

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DELORES HICKS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 94-310-P-C
)	
MAINE MEDICAL CENTER,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

In this employment discrimination case the plaintiff alleges that the defendant terminated and refused to rehire her because of her race. The plaintiff asserts claims for race discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1), and the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. § 4572(1)(A), and state-law claims for intentional and negligent infliction of emotional distress. For the reasons that follow, I recommend that the defendant’s motion for summary judgment be granted as to the Title VII and MHRA claims, and that the remaining state-law claims be dismissed.

I. Summary Judgment Standards

Summary judgment is appropriate only if “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.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential

to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). “Even in discriminatory discharge cases, where the plaintiff can rarely present direct, subjective evidence of an employer’s actual motive, the plaintiff cannot survive summary judgment with ‘unsupported allegations and speculations,’ but rather must ‘point to specific facts detailed in affidavits and depositions -- that is, names, dates, incidents, and supporting testimony -- giving rise to an inference of discriminatory animus.’” *Hoepfner v. Crotched Mountain Rehab. Ctr., Inc.*, 31 F.3d 9, 14 (1st Cir. 1994) (citation omitted).

II. Factual Context

Viewed in the light most favorable to the plaintiff, the material facts may be summarized as follows: Delores Hicks, an African-American woman, began working for the defendant Maine Medical Center in February 1987 as a file clerk in the Patient Accounts Department. Affidavit of Delores Hicks (Docket No. 9) (“Hicks Aff.”) at 1. In 1988 she was promoted to receptionist/charge-off clerk and then to financial counselor. *Id.* at 7.

Thomas Cryan was the defendant’s Director of Patient Accounts from August 1989 through the plaintiff’s termination. Affidavit of Thomas Cryan (Docket No. 5) (“Cryan Aff.”) ¶ 1. The plaintiff had the following supervisors while employed by the defendant: Robin Young (February 1987-May 1989); Rosanne Peterson (September 1989-September 1993); and Claudette Chamberland (September 1993-April 1994). Hicks Aff. at 7.

The defendant terminated the plaintiff on April 19, 1994. Cryan Aff. ¶ 5m. Cryan made the termination decision in his capacity as Director of Patient Accounts, *id.* ¶ 1, based on his personal observations of the plaintiff’s work, her personnel file and oral communications from her supervisors, *id.* ¶ 3.

Peterson gave the plaintiff a satisfactory rating on her annual review in September 1992, but noted that she needed to work on her communications skills and keep better records of conversations and requests from patients. *Id.* ¶ 5a. In early May 1993 Peterson issued a written warning for problems ongoing over the prior several months, noting specific deficiencies including: unanswered phone calls; lack of follow-up on correspondence; excessive personal telephone use; lack of punctuality; lack of teamwork; and attitude with patients and co-workers, especially when her

supervisor was away. *Id.* ¶ 5b. Peterson proposed close monitoring of the plaintiff's work and terminating her unless she improved. *Id.* ¶ 5c.

On June 10, 1993 Peterson noted improvement in the plaintiff's work, and added that she and Cryan would follow up in July. *Id.* ¶ 5d. On July 14, 1993 Cryan presented the plaintiff with a written warning for consistent tardiness, and noted that if the tardiness continued, she would be suspended for three days. *Id.* ¶ 5e.

Cryan issued the plaintiff a "Formal Performance Counseling Form" on August 20, 1993 in which he warned that she would be terminated unless she significantly improved her performance over the next forty-five days. *Id.* ¶ 5f. Cryan detailed his concerns in an attached memorandum stating that the plaintiff had shown some improvement since the May 5 warning, but had not significantly improved. Exh. G to Cryan Aff. at 1. Specifically, she remained behind in her follow up, did not adhere to financial counseling procedures, and was not meeting the needs of her department and the defendant's patients. *Id.* The memorandum explained that the plaintiff must make significant improvement in following collection procedures, that Cryan would be reviewing her accounts on a weekly basis, and that she must begin weekly meetings with her coordinator. *Id.* at 1-2.

On August 31, 1993 the defendant received feedback from two outside collection agencies with whom the plaintiff interfaced. *Id.* ¶ 5g. The feedback included complaints that: responses were inconsistent; urgent requests did not get better responses than non-urgent requests; issues requiring more research were seldom answered; little response was given on "big dollar" accounts; requests were several months behind; three accounts totaling approximately \$20,000 had recently been closed for lack of response to the agencies' requests for information; and many small accounts had recently

been closed because they were too old and requests went unanswered. Exh. H to Cryan Aff. at 958-59.

