Juroviesky v Connaught Group Ltd
2009 NY Slip Op 30081(U)
January 8, 2009
Supreme Court, New York County
Docket Number: 112077/06
Judge: Martin Shulman
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SCANNED ON 1/16/2009

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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 112077/2006

JUROIESKY, SALOMON

vs.

CONNAUGHT GROUP LTD.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 112077/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1,2,3,4,5
Answering Affidavits — Exhibits	6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED JAN 16 2009 COUNTY CLERK'S OFFICE NEW YORK

Dated: January 8, 2009

MARTIN SHULMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

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SALOMON JUROVIESKY, GUISEPPA RIBAUDO, MICHAEL LAHKMAN, SALVATORE MAZZARA,

Plaintiffs,

-against-

Index No. 112077/06

THE CONNAUGHT GROUP LTD., WILLIAM RONDINA INC., ECCOCI, INC., THE CARLISLE COLLECTIONS, CASUALS ETCETERA, INC., LIMITED EDITIONS FOR HER.

DECISION AND JUDGMENT

Defendants.

---X

SHULMAN, MARTIN, J:

In this age discrimination action, defendants The Connaught Group Ltd. ("Connaught"), Eccoci, Inc. ("Eccoci") and Casuals Etcetera, Inc. ("Etcetera")[1] (collectively, "defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

BACKGROUND

Eccoci and Etcetera are related companies of Connaught and both are engaged in the design and manufacture of women's clothing. Plaintiff Salvatore Mazzara ("Mazzara") was hired by Etcetera as a pattern maker in 2000 when he was 61 years old. Plaintiffs Salomon Jurowiesky ("Jurowiesky"), Guiseppa Ribaudo ("Ribaudo") and Michael Lahkman ("Lahkman") were employed by Eccoci as pattern makers. Jurowiesky began work at Eccoci in September, 2004 when he was 65 years old. Ribaudo also began work at Eccoci in 2004. She was 60 years old at the time she was

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[1] By order dated June 15, 2007, the complaint was dismissed as against defendants William Rondina, Inc., The Carlisle Collections and Limited Editions for Her.

hired. Lahkman was hired in 2005 when he was in his late 60's. All of the Eccoci plaintiffs were terminated within three months of each other. Etcetera terminated Mazzara about one year after the Eccoci plaintiffs were fired.

Plaintiffs complain that, as members of a protected class, they were: 1) disparately treated by being forced to work overtime; 2) the subjects of targeted harassment; and 3) fired because of their ages in violation of the New York State and New York City Human Rights Laws (New York State Executive Law §296 and New York City Administrative Code Section §8-502).

A. Mazzara

Mazzara alleges that he was rated as a good pattern maker and a team player (see, Mazzara 2005 Evaluation, Plntf. Memo of Law, Ex. 10) and that prior to his termination he was never warned about his behavior. He states that in 2006, he requested a two week vacation, which request was initially approved and then denied. He alleges that management subsequently relented and allowed him to take the time off because he was traveling overseas to attend his daughter's wedding but that when he returned from vacation his work environment became "hell" (Krebs Aff., Ex. 6 [hereinafter "Mazzara Dep."], p. 115). Mazzara claims that he was involved in an incident with a coworker named Fermin who is younger than Mazzara and that Fermin was not disciplined following the incident. Finally, he contends that he was fired after he was unjustly accused of yelling at Christina, another coworker, and refusing to follow his supervisor's order that he leave work following the incident with Christina. Mazzara contends that he was not dismissed because of the alleged incident with Christina and his insubordination, but rather that he was disparately treated because of his age.

According to Etcetera, Mazzara was terminated because he had a pattern of inappropriate and belligerent behavior toward co-workers and because he was insubordinate (Rohr Aff., Ex. B through G). The company states that Mazzara overreacted and was the first to become agitated in the alleged incident with Fermin and that neither Fermin nor Mazzara was disciplined for the incident. Etcetera also contends that, immediately prior to his termination, Mazzara's supervisor witnessed Mazzara yelling at Christina[2] in a threatening manner, and that when his supervisor told Mazzara to leave the work floor and go home, Mazzara refused to leave. The supervisor states that Mazzara finally left when she threatened to call security. In addition, Etcetera states that it had a legitimate business reason for asking Mazzara to change his vacation; that Mazzara did in fact take his vacation; and that Mazzara has presented absolutely no evidence that his life was "hell" when he returned.

