IP 04-0327-C T/K Melzoni v American Drug Stores
Judge John D. Tinder Signed on 07/29/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARTHA MELZONI,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-00327-JDT-TAB
	)	
AMERICAN DRUG STORES, INC,	)	
OSCO DRUG,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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MARTHA MELZONI,	)	
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Plaintiff,	)	
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vs.	)	1:04-cv-0327-JDT-TAB
	)	
AMERICAN DRUG STORES, INC.,	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DKT. NO. 22)[1]

Originally, Martha Melzoni brought this lawsuit seeking damages under a number of different theories of recovery. Count I of her Amended Complaint set forth claims of discrimination, failure to accommodate, and retaliation under the Americans With Disabilities Act ("ADA"). Count II alleged gender discrimination and retaliation under Title VII of the Civil Rights Act of 1964. She alleged violations of the Family Medical Leave Act in Count III, and a state law claim of wrongful discharge in Count IV. Through acknowledged voluntary withdrawal or abandonment of most claims, Melzoni is left with one theory to stand behind in pursuit of her complaint against her employer, American Drug Stores, Inc. d/b/a/ Osco Drugs ("Osco"). That theory is one of retaliation

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

under Title VII and the ADA. Osco argues that it is entitled to summary judgment on that claim as well. However, the court finds that summary judgment is not warranted with respect to that claim for the reasons discussed in this entry.

I. Summary Judgment Standard

Summary judgment is only to be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the court examines the pleadings and the proof as presented in depositions, answers to interrogatories, admissions, and affidavits made a part of the record. *First Bank & Trust v. Firstar Info. Servs., Corp*., 276 F.3d 317 (7th Cir. 2001). It also draws all reasonable inferences from undisputed facts in favor of the non-moving party and views the disputed evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986).

II. Factual Background

Martha Melzoni began her employment with Osco as a pharmacy technician in 1982. She held various positions over the years, including Management Trainee, Assistant Manager, Operations Manager and General Manager a/k/a Store Manager. She was the Store Manager for store # 5365 at the Lake Plaza in Indianapolis at the time her employment was terminated in April 2003. There are approximately thirty Osco stores in central Indiana and one District Manager, Jake Jackson, is responsible for

those stores. Each store is required to have at least one licensed pharmacist on duty when open for business. The stores also employ technicians to assist the pharmacists at the pharmacy. There is a Pharmacy Manager for each store and a Division Pharmacy Manager, Dennis Reber, who oversees all the central Indiana Osco pharmacies as well as some in the southern part of the state. During the relevant time periods, Dana Bauer served as Osco's Regional Human Resources Director and, in addition to other geographic locations, had responsibility for the central Indiana stores.

In March of 2001, Melzoni injured her back while working at the store she was managing. She continued to work but took it easy for awhile because of pain from the injury. However, the pain failed to subside and was significant enough to cause her to undergo back surgery in December of 2001. She returned to work in March of 2002, but further surgery was required at the end of May 2002. She returned to work again in September of 2002 with a half day work restriction. She was unable to work more than twenty-four to thirty hours per week through April 2004 and has since been limited to thirty to forty hours per week. Typically, a store manager works considerably more than the minimum of forty-eight hours per week set out in Osco's policies and is required to work as many hours as necessary to properly manage the store. From September 2002 until her discharge in April of 2003, Melzoni worked roughly twenty-four hours per week.

Beginning in September of 2002, Melzoni was in communication with Bauer regarding Melzoni's physical limitations and the need for an accommodation. Bauer initially told Melzoni that Osco would monitor her physical progress while

accommodating what was thought to be her temporary need to work less than full-time hours. In January 2003, Bauer received a letter from Melzoni discussing “permanent” work restrictions she said her doctor had given her, the forty-eight hour minimum required of Store Managers, and the possibility of qualifying for long term disability. After confirming from Melzoni’s doctor that she was unable to work more than approximately twenty-four hours a week and had additional physical limitations, such as lifting, Bauer determined that Melzoni could not perform the essential functions of the Store Manager job, but would qualify for a job as a part-time cashier. Bauer wrote to Melzoni indicating that it was Osco’s understanding that she could not work more than half of the hours required of a Store Manager and therefore Osco could no longer accommodate her in that position. Melzoni was told to let Bauer know if her understanding of the number of hours Melzoni could work was wrong, but that if it was not, Osco could offer her continued employment only as a part-time cashier.

