but again failed to file a response following a telephone call from my deputy clerk in which plaintiff's counsel directly stated that a

response would be filed the following day.

Lastly, plaintiff represents that no substitute counsel was available during a period of time in which lead defense counsel was disabled resulting in a delay in discovery that inhibited a timely response. There is nothing to indicate that there was any delay in discovery or that either party could not or did not complete discovery during the time period allotted. Plaintiff's counsel never informed me of any discovery problems or requested additional time to conduct discovery. Consequently, plaintiff's counsel cannot now imply that plaintiff was somehow prejudiced by lead defense counsel's temporary absence.

I have always liberally construed the provisions of Rule 60(b) for setting aside default judgments taken against parties who, as a result of excusable neglect, fail to defend against an action by filing an answer or other pleading to a complaint. This permits the merits of the case to be heard and enables a party the opportunity to present a defense. The present action, however, involves plaintiff's failure to respond to a Motion for Summary Judgment. Discovery has been completed and the record fully developed enabling me to conduct an independent and thorough review of the action in reaching my decision.

If plaintiff's arguments were given effect, the Federal and Local Rules of Civil Procedure settings forth when an act is required or permitted to be done would be nothing more than precatory language where a party could set forth any excuse for failing to complete such act. Having reviewed the reasons relied upon by plaintiff's counsel to establish excusable neglect, I conclude that he is culpable and responsible for failing to respond to defendants' Motion for Summary Judgment.

IV. Conclusion

Movant has not established that her failure to respond to defendants' Motion for Summary Judgment was the result of excusable neglect nor that she has a meritorious defense to the motion. Defendants would be prejudiced if the instant motion is granted by being burdened with the further costs of defending this action. For these reasons, plaintiff's Motion for Reconsideration and Relief from Judgment will be denied.

An appropriate order follows.

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

MARY ANN COOPER,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
CITY OF PHILADELPHIA, et . al.,	:	No. 97 - 4337
	:	
Defendants.	:	
	:	

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that plaintiff Mary Ann Cooper's Motion for Reconsideration (document number 11) is **DENIED**.

By the Court,

Donald W. VanArtsdalen, S.J.

Dated: March 19, 1998