B. Juroviesky

Juroviesky claims that he never received negative comments about his work or corrections except on one occasion when his supervisor humiliated him by using a mistake he made as an example for the entire work floor (Krebs Aff., Ex. 4 [hereinafter "Juroviesky Dep."], p. 112-120). He states that, in fact, one of Eccoci's designers had recommended him for the job and spoke very highly of him. Moreover, he claims that he agreed to work overtime twice and each time he was left waiting for feedback for hours before he could proceed with his task. Juroviesky believes that asking him to put

[2] According to the company, in April, 2005, Mazzara had a previous problem with Christina when management had to remove him from the workroom and direct him to calm down (Krebs Aff., Ex. 7 [hereinafter "Rosenberg Dep."], p.32).

in overtime only to have his time wasted was disparate treatment. He also contends that being asked to work overtime had to do with his age because people his age did not want to work overtime (Juroviesky Dep., pp. 152-157).

Eccoci claims that Juroviesky's patterns often had problems (Ruffino Aff., Exs. J through Q), that he was warned about these problems and on one occasion, when he created a pattern with the sleeves going in the wrong direction, management used his mistake as a learning tool for the other pattern makers. Eccoci also contends that besides having problems creating usable patterns, Juroviesky had a poor attitude with his coworkers, once making an inappropriate hand gesture and often using objectionable language on the workroom floor. Eccoci states that Juroviesky was warned about the inappropriate behavior, but to no avail. Eccoci also states that when deadlines had to be met, all employees, i.e. pattern makers, cutters and sample makers, were asked to, and did, work overtime and that although none of the pattern makers received overtime pay, they received "comp time" for the overtime hours that they worked. Eccoci contends that Juroviesky was terminated for poor performance and that neither he, nor Ribaudo nor Lahkman was terminated for his/her reluctance to work overtime.

C. Ribaudo

Ribaudo states that she did her job well and that she does not recall her supervisor bringing mistakes in her pattern making to her attention (Krebs Aff., Ex. 3 [hereinafter "Ribaudo Dep."], pp. 147, 228). Ribaudo states that her supervisor, Ruffino, was angry with everybody and treated all the employees poorly. Moreover, Ribaudo states that she did work overtime when she could and that she worked through

her lunch hour when asked even though her time records did not reflect that extra time. She contends that overtime requests for evenings and weekend work were a result of poor management. Ribaudo testified that when she was terminated she was told that it "was not working out."

Eccoci states that Ribaudo exhibited poor pattern making skills that required her to redo her work (Ruffino Aff., Ex. B through I) and, on one occasion, a garment she was working on had to be assigned to another pattern maker to correct and complete. Eccoci contends that Ribaudo's work was so deficient that one of the designers requested that Ribaudo not work on that designer's new designs. Eccoci claims that it terminated Ribaudo for poor performance, not because of her reluctance to work overtime.

D. Lahkman

Lahkman does not recall being told that there were problems with his patterns and he states that any problems he encountered were the fault of the designers constantly changing things (Krebs Aff., Ex. 5 [hereinafter "Lahkman Dep."], pp. 82, 88, 90). He also states that although he was unable to work overtime on the weekends, he did work overtime on his lunch hour. Lahkman contends that when he was terminated at the end of his three month probationary period he was told that "reorganization" was the reason.

Eccoci states that Lahkman was terminated because his pattern making skills were unsatisfactory (Steinberg Aff., Ex. M) and that, during his three month probationary period, there were at least four garments that had to be corrected over and over again.

CONTENTIONS

In support of summary judgment dismissing the complaint, defendants argue that plaintiffs have failed to make out all of the elements of a prima facie case because plaintiffs cannot demonstrate that they were qualified for their positions or that the circumstances surrounding their terminations give rise to an inference of discrimination. The defendants claim that the Eccoci plaintiffs were not qualified because they were all terminated based on poor pattern making skills and that Mazzara was not qualified for his position at Etcetera because his belligerent, threatening and insubordinate behavior did not meet the company's behavioral standards.

