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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No ED CV 00-224 RT (CWx) Date May 16, 2003

Title U S Equal Employment Opportunity Commission v Hitchin Lucerne

PRESENT

THE HONORABLE ROBERT J TIMLIN, JUDGE

Lenora Pulliam	None
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS	ATTORNEYS PRESENT FOR DEFENDANTS
NONE	NONE

PROCEEDINGS ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED R CIV P 56

The court, Judge Robert J Timlin, has read and considered defendant Hitchin Lucerne, Inc ("Hitchin")'s motion ("Motion") for summary judgment pursuant to Fed R Civ P 56 ("Rule 56"), plaintiff U S Equal Employment Opportunity Commission ("EEOC")'s opposition, and Hitchin's reply Based on such consideration, the court concludes as follows

I.
BACKGROUND[1]

Hitchin is a California corporation that operates the Crossroads Center, Lucerne Valley

[1]The information in this section is taken from the complaint, as well as the parties' points and authorities addressing Hitchin's motion for summary judgment

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Market IGA/ACE Hardware, and Wash 'n Shop Coin Laundry in Lucerne Valley, California Blanche Kraft ("Kraft") worked as a customer service agent for Hitchin from 1985 until her termination in 1996

The EEOC filed a complaint on Kraft's behalf, alleging that she was laid off from her position because of her sex, age and in retaliation for having complained to EEOC regarding such discrimination, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") as well as the Age Discrimination in Employment Act of 1967 ("ADEA") Thereafter, Hitchin filed the instant motion for summary judgment under Rule 56

II.
EVIDENTIARY OBJECTIONS

A EEOC's objection to Kraft's deposition, as to

(100 10-21) Sustained
(123 9-12) The court declines to rule on the evidentiary objection because the EEOC has not submitted a copy of the relevant deposition testimony, and such testimony is not found in Hitchin's papers
(44 10-25) The court declines to rule on the evidentiary objection because the EEOC has not submitted a copy of the relevant deposition testimony, and such testimony is not found in Hitchin's papers

B EEOC's objection to Kraft's deposition, as to

(39 9-15) The court declines to rule on the evidentiary objection because the EEOC has not submitted a copy of the relevant deposition testimony, and such testimony is not found in Hitchin's papers

C EEOC's objection to Ernest Gommel's deposition, as to

(17 7-14) overruled
(48-49) overruled

D EEOC's objection to Linda Gommel's deposition, as to

(44 20-23) overruled

E EEOC's objection on relevancy grounds to Gary Sugg ("Sugg")'s deposition, as to

(69 6-14) sustained

F. Hitchin's objection to Mary Smith's California Employment Development Department document, exhibit 2 of the EEOC's opposition sustained

G Hitchin's objection to Kraft's declaration dated August 7, 2001

(¶4) Sustained as to Ernest Gommel's own statements on hearsay grounds to the extent they are being offered for the truth of the matter asserted, otherwise overruled
(¶5) Sustained as to Ernest Gommel's own statements on hearsay grounds to the extent they are being offered for the truth of the matter asserted, otherwise overruled

H Hitchin's objection to EEOC's exhibit 103 overruled

I Hitchin's objection to Sugg's declaration, dated August 2, 2001

(¶3) 10-16 Sustained as to Linda Gommel's own statements on hearsay grounds to the extent they are being offered for the truth of the matter asserted, otherwise overruled
(¶4) 17-21 Sustained as to Linda Gommel's own statements on hearsay grounds to the extent they are being offered for the truth of the matter asserted, otherwise overruled

J Hitchin's objection to Peter Laura's declaration, dated August 10, 2001

(¶10) Sustained
Exhibit 3 Sustained

I Hitchin's objection to Kraft's deposition

(64 1 7-20) Granted as to Ernest Gommel's own statements on hearsay grounds to the extent they are being offered for the truth of the matter asserted, otherwise overruled

