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Reynolds v. Delmar Gardens of Lenexa, Inc.D.Kan.,2003.Only the Westlaw citation is currently available.

United States District Court,D. Kansas.
Gail REYNOLDS, Plaintiff,
v.
DELMAR GARDENS OF LENEXA, INC., d/b/a Garden Villas of Lenexa, Defendant.
Civil Action No. 02-2039-KHV.

Jan. 2, 2003.

Michael B. Dunalewicz, Dunalewicz Law Office, Overland Park, KS, for Gail M. Reynolds.
James R. Ward, Berkowitz, Feldmiller, Stanton, Brandt, Williams & Shaw, LLP, Kansas City, MO, Daniel J. Doetzel and Andrew J. Martone, St. Louis, MO, for Garden Villa's of Lenexa.

MEMORANDUM AND ORDER

KATHRYN H. VRATIL, Judge.

***1** Plaintiff brings age discrimination claims against Delmar Gardens of Lenexa, Inc., doing business as Garden Villas of Lenexa, under the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621 et seq. This matter comes before the Court on Defendant's Motion For Summary Judgment (Doc. # 24) filed August 30, 2002, which plaintiff has not opposed. Pursuant to D. Kan. Rule 7.4, "[i]f a respondent fails to file a response within the time required ... the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." When deciding whether to enter summary judgment against a non-responding party, however, Rule 56(e), Fed.R.Civ.P., requires the Court to determine whether the undisputed facts entitle defendant to summary judgment as a matter of law. See *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir.2002). For reasons set forth below, the Court finds that defendant's motion should be sustained.

Summary Judgment Standards

***1** Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.; accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir.1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

***1** The moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga, Okla.*, 942 F.2d 737, 743 (10th Cir.1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d

887, 891 (10th Cir.1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

***1** As noted above, plaintiff has not responded to defendant's motion for summary judgment. Rule 56(e), Fed.R.Civ.P., provides that
***1** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

***2** A party's failure to respond to a summary judgment motion is not a sufficient basis on which to enter judgment against the party. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-161 (1970). Rather, the Court must determine whether judgment for the moving party is appropriate under Rule 56, Fed.R.Civ.P. Essentially, the inquiry is whether the facts asserted and supported in the summary judgment motion entitle the moving party to judgment as a matter of law.

Facts

***2** Defendant Delmar Gardens of Lenexa, Inc., doing business as Garden Villas of Lenexa, ("Garden Villas") operates a retirement community. In June 2000, Garden Villas advertised for an assistant activity director. Among other prerequisites, the position required good computer skills. Job duties included producing a monthly newsletter and assisting with dietary and dining duties.

***2** Plaintiff, who was then 57 years old, applied for the position. On the part of her job application which listed "Special Skills and Qualifications," plaintiff wrote: "Type. PC (taking classes) CDL license." Ex. F.

***2** The activity director for Garden Villas, Garland Woodson, and its director, Jennifer Drozda, interviewed plaintiff. During her interview with Drozda, plaintiff stated that her former employer (another retirement center), had "worked her to death" and that she resented assisting with dietary duties there. Plaintiff also told Drozda that she had not used a computer at work in more than four years, but that she was taking a course to brush up on her skills. Drozda concluded that plaintiff did not have the computer skills to produce the newsletters, announcements and other documents for which the assistant activity director position was responsible.

***2** Woodson and Drozda also interviewed Lee Ann Hinkle for the position. Hinkle had substantial computer experience and knew how to use the computer programs required in the position. In her previous position as a recreation program assistant, Hinkle had produced news releases, monthly reports and a leisure brochure. She also planned, coordinated and directed activities and events. Based on these qualifications and the fact that Hinkle had not expressed disdain for assisting with other duties within the community, Garden Villas hired Hinkle.

***2** On October 17, 2000, plaintiff filed a charge of discrimination with the EEOC, alleging that Garden Villas refused to hire plaintiff based on her age, in violation of the ADEA. See Ex. H. Although plaintiff signed the charge of discrimination, she did not swear to the allegations set forth in the charge. See *id.*

***2** Plaintiff filed this lawsuit on January 29, 2002. On May 15, 2002, Garden Villas served plaintiff a request for admissions which included the following:

a. Admit that you were not the most qualified candidate for the Garden Villas' Assistant Activity Director position;

***2** • Admit that the Garden Villas' Assistant Activity Director position required an applicant to have good computer skills;
***3** • Admit that the Garden Villas' Assistant Activity Director position required an applicant to assist with dietary and dining;
***3** • Admit that you did not have the necessary computer skills to produce the newsletters, resident announcements and computer generated letters and invitations that were required as part of the duties of the Garden Villas' Assistant Activity Director position;
***3** • Admit that no representative of Defendant told you that your age was a factor in its decision not to hire you;
***3** • Admit that your age was not a factor in Defendant's decision not to hire you.