Cryan gave the plaintiff a rating of “Does Not Meet Standards” in her November 1993 annual evaluation. Cryan Aff. ¶ 5h. He noted: “This employee has been on probation but since she has improved, this probation has been rescinded. The Management Team will continue to work with [the plaintiff] until all aspects of job performance are in line with job standards.” *Id.*

On January 5, 1994 Chamberland issued the plaintiff a written warning concerning work that was piling up. *Id.* ¶ 5i. The plaintiff was suspended on February 4, 1994 for five work days without pay for “unacceptable job performance” based on Chamberland’s review of the her work. *Id.* ¶ 5j. In an attached memorandum, Chamberland detailed the plaintiff’s deficiencies in areas such as responding to correspondence and telephone messages, reviewing and filing inpatient folders, organizing collection agency requests, reviewing reports to prevent unnecessary forwarding to collections, spending time away from her desk, attitude and loud music. Exh. M. to Cryan Aff. at 972-74. Chamberland further wrote that she had “tried to counsel [the plaintiff] on how to better organize her work load, time management, and more efficient use of the system. I received only negative comments and no cooperation.” *Id.* at 974. The suspension notice warned, “Consequence for employee’s inability or failure to improve performance sufficiently shall be immediate termination.” Exh. L to Cryan Aff.

One of the defendant’s collection agencies called in mid-April 1994 regarding unanswered requests for information. Cryan Aff. ¶ 5k; Exh. N to Cryan Aff. The plaintiff had told Chamberland that she could not find the folder containing the information in question. Exh. N. to Cryan Aff. Chamberland later looked through the plaintiff’s correspondence, where she found copies of the file

in question. *Id.* A memorandum detailing this incident was attached to the plaintiff's April 19, 1994 termination notice. Cryan Aff. ¶ 5m. In this memorandum Chamberland summarized her evaluation of the plaintiff's performance: "Based on above examples and my coaching sessions, there has not been an overall, consistent improvement in performance and behavior. Performance generally seems better until an event brings to the forefront recurring issues and repeated lapse in work ethics." Exh. O to Cryan Aff.

The plaintiff denies that her performance merited criticism, *see Hicks Aff.* at 7-25, yet does not deny that the criticisms were made. Additionally, the plaintiff asserts facts that, if believed, would support an inference that many of the criticisms were unjustified. These facts are, generally: billing and file room backups caused delays in her work; the computer system was down most of the time, causing her work to pile up and making it impossible to respond to her phone messages and correspondence; the new billing system caused her return mail to pile up; and her audit work with outside collection agencies caused her to fall behind in her counseling work. *Id.* at 12, 13, 16-20.

Beyond her conclusory allegation that the criticism was part of a plan to build a record against her and ultimately fire her because of her race, *see id.* at 25, the plaintiff recounts some specific evidence of racial bias. Several incidents involved the plaintiff's first supervisor, Young. In mid-1988, Young told the plaintiff that she was hired as a "token" black person in the Patient Accounts Department. *Id.* at 2. Young also referred to people sun-tanning on the beach as "sand niggers." *Id.* at 4. At various times, Young called the plaintiff "cupcake" or "sunshine." *Id.* at 3.

Employee Brenda McLean circulated a mock application form for presidential candidate Jesse Jackson in approximately 1988. *Id.* The form contained racially derogatory remarks about Rev. Jackson. *Id.*

In mid-1990 Stackpole responded to the plaintiff's request for help with her work by saying, "Lincoln freed the slaves!" *Id.* at 2. Thereafter, Stackpole made several similar remarks when the plaintiff asked for help. *Id.*

In or about 1991 or 1992 some of the other employees referred to the plaintiff's work cubicle as the "inner city" in reference to her race. *Id.* at 5. Employee Maria Quartrano brought in a hubcap, which the plaintiff alleges was symbolic of the inner city, and placed it in a window near the plaintiff's cubicle. *Id.*

At various times between 1992 and 1993 Quartrano called the plaintiff "Buckwheat," a derogatory name used to refer to Negro slaves in the old South. *Id.* at 4. Robert Carpenter, a supervisor in the department, also called her "Buckwheat." *Id.* Some employees, including Quartrano, Stackpole and Young, teased the plaintiff because she spoke using expressions common to African-Americans. *Id.* at 5.

III. Title VII

Courts analyze Title VII employment discrimination claims pursuant to the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). At the first stage, the plaintiff must make out a prima facie case of discrimination. *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir. 1995). Next, the defendant must produce sufficient competent evidence, taken as true, to permit a rational fact finder to conclude that there was a nondiscriminatory reason for the termination. *Id.* Once the defendant meets this burden of production, the plaintiff must proffer sufficient admissible evidence, if believed, to prove that the defendant's stated reason was merely a pretext for race discrimination. *Id.* at 1091-92.

Conceding for purposes of its motion that the plaintiff has made out a prima facie case, the defendant states that its non-discriminatory reason for terminating the plaintiff was her deficient performance. The defendant has submitted evidence that, from September 1992 until February 1994, the plaintiff was the subject of numerous unsatisfactory job performance evaluations, one recommendation for termination, several warnings and one suspension. This amply satisfies the defendant's burden of production. Thus, the plaintiff, who always bears the burden of persuasion, must show that the defendant's stated reason for her termination was a mere pretext for race discrimination. *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 479 (1st Cir. 1993).

A. Pretext

“The factfinding inquiry into pretext focuses on ‘whether the *employer believed* its stated reason to be credible.’” *Woodman*, 51 F.3d at 1093 (quoting *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1118 (1st Cir. 1993)). Thus, the plaintiff must produce evidence from which a rational fact finder could infer that the defendant did not believe it fired the plaintiff because of her deficient performance.

