KAYE S. BLAIR,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-01,210
	:	
ANCHOR AUTO III, d/b/a ANCHOR,	:	
	:	
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: September 6, 2002

OPINION and ORDER

Facts

Before the Court is the Motion for Summary Judgment of Defendant, Anchor Auto III (Anchor), filed May 17, 2002. On July 11, 2002, the Plaintiff, Kaye S. Blair (Blair) filed a Motion asking the Court to grant an extension of time to file a response to Defendant's Motion for Summary Judgment. The Court granted the motion on July 22, 2002. The Plaintiff filed a Supplemental Brief in Opposition to Defendant's Motion on August 9, 2002 along with the depositions of David Confair and Gary Eck, an Anchor employee list prepared by Nichole Whitford, and Anchor employee wage information. The Defendant filed a Supplemental Brief in Support of its Motion on August 20, 2002.

In addition to the pleadings, the record before the Court consists of: the depositions of Plaintiff Kaye S. Blair, David Confair, and Gary Eck;

?? Defendant's Exhibit (filed July 2, 2002) in support of its summary judgment motion, including Plaintiff's Complaint to the Pennsylvania Human Relations Commission (PHRC), Defendant's Response and Answer to the Complaint, letter dismissing Complaint (November 18,

1998) Equal Employment Opportunity Commission, dismissal of charge (May 10, 1999)

?? Plaintiff's deposition (taken August 27, 2001) was attached to Defendant's summary judgment motion and included as exhibits Anchor employee wage information and the Anchor Employee Information Handbook and the application of Plaintiff for employment.

?? The depositions of Gary Eck and David Confair (taken August 1, 2001) was attached to Plaintiffs' supplemental response filed August 9, 2002, including in the Confair deposition as an exhibit, a list of Anchor employees with hiring and termination dates relevant to the timeframe at issue in this litigation.

Based upon the record, the Court finds that the following are the relevant material undisputed facts. On April 15, 2002, Anchor hired Blair as a salesperson at its Ford Lincoln Mercury dealership. *See*, Complaint, ¶7. Blair was the only female salesperson when she was hired. *See*, Complaint, ¶7. On July 30, 1996, Blair informed David Confair, manager of the Ford Lincoln Mercury dealership, and Bob Schon, its sales manager at its Ford Lincoln Mercury dealership, that she would need to be on leave for six weeks to have a hysterectomy. *See*, Blair Deposition, p. 24. The leave was approved, *see*, Answer, ¶8, but no one made any explicit statement that Blair's position would be available upon her return. *See*, Blair Deposition, 24. Even so, Blair assumed that she could return to her position at the end of her leave. *See*, Blair Deposition, p. 24. Blair left on medical leave on July 30, 1996. *See*, Answer, ¶8.

Blair was scheduled to have the surgical procedure on August 4, 1996, but due to complications it was rescheduled for August 18, 1996. *See*, Blair Deposition, 24. Blair was on leave from July 30, 1996 until October 14, 1996. *See*, PHRC Compliant, Answer, ¶8.

On October 14, 1996, Blair returned to Anchor seeking her reinstatement to her sale position. *See*, Blair Deposition, p. 27. Anchor did not reinstate Blair. *See*, Confair Deposition, p. 28.

On July 29, 1996, Anchor had hired Bobbie Davidson as a salesperson at its Ford Lincoln Mercury dealership. *See*, Anchor Employee List. On August 19, 1996, Anchor hired Allan Husband as a salesperson at its Ford Lincoln Mercury dealership. *See*, Anchor Employee List. Both Davidson and Husband were male. On the date Plaintiff Blair was hired two other male salespersons had also been hired, giving Anchor six salespersons (including Plaintiff). When she left on July 30, 1996 the sales force was reduced to five. The hiring of Husband restored it to six, and the sales force remained at six as of October 14, 1996 when Plaintiff sought re-instatement. Husband was terminated on November 22, 1996 reducing the sales force to five. On January 6, 1997 Anchor hired two salespersons, one a male, one a female, increasing the sales staff to seven.

In late 1996 and early 1997, Blair sought employment as a salesperson at two other car dealers, the Fairfield Ford and Fairfield Toyota dealerships. *See*, Blair Deposition, pp. 32-33. Neither dealership offered Blair a position. *See*, Blair Deposition, pp. 32-33. Blair did not seek employment outside the automotive field during that period, and responded only to positions advertised in the newspaper. *See*, Blair Deposition, p. 34.

