

**Kosarin-Ritter v Mrs. John L. Strong, LLC**

2013 NY Slip Op 30434(U)

February 26, 2013

Sup Ct, New York County

Docket Number: 102521/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

BARBARA KOSARIN-RITTER,

INDEX NO. 102521/12

Plaintiff,

MOTION DATE \_\_\_\_\_

**FILED**

MOTION SEQ. No. 001

-against-

MAR 05 2013 MOTION CAL No. \_\_\_\_\_

MRS. JOHN L. STRONG, LLC, et al.,

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-3

Answering Affidavits- Exhibits 4,5

Replying Affidavits 6

CROSS-MOTION:        YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 2/26/13

*Donna M. Mills*  
DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 58

**MAR 05 2013**

----- X  
BARBARA KOSARIN-RITTER,

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff,

Index No.: 102521/12

-against-

DECISION AND ORDER

MRS. JOHN L. STRONG, LLC, et al.,

Defendants.

----- X  
DONNA M. MILLS, J.

In this employment discrimination case, Barbara Kosarin-Ritter ("Plaintiff") brings this action against Mrs. John L. Strong, LLC, Mrs. John L. Strong & Co., LLC, Robert Daughton, Jacqueline Kotts, and Angela Ariola-Katz (collectively, "Defendants"). Defendants now move for summary judgment seeking dismissal of all of Plaintiff's claims in this action.

**FACTUAL BACKGROUND**

In the instant action, Plaintiff seeks redress for injuries suffered at the hands of Defendants' alleged discriminatory behavior, and subsequent termination, purportedly due to Plaintiff's age and religion.

Defendants employed Plaintiff as a retail sales associate from September 27, 2010 through November 10, 2011. The parties differ significantly about the cause of Plaintiff's termination.

Plaintiff claims that she was a good, hardworking employee who was forced to endure Defendants' disparaging comments about her age, and offensive questions regarding her Jewish faith, without a formal means of redress within the company.

Defendants, contend on the other hand, that during Plaintiff's tenure, her abrasive personality and disruptive behavior resulted in numerous conflicts with her co-workers and supervisors. In addition, Defendants contend that Plaintiff failed to consistently meet her sales objective and made numerous errors in processing customer orders. As a result, Defendants claim they lawfully terminated Plaintiff.

Shortly thereafter, Plaintiff brought this action alleging: (1) unlawful discriminatory practices in violation of New York City Administrative Code §§ 8-107(1), 8-107(6), and 8-107(13); (2) retaliation under New York City Administrative Code § 8-107(7); and (3) breach of contract.

### DISCUSSION

Plaintiff bears the initial burden of establishing a prima facie case of racial and/or age discrimination by showing that she was a member of a protected group, that she suffered an adverse employment consequence, and that the employer's action occurred under circumstances giving rise to an inference of racial and/or age discrimination (Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 305 [2005]; Ferrante v. American Lung Assn., 90 N.Y.2d 623, 629 [1997]; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 [1973]). If the plaintiff successfully establishes a prima facie case, 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 its employment decision" ( *id.* [citations omitted] ). In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that

discrimination was the real reason.

To prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. (Forrest v. Jewish Guild for the Blind, supra, 3 NY3d, at 305, quoting Ferrante v. American Lung Assn., supra ).

Although the question of whether discrimination occurred generally presents an issue of fact, summary judgment may be granted in discrimination cases when the defendant demonstrates the absence of a prima facie case, and plaintiff is unable to raise an issue of fact ( see Forrest v. Jewish Guild for the Blind, supra, 3 NY3d at 305–306).

The Defendants contend that Plaintiff has not come forward with any evidence to show that she was discriminated against based either on her Jewish religion or her age, and, thus has failed to make out a prima facie case of discrimination. Alternatively, the Defendants contend that, even if plaintiff satisfied her initial burden, the Defendants have presented evidence of legitimate, non-discriminatory reasons for its actions, which have not been rebutted by Plaintiff. The Defendants submit that, in the absence of evidence that the reasons it articulated are a pretext for age or national origin discrimination, summary judgment dismissing the Complaint is warranted.

Among other things, the Defendants contend that the evidence confirms that: (a) Plaintiff's personality conflicted with co-workers and supervisors, and was counseled about that behavior; (b) Plaintiff failed to meet sales objectives; and (c) the Plaintiff

made repeated errors with customer orders.

In support of their motion for summary judgment, Defendants' submit deposition testimony from supervisors and several co-workers who all disclose specific incidents where they felt Plaintiff's conduct and conversations were disruptive and inappropriate. Co-defendant, Angela Ariola Katz, hired as Vice President of Sales, Merchandising, and Planning during Plaintiff's tenure stated in her deposition that Plaintiff was very disruptive in the workplace, that there were various inaccuracies in Plaintiff's work for orders that were sent to be created. Ms. Katz further stated that on a daily basis she was required to intercede in some kind of blow-up Plaintiff was continuously having with other co-workers. Ms. Katz also stated, that at one weekly meeting with Plaintiff, Plaintiff would not answer her questions and became very disrespectful with the confrontation being heard throughout the office.

Defendants also rely on the deposition of other co-workers who corroborate Ms. Katz, and detail other work place incidents that caused them to be extremely uncomfortable in Plaintiff's presence.

