

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Charles Carlton,

Plaintiff,

96 CV 4063 (DGT)

- against -

Mystic Transportation, Inc.,
Mystic Bulk Carriers, Inc. and
Leonard Baldari,

OPINION

Defendants.

TRAGER, District Judge,

Plaintiff, Charles Carlton, brought this action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. ("ADEA"); the New York State Human Rights Law §296 et seq. ("NYSHRL"); and the Administrative Code of the City of New York §9-101 ("NYCHRL"). Plaintiff claimed that he was dismissed from his job in April, 1995, by defendant Baldari, the president and sole shareholder of defendant corporations, because of his age. Defendants disputed that age played any role in plaintiff's dismissal, and instead claimed that plaintiff was laid off during a downturn in business when ten other employees were also terminated. Defendants also stated that though the reason for plaintiff's dismissal was the economic downturn, plaintiff was specifically selected because of his mediocre job performance and not his age.

Mystic Transportation is involved in the transportation of heating oil in the New York City metropolitan area, while Mystic Bulk handles the transportation of other petroleum products,

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including gasoline, asphalt and jet fuel. The two companies are inextricably intertwined; they are owned by Baldari and have consolidated financial statements. In April, 1995, defendant Baldari terminated plaintiff along with ten other employees as part of a financial retrenchment necessitated by an undisputed economic downturn. Nonetheless, plaintiff claims that his discharge occurred because of his age.

Defendants filed a motion for summary judgment, pursuant to F.R.Civ.P. 56. Plaintiff filed a motion for summary judgment strictly on the issue that defendants did not properly plead the affirmative defense that plaintiff failed to mitigate his damages. Oral argument was held on July 2, 1998, at which time the court granted defendants' motion for summary judgment. This opinion is issued to explain in detail the reasons stated on the record for granting defendants' motion.

Background

Plaintiff was hired as a salesman by Baldari in August, 1988, at the age of forty-nine. Shortly after hiring plaintiff, Baldari appointed plaintiff as the "Director of Marketing" for Defendant corporations. One year prior to plaintiff's termination in April, 1995, Baldari had hired Lydia Gounalis (age 38) to assist in marketing matters, and some time after plaintiff's dismissal, she assumed the position of "Director of Marketing." Three months after plaintiff was terminated, Baldari hired John Oravets (age 31). In June, 1996, Gounalis's title

changed to "Marketing Manager" and Oravets took over the Director of Marketing position.¹

Discussion

In an age discrimination case, the plaintiff has the burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To make out a prima facie age discrimination case, the plaintiff must show that: (1) he belongs to the protected class; (2) he was and can continue to perform his duties satisfactorily; (3) he was discharged; and (4) his discharge occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class. See e.g., Grady v. Affiliated Cent., Inc., 130 F.3d 553, 559 (2d Cir. 1997).

Once the plaintiff has established a prima facie case, the burden shifts to the employer to offer a legitimate non-discriminatory explanation for its actions. See Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1992). After the employer has offered such an explanation, if the plaintiff is to survive a motion for summary judgment, he must offer evidence that the stated reasons were a pretext for age discrimination. See Meiri

¹It is not clear whether Gounalis's title change was a promotion or demotion. If anything, Gounalis's deposition testimony indicates that she and Oravets worked side-by-side and that neither of them reported to the other. See Gounalis Deposition, Oct. 7, 1997, pp. 73-4.

v. Dacon, 759 F.2d 989 (2d Cir. 1985).

In an age discrimination case, a defendant's motion for summary judgment will be granted only if there is a "lack of evidence in support of the plaintiff's position, or the evidence [is] so overwhelmingly tilted in one direction that any contrary finding would constitute clear error." See Danzer v. Norden Sys., Inc., 1998 WL 455774 *2 (2d Cir. July 15, 1998) (Calabresi, J.) (citations omitted). In this case, plaintiff's evidence of age discrimination is lacking, but, even accepting he has presented some evidence, the record as a whole is so "overwhelmingly tilted" in defendants' direction that a jury's finding for plaintiff "would constitute clear error." Id.