III
UNDISPUTED MATERIAL FACTS

The following facts are uncontroverted and supported by admissible evidence

Kraft was hired by Hitchin on November 4, 1985, to work in its grocery store

In the spring of 1996, members of Hitchin's operating board met to discuss the economic

recession and decided to lay off several individuals because the business was losing money

Hitchin subsequently laid off Kraft on March 18, 1996 At that time she was 62 years old Around the same time, it also laid off eight to nine other employees, older and younger women and men, including three persons in Customer Service who were approximately 40 years younger than Kraft and one female age sixty-six years

Kraft was told of her layoff at a meeting with Hitchin employees Mary Thomas and Ed Ramirez, who advised that the reason for her layoff was economic recession, not enough business for the market, too much money going out and not enough coming in and a general reduction in force

After her termination Kraft had an opportunity to fill out an application to seek new employment by Hitchin but did not seek new employment with Hitchin She rejected a temporary position offered to her by the company

Another Hitchin employee, Gretchen Baziotis ("Baziotis"), had notified Hitchin that she was leaving to work elsewhere, but she returned to Hitchin after that job fell through and Hitchin allowed her to resume her job as if she had never given notice Hitchin believes that Baziotis possesses more diverse skills than Kraft Baziotis is younger than Kraft

After Hitchin terminated her employment, Kraft filed claims with the EEOC and California Department of Fair Employment and Housing ("DFEH") asserting that she was terminated due to her age and gender

IV.
ANALYSIS

A. Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant a motion for summary adjudication of issues where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"A moving party without the ultimate burden of persuasion at trial– usually, but not always, a defendant– has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). The moving party may carry its burden of production by either producing evidence negating an essential element of the nonmoving party's claim, or by showing that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial. Id. (citing High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990). Correspondingly, the moving party may carry its ultimate burden of persuasion by demonstrating that there is no genuine issue of material fact. See id.

If the moving party "meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue

for trial '" T W Elec Serv , Inc v Pacific Elec Contractors Ass'n, 809 F 2d 626, 630 (9th Cir 1987) (quoting Fed R Civ P 56(e) and citing Celotex Corp v Catrett, 477 U S 317, 323 (1986)) Once the nonmoving party produces evidence to create a genuine issue of material fact, it defeats the summary judgment motion Id (citing Celotex, 477 U S at 322) With respect to those specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party See T W Elec Serv , 809 F 2d at 630-31 (citing Matsushita Elec Indus Co v Zenith Radio Corp , 475 U S 574 (1986))

In an employment discrimination case, the Ninth Circuit has set a high standard for granting a motion for summary judgment Schnidrig v Columbia Mach , Inc , 80 F 3d 1406, 1410 (9th Cir 1996) In particular, "very little evidence to survive summary judgment in a discrimination case [is required] because the ultimate question is one that can only be resolved through a 'searching inquiry– one that is most appropriately conducted by the factfinder, upon a full record '" Id (quoting Lam v Univ of Hawaii, 40 F 3d 1551, 1563 (9th Cir 1994)) Moreover, for plaintiffs seeking to establish a prima facie case through direct rather than circumstantial evidence, "very little such evidence is required to raise a genuine issue of fact regarding an employer's motive " Id at 1409 (quoting Lowe v City of Monrovia, 775 F 2d 998, 1005 (9th Cir 1986))

B. Claims under Title VII and the ADEA

1 Disparate Treatment

Because the EEOC's claims under Title VII and the ADEA entail the same burdens of persuasion and proof, they will be addressed together Wallis v J R Simplot Co , 26 F 3d 885,

