

**Andersen v Young & Rubicam, Inc.**

2007 NY Slip Op 30801(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0113140/2004

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 113140/2004

ANDERSEN, KELVIN D.

vs

YOUNG AND RUBICAM

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE: 12/15/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

IN ACCORDANCE WITH A COURT ORDER, THIS MOTION IS DECIDED

FILED

APR 19 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/12/07

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WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
KELVIN D. ANDERSEN

Plaintiff,

-against-

YOUNG AND RUBICAM, INC.,

Defendant.  
-----x

Index No. 113140/04  
Mtn Seq. 001

**FILED**  
APR 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE  
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**WALTER B. TOLUB, J.:**

By this motion, defendant moves pursuant to CPLR 3212 for summary judgment and dismissal of plaintiff's complaint.

Defendant Young and Rubicam, Inc. ("Young and Rubicam" or "defendant"), is a global group of companies providing marketing and advertising services. In July of 1998, Wunderman, a division of Young and Rubicam ("Wunderman"), hired plaintiff Kelvin Andersen ("Andersen" or "plaintiff") as an at-will Creative Supervisor. At the time of hiring, plaintiff was 50 years old and was paid approximately \$100,000 annually.

In 2000, plaintiff was assigned to work for two Group Creative Directors, Lorna Rankin ("Rankin") and Peter White ("White"). In October, 2000, plaintiff was promoted by Ms. Rankin and Mr. White to the senior-level position of Associate Creative Director ("ACD"). In October 2003, plaintiff, then 55 years old and earning a salary of approximately \$115,000 annually, was terminated from his position. Subsequent to plaintiff's termination, defendant hired two employees in junior-

level positions: James Chung and Greg Dadah, both of whom were under the age of 35 and each hired at a rate of \$40,000 annually (Notice of Motion, Affidavit of Toni Iacono, Senior Vice President and Associate Human Resources Director at Wunderman; Supplemental Affidavit of Toni Iacono).

In September, 2004, plaintiff commenced the instant action claiming that defendant terminated his employment because of his age, in violation of New York Executive Law §§ 296 et seq. and New York City Administrative Code §8-107 et seq.

Plaintiff's entire action is predicated upon several comments which plaintiff claims were made by his supervisors in close proximity to his job termination. Plaintiff specifically claims that his supervisor, Peter White, commented about Wunderman's desire to eliminate senior people and hire younger, junior people (Deposition of Kelvin Andersen, Affirmation in Opposition, Exhibit C, Tr. p. 92).<sup>1</sup> Additionally, plaintiff claims that following his termination from Wunderman, Lorna Rankin, who had also been one of plaintiff's supervisors, told

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<sup>1</sup>Plaintiff testified as follows:

Q: [...] Did you ever hear anyone at Wunderman make any comment about age?

A: A couple of things.

Q: Sorry?

A: A couple of things.

Q: What do you recall?

A: Well, you know, sort of about a year earlier, Peter had said to me, he said, come to lunch [...] and he said, you know, watch out, they are trying to get rid of senior people and hire younger, cheaper people. [...] (Id.)

\* 4

him that he had been replaced by someone half his age for half of his salary (Id. at 42).<sup>2</sup> It is plaintiff's contention that these statements, coupled with the fact that following his termination, two people were hired in junior-level employment positions and directed to work on projects plaintiff had been working on while employed with Wunderman,<sup>3</sup> collectively maintain a prima facie case of age discrimination against defendant.

In opposition to plaintiff's allegations, defendant offers the deposition testimony of Ms. Rankin and Mr. White, both of whom were plaintiff's supervisors while at Wunderman and

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<sup>2</sup> The relevant portion of plaintiff's testimony is as follows:

Q: How did you obtain that job?

A: Actually, Lonnie Rankin called me.

Q: After October '03, when you were laid off?

A: Yes.

Q: What did she say, to the best of your recollection?

A: She said that there was a position [...] and then she said, I'm very sorry, they have replaced you with someone, you know, half your age for half the money. I'm sorry that happened (Id., Tr. p. 42).