***3** Ex. I. Plaintiff's response to defendant's request for admissions was due on or before June 17, 2002. Plaintiff did not respond until July 24, 2002, and she has not sought leave of Court to withdraw or amend her admissions.

Analysis

***3** A plaintiff can prove that a potential employer discriminated against her by providing either direct or circumstantial evidence of age discrimination. *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir.2000). Direct evidence demonstrates on its face that the potential employer decided not to hire plaintiff for discriminatory reasons. *Ramsey v. City & County of Denver*, 907 F .2d 1004, 1008 (10th Cir.1990). Circumstantial evidence allows the jury to draw a reasonable inference that discrimination occurred. *Stone*, 210 F.3d at 1136.

***3** This case presents one item of arguably direct evidence of age discrimination: plaintiff's testimony that Woodson told her that Drozda told him that "she really wanted to go with someone younger, that [plaintiff was] too old." Ex. D at 97. While this statement by a decision maker ordinarily would be direct evidence of age discrimination, it does not raise a genuine issue of material fact because plaintiff did not timely respond to defendant's request for admission "that no representative of defendant told her that her age was a factor in the decision not to hire her." The Court must therefore deem that plaintiff admitted the request for admission. See, e.g., *Havenfield Corp. v. H & R Block, Inc.*, 67 F.R.D. 93, 97 (W.D.Mo.1973) (plaintiff failed to provide proper answers as required by Rule 36(a); defendant's request for admission deemed admitted); *Kan. Nat'l Bank & Trust Co. v. Allmon*, 1990 WL 182350, *1 (D.Kan., Oct. 29, 1990) (pursuant to Rule 36, Fed.R.Civ.P., defendant deemed to have admitted each request for admission by failing to respond within 30 days); *cf. Bergemann v. United States*, 820 F.2d 1117, 1120-21 (10th Cir.1987) (response to motion for summary judgment arguing in part that opposing party should not be held to admissions can constitute Rule 36(b) motion to withdraw those admissions).

***3** The Court thus turns to the question whether the record contains indirect evidence of discrimination. The Court evaluates claims of discrimination that rely on circumstantial evidence using the familiar burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the plaintiff must first establish a prima facie case of discrimina-

tion. *Stone*, 210 F.3d at 1137. If plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a facially nondiscriminatory reason for its actions. See *Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1533 (10th Cir.1995). If defendant articulates a legitimate nondiscriminatory reason, the burden shifts to plaintiff to present evidence sufficient on which a reasonable jury might conclude that defendant's proffered reason is pretextual, that is, "unworthy of belief." *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1165 (10th Cir.1998) (quoting *Randle v. City Of Aurora*, 69 F.3d 441, 451 (10th Cir.1995)).

***4** The critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred "under circumstances which give rise to an inference of unlawful discrimination." *O'Connor v. Consol. Coin Caterers Corp .*, 517 U.S. 308, 311-12 (1996). In order to set forth a prima facie showing of age discrimination in hiring, plaintiff must present evidence (1) that she belongs to the protected class; (2) that she applied for and was qualified for the assistant activity director position; (3) that despite her qualifications she was not hired; and (4) that defendant continued to seek applicants from individuals having qualifications similar to those of plaintiff, or filled the position with someone sufficiently younger to permit an inference of age discrimination. See *Dunbar v. Bd. of Dirs. of Leavenworth County Library*, 10 F.Supp.2d 1222, 1226 (D.Kan.1998) (citing *Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 448-49 (10th Cir.1981)); see also *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1228-29 (10th Cir.2000) (comparison to person outside of protected class in fourth prong of prima facie case not necessary to create inference of discrimination).

***4** The record contains undisputed evidence of the first element: plaintiff is within the statutorily protected age group and defendant did not hire her. Defendant asserts, however, that plaintiff has not met the second element because she admitted that she was not qualified for the position. Defendant points out that plaintiff did not timely respond to its requests for admissions under Rule 36(b) and that one admission was that plaintiff did not have the computer skills required for the assistant activity director position. Under Rule 36(b), this matter "is conclusively established unless the Court on motions permits withdrawal or amendment of the admission." Plaintiff has not sought to withdraw or amend the admission and therefore it stands. Plaintiff has admitted for purposes of this lawsuit that she was not qualified for the position, and she therefore has failed to set out a prima facie case of discriminatory refusal to hire.

***4 IT IS THEREFORE ORDERED** that Defendant's Motion For Summary Judgment (Doc. # 24) filed August 30, 2002, be and hereby is **SUSTAINED.**

D.Kan.,2003.
Reynolds v. Delmar Gardens of Lenexa, Inc.
Not Reported in F.Supp.2d, 2003 WL 192481 (D.Kan.)

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• 2:02cv02039 (Docket) (Jan. 30, 2002)

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