2002 WL 1447582
United States District Court, E.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
DELTA AIRLINES, INC., Defendant.

No. 97 CV 5646(SJ). | June 26, 2002.

Attorneys and Law Firms

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Opinion

MEMORANDUM & ORDER

JOHNSON, J.

***1** Plaintiff, The Equal Opportunity Commission ("EEOC"), brings this action alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994) ("Title VII") on behalf of Christophe Jean-Marie, a Seventh Day Adventist and former employee of Defendant Delta Air Lines, Inc.. Presently before this Court is Defendant's Motion for Judgment as a Matter of Law pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated below, Defendant's Motion for Summary Judgment is granted.

BACKGROUND

Christophe Jean-Marie ("Jean-Marie") is a member of the Seventh Day Adventist church. Due to religious obligations, he observes the Sabbath from sundown Friday to sundown Saturday, and believes that he must abstain from work during those hours.

On February 16, 1996, Jean-Marie applied for employment at Delta Airlines, Inc. ("Delta") to be a ticket or ramp agent at Delta's operation at John F. Kennedy International Airport ("JFK"). When Jean-Marie applied for a job with Delta, he filled out Delta's employment application form. In filling out the form, Jean-Marie answered "yes" to the question of whether he was willing to work "nights, weekends or holidays." (Def.Ex. 3).

In order to maintain adequate coverage on all of its shifts, Delta establishes work schedules. (Affidavit of Richard Ealey ("Ealey Aff.") ¶ 8). Every six months, employees in each department bid their preference, including work area and shift, and their bids are awarded based on seniority. (*Id.* ¶ 9.) For those new hires who arrive in the middle of the cycle, open shifts are made available for bidding, and the new hires then bid on their preferential shifts, with the most senior new hire given first choice until all of the shifts are filled. (*Id.* ¶ 10). Due to the likelihood that an employee's schedule might require that he work weekends and public holidays, Delta's application for employment includes specific questions regarding the applicant's availability to work on such days. (*Id.* ¶ 14).

On March 29, 1996, Robert McClain ("McClain"), a Delta employee, interviewed Jean-Marie for a position in customer service. During the course of the interview, McClain asked Jean-Marie if he could work weekends, holidays, and nights, to which Jean-Marie replied, "yes, I can, but I cannot work during the Sabbath hours. I can work holidays, I can work nights and days, but cannot work during the Sabbath hours." (J-M Dep. at 79-80, 82). In response to this statement, McClain explained that Delta's schedule was determined by seniority, and that Jean-Marie might be given a shift in which he would be required to work weekends. (J-M Dep at 83). He told Jean-Marie, that being a new candidate, "[he] may not have an option." (*Id.*) In his deposition, Jean-Marie stated that, "I wasn't discouraged. I was still wanting to take that chance to see if I could get the sabbath." (J-M Dep. at 83). McClain told Jean-Marie that with respect to his Sabbath requirement, Delta may be able to "work it out but they can't guarantee it." (J-M Dep. at 80). To this, Jean-Marie responded, "I'll take a chance and see how it works out. If I end up having days that I request off, fine, super, great." (J-M Dep. at 81).

***2** Subsequent to this interview, Delta offered Jean-Marie employment. Jean-Marie accepted the offer, and on June 3, 1996, began working for Delta in a part-time position as a Ready Reserve contract employee in Delta's Aiport Customer Services Department ("Department 120") at JFK. In June of 1996, Delta employed thirty seven Ready Reserve Contract Employees in Department 120. Of those thirty seven, fourteen began employment at Delta before Jean-Marie, nine began on the same date, and thirteen

began on June 24.

As a new hire, Jean-Marie was required to attend a week long training session, which began on June 3, 1996. Herman Tebben ("Tebben") was the instructor of this session. According to Jean-Marie, the training consisted of "Delta airline operation on the ramp, what they expect from their workers, what the workers should know, a lot of rules and regulations, different procedures...." (J-M Dep. at 86). As part of his training, Jean-Marie was provided with a training booklet entitled, "Airport Customer Service New Hire Employee Familiarization," which contained information concerning shift swaps and use of personal time off for temporary absence. (Rosenstein Decl., Ex. 4). Specifically, the booklet stated:

> [Ready Reserve] employees are allowed to swap shifts with other employees or take unpaid personal time off (PTO). When employees swap shifts, the employee agreeing to work the shift becomes responsible for shift coverage. All requests for shift swaps and PTO must be approved by your local supervisor and are granted based on operational requirements. Local policy may vary from station to station, so it is important to check with your local supervisor regarding your local policy. *Id.*