(1)

In his papers plaintiff demonstrated that he satisfied the first three elements of his prima facie age discrimination case. With respect to the fourth element, however, plaintiff has failed to show that he was dismissed under circumstances giving rise to an inference of age discrimination.

Defendants have presented compelling evidence against a finding of such an inference in two arguments relating to their employment statistics and their financial condition at the time of plaintiff's discharge. First, an analysis of the age statistics provided by defendants, and unchallenged by plaintiff, alone constitutes powerful evidence negating an inference of age discrimination. In April, 1995, Mystic Transportation employed

63 people, 27 of whom were over 40, representing 42.8% of the company. Moreover, of those 27, 12 were over 40 when hired. Mystic Bulk employed 204 people, 85 of whom were over 40, representing 42% of the company, and 66 of those were over 40 when hired. On the other hand, of the eleven persons terminated in April, 1995, eight were under 40 while only three, or 27%, were over 40.

Second, defendants also provided unrefuted evidence that during the winter preceding plaintiff's termination, mild weather conditions resulted in a significant decrease in defendants' business and profits as compared to the prior year's winter and the one that preceded it. This evidence is especially significant because defendants' business is a cyclical one that derives a disproportionate part of its yearly profits from heating oil transportation conducted during the first financial quarter. Citing statistics published in the New York Times, defendants demonstrated that the number of "degree days," which is the standard measure of temperature levels relevant to the oil heating industry, in the winter of 1994/1995 was 4,095, whereas it had been 4,879 in 1993/1994 and 4,722 in 1992/1993. Thus, degree days had dropped roughly 20% in 1994/1995, and this drop resulted in greatly decreased first quarter profits of \$584,108, as compared to first quarter profits in the prior two years, \$1,968,848 and \$1,562,188. Having suffered a profit shortfall of \$1,400,000 in 1995, defendants claim, again without contradiction, they would have had great difficulty in repaying

their \$1,500,000 line of bank credit. Defendants, therefore, sought to reduce operating costs, in among other ways, by cutting payroll expenses. Plaintiff, along with the ten other employees, was terminated.²

Seeking to overcome these employment and financial statistics, plaintiff claims that the fact that defendants "replaced" him after his termination raises the inference that his dismissal was motivated by age discrimination. If, as plaintiff alleges, defendants hired a younger person at a reduced salary to perform plaintiff's job, this fact might give rise to such an inference, but confronted with defendants' otherwise compelling employment statistics, it would be a weak inference at best. Plaintiff's evidence, however, is simply insufficient to permit a reasonable juror to conclude that plaintiff was replaced after his termination.

Plaintiff first argues that he was replaced by Gounalis, age 38, who did, in fact, take over plaintiff's position as marketing director after he was fired. Gounalis, however, was hired by defendants nearly one year before plaintiff's termination, during an economic season, as described below, see discussion, part (2), that was much rosier than that existing in April, 1995.

Plaintiff has not and cannot controvert the fact that Gounalis

²Defendants stated that discharging the eleven employees resulted in a savings of \$400,000, to which they added "additional insurance and operation changes [which] saved \$200,000." Again, plaintiff does not controvert these latter cost reductions.

was hired well before plaintiff was fired and the mere fact that a younger person assumed plaintiff's title and some of his responsibilities after he was dismissed cannot, without more³, give rise to an inference of age discrimination.⁴

Second, plaintiff points to the fact that Baldari hired Oravets, age 31, three months after plaintiff's dismissal as evidence that defendants replaced him with a younger worker. Indeed, Oravets took over some of plaintiff's former job duties, but the remainder of the accounts continued to be managed by Gounalis and Baldari. See Oravets Deposition, Oct. 7, 1997, p. 49 ("Q: Now aside from the asphalt and cement business, you were given some oil business or gasoline business? A: Uh-Huh. Q: What were you given? A: Texaco, Shell, Sunoco and Hess, Merit."); Gounalis Deposition, Oct. 7, 1997, pp. 71-72 ("Q: So Mr. Oravets then took over the relationships with all the major [oil] companies or some of them? A: No, just two of them. Q: Which ones? A: Texaco and Sunoco . . . those two accounts require almost no maintenance . . . you just go and say hello once a

³The "more" that plaintiff has presented is limited to one isolated remark made by Baldari to plaintiff at the time of his dismissal. See Discussion, part (2).

⁴Though plaintiff seeks to downplay the costs savings occasioned by his termination, see discussion, part (2), the fact that defendants could conduct their marketing operations by employing Gounalis alone (with Baldari's assistance) at a salary of \$42,000, rather than both Gounalis and plaintiff, costing \$99,000, gives more than minimal support to defendants' claim that plaintiff's firing was an effective way to reduce operating expenses.

month. Q: It didn't take much work at all to handle those accounts? A: No."); Baldari Affidavit, ¶26 ("At the time I terminated plaintiff, I did not contemplate hiring Mr. Oravets. I took over all of the plaintiff's duties. . . . Mr. Oravets did not replace Mr. Carlton. He took over my responsibilities in one area of our business and assisted me in marketing."). Eventually, Oravets also took over plaintiff's former title of Director of Marketing.

In response to plaintiff's contention that he was replaced by Oravets, defendants present several arguments, which taken together, do not permit a reasonable jury to find that Oravets "replaced" plaintiff after his dismissal. First, Oravets was hired a full three months after plaintiff was fired. Second, even ignoring Baldari's denial, plaintiff has not provided a shred of direct or circumstantial evidence that this hiring was effected pursuant to some preplanned scheme to replace plaintiff. Third, even if three months after plaintiff's termination, Oravets had specifically taken over plaintiff's prior position, defendants stated - and plaintiff does not controvert - that a new business development required the hiring of an additional marketing employee. Immediately prior to Oravets's hiring and well after plaintiff's discharge, Baldari secured a large new account, when an existing client expanded through a take-over, which would occupy a significant portion of the time he otherwise was spending on general marketing matters. See Baldari Deposition, Dec. 2, 1997, pp. 46-48 ("Q: When was [Mr. Oravets]

hired? A: He was hired in August or September [1995], after we succeeded in - I succeeded in putting in a very large oil account, which probably would rough us up 20 percent, 40 percent on the transportation corporation. . . . Q: It was after that that you decided to hire Mr. Oravets? A: Yes. . . . Q: What was the reason that you wanted to hire him? A: Because I felt he had a lot of potential. I felt that I could use the help, and with the added business being put on, things were looking very good."). Fourth, defendants contend that Oravets was hired because of specific unique contributions he could make to defendants' marketing efforts. Oravets, unlike plaintiff, had received formal academic marketing training, and, more significantly, had extensive contacts in the dry powder cement business, an industry into which Baldari wanted to expand as a hedge against the cyclical weather-dependent nature of defendants' heating oil business. See Baldari Affidavit, ¶¶25-26 (Oravets "did not replace the plaintiff. He was hired to develop a new area of our business - dry cement deliveries. . . . [He] had a marketing degree and a background in construction. He developed that business for us, which plaintiff could not, or just would not, do."). The uncontroverted evidence showed that subsequent to Oravets's hiring, defendants' dry powder cement business did, in fact, expand substantially, tripling within six months, and increasing ninefold in two years.