In January 1997, Blair filed a complaint with the Pennsylvania Human Relations Commission. *See*, PHRC Complaint, 2. On February 13, 1997, Anchor offered Blair a sales position at its Avis Chevrolet dealership. *See*, Blair Deposition, Exhibit 3. Blair declined the offer based on the additional travel, smaller size of the showroom, and reduced business compared to the Ford Lincoln Mercury Dealership. *See*, Blair Deposition, pp. 35-36. On November 18, 1998, The Pennsylvania Human Relations Commission determined that Blair's complaint should be dismissed "because the facts of the case do not establish that probable cause exists to credit the allegations of unlawful discrimination." *See*, PHRC Dismissal Letter. Subsequently, Blair filed a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC dismissed Blair's complaint and adopted the findings of the Pennsylvania Human Relations Commission. *See*, EEOC Dismissal Letter.

In Blair's complaint to the Pennsylvania Human Relations Committee, she alleged that she was discharged because of her gender and that male employees who went on leave were allowed to retain and return to their sales positions. *See*, PHRC Complaint, p. 2. Specifically, she asserted Lonnie Gamble had been on leave for oral surgery and was not discharged and Wayne Wigg was told to take as much time as he needed when his father died. See, PHRC Complaint, p. 2. Anchor responded to the PHRC complaint that Lonnie Gamble used his accumulated vacation time for his oral surgery and was off work only two days. *See*, PHRC Answer, p. 2. Anchor also asserted in the PHRC proceeding Wayne Wigg was off leave for three days for the funeral of his father in accordance with Anchor's written Funeral Leave Policy. See, PHRC Answer, 2; Anchor Employee Information Handbook, 18.

Discussion

Anchor contends that Blair has not produced any evidence of record, which would support a *prima* facie case of employment discrimination. The Court disagrees with the Defendant and will deny its Motion for Summary Judgment.

Any party may move for summary judgment "once the pleadings are closed." *See*, Pa.R.Civ.P. 1035.2. Summary Judgment will be granted when the movant is entitled to judgment as a matter of law and either "(1) there is no genuine issue of any material fact as to a necessary element of the cause of action … or (2) after completion of discovery and production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action." *See*, ***Campanaro v. Pennsylvania Elec. Co.***, 738 A.2d 427, 476 (Pa. Super. Ct. 1999). A court must "view the record in the light most favorable to the non-moving party" giving the non-moving party all "reasonable inferences" and resolving any doubts as to the existence of a factual dispute in favor of the non-moving party. *See*, ***Id***.

The Pennsylvania Human Relations Act (PHRA) is generally applied in accordance with Title VII of the Civil Rights Act of 1964 (Title VII), so Pennsylvania courts may look to Title VII precedents in interpreting the PHRA. *See*, ***Bailey v. Storalazzi***, 729 A.2d 1206, 1211 n6 (Pa. Super. Ct. 1999). Under the PHRA, it is illegal for an employer to:

> refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required

because of the individual's sex. *See*, 43 P.S. 955 (a). It is also illegal for an employer to discriminate against an employee based on her sex under Title VII. *See*, 42 U.S.C. §2000e-2(a); ***Bailey***, 729 A.2d at 1211. In analyzing an employment discrimination case under the PHRA, Pennsylvania has adopted the approach of ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973). *See*, ***Fairfield Township Volunteer Co. No. 1 v. Commonwealth***, 609 A.2d 804, 805 (Pa. 1992); ***General Electric Corp. v. Pennsylvania Human Relations Comm'n***, 365 A.2d 649 (Pa. 1976).

Under the ***McDonnell-Douglas*** model, the "plaintiff bears the burden of establishing a prima facie case of discrimination by a preponderance of the evidence." *See*, ***Campanaro***, 738 A.2d at 475. The plaintiff must prove that (1) she is a member of a protected class, (2) she is qualified for the job, (3) she has suffered an adverse employment action, and (4) the employer has sought others with similar qualifications not in the protected class for the position or others not in the protected class have been treated differently. *See*, ***H.H.S. Vending Distr. v. Pennsylvania Human Relations Commission***, 639 A.2d 953, 956 (Pa. Commw. Ct. 1994); ***Bailey v. Storlazzi***, 729 A.2d 1206, 1213 (Pa. Super. Ct. 1999).