After receiving Bauer’s letter, Melzoni contacted her by telephone to discuss the situation. She inquired about the pay rate for a cashier and indicated that certain of her physical restrictions might disqualify her from that position. She did not specifically inquire about other available positions at any Osco store, and no other positions were available at the store where she had been the manager. Osco terminated Melzoni’s employment effective April 19, 2003.

Shortly after her employment was terminated, Melzoni noticed an add in a trade magazine in which Osco was soliciting applicants for pharmacy technician positions said to be immediately available in the Indianapolis area. Melzoni was anxious to obtain

further employment with Osco within ninety days so as to retain certain benefits, including her seniority date. On May 8, 2003 she wrote Bauer asking to be considered for a part-time position as a pharmacy technician. The two exchanged telephone messages and eventually spoke on May 20, 2003. Bauer indicated she had been unaware of Melzoni's certification as a pharmacy technician, but would look into the possibilities of her obtaining such a position. She later left a message for Melzoni indicating she had spoken to both Jake Johnson and Dennis Reber regarding Melzoni's interest in a technician job and both had indicated that they would be interested in having her at a store in such a capacity.

Reber and Melzoni spoke on a number of occasions during the summer of 2003 regarding potential technician positions at various Indianapolis area Osco stores. Reber testifies that he was just forwarding on potential opportunities at individual stores so that Melzoni could contact the particular store's pharmacy manager who would be responsible for the actual hiring of any technicians. Melzoni testifies that Reber made at least one specific offer of a position and that she accepted that offer in writing, but was never put into that position. The parties dispute the nature and conditions of other offers of employment made to Melzoni by Osco between June 2003 and November 2003 and how Melzoni reacted to those offers. It is undisputed that she began working part-time as a fill-in pharmacy technician for Osco store #5358 on November 3, 2003.

Between the time Melzoni was let go as a store manager and rehired as a pharmacy technician, she filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") complaining that Osco failed to

accommodate her disability and later discharged her because of her disability. In an attempt to facilitate the resolution of her claim, the EEOC scheduled a mediation in July of 2003. Prior to that mediation, Melzoni claims that Reber called her and offered her a position at store #5316. A responsive letter dated July 8, 2003, from Melzoni to Reber opens with the following request: "[P]lease consider me for the Pharmacy Tech. position at store 5316 for 24 hours, I am able to work 40 hours as well." Reber agrees that he had contacted Melzoni regarding a potential opening at store #5316, but that it was up to Melzoni to follow up with that store's pharmacy manager if she wanted to be employed there. As it turns out, the EEOC mediation was held on July 8, 2003 as well. At the mediation, the technician job at store #5316 was offered to Melzoni. Melzoni thought it was an offer conditioned upon her settling her disability discrimination claim and did not accept the offer. Osco says it was an unconditional offer of employment as a pharmacy technician. In any event, the position at store #5316 was filled by someone else shortly after the mediation.

On July 11, 2003, Bauer wrote to Melzoni stating that Osco was willing to offer her employment as a pharmacy technician if she contacted Bauer within the next thirty days so that they could discuss what store location would be compatible. Unable to reach Bauer by telephone on July 26, 2003, Melzoni wrote to her indicating that she was still interested in a pharmacy technician position. The letter said, "[P]rior to accepting this position I need to know how many hours of work you are offering along with the location of employment and the rate of pay including any benefits." She went on to provide the various days and evenings during the week that she was available to

work and included the most recent health assessment from her doctor. However, despite being sent by certified mail, the letter was lost by the postal service and another was sent on August 5, 2003 and delivered to Osco on August 7th. Bauer testifies that after Melzoni indicated she was still interested in a pharmacy technician position, she gave the information to Reber and left it to him to try to find a position for her.