Furthermore, the booklet stated:

> If arrangements have been made, and operational requirements permit, an employee may be granted PTO. PTO may also be granted to an employee when emergency situations or extraordinary circumstances require a temporary absence. *Id.*

Jean-Marie was also provided a copy of Delta's Personnel Practices Manual. According to the manual, Ready Reserve personnel were not scheduled to work overtime and were not eligible for sick leave (paid or unpaid), vacation, or unpaid leaves of absence unless the absence was a result of a military leave or an unpaid leave under the Family and Medical Leave Act of 1993. (Plaintiff's Mem. in Opp'n to Summ. J. ("Pl's Mem.") at 5). Ready Reserve personnel were, however, eligible for shift swaps, and would be paid for the day the work was performed. (Rosenstein Decl., Ex. 4). During the training class, Tebben informed Jean-Marie that "there is a formal process at Delta involving filling out a form if you want to swap a shift or request personal time off." (J-M Dep. at 108-09).

During his training, Jean-Marie received a document entitled, "Spring Bid-1996-Revision # 1," which listed available schedules for which trainees could bid. (J-M Dep. at 90 and Def. Ex. 8). The work site and regular days off were listed for each schedule for which trainees could bid. *Id.* Jean-Marie was informed that he could only bid for the Ready Reserve shifts. (J-M Dep. at 99). Of the twenty four Ready Reserve shifts offered, three-numbers nine, sixteen, and twenty two-offered Friday and Saturday as regular days off. (Def.Ex. 8).

***3** While in training, Jean-Marie received another document, this one entitled "Work Schedule Bid Sheet Ramp RR-Revision # 1-Effective Date: 6/30/96," on which he was instructed to list his choice of work schedule in order of preference. (J-M Dep. at 94 and Def. Ex. 9). In an effort to obtain a work a schedule that would afford him Fridays and Saturdays off, Jean-Marie listed work schedules nine, sixteen, and twenty two as his preferred work schedules. ((J-M Dep. at 101, 106 and Def. Ex. 9). He did not list any other work schedules. (Def.Ex. 9).

On Friday, June 7, Jean-Marie learned that he would not be working any of the schedules for which he had bid, and that his schedule for the following week required him to work during the Sabbath. After learning of his schedule assignment, Jean-Marie alerted Tebben of his need to observe the Sabbath. Tebben stated that "we could switch schedules" but then said the schedule had been given to him and it was not up to him to change it. (J-M Dep. at 118). Tebben mentioned the possibility of shift swaps and personal time off, and then took Jean-Marie to the office of Joe Von During ("Von During"), Tebben's supervisor and head of Department 120 at JFK. (J-M Dep. at 119-23). After telling Von During that Jean-Marie was a Seventh Day Adventist and thus could not work on the Sabbath, Tebben asked what could be done. (J-M Dep. at 120-21). Von During replied by stating to Jean-Marie that "Delta is a full time operation," and then asked Jean-Marie why he applied for the position if he knew he was not going to be available to work those hours. (J-M Dep. at 121). Jean-Marie told Von During that he "never had any problem with [his] previous jobs." *Id.* Von During then gave Jean-Marie a form to fill out to explain his reasons for resignation. *Id.* Jean-Marie wrote the following resignation letter:

> I, Christophe Jean-Marie, elect to resign my employment with Delta Air Lines, Inc. for Religious Observation. My resignation is effective the date of this letter. Dated 6/7/96 (Def.Ex. 11).

On June 17, 1996, Jean-Marie filed a charge of discrimination with the EEOC. The EEOC found probable

cause, and issued a right to sue letter. This action was commenced by the EEOC on Jean-Marie's behalf, on September 30, 1997.

DISCUSSION

I Summary Judgment Standard

Under Fed.R.Civ.P. 56(c), a court may grant summary judgment only when "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 moving party is entitled to a judgment as a matter of law." In a ruling on a motion for summary judgment, a trial court must be limited to "discerning whether there are any genuine issues of material fact to be tried, not to deciding them." *Chase Manhattan Bank, N.A. v. T & N PLC,* 905 F.Supp. 107, 111 (S.D.N.Y.1995) (quoting *Gallo v. Prudential Residential Servs. Ltd. Pshp.,* 22 F .3d 1219, 1224 (2d Cir.1994)). In determining whether there is enough evidence presented so that a reasonable jury could return a verdict for the non-moving party, the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986).

