UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

LAIDLAW INC., and LAIDLAW EDUCATION SERVICES dba LAIDLAW TRANSIT, INC ,

Defendants

SHERYL EVERSON,

Plaintiff in Intervention

No C02-468Z

ORDER

INTRODUCTION

THIS MATTER comes before the court on a motion for summary judgment, docket no. 32, filed by defendants Laidlaw, Inc , and Laidlaw Educational Services doing business as Laidlaw Transit (hereinafter both taken together as "Laidlaw") Laidlaw alleges that plaintiff Equal Employment Opportunity Commission and plaintiff in intervention Sheryl Everson fail (1) to set forth a *prima facie* case of employment discrimination by disparate

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treatment on the basis of sex and (2) to state claims for negligent infliction of emotional distress and negligent hiring. Plaintiffs have filed in opposition, arguing that they have satisfied their *prima facie* case of disparate treatment, but not opposing defendant's motion to dismiss claims of negligent hiring and negligent infliction of emotional distress. Having reviewed the pleadings filed in support of and in opposition to the motion together with relevant portions of the record, the Court finds and rules as follows.

BACKGROUND

Plaintiffs filed suit against Laidlaw alleging claims of employment discrimination on the basis of sex under Title VII of the Civil Rights Act, 42 U S.C. § 2000e *et seq* and the Washington Law Against Discrimination, R.C.W. Chapter 49.60, and claims negligent infliction of emotional distress and negligent hiring.

Everson, formerly, for sixteen years, an employee of Laidlaw, drove school buses on regular routes and charter buses on special "mountain trips " During her employment, Everson received positive job performance reviews. Chun Decl , docket no 28, at Ex E. Everson's claim of sex discrimination arises from her service as a bus driver on a mountain trip

Driving on a mountain trip is a desirable assignment because more pay is involved It is also a more challenging assignment Therefore, it is Laidlaw's policy that only those drivers who have received annual training are eligible for mountain trips. Qualified drivers are put on a "ski qualification" list in order of seniority. Additionally, drivers compete against one another by submitting bids for each mountain trip In awarding mountain trips, Laidlaw looks to seniority and schedule accommodation Everson Decl., docket no. 31, at ¶ 3

In February 2001, Laidlaw awarded Everson and two other bus drivers, Greg Mattics and Anthony Lombardi, a mountain trip from Seattle, Washington, to Antelope, Oregon [1] Before departing, the drivers determined that their buses were unprepared. Accordingly, they informed the bus dispatcher and District Manager Peter McCue that the buses required servicing. However, the buses were not serviced before the drivers departed for Antelope Middleton Decl , docket no. 23, at Ex. F, 2-3.

During the trip, the drivers experienced difficult road conditions, and all three buses suffered mechanical problems. Everson's bus experienced brake problems, and the brakes caught fire Lombardi's brake pads "glazed over," and Mattics's bus overheated and lost oil. After the drivers arrived in Antelope, Laidlaw delivered three replacement buses for the return trip. Middleton Decl , docket no. 23, at Ex F, 2

While in Antelope, Everson telephoned McCue to inquire about her paycheck. According to Everson, an argument ensued during the telephone call after McCue called her "incompetent." Chun Decl , docket no 28, at Exhibit A (Everson Deposition at 148 6-13). Everson contends that after she defended herself, McCue stated:

> No female will ever stand up to me and get away with it You will never, ever drive my equipment to any mountain trip again.

Id at 151 10-11. Although McCue admits having a telephone conversation with Everson, he denies having an argument and denies making the statements alleged by Everson Chun Decl , docket no 28, at Exhibit B (McCue Deposition at 157:11-158 1).

After returning to Seattle, McCue informed Everson and Lombardi that because they misused their brakes, they would be ineligible for future mountain trips until they received "retraining " *Id* at 161.15-162:21. McCue determined that Mattics did not require

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[1] Although Everson and Mattics had driven on mountain trips prior to the Antelope trip, it is unclear from the pleadings whether Lombardi had prior experience driving buses on mountain trips

"retraining" because the mechanical problems he experienced were unrelated to brake misuse. Middleton Decl , docket no. 23, at Exhibit F, 2.

In its written policy for retraining, Laidlaw disciplines its drivers who have a "preventable accident or mishap" by requiring additional training Chun Decl., docket no 28, at Ex. J. McCue, however, testified that "retraining" Everson was not a disciplinary action. Chun Decl., docket no. 28, at Exhibit B (McCue Dep. at 167:10-13)

Everson denies that she misused her brakes and alleges that a mechanic in Antelope told her that the front brakes on her bus overheated because a "slack adjuster pin" was missing. Chun Decl., docket no 28, at Exhibit A (Everson Dep at 126:8-25). After the Antelope trip, Everson pursued retraining but Laidlaw failed to follow its written policy and never provided Everson retraining

After the Antelope trip, it is unclear from the pleadings whether Lombardi was able to bid on mountain trips Everson, however, bid on and was denied at least eight mountain trips. *Id.* at 51:20-54 17.