889 (9th Cir 1994), Rose v Wells Fargo & Co , 902 F 2d 1417, 1420 (9th Cir 1990) Plaintiffs seeking to establish a prima facie case of disparate treatment must provide evidence that "give[s] rise to an inference of unlawful discrimination " Butler v Home Depot, Inc , 1997 WL 605754, at *2 (N D Cal 1997) (quoting Texas Dept of Cmty Affairs v Burdine, 450 U S 248, 253 (1981)) This evidence may be either direct or circumstantial Nidds v Schindler Elevator Corp , 113 F 3d 912, 917 (9th Cir 1996) In order to establish an inference of discrimination through circumstantial evidence, a plaintiff challenging a discharge based on age discrimination must show that she was (1) a member of a protected class, (2) performing her job in a satisfactory manner, (3) discharged, and (4) replaced by a "substantially younger employee with equal or inferior qualifications " Id However, this fourth element has not always been required by the courts As the Ninth Circuit has held, "the failure to prove replacement by a younger employee is 'not necessarily fatal' to an age discrimination claim where the discharge results from a general reduction in the work force due to business conditions " Id (quoting Rose, 902 F 2d at 1421)

Once a plaintiff has established a prima facie case, through either direct or circumstantial evidence, a presumption arises that the employer has engaged in unlawful discrimination Burdine, 450 U S at 254 The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for an adverse employment action, in this case Kraft's discharge from employment Nidds, 113 F 3d at 917, Wallis, 26 F 3d at 889 If the employer meets this burden, the presumption of unlawful discrimination disappears and the burden shifts to the plaintiff to show that the employer's articulated reason is a pretext for discrimination Id On a summary judgment motion reaching the pretext stage of the analysis, the plaintiff must produce sufficient

probative evidence to raise a genuine issue of material fact as to whether the employer's reason for its action is pretextual Schnidrig, 80 F 3d at 1410 To do this, the plaintiff must produce enough evidence for a reasonable factfinder to conclude either that the employer's alleged reason is false, or that the true reason for the discharge is discriminatory [2] Nidds, 113 F 3d at 918

The EEOC has submitted evidence that Ernest Gommel, President of Hitchin, made comments to Kraft regarding her age, stating that because of her age and weight she was an accident waiting to happen He also asked her if she qualified for any state or federal programs EEOC contends this evidence constitutes direct evidence of age discrimination Although Ernest Gommel's age-related comments were made two years before Kraft's layoff, Gommel stated in his deposition that he made them as part of an ongoing deliberation about whether to terminate Kraft In this context, the remarks do give rise to an inference of a discriminatory animus by Hitchin's supervisorial employees

Under the low threshold for such evidence established by the Ninth Circuit, the court concludes that these age-related remarks although disputed by Hitchin, are sufficient direct evidence to constitute a prima facie case of age discrimination See Naton v Bank of California, 649 F 2d 691, 698 (9th Cir 1981) (holding that age-related remarks constituted evidence of discrimination), Schnidrig, 80 F 3d at 1409 (finding that age-related remarks qualified as direct evidence of discriminatory motives) In finding that there is direct evidence establishing a prima

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[2]As the EEOC points out, Hitchin misstates the holding in St Mary's Honor Ctr v Hicks, 509 U S 502 (1993), in asserting that plaintiffs must demonstrate both that an employer's reason is false and that the true reason is discriminatory As clarified in Reeves v Sanderson Plumbing Prod , Inc , 530 U S 133, 146-7 (2000), a factfinder's rejection of an employer's stated reason for its action *allows*, but does not *compel*, the conclusion that the employer's ultimate motive was discriminatory Therefore, the EEOC is not required to show both falsity and an underlying discriminatory purpose

facie case of age discrimination, the court recognizes that "[t]he requisite degree of proof necessary to establish a prima facie case for Title VII on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence," Wallis, 26 F 3d at 889 Because the prima facie case is supported by direct evidence, there is no need to apply the circumstantial evidence test giving rise to a presumption of discrimination Id

There is evidence, although disputed, that Ms Linda Gommel, a Hitchin Manager of the store at which Kraft worked, remarked to an EEOC investigator that Hitchin did not consider assigning Kraft to hardware because the customers wanted a male employee in hardware Evidence shows that Kraft filled in for personnel in the hardware department