It is quite apparent to the Court that Defendants demonstrated, prima facie, that it terminated plaintiff for employment reasons (see Forrest v Jewish Guild for the Blind, 3 NY3d 295, 305 [2004]), and, in response, plaintiff failed "to raise a question of fact concerning either the falsity of defendant's proffered basis for the termination or that discrimination was more likely the real reason" (Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

Plaintiff's allegation that her termination was motivated by age discrimination is based on four events: (a) Defendants' owner, Jacqueline Kotts, allegedly telling her that

gray hair made her look old; (b) her supervisor Mr. Daughton's statement in a September 3, 2011, sales meeting that the company was "going young" (c) the implementation of a dress code effective September 12, 2011, which included the guideline that hair should be "consistent with regard to color;" and (d) an October 27, 2011 email from Mr. Daughton to Plaintiff attaching a cartoon video regarding senior citizens. None of these events gives rise to an inference that Plaintiff's termination was motivated by age discrimination.

Plaintiff specifically alleges that in May 2011, she stopped coloring her hair to allow her hair to grow gray, and that she was told by Ms. Kotts that "your gray hair makes you look old." Through their Answer and Affirmative Defenses, Defendants denied that such a comment was made. This isolated comment if made, falls well short of making out a prima facie case ( see Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2nd Cir.1998) ("isolated remarks or occasional episodes of harassment will not merit relief under Title VII" ) (citation omitted); Spence v. Maryland Cas. Co., 995 F.2d 1147, 1155 (2nd Cir.1993) ("stray remarks uttered in the workplace ... insufficient to create a material issue of fact to defeat a summary judgment motion"); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577-578 (2nd Cir.1989) (incidents "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive") (citation omitted); Bellom v. Neiman Marcus Group, Inc., 975 F.Supp. 527, 532 (S.D.N.Y.1997) (mimicking of accent on one or two occasions insufficient to establish national origin discrimination).

Plaintiff next complains about a comment made by Mr. Daughton during a weekly sales meeting that the company was "going young". Mr. Daughton in his

deposition did not deny using words to that effect during a meeting, but claims that it had nothing to do with the age of Defendants' employees but with looking to address a younger clientele. Co-workers who were at the meeting confirmed during their deposition that they took the statement "going young" to mean, targeting potential clients, and not what Plaintiff inferred the comment to mean that it was in reference to the age of Defendants' employees.

Plaintiff also complains about a written dress code for Defendants' employees which contained a provision that hair style be well maintained and consistent with regard to color. Plaintiff claims that she was signaled out in the dress code due to her age and gray hair. Because Plaintiff has no evidence that the subject dress code was applied more harshly to her than other employees, the implementation of the dress code does not provide an inference of discrimination (see Nidzon v Konica Minolta Bus. Solutions, 752 F.Supp.2d 336, 349-350 (S.D.N.Y. 2010)).

Finally, Plaintiff complains about a cartoon video regarding senior citizens that was sent to her by Mr. Daughton. Mr. Daughton does not deny that he sent Plaintiff the cartoon video, but claims that Plaintiff asked him to send it to her. During her deposition, Plaintiff did not rebut the claim that she asked Mr. Daughton to send the video to her email address. As such, Plaintiff's inability to rebut the testimony that the video be sent to her is fatal to her claim that the cartoon video provides an inference of discrimination.

Plaintiff's allegation that her termination was motivated by religious discrimination is based solely on her assertion that she requested certain Jewish holidays off work, and her requests were denied. This assertion is contradicted by her own

contemporaneous email, as well as the testimony of multiple witnesses. Plaintiff admitted in her deposition that she never complained to Mr. Daughton that she had been denied a day off for any holiday that she requested. There is no evidence that Plaintiff ever requested a day off for religious purposes whereby it was denied. By contrast the evidence demonstrates that for days on which she actually asked off (including Yom Kippur), her requests were accommodated. Therefore, Plaintiff's claims based on religious discrimination have not been established.

This Court also finds that there are no triable issues of fact, as to the remaining two causes of action for retaliation and breach of contract.

To sustain a claim for retaliation, plaintiff must allege that she engaged in protected activity, that her employer was aware of the protected activity, and that she suffered an adverse employment action as a result of the protected activity (Forrest v. Jewish Guild for the Blind, supra at 312–13; Bendeck v. NYU Hosps. Ctr., 77 A.D.3d 552, 553, 909 N.Y.S.2d 439 (1st Dep't 2010).

Here, Plaintiff's claim for retaliation cannot be met in light of the fact that the first time she ever complained to anyone about alleged discriminatory treatment at Defendants' employ, was when she filed a complaint with the New York State Department of Human Rights, after she had already been terminated. Thus, it is chronologically impossible for there to have been a causal connection between Plaintiff's complaints about discrimination (i.e. protected activity) and her termination or other alleged adverse employment action. Accordingly, her claim for retaliation must be dismissed.

Lastly, Plaintiff claims that Defendants breached her employment contract by

modifying the commission structure that was in place at the time she was hired. But in order to maintain an action for breach of an employment contract, Plaintiff must first prove the existence of a contract. The document that Plaintiff claims to be an employment contract is her offer of employment letter which states, inter alia: "This is not an employment contract your employment is at will and is governed by the employment laws of the State of New York." Absent an agreement fixing a duration of employment, an employment relationship is presumed to be a hiring at-will, terminable at any time for any lawful reason or no reason (see Rooney v Tyson, 91 NY2d 685, 689 [1998]). In the instant action, Plaintiff acknowledged her employment at will and has offered no other evidence of the existence of an employment contract. As such, her claim for breach of contract must be dismissed.

Accordingly, it is hereby

ORDERED that the Defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of Defendants and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Defendants.

Dated: 2/26/13

**FILED**  
 MAR 05 2013  
 NEW YORK  
 COUNTY CLERK'S OFFICE

ENTER:  
 \_\_\_\_\_  
*Donna M. Mills*

**DONNA M. MILLS, J.S.C.**