Everson contends that after the Antelope trip, Laidlaw's continued denial of her bid for mountain trips demonstrates (1) that McCue followed through with his telephone statement that she would not "get away with it" and "will never . . . drive my equipment to any mountain trip again" and (2) that, in its actions toward her, Laidlaw discriminated on the basis of sex.

DISCUSSION

A. Sex Discrimination

In order to overcome a motion for summary judgment in a sex discrimination claim arising from employment, a plaintiff must establish a *prima facie* case of disparate treatment under Title VII that gives rise to an inference of unlawful discrimination. Cordova v State Farm Ins. Companies, 124 F 3d 1145, 1148 (9th Cir. 1997) A *prima facie* case can be shown in one

of two ways: either through direct evidence of discriminatory intent, or by satisfying the factors set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to rebut the presumption by producing evidence of a legitimate, nondiscriminatory reason for the challenged action. *Id.* If the employer carries this burden of production, the plaintiff must then demonstrate that the proffered nondiscriminatory reason is merely a pretext for discrimination. Lyons v. England, 307 F.3d 1092, 1112 (9th Cir. 2002).

1. Prima Facie Case

a. McDonnell Douglas Factors

Everson may prove her *prima facie* case through circumstantial evidence, by showing that (1) she belongs to a protected class, (2) she was performing according to her employer's legitimate expectations, (3) she suffered an adverse employment action, and (4) similarly situated male employees were treated more favorably. McDonnell Douglas, 411 U.S. at 802; Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998). Washington courts also follow the McDonnell Douglas burden-shifting approach in analyzing discrimination claims. Marquis v. City of Spokane, 130 Wash.2d 97, 106 (1996).

In the present case, it is undisputed that Everson is in a protected class, that she was qualified and experienced in driving buses on mountain trips, and that, after the Antelope trip, she was denied mountain trips.

The parties dispute whether Everson was treated less favorably than a similarly situated male employee. Where a plaintiff seeks to establish the minimal *prima facie* case by making reference to the disparate treatment of other employees, those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination. Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 660 (9th Cir. 2002) (*citing* McGuinness v. Lincoln Hall, 263 F.3d 49, 53-54 (2nd Cir. 2001)).

Laidlaw asserts that Everson was not treated less favorably than Lombardi, a similarly situated employee In its view, Everson and Lombardi are similarly situated, not because of their driving experience, but because of the condition of their brakes after the Antelope trip Chun Decl., docket no. 28, at Exhibit B (McCue Dep. at 162 19-21). Laidlaw contends that, because both employees misused their brakes, it directed them to undergo retraining before they would be eligible for future mountain trips. *Id*

Everson, however, asserts that Laidlaw treated her less favorably than Mattics, who is similarly situated. She contends that Mattics, not Lombardi, is more similarly situated because Mattics was a senior bus driver, Mattics' bus experienced mechanical problems during the Antelope trip, and Mattics bid on mountain trips after the Antelope trip Everson alleges that, after the Antelope trip, she was treated less favorably than Mattics During the same time, both Everson and Mattics bid on mountain trips, but Laidlaw awarded Mattics trips while persisting in denying Everson trips Chun Decl , docket no. 28, at Exhibit A (Everson Dep at 54·7-14); Everson Decl , docket no. 31, at ¶ 10

Further, Everson contends that Lombardi's employment situation is dissimilar to hers because Lombardi had "significantly less" experience driving on mountain trips than did Everson Chun Decl., docket no 28, at Exhibit C (Royal Dep. at 123 12-16) Although Everson admits that she and Lombardi experienced brake problems, she contends that their brake problems were different Everson asserts that her brake problems arose from the loss of a slack adjuster pin and that Lombardi's brake problems occurred because his brake pads were "glazed over." Everson Decl., docket no. 31, at ¶¶ 6, 7, Middleton Decl , docket no. 23, at Ex F, 2. Finally, Everson argues that there remains a genuine issue of material fact, namely, whether Lombardi bid on mountain trips after the Antelope trip.

Because Everson has put forth sufficient circumstantial evidence that gives rise to an inference that she was treated less favorably than a similarly situated employee, she has met her minimal *prima facie* burden under McDonnell Douglas Wallis v J R Simplot Co , 26 F 3d 885,

889 (9th Cir 1994) (requisite degree of proof necessary to establish a *prima facie* case of discrimination is minimal; plaintiff need only offer admissible circumstantial evidence which gives rise to an inference of unlawful discrimination)

b. Direct Evidence

Additionally, Everson contends that she has met her *prima facie* burden by direct evidence. Direct evidence of discrimination is evidence that, "if believed, proves the fact of a discriminatory animus without inference or presumption " Godwin, 150 F.3d at 1221 "Sexist" statements constitute "direct evidence" of discrimination. *Id.*

In the present case, McCue's alleged statement that "no female will ever stand up to me and get away with it" is direct evidence that suggests the existence of bias and requires no inference to find a discriminatory animus *Id* (finding direct evidence when decision-maker who denied plaintiff a position said that he "did not want to deal with another female"), Lindhal v. Air France, 930 F.2d 1434, 1439 (9th Cir. 1991) (finding direct evidence when employer stated that female candidates get "nervous" and "upset")

In addition, not only did McCue direct the alleged statement to Everson, but his statement is allegedly tied to Laidlaw's denial of mountain trips McCue's alleged statement, therefore, is not a "stray remark" that was "uttered in an ambivalent manner." Godwin, 150 F.3d at 1221; *cf.* Nesbit v Pepsico, Inc , 994 F 2d 703, 705 (9th Cir. 1993) (finding supervisor's comment, "[w]e do not like grey hair" was weak circumstantial evidence of a discriminatory animus when it was uttered in an ambivalent manner and not tied directly to employee's termination).