Moreover, defendants argue that plaintiffs cannot establish an inference of discrimination because the plaintiffs admitted that all employees were asked to work overtime when there was a business necessity; the decision makers at Eccoci and Etcetera were members of the same protected class as the plaintiffs; that all the plaintiff's were over sixty years of age when they were hired; that the supervisor, Ruffino, treated all the workroom employees, regardless of their age, in the same manner and that plaintiffs have not presented any direct, statistical or circumstantial evidence to support their contention of discrimination.

In opposition to the motion, plaintiffs argue that they have established their prima facie case by showing that they were members of a protected class and that they were qualified for their positions but that, despite their qualifications, they were terminated. Plaintiffs also claim that an inference of discrimination can be drawn because management's overtime requests had a disparate impact on the older pattern makers. They also state that they were terminated and replaced by younger individuals and the

statistical evidence is sufficient to create an inference of discriminatory intent. It is plaintiff's position that defendants' "legitimate reasons" for terminating plaintiffs, i.e. poor performance and belligerent behavior, are all pretextual.

DISCUSSION

Disparate treatment claims under the New York Civil Rights laws are analyzed in accordance with the standard set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination (*Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623, 629 [1997]). To support a prima facie case of age discrimination under the Human Rights Laws, plaintiff must demonstrate that: (1) (s)he is a member of a protected class; (2) (s)he was actively or constructively discharged; (3) (s)he was qualified to hold the position from which (s)he was terminated and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination (*McDonnell Douglas Corp. v. Green,* 411 U.S. at 802; *Ferrante v. American Lung Ass'n,* 90 N.Y.2d at 629).

The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support the employment decision." (*Miller Brewing Co. v. State Div. of Human Rights*, 66 N.Y.2d 937, 938 [1985]; *see also, Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 [1981]). "If the defendant's evidence raises a genuine issue of material fact as to

[* 9]

whether it discriminated against plaintiff, then the presumption raised by the prima facie case is rebutted and 'drops from the case'" (*Ferrante v. American Lung Ass'n*, 90 N.Y.2d at 629 *quoting St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 [1993]).

However, despite the absence of a presumption, plaintiff is still entitled to prove that the allegedly legitimate reasons proffered by the defendant were merely a pretext for discrimination. The 'ultimate issue' in any employment discrimination case is whether the adverse employment decision was motivated, at least in part, by a discriminatory reason (*Griffin v. Ambika Corp.,* 103 F.Supp.2d 297, 307 [S.D.N.Y. 2000]).

To prevail on their summary judgment motion, defendants must demonstrate either plaintiffs' failure to establish every element of their prima facie case or, having offered legitimate, non-discriminatory reasons for their challenged actions, the defendants can show that there are no questions of fact about whether their actions were pretextual. In order to defeat the motion, plaintiffs must present sufficient admissible evidence to demonstrate that it is more likely than not, they were the victims of intentional discrimination. *Id.*

In this case, plaintiffs have failed to establish every element of their prima facie case. Indeed, although plaintiffs' burden in establishing a prima facie case is not onerous and has frequently been described as minimal (*see, e.g., St. Mary's Honor Ctr. v. Hicks,* 509 U.S. at 515), plaintiffs in this case have failed to come forward with any direct, statistical or circumstantial evidence sufficient to give rise to an inference that

their terminations were the result of age discrimination[3] (*see, e.g., Dew v. Health Ins. Plan of Greater New York,* 1999 WL 684158, at *6 [E.D.N.Y.] *aff'd* 208 F.3d 202 [2nd Cir. 2000][plaintiff failed to make out a prima facie case where evidence precluded any rational inference that discrimination played a part in the decision to terminate plaintiff]).

Plaintiffs admit that they have no direct evidence of discrimination (Juroviesky Dep., pp. 133, 137; Lahkman Dep., p. 128; Ribaudo Dep., pp. 168, 180-181; Mazzara Dep., pp. 186-187). However, plaintiffs' inability to produce direct evidence of discrimination is neither telling nor dispositive. As the court stated in *Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2nd Cir. 1997), "[a]n employer who discriminates is unlikely to leave a 'smoking gun', such as a notation in an employee's personnel file, attesting to a discriminatory intent (citation omitted)." An employer's discriminatory intent usually must be proved by the weight of the circumstantial evidence alone (*Id.,* 110 F.3d at 215).