<sup>3</sup> Plaintiff testified as follows:

Q: Did there come a time when you learned who replaced you at Wunderman or do you not know that?

A: Yes.

Q: Who replaced you?

A: James Chung, 26, which seemed to fit in with, you know that half the age nonsense and half the money, and it was confirmed when I saw the E-mails yesterday.

Q: Did you learn that James Chung replaced you as a result of your looking at documents yesterday or did you know that before yesterday?

A: I knew before yesterday.

Q: How did you come to learn that?

A: It was a rumor (Id. Tr. p. 56)

\* 5 ]

testified that in 2003, they were directed by upper management to re-evaluate their staff and make appropriate changes so that they could balance a "top-heavy" Creative Department (Deposition of Lorna Rankin, Affirmation in Opposition, Exhibit G, Tr. p. 23; Deposition of Peter White, Affirmation in Opposition, Exhibit D Tr. p. 19-21). Both further testified that the restructuring of their department was directed to reduce the overall cost of doing business (Deposition of Lorna Rankin, Id. at Tr. p. 23-25; Deposition of Peter White, Id. at Tr. p. 19-23, 36-37) because clients were balking at the rates being charged by Wunderman, and these rates were linked directly to the number of senior and junior people working on an account (Deposition of Lorna Rankin, Id. at Tr. p. 23-25, 32). The court notes that at deposition, it was indicated that "junior people" did not necessarily mean that the employees were younger, but were less expensive for the company (Deposition of Peter White, Id. at Tr. p. 30-31).<sup>4</sup>

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<sup>4</sup> Mr. White testified as follows:

Q: When you had these discussions with Mr. Sobelson, did you discuss with him the fact that the work in your department still had to get done?

A: Yes.

Q: And did you have a discussion with him about hiring other people to replace the people you were reducing or eliminating?

A: Yes.

Q: And those people would be - was that discussion centered around hiring junior people?

A: It was centered around hiring less expensive people.

Q: And less expensive people would be younger people, would they not?

A: I think not necessarily. I think that it was really about the cost of doing business. He wouldn't care if I hired a 70-year-

[\* 6]

Defendant further contends that in an attempt to restructure their department, in addition to plaintiff, three other senior-level employees were considered for elimination from their positions with Wunderman: Gene Tashoff, Sandra Ulrich, and Indrajeet Chandrachud (Deposition of Peter White, Affirmation in Opposition, Exhibit D Tr. p. 27-29). Although none of these other individuals were terminated from their jobs at that time.<sup>5</sup> Mr. White further testified that Joel Sobelson,<sup>6</sup> the Chief Creative Officer at Wunderman, directed Mr. White and Ms. Rankin to terminate one senior person at the ACD title level from their department (Id.).

With respect to plaintiff's allegations concerning comments made about hiring younger people, Mr. White denied ever making comments suggesting that plaintiff's job termination was motivated by his age (Deposition of Peter White, Id. at Tr. p. 46-47, 63-65).<sup>7</sup> Moreover, according to deposition testimony, the

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old guy if he would work for less. [...] (Affirmation in Opposition, Exhibit D, Tr. p. 30-31)

<sup>5</sup> Mr. Tashoff's schedule was reduced to a shorter work week and Ms. Ulrich was demoted to a lower grade title, allowing her to be billed out at a lower rate (Id. at 29).

<sup>6</sup> The court notes that Mr. Sobelson, whom plaintiff mentions on numerous occasions as having made statements supporting his claims of age discrimination, was never deposed.

<sup>7</sup> Despite plaintiff's allegations that Ms. Rankin also made comments, the subject was never raised in her deposition. (See, Transcript of Deposition of Lorna Rankin).

decision to terminate plaintiff's job was based upon review of the remaining ACD's within the department as well as past work evaluations.<sup>8</sup> Plaintiff's job was ultimately terminated because

[...] All of them [the ACD's] with the exception of Kel had primary responsibility for pieces of the business. So that was already a problem with Kel. He was not functioning at that level

Q: What level is that?