The only piece of evidence that plaintiff could muster to show that Oravets replaced him was that Oravets took over several

of plaintiff's accounts. This, plaintiff contends, undercuts defendants' asserted explanation for Oravets's hiring. Assuming its truth, however, this fact is not sufficient, given all the surrounding circumstances, for a reasonable jury to find that Oravets replaced plaintiff. One, there is nothing unusual or indicative of age discrimination in the mere fact that in a relatively small, privately owned company, employees are required to assume multiple responsibilities. The boundaries among job duties in such companies are frequently less than sharply drawn. That Oravets, Gounalis, and Baldari assumed some or all of plaintiff's obligations demonstrates little more than the ordinary manner in which small companies, such as defendants' with a "marketing department" of less than three persons, including the owner, operate. See Baldari Deposition, Dec. 2, 1997, pp. 15-16 ("It's my company. I'm the director of marketing. I've washed the toilet. I sweep the floors. I evaluate my people. I don't have a barrage of people around me in management. . . . [Carlton] assists me. I'm the - I'm the marketing man. It's my company. . . . [Carlton] would assist me."). Two, and more significantly, plaintiff presented no evidence to refute defendants' claim that Oravets was hired principally to develop the dry powder cement business, and that he did so to a great degree. In light of defendants' evidence, which indicates that though Oravets's job partially overlapped with plaintiff's position, it encompassed significant additional duties, no reasonable jury could find that Oravets replaced plaintiff.

(2)

Assuming arguendo that plaintiff has somehow succeeded in making out a prima facie case of age discrimination, he failed to rebut defendants' non-discriminatory explanation for his termination, namely, that economic conditions necessitated a reduction in operating costs.

In an effort to show that defendants' explanation for plaintiff's dismissal was a pretext for discrimination, plaintiff argues that an alleged comment by Baldari at the time plaintiff was fired demonstrates that defendants were concerned with plaintiff's age and not economic conditions. Plaintiff claims that Baldari asked plaintiff into his office and told him that "he wanted him to 'retire' and . . . [that his] termination was for financial reasons." Plaintiff's Memo. of Law, p. 4.

Assuming that Baldari did, in fact, suggest that plaintiff retire, in light of all other facts present in this case, again no reasonable juror could conclude that plaintiff's age, and not defendants' proffered non-discriminatory reason, was the reason or even a motivating factor for plaintiff's termination. First, on its face, the suggestion that an employee retire, made just prior to that employee's dismissal for economic reasons, is at best ambiguous and hardly proof that age was relevant to the firing decision.⁵ A suggestion to retire might just as easily be

⁵This is especially the case, where as here, there is no claim that an employee retirement plan or other benefits plan would be affected depending on whether plaintiff voluntarily retired or was involuntarily dismissed.

interpreted as Baldari's way of attempting to soften an unpleasant message and avoid a confrontational dismissal, especially when it is combined, as plaintiff concedes, with a statement concerning economic difficulties, which undoubtedly plaintiff - as a member of a committee that drew up the initial termination "hit list" - knew very well was the case. It is difficult to conceive of how Baldari's suggestion leads to the conclusion that Baldari thought plaintiff too old and decided to terminate him on that basis. But, even if Baldari intended to refer to plaintiff's age, as a matter of law, this one single stray comment is not sufficient to warrant a finding that age discrimination motivated the employment decision.⁶

⁶See Raskin v. Wyatt Co., 125 F.3d 55, 58 & 63 (2d Cir. 1997) (summary judgment for employer affirmed on ADEA claim where employer had stated to plaintiff that he "assumed that [plaintiff] did not want to be office manager so late in his career" and that he was concerned that plaintiff might choose to retire, and, therefore, "might not remain with [defendant] long enough to learn the [new] job," the court ruled that these comments were insufficient to rebut defendant's proffered reasons for not promoting plaintiff, under both the Price Waterhouse v. Hopkins mixed motive and McDonnell Douglas Corp. v. Green burden shifting analyses, holding that "[t]he ADEA does not make all discussion of age taboo" and these comments "do not reflect discriminatory animus, or show that [plaintiff's] age 'was in fact a 'motivating' or 'substantial' factor in the employment decision'" (quoting de la Cruz v. New York City Human Resources Admin. Dep't of Soc. Servs., 82 F.3d 16 (2d Cir. 1996)); Woroski v. Nashua Corp., 31 F.3d 105, 108 & 110 n.2 (2d Cir. 1994) (where employer was alleged to have stated that salaried employees "had been around too long, made too much money and enjoyed too many benefits" and that the "company needed . . . new younger people . . . that were . . . more aggressive . . . and in fact could be hired for . . . half or 70%" of what older workers earned, the court granted employer's motion for summary judgment and stated