The court similarly finds that the gender-related comments made by Linda Gommel also constitute direct evidence establishing a prima facie case of gender discrimination Ms Gommel's statements indicate that in the context of Kraft's termination, Hitchin had considered and then rejected the possibility of retaining her in the hardware department based on a belief that customers preferred male employees in that department [3] See Butler, 1997 WL 605754, at *7 & fn 3 & 4 (*finding the rejection of qualified female applicants from the hardware and* merchandising departments, along with Home Depot's statement that "girls don't work in the lumber department," to constitute part of a prima facie case of discriminatory intent)

Since the EEOC has presented significant probative direct evidence to establish a prima facie case of unlawful discrimination based on age and gender, the burden shifts to Hitchin to

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[3]Hitchin's argument that because the conversation with the EEOC investigator took place two years after Kraft's termination, Gommel's remarks do not constitute evidence of discriminatory intent is without merit It is inferrable from the investigator's notes that Linda Gommel was relating Hitchin's reasons for not reassigning Kraft to the hardware department at the time of her layoff

articulate a legitimate, nondiscriminatory reason for discharging Kraft from her employment position In support of its decision, Hitchin points to evidence of the general economic decline which hit Lucerne Valley, leading to a significant decrease in its store revenues and necessitating employee layoffs Hitchin also stresses that it is uncontroverted that it laid off six other employees in addition to Kraft, including older, younger, male, and female employees Hitchin further refers to evidence, although disputed, that Kraft was a poor performer and that she lacked adequate job skills, such as an ability to work the cash register, so as to be retained over other employees who possessed such skills This evidence, if uncontroverted, suffices as a legitimate, nondiscriminatory reason for Kraft's discharge with regard to the age discrimination claim See Nidds, 113 F 3d at 918 (stating that employer met its burden by pointing to an economic downturn and by relying on factors such as employee performance and qualification in determining whom to lay off)

There is, however, a genuine issue of material fact regarding Kraft being an inadequate employee and lacking the necessary job skills The uncontradicted evidence shows that she worked for Hitchin for more than ten (10) years and received favorable employee evaluations The Court cannot as a matter of law conclude that Hitchin has articulated a legitimate, nondiscriminatory reason for its action Assuming the Court did so conclude, the burden then shifts back to the EEOC to show that this reason is a pretext for discrimination The EEOC states there are genuine issues of fact regarding this element, which preclude granting the motion It argues that Hitchin's reliance on Kraft's poor performance and lack of job skills is pretextual in light of the uncontradicted evidence of Kraft's 1995 employment evaluation, her 1986 recognition as an outstanding employee, and the declarations of three customers stating that,

contrary to Hitchin's allegations, she was not slow

While Kraft's positive employment evaluation a year before her discharge does not necessarily create an issue of fact regarding her lack of skills for alternative jobs, it does create an issue of fact regarding Hitchin's assertion of poor performance Together with the customer declarations, this evidence suffices to create an issue of fact as to whether Hitchin's explanation for its decision to terminate Kraft is the true reason for the termination See Nidds, 113 F 3d at 918 Moreover, evidence of the age-related remarks made by Ernest Gommel also constitute sufficient evidence of a factual dispute regarding whether Hitchin's true motivation was discriminatory This satisfies the alternative prong of the Nidds summary judgment pretext analysis See id Moreover, while Hitchin may use evidence of a general economic decline to justify its initial decision to conduct employee layoffs, this does not negate the factual issue of whether its decision to lay off Kraft in particular was discriminatory See id at 918 (discussing general and specific reasons for company's layoff decision) As the court in Sischo-Nownejad v Merced Community College Dist , 934 F 2d 1104, 1111 (9th Cir 1991) noted

> When [] evidence [of a prima facie case], direct or circumstantial, consists of more than the McDonnell Douglas presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason The existence of this question of material fact will ordinarily preclude the granting of summary judgment