***4** Once the moving party has met its burden demonstrating that there is no genuine issue of material fact to be tried, the burden shifts to the non-moving party to present "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Chase Manhattan Bank,* 905 F.Supp. at 112. Mere conclusory allegations will not suffice. *Anderson,* 477 U.S. at 249. Any disagreement about a material issue of fact precludes the use of summary judgment.

II Title VII Claim

Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer to discriminate against an employee on account of his or her religion. Specifically, Title VII's provisions make it an unlawful employment practice to discriminate against any employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion," or to "limit, segregate or classify" an employee in a way that would "adversely affect his status as an employee," because of that employee's "religion." 42 U.S.C. §§ 2000e-2(a)(2) and 703(a)(2). To establish a *prima facie* case of religious discrimination, the plaintiff bears the burden of demonstrating that: (1) he has a bona fide religious belief or practice that conflicts with an employment requirement; (2) he informed the employer of this belief or practice; and (3) he was disciplined for failing to comply with the conflicting employment requirement. *Elmenayer v. ABF Freight Systems,* 2001 U.S. Dist. LEXIS 15357 at *13 (E.D.N.Y.). If the plaintiff establishes a *prima facie* case, "the employer then has the burden to show that it made good faith efforts to provide the employee with a reasonable accommodation or that providing such an accommodation would cause undue hardship to the employer's business." *Id.; see also Jones v. New York City Dep't of Corr.,* 2001 U.S. Dist. LEXIS 2669 at *7 (S.D.N.Y.). To avoid Title VII liability, the employer need not offer the accommodation the employee prefers. *Cosme v. Henderson,* 287 F.3d 152, 158 (2d Cir.). Instead, when any reasonable accommodation is provided, the statutory inquiry ends. *Id.*

Jean-Marie has not established a *prima facie* case of religious discrimination because he was never disciplined for his failure to work on the Sabbath. A plaintiff must show that she has suffered an adverse change in the conditions of his employment. *Durant v. Nynex,* 101 F. Supp 2d 227, 233 (S.D.N.Y.2000). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* (quoting *Burlington Indus. Inc. v. Ellerth,* 524 U.S. 742, 761 (1998)). Here, the only allegation of "adverse action" presented by Plaintiff is that Delta "forced" Jean-Marie to resign (Pl's Mem. at 8-9). Plaintiff does not allege that Delta took any other disciplinary measures against Jean-Marie, or that he suffered any other "adverse action" besides his alleged loss of employment. Thus, in order to determine whether Plaintiff has established a *prima facie* case, this Court must determine whether Jean-Marie was constructively discharged, as that is that only claim of "adverse action" that has been alleged by Plaintiff.

***5** In order to maintain a claim for constructive discharge, a plaintiff must present evidence sufficient to permit a rational jury to conclude that the employer deliberately created working conditions that were "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Wilson v. Consol. Edison Co. of New York, Inc.,* 2000 U . S. Dist. LEXIS 3895 at *11 (S.D.N.Y.) (quoting *Stetson v. NYNEX Serv. Co,* 995 F.2d 355 (2d Cir.1993)). A plaintiff cannot merely show that he was dissatisfied with the nature of his assignments, or that the working conditions were unpleasant or difficult. *Id.; see also Victory v. Hewlett-Packard Co.,* 34 F.Supp.2d 809, 826 (S.D.N.Y.1999). Furthermore, "not only is it necessary to show intolerable working conditions, but the plaintiff must also allege facts sufficient to prove that these

conditions were intentionally created by the employer for the purpose of inducing the employee's resignation or retirement." *Wilson,* 2000 U.S. Dist. LEXIS 3895 at *11 (quoting *Victory,* 34 F.Supp.2d at 826).

Here, Plaintiff claims that Von During's response to Jean-Marie's situation, when coupled with Delta's unwillingness to accommodate his religious obligations, "supports an inference that Jean-Marie was forced to choose between his job and his religious belief, observance and practice." (Plt's Mem. at 9). However, the Court finds that there is simply no evidence that Von During, or any other Delta employee, intentionally created difficult or unpleasant conditions for the purpose of inducing Jean-Marie's resignation, as is required to allege a claim of constructive discharge. Even had Jean-Marie alleged that Delta intentionally created unpleasant working conditions, Delta offered Jean-Marie a reasonable accommodation in the form of a shift swap. If an employee is offered accommodations which might permit him to avoid a work conflict with his religious duties, yet fails to take advantage of these accommodations, he cannot then assert that he was constructively discharged, or as Plaintiff asserts, "forced to resign." *Cleveland v. International Paper Company,* 1998 WL 690915 at *5 (N.D.N.Y.).