This conclusion is especially justified where the plaintiff was within the ADEA's protected class, 49, when he was hired and then was fired by the very same person who hired him - Baldari. See Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997) (in suit for discrimination under the ADEA, court noted that "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire"); Deydo v. Baker Eng'g New York, Inc., 1992 U.S. Dist. Lexis 132, at *18 (S.D.N.Y. Jan. 13, 1998) (being hired while already a member of the protected class "militates against any finding of age animus").

Second, plaintiff argues that defendants' statement that plaintiff was selected to be fired because of poor job performance was also a pretext for age discrimination. In defendants' legal memorandum and EEOC filings, however, defendants made clear that they never claimed that plaintiff was fired because of his job performance, only that it played a role when it came time to make cuts. When an employer needs to make bona fide cost reductions, it should be able to employ any reasonable business criteria it wishes in making a termination

that these statements merely "indicate a concern for unjustifiably higher costs associated with employees having greater seniority" and "[t]he ADEA does not prohibit an employer from acting out of concern for excessive costs, even if they arise from age-related facts"); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989) (solitary remark by immediate supervisor, that he "needed younger blood," insufficient to defeat summary judgment motion).

decision and a court should not second-guess the employer's judgment without more powerful direct or circumstantial evidence that the selection was due to age. Though the record suggests that plaintiff had been a valued employee, it is bereft of evidence that would require a court to second-guess defendants' determination that other employees were more valuable to the company than plaintiff and that he should be one of the employees dismissed.

In addition, it should be noted that since plaintiff was one of at most three employees performing marketing functions, it would undoubtedly have been very difficult for defendants to compare plaintiff's performance on a more objective basis to that of other employees holding different jobs, with their attendant distinct and varied responsibilities, functions and roles, when making the decision to fire plaintiff.⁷

Third, plaintiff argues that, contrary to defendants' assertion that plaintiff was fired to reduce costs in a time of financial crisis, firing him actually resulted in an insignificant reduction of operating expenses. Plaintiff asserts that prior to his termination he earned a yearly salary of \$57,000, and Oravets, who was hired three months later, earned a salary of \$46,000, resulting in a savings of only \$11,000 from plaintiff's dismissal. Though technically accurate, plaintiff's

⁷It should be noted that if plaintiff's job performance were as stellar as he argues, it would have been illogical for defendants to choose to fire an employee who contributed so significantly to the firm, instead of one or two others who were making less significant contributions.

argument once again conclusorily assumes that Oravets was hired to replace him, but more importantly, it fails to account for the fact that ten other employees were fired along with plaintiff. In light of the total savings resulting from the elimination of eleven jobs, the rehiring of Oravets did not significantly undermine defendants' effort to cut \$400,000 in salaries. In addition, even if there was only an \$11,000 savings after Oravets was hired, by this time, the company's prospects had improved.⁸

Fourth, plaintiff contends that defendants' financial condition was unchanged when it hired Oravets, and if Oravets was hired to perform similar functions as plaintiff, his hiring casts doubt on a financial crisis as the reason for plaintiff's dismissal. To support this theory plaintiff cites the deposition testimony of a Mr. Hiller, defendants' CFO, who stated that at the time Oravets was hired, defendants' financial problems were unchanged, "[o]ther than cost cutting measures," i.e., the discharge of 11 employees. As discussed above, however, defendants stated that after plaintiff was dismissed, Baldari succeeded in recruiting a large new account, Stuyvesant, and as a