Melzoni did not hear anything further from Osco again until October of 2003. Reber contacted Melzoni to let her know that there would likely be an opening at store #5323, but the pharmacy manager was on his honeymoon and would not be able to contact her until he got back. Reber had told the pharmacy manger to contact Melzoni about any opening when he returned and also encouraged Melzoni to follow up on the opportunity. The store #5323 pharmacy manager never got in touch with Melzoni and she never contacted him.

Later in October of 2003, a pharmacy technician resigned at store #5358. The pharmacy manager at that store recruited two technicians from other Osco stores to take some of the hours of the technician who left. She also received an e-mail from Reber informing her of Melzoni's interest in working part-time as a technician. The pharmacy manager at store #5358 contacted Melzoni about working some evening hours and Melzoni began doing that on November 3, 2003. The number of hours she worked each week varied depending on how many hours the two other technicians took. The other two technicians were given first choice on hours by the pharmacy manager because they had been contacted first about taking over the hours available when the previous technician left and had agreed to do so. In April of 2004, Melzoni

was offered and accepted a pharmacy technician position at store #5323 which provided her with 30 hours of work per week. She continues to work there today.

Melzoni filed this lawsuit in February of 2004. During the course of her deposition she voluntarily withdrew her claims of a hostile work environment, common law wrongful discharge and violations of the FMLA. Osco filed its Motion For Summary Judgment attacking all remaining claims and pointing out the withdrawn claims. In response, Melzoni abandoned her sex and disability discrimination claims, but continues to pursue claims of retaliation under the ADA and Title VII.

III. Analysis

Melzoni asserts that in retaliation for her filing a charge of discrimination with the EEOC, under the provisions of the ADA and Title VII, Osco delayed hiring her into a position as a pharmacy technician. Both Title VII and the ADA make it unlawful for an employer to discriminate against an employee or applicant for employment because that person filed a charge with the EEOC. 42 U.S.C. § 2000e - 3(a); 42 U.S.C. § 12203(a). A plaintiff has two ways to go about pursuing a retaliation charge. The Court of Appeals for the Seventh Circuit detailed those two avenues in *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640 (7th Cir. 2002). She may elect to proceed under the direct method, which requires either an admission of guilt by the defendant or circumstantial evidence substantial enough that if believed would prove discriminatory motive without reliance on inference or presumption. *Id.* at 644. The second alternative is for the plaintiff to pursue the indirect method of proving retaliation based upon an

adaptation of the *McDonnell Douglas* burden shifting paradigm. *Stone*, 281 F.3d at 644. In this case, Melzoni is attempting to prove discrimination through the indirect method.

According to the analysis offered in the *Stone* decision, at the first stage of the indirect method of proof, a plaintiff must show that after engaging in statutorily protected conduct only she, and not other similarly situated employees who did not engage in protected conduct, was subject to an adverse employment action despite performing her job in a satisfactory manner. *Id.* If the plaintiff makes this primary showing and the defendant offers no evidence in response, the analysis ends and plaintiff is entitled to a judgment. *Id.* However, if the employer presents unrebutted evidence of a noninvidious reason for the adverse action, then it is entitled to summary judgment. *Id.*

While *Stone* provides the modified *McDonnell Douglas* template for retaliation claims, the adverse employment action at issue in that case was the employer terminating the plaintiff's employment. In the case at bar, the adverse employment action is the failure to hire or delay in rehiring a former employee who had previously been terminated. The Seventh Circuit did not discuss in *Stone* the factual background other than the fact that the plaintiff alleged a retaliatory discharge. Instead, the court stated it was limiting the published opinion specifically to clarifying the summary judgment standard for retaliation cases. *Id.* at 642. The fact that the case at bar has the distinction of dealing with a failure to timely rehire at first gave this court some reason to pause. That part of the *Stone* template which requires the plaintiff to show that she was "performing her job in a satisfactory manner," but still was subject to the adverse employment action, left this court with the initial impression that the *Stone*

template was distinctly applicable to a situation where the employee was still employed with the employer at the time the adverse employment action occurred. However, the Seventh Circuit has recently found the *Stone* analysis to be just as applicable in a situation involving a failure to rehire as it is in a claim of retaliatory discharge. *See Cichon v. Exelon Generation Co.*, 401 F.3d 803, 810 (7th Cir. 2005). The measurement point for satisfactory job performance in a retaliatory failure to rehire case is at the time the plaintiff was terminated prior to seeking re-employment. *Id.* at 811.