Accordingly, Everson has met her minimal *prima facie* burden by setting forth direct evidence of a discriminatory animus

2. Laidlaw's Non-Discriminatory Reason

Because Everson has established a *prima facie* case, the burden shifts to Laidlaw to articulate a non-discriminatory reason for the employment action. McDonnell Douglas, 411 U.S at 802 Laidlaw asserts that the condition of the brakes on buses driven by Everson and

Lombardi indicated misuse, whereas the condition of the brakes on the bus driven by Mattics, who did not experience brake problems, did not indicate misuse. Laidlaw determined that the condition of brakes served as the basis for requiring retraining of Everson and Lombardi before it would permit them to drive on future mountain trips.

Since Laidlaw has offered a non-discriminatory reason for denying Everson mountain trips, the burden shifts back to Everson to raise a genuine issue of fact whether Laidlaw's proffered reason is pretext for discrimination. Lyons, 307 F 3d at 1112.

3. Pretext

In evaluating whether the employer's articulated reason is pretextual, the same evidence that the plaintiff introduced to establish her *prima facie* case is considered. Sischo-Nownejad F 2d 1104, 1111 (9th Cir. 1991) A plaintiff can prove pretext by relying on additional evidence in two ways· (1) indirectly, by showing that the employer's proffered explanation is "unworthy of credence" because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer. Godwin, 150 F 3d at 1220-22.

In the present case, Everson asserts that McCue's determination that she misused her brakes is pretext for discrimination and that McCue's actions were tantamount to sex discrimination She submits circumstantial and direct evidence of pretext for discrimination, in addition to the evidence presented in her *prima facie* case.

Everson submits direct evidence to show an atmosphere of sex discrimination at Laidlaw arising from sex-based comments made by McCue to other female employees For example, in her declaration, Lyn Faunce states that over a two year period, McCue made statements to her that "[w]omen like you can't keep their mouths shut," "[w]omen like you need to shut your trap," [w]omen never learn to listen," and "[y]ou're a woman; you're not smart enough to understand " Faunce Decl , docket no. 32, at ¶ 3 In addition, Jo Anne Royal, a branch manager at Laidlaw,

once overheard McCue refer to someone as "that bitch " Chun Decl , docket no. 28, at Exhibit C (Royal Dep at 72.22-73 3) [2]

Everson contends that McCue's own testimony reveals the disingenuous nature of McCue's determination that she misused her brakes and is, therefore, pretext for Laidlaw's discriminatory treatment For example, McCue testified that he assumed Everson rode her brakes instead of pumping them but cannot recall anyone telling him how Everson used her brakes on the Antelope trip. Chun Decl., docket no. 28, at Exhibit B (McCue Dep. at 140.7-13). McCue testified that he never made a written record of his determination that Everson misused her brakes, even though it was inconsistent with his prior procedure *Id.* at 162:13-163.3. Further, McCue testified that that he lacks mechanical expertise with buses and that he planned to examine Everson's bus, but never did so. *Id* at 135:3-5, 159:26-160.20-24. Finally, Everson contends that, although McCue testified that he reviewed a "repair order" of Everson's bus that showed the brakes were "burned up" and the "slack adjuster busted," Laidlaw has failed to produce the alleged "repair order" despite outstanding discovery requests. *Id* at 139 20-24.[3]

When direct or circumstantial evidence consists of more than the McDonnell Douglas presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. Sischo-Nownejad, 934 F 2d at 1111. Viewing the evidence in the light most favorable to Everson, the Court finds that there remain genuine issues of material fact that preclude summary judgment.

B. Negligent Infliction of Emotional Distress and Negligent Hiring and Retention

Plaintiffs concede that they have no cause of action against Laidlaw under negligent infliction of emotional distress and negligent hiring and retention Accordingly, the Court

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[2] Everson also submits declarations of former employees who offer direct evidence of racially-based comments made by McCue.

[3] Everson contends that Laidlaw has also failed to produce any documents relating to the condition of the brakes on the bus driven by Lombardi

DISMISSES those claims in the Complaint of Plaintiff-in-intervention Everson, docket no. 11, at ¶¶ 12, 13, and the second sentence in ¶ 14.

CONCLUSION

For the foregoing reasons, Laidlaws motion for summary judgement is GRANTED in part and DENIED in part

IT IS SO ORDERED.

DATED this 10th day of April, 2003.

Thomas S Zilly

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE