

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARLINE CRAWFORD,)	
)	
Plaintiff,)	
)	
vs.)	
)	No. <u>04-2720 BP</u>
MUVICO THEATERS, INC.,)	
)	
Defendant.)	
)	
)	
)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT’S MOTION TO STRIKE

Before the court is defendant Muvico Theaters, Inc.’s (“Muvico”) Motion to Strike Unsworn Statements and Affidavits Attached to Plaintiff’s Response to Defendant’s Motion for Summary Judgment and Portions of Plaintiff’s Affidavit in Contradiction to her Deposition Testimony, filed October 27, 2005 (dkt #31). Plaintiff Carline Crawford filed a response in opposition on December 13, 2005. On November 1, 2005, the motion was referred to the Magistrate Judge for determination. For the reasons below, Muvico’s motion is GRANTED in part and DENIED in part.

I. BACKGROUND

On September 13, 2004, Crawford, a former employee of Muvico, filed a complaint against Muvico, alleging that she was

discriminated against on the basis of her race and gender, in violation of Title VII of the Civil Rights Act of 1964. Muvico filed a motion for summary judgment on August 9, 2005. Crawford filed a response in opposition to Muvico's motion for summary judgment on October 14. Attached to her response was (1) a letter from Mark Draper, general manager of McAlister's Deli; (2) a letter from Michael Huff, a former co-worker of Muvico; (3) two letters from Joyce Wright, another former co-worker of Muvico; and (4) two unsworn statements from Crawford herself. On October 14, 2005, Crawford also filed an affidavit in opposition to Muvico's motion for summary judgment. Muvico filed the present motion on October 27, asking the court to strike the letters by Draper and Wright, Crawford's unsworn statements, and portions of Crawford's affidavit that contradict her deposition testimony.

II. ANALYSIS

Federal Rule of Civil Procedure 56(e) sets forth the requirements for affidavits filed in support of, and in opposition to, motions for summary judgment. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Unsworn affidavits and hearsay statements do not comply with Rule 56(e) and should not be considered in connection with a motion for summary

judgment. See Mitchell v. Toledo Hosp., 964 F.2d 577, 584-85 (6th Cir. 1992); Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 n.2 (6th Cir. 1985).

A. Mark Draper Letter

The unsworn letter of recommendation written by Mark Draper, general manager of McAlister's Deli, cannot be considered by the court in its determination of Muvico's motion for summary judgment. Rule 56(e) requires statements such as Draper's to be sworn in order to be considered by the court. Purdy v. Newland, No. 93-2110, 1994 U.S. App. LEXIS 30817, at *2 n.1 (6th Cir. Nov. 2, 1994) (per curiam) (unpublished); Carter, 767 F.2d at 273 n.2 ("unsworn affidavits and uncertified copies of documents attached as exhibits to appellees' motion for summary judgment . . . do not comport with the requirements of Fed. R. Civ. P. 56(e)"). Moreover, even if Draper's letter were sworn to, its contents are irrelevant to Crawford's claim. Draper writes in support of Crawford, noting that "Carline is always here and on time, and she is always smiling." Although Draper's letter of recommendation may tend to show that Crawford is a good employee generally, the letter only comments upon Crawford's performance as an employee of McAlister's and does not provide any support for Crawford's pending claims against Muvico. Federal Rule of Evidence 402 renders inadmissible "[e]vidence which is not relevant." Federal Rule of Civil Procedure 56(e) requires supporting affidavits to "set forth such

facts as would be admissible in evidence." On both of these grounds, defendant's motion to strike with respect to Draper's letter is GRANTED.

B. Joyce Wright's Letters

Muvico next challenges two notarized letters written in support of Crawford's claim by Joyce Wright, a former administrative assistant at Muvico from March, 2003 until January, 2005. Wright's first letter, dated April 13, 2005, recounts several instances where Wright believes Muvico's general manager, Richard Keenan, showed racial prejudice against African-American employees. Wright alleges that Keenan treated African-American employees who were suspected of theft differently from white employees who were similarly suspected of theft; did not give African-American employees deserved pay raises; and required Wright to perform more duties than her white co-workers. The court finds that Wright's April 2005 letter contains a series of conclusory allegations that Keenan treats African-American employees disrespectfully and is almost entirely based on hearsay statements by Keenan. The court finds that this letter is irrelevant and is based on inadmissible hearsay, and thus defendant's motion to strike is GRANTED with respect Wright's letter dated April 13, 2005.

Wright's second letter, dated May 18, 2005, alleges that a former African-American manager at Muvico, Lucretia Sharp, also

experienced discrimination at Muvico as a result of her race. Again, Wright's letter is primarily supported by hearsay statements attributed to Sharp and other current and former Muvico employees. Wright completes her letter with a conclusory allegation that she has "no doubt in [her] mind that Mr. Richard Keenan Jr. fired Ms. Carline Crawford with great negligence and severe racial prejudices." As was the case with Wright's April letter, Wright's May letter is inadmissible due to its reliance on hearsay statements and irrelevant conclusory opinions by Wright. Defendant's motion to strike is GRANTED with respect to Wright's letter dated May 18, 2005.

C. Crawford's Unsworn Letters

Muvico next argues that the two unsworn letters written by Crawford in support of her claim should also be stricken. Unsworn and unauthenticated materials filed in support or in opposition to motions for summary judgment do not comply with the requirements of Rule 56(e) and should not be considered by the court. See Carter, 767 F.2d at 273 n.2; Ross v. City of Gatlinburg, 327 F. Supp.2d 834, 838 n.3 (E.D. Tenn. 2003). Thus, defendant's motion to strike is GRANTED with respect to Crawford's letters.