⁸Plaintiff also claims that when he was terminated defendants had purchased several "luxury" cars, in spite of the purported financial crisis existing at that time. Defendants responded, unchallenged by plaintiff, that the supposed purchases of automobiles were actually leases of three automobiles, which were paid out over a period of between 2 1/2 and 4 years, and were among roughly ten vehicles leased by defendants in the ordinary course of business. Plaintiff's claim that defendants' continuing to lease cars is evidence that defendants' proffered explanation for his discharge is a pretext for age discrimination borders on the absurd.

result Baldari's ability to continue assisting Gounalis in performing plaintiff's tasks was compromised. Furthermore, Oravets was hired because of his contacts and expertise in the dry powder cement business. Indeed, after Oravets came on board, revenues in the dry powder cement business tripled.

Fifth, plaintiff attempts to refute defendants' explanation for his discharge by identifying an apparent inconsistency in Baldari's description of the new client, once referred to as Original Customers and, on a second occasion as Stuyvesant, and in that manner show that defendants' claims were not genuine. Defendants' clarification of this apparent inconsistency, that Original Customers was taken over by another company entitled Stuyvesant, however, is unrefuted.

Plaintiff's last argument that defendants' reason for his discharge was a pretext for age discrimination is that the other ten employees discharged along with plaintiff held low-level positions, as compared to his own. Defendants correctly argue that during times of lay-offs employees from all job levels may be terminated, depending on whether their services are needed. Indeed, it would seem strange if only low level employees were discharged during a reduction in force. A court is not in a position to decide whether defendants' business judgment was unsound.

In sum, having reviewed plaintiff's papers and listened to plaintiff's contentions at oral argument, there was simply no justification for submitting this case to a jury. Support for

his claim consists of two factors: Baldari's ambiguous statement and plaintiff's "replacement" by Oravets. Even assuming, for purposes of plaintiff's prima facie case, that Baldari did, in fact, ask plaintiff to retire and that Oravets's hiring in some manner constituted a "replacement" of plaintiff, this evidence is rendered completely toothless by defendants' non-discriminatory explanations for plaintiff's discharge. First, Baldari's alleged statement is, as a matter of law, insufficient to show discriminatory animus. Second, whatever minimal probative value could be afforded to the fact that Oravets took over some of plaintiff's accounts, the undisputed evidence is that Oravets had the background to assist defendants in expanding into the less volatile dry cement business, and that he succeeded in doing so. Furthermore, plaintiff's proof - such as it is - is completely overwhelmed by defendants' presentation of employment and financial statistics, which showed both that defendants employed (and continued to employ after the reduction in force) a large number of persons over 40 years of age and that a significant economic downturn necessitated not only plaintiff's dismissal, but also that of ten other employees, seven of whom were under 40.

Thus, plaintiff has presented two extremely weak pieces of evidence, which, individually or in combination, do not warrant presentation to a jury. See Woroski v. Nashua Corp., 31 F.3d 105, 110 (2d Cir. 1994) ("a plaintiff opposing such a motion [for summary judgment] must produce sufficient evidence to support a

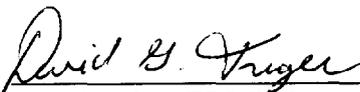
rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee's age was the real reason for the discharge"). The evidence presented does not support an inference of age discrimination or a finding that defendants' proffered reasons for plaintiff's discharge were pretextual. In Judge Calabresi's words, the evidence is "overwhelmingly tilted" in defendants' favor. See Danzer v. Norden Sys., Inc., 1998 WL 455774 (2d Cir. July 15, 1998).

Conclusion

For the reasons stated above, defendants' motion for summary judgment was granted. Plaintiff's cross-motion is denied as moot.

Dated: Brooklyn, New York
August 25, 1998

SO ORDERED:



DAVID G. TRAGER
United States District Judge

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