In terms of indirect or circumstantial evidence, plaintiffs' contention that Eccoci's requests for overtime had a disparate impact on the pattern makers is without merit. First, plaintiffs have offered no evidence in support of their assertion that pattern makers were the oldest group of employees. In addition, plaintiffs concede that all pattern makers, no matter what their age, were treated the same when it came to requests for overtime. Indeed, they all agree when there were deadlines that had to be

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[3] It is undisputed that plaintiffs were all members of a protected class based on their age and that they were all terminated. We assume, without finding, that plaintiffs have met the minimal burden associated with making a prima facie showing that they were qualified for their positions as pattern makers (*see, Sutherland v. New York State Dept. of Law*, 1999 WL 314186, at *9 [S.D.N.Y.]), *aff'd* 216 F.3d 1073 (2nd Cir. 2000).

met, management asked all production room employees, including all the pattern makers, no matter what their age, to work overtime (Ribaudo Dep., pp. 177-179; Lahkman Dep., p. 142; Juroviesky Dep., pp. 149-151; Mazzara Dep., p. 181).

Plaintiffs' claim regarding disparate treatment as to payment of overtime wages is also without merit. It is undisputed that cutters and sample makers no matter what their age are considered non-exempt salaried workers and as such they are paid overtime wages. On the other hand, all pattern makers, regardless of age, were given "comp time", in lieu of wages because they were classified as exempt professionals. Pattern makers are not similarly situated with cutters and sample makers and thus the difference in treatment regarding overtime wages does not raise an inference of discrimination (*see, Washington County v. New York State Div. of Human Rights*, 7 A.D.3d 895 [3rd Dept 2004]).

Moreover, plaintiffs acknowledge that when they were asked to work overtime there was work to be done and that therefore, management's requests for overtime were for a legitimate business purpose (Lahkma Dep., p. 117; Juroviesky Dep., p. 153; Ribaudo Dep., pp. 137-138)(*See, e.g., Weit v. Flaum*, 1997 WL 1107704, at *3 [Sup. Ct. NY County]), *aff'd* 258 AD2d 286 (1st Dept 1999).

In addition, the Eccoci plaintiffs have not presented any evidence, other than their own deposition testimony, to demonstrate that they were performing well at their jobs. The mere fact that an employee disagrees with his/her employer's assessment of his/her work cannot, standing on its own, show that his/her employer's asserted reason for termination was pretextual (*Griffin v. Ambika Corp.*, 103 F.Supp.2d at 308-309 *citing*

Ricks v. Conde Nast Publications, Inc., 92 F.Supp.2d 338, 347 [S.D.N.Y. 2000] *aff'd* 6 Fed.Appx. 74 (2nd Cir. 2001); *Hawkins v. Astor Home for Children*, 1998 WL 142134, at *4 [S.D.N.Y]. The court also notes that although plaintiffs testified that they received many compliments on their work, they failed to present evidence in admissible form to corroborate these statements. As the *Griffin* court stated:

> We note in particular that plaintiffs have not provided, in either affidavit or unsworn letter form, evidence from any other co-worker or former employer that contradicts defendant's assessment of plaintiffs' poor performance. As Judge Sotomayor has noted, the Second Circuit requires that plaintiff 'show satisfactory job performance at the time of discharge.'

Griffin v. Ambika Corp., 103 F.Supp.2d at 308-809 (citations omitted).

The courts have also found that where a plaintiff is substantially older at the time he or she is hired, it is unlikely that discriminatory animus emerged during the course of his or her employment. "[T]he inference of discrimination is much weaker where the plaintiff is well within the protected class when first hired" (*O'Connor v. Viacom, Inc./Viacom Int'l Inc.*, 1996 WL 194299, at *7 [S.D.N.Y.]) *aff'd* 104 F3d 356 (2nd Cir 1996).

Moreover, as to plaintiffs' contention that they were replaced by younger workers, "[t]ypically, younger workers will replace older ones; this is an unremarkable phenomenon that does not, in and of itself, prove discrimination" (*Futrell v. J.I. Case*, 38 F.3d 342, 348 [7th Cir. 1994]).