So, under the facts of this case, Melzoni was performing her job satisfactorily, but simply could not perform a sufficient number of hours due to her physical restrictions. Despite her subsequent prompt response to advertised openings, others were hired to fill open positions at Osco stores for which she was undisputedly qualified. As examples of similarly situated individuals who were not subject to the adverse employment action, Melzoni points to documents produced by Osco which indicate that: 1) it hired Veda Daniel for a pharmacy technician position at store #5323 in September of 2003; and, 2) that it originally hired Andrea Turnstall in June of 2003 as a pharmacy technician at store #5316 and then rehired her in October 2003 for a similar position.[2]

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[2] Melzoni also points to the existing Osco pharmacy technicians who were given the opportunity to claim hours at store #5358 prior to her being given hours as an example of the company filling a position she was qualified for with someone else. However, the court does not see a situation where employees within the company are given opportunities to work hours ahead of adding an additional employee as constituting an adverse employment action toward the former employee not hired, especially here, where she was given the opportunity to work hours those existing employees did not take.

Osco meets Plaintiff's contentions with numerous arguments of its own, none of which are completely convincing. First, Osco says that because Melzoni was hired in November of 2003, there has been no adverse employment action, maintaining that at most any delay was a mere inconvenience. However, in a footnote, Osco concedes that carried to an extreme, its analysis might not be apropos, citing *Collum v. Brown*, 209 F.3d 1035, 1042 (7th Cir. 2000), where the Seventh Circuit said that a delay in promotion was an adverse employment action because it affected such things as rates of pay and accrual of leave. The court finds a delay in hiring in this case to be equally or even more adverse in that it affects rate of pay and seniority to an even greater degree than does a delay in promotion. And while there may be a line to draw where a delay is only a matter of days or weeks, here the claim is that the delay was a matter of at least a few months. "The adversity of an employment action is judged objectively. . . ." *Id.* at 1041. There is no question that a reasonable person could find this delay to be adverse.

Next, Osco claims that Melzoni is required to show that the people charged with hiring responsibilities were aware that she had filed the charge of discrimination with the EEOC. There is no indication in the *Stone* decision that any such requirement exists. Even so, Osco wants the court to find that Mr. Reber, the Division Pharmacy Manager, did not have the ability to hire or direct a local pharmacy manager to hire Melzoni to fill an open technician position. Not only does this not square with a logical analysis of the administrative hierarchy, but it goes directly against what Bauer, the Regional Human Resources Director, thought because she left the matter of finding a position for Melzoni

in Reber's hands. The court is not impressed with Osco's argument that neither Reber nor Bauer had any "duty" to find Melzoni a position. That may or may not be so up to the point that Melzoni applied for the advertised positions and Bauer and Reber both actively engage in either offering Melzoni such positions or discussing with her the availability of such positions and her availability to fill positions in the Indianapolis area. It is clear that Melzoni thought she was dealing with the right people to obtain a job. That impression was based on conduct and statements by management level employees of Osco. Whether her impression was reasonable in light of other communications made to her should be determined by a jury.