In *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 70 (1986), the Supreme Court wrote that "requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one." *See Durant,* F.Supp.2d at 243. The Second Circuit has written approvingly of an employer accommodating an employee by permitting voluntary shift swaps. *See Genas v. State of N.Y. Dep't of Corr. Serv.,* 75 F.3d 825, 832 (2d Cir.1996). Furthermore, the Code of Federal Regulations implementing Section 701(j) of Title VII makes it abundantly clear that voluntary substitutions and shift swaps are generally reasonable accommodations where a voluntary substitute with substantially similar qualifications is available. 29 C.F.R. § 1605.2.

***6** In the instant case, Delta made a preliminary offer to Jean-Marie of a reasonable accommodation in the form of shift swaps. It is possible that at some point the accommodation offered to Jean-Marie would not have provided the schedule relief required by his religious obligations, but Jean-Marie never waited for this moment to come to pass. Instead, he refused the accommodation offered by Delta because it could not guarantee that he would be able to observe the Sabbath. The mere possibility that the accommodation might have failed at some point does not retroactively render Defendant's June 1996 offer of accommodation unreasonable. *See Elmenayer,* 2001 U.S. Dist. LEXIS 15357 at *22.

In its Memorandum in Opposition to Summary Judgment, Plaintiff alleges that Tebben's offer to accommodate was rescinded by Von During. This claim is not supported by the record. Even assuming that Von During did rescind Tebben's offer to accommodate Plaintiff, there is no evidence that Plaintiff was willing to accept a compromise of any sort with Delta. Rather, Plaintiff's own deposition testimony makes it abundantly clear that he knew of the possible accommodation proposed by Delta, but found it to be insufficient because it did not guarantee that he would never be required to work on the Sabbath.

The following excerpt from Jean-Marie's deposition illustrates that he understood what a shift swap was, and how it might have eased the conflict between work and his religious obligations:

Q: You understood you could, assuming Smith was willing to trade shifts, you would have his shift and he would have your shift?

A: Correct

Q: And that would allow you to work for Delta and not on the Sabbath?

A: Yes.

Q: And when you say there is no guarantee he would[n't] say [”]no way[”] -

A: Or he might say yes for a week, month and want his original shift back.

Q: Right. So either initially or at some point he may not agree to swap with you?

A: Not all the time.

Q: And the same with whoever holds shifts [a different shift], they may or may not be willing to swap with you, they may be willing to swap with you on some weekends about not other weekends?

A: Right.

Q: And that's what you wanted, right?

A: Yes. (J-M Dep. at 125-126).

Thus, it is evident that Plaintiff understood the nature of the proposed accommodation. It is just as clear that Plaintiff found this accommodation unacceptable. Plaintiff's deposition testimony indicates his expectations of his work assignments at Delta:
Q: You wanted to be guaranteed that you wouldn't have to work on Fridays and Saturdays.

A: Yes

Q: You didn't want to have to rely on whether or not other employees would be willing to swap with you?

A: Correct

Q: That's why you went to Mr. Von During's office with Mr. Tebben to see if that could be done?

A: Yes.

Q: Mr. Von During said it couldn't be done so you resigned?

A: Yes

Q: So far as you know, Mr. Tebben would have assisted you in identifying those individuals to see if they would swap, but that wasn't sufficient for you because you wanted a guaranteed shift, correct?

***7** A: Correct. (J-M Dep. at 125-127, 149).

In the instant case, Delta offered Jean-Marie the possibility of a shift swap, which while potentially imperfect, is the exact sort of reasonable accommodation contemplated in the Code of Federal Regulations implementing Title VII. 29 C.F.R. § 1605.2. Jean-Marie understood the proposal but found it to be unsatisfactory. This Court need not determine whether there were alternative reasonable accommodations that could have been agreed upon, since Title VII requires only that the employer propose a reasonable accommodation, and does not require that the employer offer the specific accommodation the employee seeks. *Durant,* 101 F.Supp.2d at 234; *see Ansonia,* 479 U.S. at 69. Under the facts before this Court, the Court finds that Plaintiff has failed to make out a *prima facie* case of religious discrimination in violation of Title VII.

CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56 is granted and judgment should enter dismissing the complaint.

SO ORDERED.

Parallel Citations

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