Plaintiffs have also failed to come forward with any statistical evidence sufficient to give rise to an inference of discrimination. Plaintiffs have provided no evidence or

information about the size of the workforce at the defendant companies and/or the age makeup of that work force. Thus, the fact that all three of the Eccoci plaintiffs were fired within three months of each other has no relevance or statistical value because, in essence, it is statistical evidence in a vacuum. Statistics cannot be analyzed in a vacuum, they must be considered in the context of all relevant factors (*see, Williams v. McCausland,* 1996 WL 44456, at *4 [S.D.N.Y.]). Simply pointing to one's age as proof of discriminatory intent is insufficient to withstand a motion for summary judgment. (*Mathews v. Huntington,* 499 F.Supp.2d 258, 266 [E.D.N.Y. 2007]. As the court stated in *Coraggio v. Time Inc. Magazine Co.*, 1996 WL 139786, at *5 [S.D.N.Y.]), *aff'd* 108 F3d 329 (2nd Cir 1997), "a plaintiff must do more than show that she belonged to a protected group and that she suffered adversity at the workplace." In this case, plaintiffs have shown that they are members of a protected class who were terminated, but failed to come forward with statistical evidence to show that the defendant companies engaged in a pattern of terminating older employees which would create an inference that plaintiffs' terminations were motivated, at least in part, by discrimination (see, *Owens v. Nat'l R.R. Passenger Corp. (Amtrak)*, 1994 WL 455589 [S.D.N.Y.]), *aff'd* 62 F3d 1412 (2nd Cir 1995).

However, even assuming *arguendo* that plaintiffs have established a prima facie case of discrimination, defendants satisfied their burden by presenting evidence establishing a legitimate reason for the terminations. Etcetera has presented evidence of Mazzara's belligerent attitude, the warnings he received because of this behavior and his insubordination following the August, 2006 "Christina" incident (Rohr Aff., Exs. D, F,

G). In addition, Mazzara admits that he refused to leave the workplace after his supervisor instructed him to do so (Mazzara Dep., pp. 199-203). Proof of insubordination may be sufficient to rebut a prima facie case of discrimination and to demonstrate that the employer had a legitimate non-discriminatory reason for its actions (*see, Myrick v. New York City Employees Retirement System*, 2002 WL 868469, at *9 [S.D.N.Y.]) aff'd 56 Fed.Appx. 70 (2nd Cir 2003).

Defendants' evidence also establishes that Lahkman was terminated for unsatisfactory work at the end of his probationary period (Steinberg Aff., Ex. M; Rosenberg Aff., Ex. 14-16) and that Juroviesky and Ribaudo had difficulty making patterns that were acceptable and that their work often had to be corrected many, many times before it was accurate (Ruffino Aff., Exs. C through Q). Poor work performance may serve to rebut plaintiffs' prima facie case (*see, Bockino v. Metro. Transp. Auth.*, 224 A.D.2d 471 [2nd Dept. 1996]).

In order to overcome defendants' evidentiary showing, it was incumbent upon plaintiffs to come forward with evidence, in evidentiary form, to support their contentions of age discrimination. Plaintiffs cannot merely rely on their own beliefs and speculations that they were terminated because of their age (*Satterfield v. United Parcel Service, Inc.*, 2003 WL 22251314, at *15 [S.D.N.Y.]). They must do more than simply disagree with their employers' judgments concerning their qualifications in order to create a material question of fact (*Mareno v. Madison Square Garden, L.P.*, 1999 WL 777952, at *4 [S.D.N.Y.]).

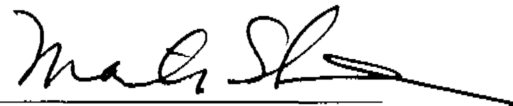
In this case, plaintiffs have failed to come forward with a scintilla of evidence to prove that the decision to terminate them would not have been made but for defendants' discriminatory motives. "Plaintiff cannot meet his burden of proving pretext simply by refuting or questing defendant's articulated reason" (*see, Ioele v. Alden Press, Inc.*, 145 A.D.2d 29, 36 [1st Dept 1989][citation omitted]). Here, plaintiffs have come forward with nothing more than conclusory allegations to suggest a causal relation between their age and their terminations which, without more, fail to raise a question of fact sufficient to overcome defendants' proof in support of their motion for summary judgment (*see, Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 714 [2nd Cir. 1996]). Because the court finds the above discussion to be dispositive, it will not address the parties' other arguments. Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing is the decision and order of this court. A copy of this decision and order has been sent to counsel for the parties.

Dated: January 8, 2009



Hon. Martin Shulman, J.S.C.

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