Once the plaintiff has established her *prima facie* case "a presumption of discrimination is raised." *See*, ***Taylor v. Pennsylvania Human Relations Commission***, 681 A.2d 228, 232 (Pa. Commw. Ct 1996). The burden then shifts to the defendant to "articulate a legitimate, non-discriminatory reason for the employment action." *See*, ***Campanaro***, 738 A.2d at 476. If the defendant does proffer such a reason, the plaintiff then must prove by a preponderance of the evidence that the legitimate reaso[n] offered by the employer [was] not its true reason, but rather, a pretext for discrimination." *See*, ***Id***. Once the plaintiff proves that the

defendant's reason was pretext for discrimination, it becomes a matter for "the trier of fact to decide which party's explanation of the employer's motives it believes." *See*, ***Taylor***, *supra*, 681 A.2d at 232.

The Court finds that Blair is able to demonstrate sufficient evidence of record in this case, which, if believed, would establish her *prima facie* case. Blair is a member of a protected class and qualified for the position of salesperson. Blair suffered an adverse employment action when she was not allowed to return as a salesperson at the Ford Lincoln Mercury dealership. Blair contends that the discrimination is evidenced by the fact that male salespersons who went on leave were given favorable treatment and allowed to return to their prior positions and that Anchor sought males for the position of salesperson during her leave and hired males in her place. In ***Bailey v. Storlazzi***, Victor Bailey was the only African American employee of a small family run printing business. *See*, 729 A.2d at 1208. During his employment, fellow employees subject him to racial slurs. *See*, ***Id***. When Bailey requested some vacation days he was "immediately fired." *See*, ***Id***. at 1209. The Superior Court held that Bailey had alleged facts sufficient enough to prima facie case because he asserted non-African American employees that had requested vacation were not terminated, and that non-African Americans who had requested leave were given more favorable treatment then African Americans that requested leave. *See*, ***Id***. at 1213

Similarly in ***Butler v. Elwyn Institute***, the District Court decided that summary judgment could not be given to the employer. *See*, 765 F. Supp. 243, 250 (E.D. Pa. 1991). The Elwyn Institute employed Daphne Butler, an African American woman. See, Id. at 245. Butler requested a thirty-day leave for personal reasons. *See*, ***Id***. Elwyn denied Butler's

request stating that it did not grant leave for employees to serve jail sentences. *See*, ***Id***. Butler was absent during the period of time she had requested for leave. *See*, ***Id***. Elwyn terminated Butler. *See*, ***Id***. The District Court held that Butler demonstrated sufficient evidence, which would establish her *prima facie* case of employment discrimination. *See*, ***Id***. Caucasian employees that had requested leave for personal reasons were given leave, while Butler was not. *See*, ***Id***. The District Court stated that although she did not demonstrate by any evidence that Caucasian employees who were sent to jail were granted leave it was sufficient that the evidence she did present could demonstrate that Caucasian employees who requested leave for personal reasons were given more favorable treatment then African American employees that requested leave for personal reasons.

Applying ***Bailey*** and ***Butler***, Blair's evidence could sustain a *prima facie* discrimination claim. Plaintiff argues that male salespersons were given more favorable treatment when they were allowed to return to their sales positions following leave. Plaintiff would be correct if that general statement was accurate. Plaintiff points to evidence of two employees to support this contention, Lonnie Gamble and Wayne Wigg. Defendants counter with evidence that Lonnie Gamble was on leave for two days in order to have oral surgery, using his accumulated vacation time for those two days. Defendant also states Wayne Wigg was on leave for three days, which was permitted under Anchor's Funeral Leave Policy. In comparison, Blair was on leave for roughly ten weeks. Obviously, if Blair had been terminated after a three-day leave, then there would have been disparate treatment and ***Bailey*** and ***Butler*** would apply. Similarly, if Gamble or Wigg were out for ten weeks and then returned to work ***Bailey*** and ***Butler*** would apply what the true facts are remaining in dispute. To support a

summary judgment motion, Anchor cannot rely upon its oral assertions as to Gamble and Wigg, which Blair, while not countering with other evidence, has not conceded. Therefore, the disparagement in the length of leaves, if true, may not be a demonstration that male salespersons were not treated differently then Blair.

Blair has also produced evidence that Anchor sought members of an unprotected class to fill Blair's position. Anchor hired Allan Husband on August 18, 1996. *See*, Confair Deposition, Exhibit B. This occurred while Blair was on leave (July 30, 1996 – October 14, 1996). The number of Anchor salespersons as of July 30, 1996, when Blair went on leave, was six, including Blair.[1] The number of Anchor salespersons as of October 14, 1996, when Blair attempted to return, was six.[2] Anchor states that Plaintiff was not replaced, but that the sales position was eliminated. *See*, Defendant's Brief, p. 5. According to David Confair, there was "no sales position available at that time." *See*, Defendant's Supplemental Brief, p. 4. There was no decision to fire Blair because of her gender; just simply they could not offer her a position that did not exist anymore.