Assuming, as the plaintiff claims, that the defendant incorrectly and unfairly criticized her job performance, that is insufficient to show pretext. *Gadson v. Concord Hosp.*, 966 F.2d 32, 35 (1st Cir. 1992). The plaintiff “cannot meet [her] burden of proving pretext simply by questioning [the defendant]’s articulated reason.” *Id.* Cryan stated that he decided to fire the plaintiff because of deficiencies in her job performance based on his observations, written documentation in her personnel file and input from her supervisors. Despite her conclusory allegation that Cryan criticized and discharged her because of her race, the plaintiff has produced no evidence suggesting that Cryan

did not believe her performance was deficient. Thus, the plaintiff has not shown that the defendant's stated reason for termination was pretextual.

B. Discriminatory Animus

Moreover, even if the plaintiff had shown that the defendant's stated reason was a pretext, her task would not be complete without proof that underpinning the pretext was discriminatory animus. *Vega*, 3 F.3d at 479. The plaintiff must produce evidence from which a rational fact finder could infer that intentional race-based discrimination was a determinative factor in the plaintiff's termination. *Woodman*, 51 F.3d at 1092.

Merely proving racial bias on the part of some employees does not satisfy the plaintiff's burden. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990). Where one person makes and carries out the decision to terminate an employee, the racial biases of those with whom the decisionmaker consults are irrelevant: the plaintiff must demonstrate *the decisionmaker's* racial bias. *See La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1412 (1st Cir. 1984).

Cryan himself made the decision to terminate the plaintiff. The plaintiff, therefore, must demonstrate that racial bias played a substantial factor in his decision. *See id.* In 1994 Cryan told the plaintiff not to apply for a particular job in the Patient Accounts Department because he would not give it to her, and the job was later given to a white employee with less seniority. Hicks Aff. at 6-7. Yet, she offers no evidence suggesting that Cryan's advice and warning to her or his subsequent decision were motivated by her race rather than her poor performance evaluations. She further alleges that Cryan criticized and ultimately discharged her because she complained about derogatory

racial comments. *Id.* at 25. Finally, she claims that employees who made racist remarks were not disciplined, *id.* at 4, 5, apparently implying that Cryan shared their racial bias toward the plaintiff.

As the First Circuit has warned, “Optimistic conjecture, unbridled speculation, or hopeful surmise will not suffice” to create a factual dispute. *Vega*, 3 F.3d at 479. To survive summary judgment, the plaintiff must point to “specific facts . . . giving rise to an inference of discriminatory animus.” *Hoepfner*, 31 F.3d at 14. Yet, the plaintiff offers only conclusory allegations and unbridled speculation to show that racial bias played a role in Cryan’s decision.

Furthermore, the plaintiff’s allegation that Cryan fired her for racial reasons belies the numerous reprises that Cryan afforded her. In early May 1993 Peterson proposed terminating the plaintiff if her performance did not improve. Cryan himself warned on August 20, 1993 that he would fire the plaintiff if her performance did not significantly improve. On August 31, 1993 the defendant learned that one of the collection agencies with whom the plaintiff worked had closed approximately \$20,000 worth of accounts because of unanswered requests for information. The plaintiff received a warning on January 5, 1994 and a five-day suspension on February 4, 1994. Despite all this, Cryan did not fire Hicks until April 19, 1995. If Cryan wanted to fire the plaintiff because of her race he had ample “pretext” to do so by August 1993, particularly when he learned that her performance had cost approximately \$20,000. Rather, the record reflects efforts by the defendant to work with the plaintiff in an effort to help her improve her performance. The inferences the plaintiff would have a fact finder draw simply are not supported by the summary judgment record.

IV. Pendent State-Law Claims

When summary judgment is entered against a plaintiff on its federal claims, the court has the discretion to dismiss pendent state-law claims. *See* 28 U.S.C. § 1367(c)(3); *Burns v. Loranger*, 907 F.2d 233, 234 n.1 (1st Cir. 1990). I can discern no compelling reason why this court should retain jurisdiction respecting the remaining state-law tort claims. Accordingly, I conclude that the plaintiff's claims for intentional and negligent infliction of emotional distress should be dismissed.

V. Conclusion

For the foregoing reasons, I recommend that summary judgment be **GRANTED** in favor of the defendant as to Counts I (Title VII) and II (MHRA),¹ and that Counts III (intentional infliction of emotional distress) and VI [sic] (negligent infliction of emotional distress) be dismissed.

¹ The analysis of the MHRA claim is identical to the Title VII analysis contained herein. As this court has explained, "The MHRA was intended by the Maine legislature to be the state analogue to Title VII, and the judicial construction of federal antidiscrimination law has, as a result, long been adverted to by the Law Court as persuasive authority for the interpretation of the MHRA." *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1511 (D. Me. 1991) (citing *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1261 (Me. 1979); *Greene v. Union Mut. Life Ins. Co.*, 623 F. Supp. 295, 298-99 (D. Me. 1985)).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of November, 1995.

David M. Cohen
United States Magistrate Judge