Finally, Osco argues that Melzoni has failed to demonstrate that others similarly situated who did not file charges of discrimination were treated more favorably. It argues that Melzoni's claim that similarly situated individuals include Veda Daniels, Andrea Turnstall and two other unidentified individuals who took other technician positions in the Indianapolis area from July 2003 through October 2003 is not explained or supported by admissible evidence. The problem with Osco's argument is that Melzoni is simply relying on Osco's own answer to her interrogatory which asked for information regarding those who were hired as pharmacy technicians subsequent to January 1, 2003. In response to the interrogatory, which included a request for background information on the individuals identified, Osco chose only to provide certain documents from its employment files, after setting forth what has unfortunately become the typical two page "general objection" (better described as a "kitchen sink" objection)

in response to a relatively straight forward request for relevant information.[3] For Osco to argue that Melzoni cannot rely on the authenticity of documents Osco produced to her or that she has failed to adequately describe why she is similarly situated to those who are mentioned in the documents is more than a bit disingenuous. Osco chose to respond to an interrogatory by producing the documents without any explanatory caveat. Under those circumstances, Melzoni is certainly free to argue logical inferences from the contents of the documents and rely upon the implicit authentication of a document produced by the opposition in response to discovery. *See In re Greenwood Air Crash*, 924 F. Supp. 1511, 1514 (S.D. Ind. 1995). And, the documents produced can certainly be interpreted as showing that, at least with respect to Turnstall, an employee who Osco did not identify as having filed a discrimination charge, was hired, let go and rehired all during the time period Melzoni was seeking the same type of position.

So, Melzoni gets credit for satisfying the first stage of the *Stone* inquiry. That leaves the question of whether or not Osco has offered uncontested evidence that it had a nondiscriminatory reason for taking so much time before it hired Melzoni. Osco says that Reber informed Melzoni of the stores with openings as he became aware of them and Melzoni either failed to respond quickly enough or did not respond at all. And, while

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[3] While written discovery requests may at times be a bit broad or less focused than they should be, in recent times these "General Objections," which parties set out in front of answers which invariably start with "subject to the previously stated general objection," have taken on even more breadth and less focus. Objections to responding to discovery should be direct and to the point and not made for the obvious purpose of trying to allow a watered down response to continue to muddy the facts and circumstances surrounding relevant issues.

Osco's reason for the length of time it took to hire Melzoni is not invidious, Melzoni has set forth sufficient evidence to allow a reasonable jury to conclude differently. As she points out, while Osco wants to relieve Bauer and Reber from any hiring responsibility, Bauer is the person who, on at least two occasions, offered to employ her as a pharmacy technician and later said she left it to Reber to take the situation to its conclusion. There may be quite a bit of evidence to support a conclusion that Melzoni's own lack of action, claim related sparring or unrealistic interpretation of the conditions of an offer were the real reason for the delay. However, there is also enough evidence to support a conclusion that Osco's proffered reason was not the real reason for its action - or lack thereof for several months. If there is evidence that would support a conclusion that retaliation as opposed to the proffered nondiscriminatory reason was at the root of the relevant decision, than a defendant is not entitled to a summary judgment. *See King v. Preferred Tech. Group*, 166 F.3d 887, 893-894 (7th Cir. 1999). Here, though not in plentiful amounts, there is at least some evidence that Mr. Reber and Osco could have placed Melzoni in a pharmacy technician position in Indianapolis a good deal before it actually occurred.[4]

IV. Conclusion

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[4] The court is treating November 3, 2003, as the date Melzoni was rehired. Though on occasion she has made arguments that this was just a fill-in position and that she really did not become a part-time pharmacy technician until the later assignment, there is no question that she was an Osco employee again as of November 3rd. If at trial it is determined that she would have been hired some time prior to November 3rd for a position that would have given her more hours than she was able to get at store #5358, the limited fill-in hours she received would be an issue relevant to calculating damages only.

Most of Plaintiff's claims have fallen by the wayside either voluntarily or in the course of briefing on the pending motion for summary judgment. However, there is still an avenue of recovery that has yet to become factually or legally unattainable. Consequently, Defendant's Motion For Summary Judgment is **GRANTED IN PART**. Judgment in favor of Osco will be entered on all of Melzoni's claims other than her claim for retaliation under Title VII and the ADA after these latter claims are resolved. The case will now proceed on the basis of that claim alone.

ALL OF WHICH IS ENTERED this 29th day of July 2005.

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John Daniel Tinder, Judge
United States District Court

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