The fact that they number of salespersons are the same is evidence indicating that Blair was replaced, and not that her position was eliminated. The hiring of Allan Husband established that Anchor sought members of an unprotected class to fill Blair's position. Thus, Blair demonstrates sufficient evidence of record in this case, which, if believed, would establish her *prima facie* case. Anchor therefore must "articulate a legitimate, non-discriminatory reason for the employment action." *See*, ***Campanaro***, 738 A.2d at 476. Anchor does assert a non-

[1] Anchor salespersons as of July 30, 1996 were Gary Eck, Lonnie Gamble, Wayne Wigg, Bobbie Davidson, Dennis Barna, and Kaye Blair. *See*, Confair Deposition, Exhibit B.

[2] Anchor salespersons as of October 14, 1996 were Gary Eck, Lonnie Gamble, Wayne Wigg, Bobbie Davidson, Dennis Barna, and Allan Husband. *See*, Confair Deposition, Exhibit B.

discriminatory reason for not reinstating Blair by stating there was no open position for her when she sought to return to work. Blair must now "prove by preponderance of the evidence" that Anchor's reason was "a pretext for discrimination." *See*, ***Campanaro***, 738 A.2d at 476. Blair has demonstrated enough evidence, which, if believed, to carry this burden. Anchor's non-discriminatory reason was that the sales position was eliminated. If that was true why would the number of salespersons be the same when Blair went on leave and when she returned. The number of Anchor salespersons as of July 30, 1996, when Blair went on leave, was six. *See*, Confair Deposition, Exhibit B. The number of Anchor salespersons as of October 14, 1996, when Blair attempted to return, was six. *See*, Confair Deposition, Exhibit B. This indicates that the position was not eliminated, but that Blair was replaced by a new salesperson not of the protected class.

Anchor did not offer Blair a sales position at the Ford Lincoln Mercury dealership when one became available. Allan Husband's employment ended on November 22, 1996. *See*, Confair Deposition, Exhibit B. Anchor later hired two salespersons, George Jensen III and Debra Colyer, on January 6, 1997. *See*, Confair Deposition, Exhibit B. It was not until after Anchor received notice of Blair's PHRC complaint on January 30, 1997 that it offered Blair a sales position at its Avis dealership. *See*, Defendant's Exhibits in Support of Its Motion for Summary Judgment, Exhibit 1; Blair Deposition, Exhibit 3. It would appear that Anchor would only offer Blair a sales position under the threat of a discrimination action, and not when the employment need arose.

There is also circumstantial evidence of gender discrimination, which bolsters Blair's claim that Anchor's proffered reason was a pretext for gender discrimination. When

Blair returned seeking reinstatement, she was told that since there was no sales position for her she could fill in as a secretary. *See*, Blair Deposition, p. 27. The position of secretary is traditionally a position filled by a woman, and this offer smacks of traditional gender stereotypes. Especially since all the secretaries at Anchor were female at the time. *See*, Confair Deposition, pp. 22-25.

Gary Eck in his deposition said that, "Again, since I have been there, any – not to discriminate against women, I have never seen a very productive woman salesperson yet, as far as selling 10 to 20 cars a month, okay? There's only been a handful, okay, since I've been there." *See*, Eck Deposition, 13-4. Anchor is correct that Eck is not a manager in charge of employment decisions. Anchor is also correct in that an "off-hand remark by an employer does no, by itself give rise to liability for gender discrimination. *See*, Defendant's Supplemental Brief, 5 citing ***Taylor***, 681 A.2d at 232. However, "discriminatory comments by non-decision makers; or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination." *See*, ***Abrams v. Lightolier***, 50 F.3d 1204, 1214(3rd Cir. 1995). Eck's deposition testimony can be used a part of a circumstantial case to establish gender discrimination regarding Anchor's failure to reinstate Blair. The offer of a secretary position, the failure to offer Blair a position when one became available, and the Eck testimony help cast doubt upon Anchor's non-discriminatory reason.

Blair has therefore produced evidence that Anchor's proffered non-discriminatory reason was a pretext for gender discrimination. Now it becomes "a matter for the trier of fact to decide which party's explanation of the employer's motives it believes." *See*, ***Taylor***, 681 A.2d at 232. Therefore, Anchor's motion for summary judgment must be denied.

O R D E R

The Motion for Summary Judgment filed by Defendant, Anchor Auto III, is HEREBY DENIED

BY THE COURT:

William S. Kieser, Judge

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