Id at 1009

In the context of a motion for summary judgment, the Court finds that there is sufficient evidence creating genuine issues of fact as to whether Hitchin's stated reasons for discharging Kraft are pretextual Therefore, after drawing all reasonable inferences in favor of the EEOC as the nonmoving party, see T W Elec Serv , 809 F 2d at 630-31, the court will deny

Hitchin's motion for summary judgment on the age discrimination claim

In response to the EEOC's contention that there are genuine issues of fact regarding gender discrimination, Hitchin simply states that Linda Gommel was not aware at the time she made the remarks to the EEOC investigator that the EEOC was investigating Kraft's complaint against the store, and that just because Hitchin acknowledges customer bias does not mean its staffing decisions reflect such bias While "the mere existence of a *prima facie* case, based on the minimum evidence necessary to raise a McDonnell Douglas presumption, does not preclude summary judgment," Wallis, 26 F 3d at 890, here the EEOC has presented more than the minimum evidence required for a prima facie case of gender discrimination Linda Gommel's remarks constitute direct evidence of a discriminatory intent, raising a genuine issue of fact regarding Hitchin's motive for terminating Kraft being directed by a discriminatory animus and Hitchin's stated reason for the termination being pretextual The Court will deny Hitchin's motion for summary judgment on the gender discrimination claim

2 Retaliation

To establish a prima facie case of retaliation against Hitchin based on Kraft's filing complaints with the EEOC and FEHA claiming age and gender discrimination by Hitchin in terminating her, the EEOC must show 1) that Kraft engaged in a protected activity, 2) that she suffered an adverse employment decision, and 3) that there is a causal link between the protected activity and the adverse employment decision See Yartzoff v Thomas, 809 F 2d 1371, 1375 (9th Cir 1987) "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity" Cohen v Fred Meyer, Inc , 686 F 2d 793, 796 (9th Cir 1982) The Ninth Circuit has defined "adverse employment action" broadly, as

"adverse treatment that is reasonably likely to deter employees from engaging in protected activity" Ray v Henderson, 217 F 3d 1234, 1237 (9th Cir 2000)

EEOC contends the adverse employment decision involving retaliation was Hitchin's failing to rehire Kraft Here, Kraft's filing of complaints with the EEOC and FEHA against Hitchin constitutes protected activity See 42 U S C § 2000e-3(a), Henderson, 217 F 3d at 1240 & fn 3 However, the Court concludes under Henderson, that Hitchin's failure to rehire Kraft does not constitute an adverse employment action The uncontroverted facts establish Kraft expressed no interest in being rehired and declined to file an application to be rehired despite Hitchin's invitation to her that she do so Hitchin's failure to rehire Kraft was not reasonably likely to deter her from engaging in protected activity EEOC has not submitted significant probative evidence to establish a triable issue of material fact as to a causal connection between Kraft's complaints to the FEHA and EEOC and Hitchin's decision not to rehire Kraft

Moreover, although the EEOC contends that, unlike Kraft, Hitchin employee Gretchen Baziotis was rehired without having to file an application for reemployment, the uncontradicted evidence shows the contrary Ms Baziotis simply withdrew a notice of leaving her job with Hitchin that she had given to Hitchin after the anticipated new job fell through due to a negative physical fitness report The court finds that Hitchin's allowing Ms Baziotis to resume her job does not demonstrate retaliation against Kraft for filing her complaints with the FEHA and EEOC Since the EEOC has failed to present any evidence demonstrating that a genuine issue of material fact exists with respect to the third element of its retaliation claim, namely, the causal link, the Court concludes as a matter of law that Hitchin's motion for summary judgment on this claim will be granted

V.
DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT

(1) Hitchin's motion for summary judgment on the Title VII and ADEA age discrimination claims is DENIED,

(2) Hitchin's motion for summary judgment on the Title VII gender discrimination claim is DENIED, and

(3) Hitchin's motion for summary judgment on the Title VII retaliation claim is GRANTED