D. Crawford's Affidavit

Finally, Muvico argues that portions of Crawford's contemporaneously filed affidavit should be excluded from consideration because they contradict Crawford's earlier deposition

testimony. "It is accepted precedent that a party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts his earlier deposition testimony." Gagne v. Northwestern Nat. Ins. Co., 881 F.2d 309, 315 (6th Cir. 1989) (overruled on other grounds); see also King v. City of Eastpointe, 86 Fed. Appx. 790, 793 n.1 (6th Cir. 2003) ("The purpose of this rule is to bar the non-moving party in a summary judgment proceeding from creating an issue of fact merely by making contrary statements in an affidavit, and does not apply to an affidavit filed by the moving party."). The court should "determine whether an untimely affidavit is inconsistent with a party's interrogatories, admissions, or depositions" and should disregard inconsistent affidavits in its consideration of the motion for summary judgment. First Bank v. Hartford Underwriters Ins. Co., No. 98-4284, 1999 U.S. App. LEXIS 29273, at *13-14 (6th Cir. Nov. 3, 1999).

Crawford was deposed by Muvico on April 21, 2005. During her deposition, Crawford discussed Muvico's uniform policy:

Q: Is it fair to say that Exhibit Two indicates that when you're on the property, whether you're working or on a break, that you're supposed to have your shirt tucked in?

A: Yes. When you're on the premises, it says that you're supposed to have your shirt tucked in until you clock out and leave the building.

Q: Well, I'm not - maybe we weren't communicating. I'm not trying to find out how you were supposed to be dressed when you leave the building, when you leave the property. I'm just talking about when you're on the

actual property, okay?

A: If you're inside the building, inside Muvico, you're supposed to have your shirt tucked in.

Q: Okay. If you're inside the building, whether, you may be going to break, you may be on break, but if you're inside the building, is it fair to say that you're supposed to have your shirt tail tucked in?

A: Yes.

(Crawford Dep. at 73-74.)

On October 14, 2005, Crawford submitted an affidavit contemporaneously with her response to Muvico's motion for summary judgment. In her affidavit, Crawford states that "[w]hen I started working at Muvico, the uniform policy as I understood it was that as long as we were off the clock we could have our shirt out but when on the clock we supposed [sic] to look neat and dressed." (Crawford Aff. at 1.) The court finds that Crawford's affidavit statement does not clearly contradict her deposition testimony, and thus Muvico's motion to strike with regard to this portion of Crawford's affidavit is DENIED.

Muvico also argues that Crawford's affidavit contradicts her deposition testimony by declaring that she "personally saw Cole Huff, Justin Young, Jason Young, Brian Hamilton, and Tyler Overman with their shirts out and nothing was said or done." (Crawford Aff. at 1.) Muvico points to the following portion of Crawford's deposition for support:

Q: Now, you had mentioned earlier in your testimony that at some point in your conversation with Mr. Keenan you

had said that white employees would have their shirts out, and that he wouldn't say anything to them, right?

A: Yes.

Q: Was that something you said in the conversation that was the one -

A: Yes.

Q: - where you were ultimately terminated?

A: Yes.

Q: Okay. Tell me as close as you can, what you said to Mr. Keenan?

A: I told Mr. Keenan that he has white employees that have their shirts out even on break, and when they come into work, he never said anything to them about it. I told him I done seen Michael Huff - that's Cole, he's white - with his shirt out; he never said anything to him. Jason Young, he's a white employee, he had his shirt out; he didn't say anything to him. Justin Young, he had his shirt out; he didn't say anything to him about it.

Q: All right. Are those the three people that you told -

A: That I have seen, yes.

Q: - those are the three people whose names you used when you were talking to Mr. Keenan?

A: Yes.

Q: Okay. Did you identify anybody else for him other than these three white, look like, white males?

A: No.

. . .

Q: All right. Now, you identified for me, I think you've already covered for me the white males. Seems like there were three of them that you say that you had seen -

A: That I have seen.

Q: That you had seen that walked around that had their shirttail out. So, we've already covered them, right?

A: Yes.

Q: You've given me all the white males that you can identify for me, because Mr. Keenan to you [sic] knowledge, saw or knew about who had their shirttails out?

A: Yes.

Q: So, we've covered that?

A: Yes.

(Crawford Dep. at 108-110, 140.)

The court finds that Crawford's affidavit does not contradict her deposition testimony. The subject matter of the deposition testimony was not the number or identity of Muvico employees who Crawford had witnessed wearing uniforms improperly, but rather the employees who Crawford identified during her meeting with Keenan. Crawford's affidavit is broader, as it pertains to all employees who she has seen wearing their shirttails out. Because the court finds that Crawford's affidavit is not inconsistent with her deposition testimony concerning the breach of Muvico's uniform policy by white employees, Muvico's motion to strike is DENIED with respect to this particular statement.

III. CONCLUSION

For the reasons above, defendant's Motion to Strike Unsworn Statements and Affidavits Attached to Plaintiff's Response to

Defendant's Motion for Summary Judgment and Portions of Plaintiff's Affidavit in Contradiction to her Deposition Testimony is GRANTED with respect to the letters submitted in opposition to Muvico's motion for summary judgment by Mark Draper, Joyce Wright, and Carline Crawford. Defendant's motion is DENIED with respect to Crawford's affidavit.

IT IS SO ORDERED.

S/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

January 27, 2006

Date