A: ACD. He was not fulfilling the role of ACD. He was really on a daily basis fulfilling the role of a more junior person. But at a much higher salary level and we couldn't defend it

(Deposition of Lorna Rankin, Affirmation in Opposition, Exhibit G, Tr. p. 33).

#### Summary Judgment

As with any motion for summary judgment, success is predicated on the tender of evidence which sufficiently eliminates any material issues of fact requiring trial (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005]; Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2006] §37:91-92). On a motion for summary judgment in an age discrimination case, the

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<sup>8</sup> Plaintiff and Ms. Rankin both testified that there existed performance issues with plaintiff's work which were raised prior to plaintiff's termination from Wunderman (see, Notice of Motion, Iacono Exhibit 4; Iacono Exhibit 5. See also Deposition Transcript of Kelvin Andersen, Tr. p. 84-92; Deposition Transcript of Lorna Rankin Tr. 34-3).

employer bears the burden of demonstrating "either the employee's failure to establish every element of intentional discrimination, or - having offered legitimate, nondiscriminatory reasons for the challenged action - the absence of a material issue of fact as to whether its explanations were pretextual (Messinger v. Girl Scouts of the U.S.A., 16 AD3d 314, 314 [1<sup>st</sup> Dept. 2005]); Forrest v. Jewish Guild for the Blind, 3 NY 3d 295, 391 [2004]).

A prima facie claim for age discrimination requires plaintiff to demonstrate that (1) he is a member of a protected age group; (2) he was terminated from his job; and (3) that he was sufficiently qualified to hold his position with defendant (see, Bailey v. New York Westchester Square Medical Centre, \_\_ AD3d \_\_; 829 NYS2d 30, 34 [1<sup>st</sup> Dept. 2007]). If plaintiff "does not produce direct or statistical information that would logically support an inference of discrimination" (Id.), plaintiff must demonstrate that the position held by him was subsequently either filled by or held open for a younger person (Id.). Upon satisfying either of these burdens,

the employer must then produce admissible evidence that clearly sets forth legitimate, independent and nondiscriminatory reasons to rebut the presumption of discrimination (see St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 [1993]; see also Ferrante, 90 N.Y.2d at 629, 665 N.Y.S.2d 25, 687 N.E.2d 1308). If the employer produces such evidence, the burden shifts back to plaintiff, who must then show that the proffered reason was merely a pretext for discrimination by demonstrating "both that the reason was

[\* 9]

false, and that discrimination was the real reason" (*St. Mary's Honor Ctr*, 509 U.S. at 515 [emphasis in original]; see also *Brennan v. Metropolitan Opera Assn.*, 284 A.D.2d 66, 71 [2001])  
(*Id.*).

The court does not question plaintiff's status as a member of a protected class. Nor does the court question the fact that defendant, following plaintiff's termination from the company, hired two, considerably younger, junior-level employees. However, notwithstanding the respective arguments advanced by the parties, this court notes that there appear to be several issues of fact raised which, at this juncture, preclude an award of summary judgment. This includes the most basic question of whether the individuals hired by Wunderman around the time of plaintiff's termination were hired to perform the same job as plaintiff, without actually filling the ACD position he previously held. If in fact the jobs performed by the incoming junior employees were identical to the ACD position, but without the title or the pay, plaintiff's claims of age discrimination against defendant are strengthened. If however, the incoming junior employees were not doing plaintiff's job, and plaintiff's position was never re-filled, then plaintiff would be unable to maintain a cause of action for age discrimination for age discrimination under Executive Law § 296 (see, *Bailey*, 829 NYS2d 30, 34).

Inasmuch as there exist questions of fact, summary judgment is therefore denied and the matter shall be set down for trial.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied and it is further

ORDERED that the action is hereby restored to the court's active calendar.

Counsel for the parties shall appear for a Pre-Trial conference in IA Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on Friday May 18, 2007.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/12/07

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HON. WALTER B. TOLUB, J.S.C.

**FILED**  
APR 19 2007  
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