UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WOLOCHUK	:	
	:	
v.	:	Civ. Action No.
	:	3:98 CV 01667 (SRU)
	:	
VOLLMER ASSOCS., LLP	:	

RULING ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Leon Wolochuk ("Wolochuk") filed this action seeking damages for alleged age discrimination. Specifically, Wolochuk claims that Vollmer Associates, LLP ("Vollmer") terminated him from his position as engineer and manager of Vollmer's Connecticut branch, because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*., and Connecticut General Statutes § 46a-60.

Vollmer filed the present motion for summary judgment alleging that it is entitled to summary judgment on all allegations of the complaint because no reasonable jury could find that plaintiff filed his claims in a timely fashion. Vollmer further argues that summary judgment is appropriate because as a matter of law, no reasonable jury could find that Vollmer's given reason for terminating Wolochuk was false or a pretext for discrimination.

Because Vollmer has failed to demonstrate the absence of genuine material facts concerning the timeliness of Wolochuk's claims, and because Wolochuk's proffered evidence, if admitted and believed by a jury, would be sufficient to permit a rational finder of fact to conclude that Vollmer's stated reason for terminating Wolochuk was mere pretext, Vollmer's Motion for Summary Judgment **(doc# 12)** is denied.

I. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the evidence demonstrates 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." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). When ruling on a summary judgment motion, the court must construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson, 477 U.S. at 255; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); see also Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d. 520, 523 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992).

To present a genuine issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. Even if the nonmoving party's evidence appears "implausible," the court may not "weigh" the evidence and must proceed with the greatest caution. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 58-59 (2d Cir. 1997). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions. . . ." Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2102 (2000). If reasonable minds could differ over the import of the evidence, and if there is any evidence in the record from which a reasonable inference in the nonmoving party's favor may be drawn, the moving party simply cannot obtain a summary judgment. R.B. Ventures, Ltd., 112 F.3d at 58-59.

The Second Circuit has stated that a district court should exercise caution when deciding whether summary judgment should issue in an employment discrimination case. Carlton v. Mystic

Transportation, Inc., 202 F.3d 129, 134 (2d Cir.), *cert. denied*, 120 S. Ct. 2718 (2000); Gallo v. Prudential Residential Services, L.P., 22 F.3d 1219, 1223 (2d Cir. 1994). In particular, at the summary judgment stage when intent is at issue, the court must carefully scrutinize the depositions and affidavits for circumstantial evidence that if believed, would show discrimination. Gallo, 22 F.3d at 1223.

II. DISCUSSION

Vollmer is not entitled to summary judgment because it has failed to establish that there are no genuine issues of material fact concerning the timeliness of Wolochuk's claims. Specifically, a genuine factual dispute exists concerning when Wolochuk received definite notice of his termination sufficient to inform him that the notice was the official position of Vollmer. Vollmer's motion further fails because issues of material fact exist concerning Vollmer's motivation in firing Wolochuk. Specifically, a reasonable jury could conclude that Vollmer terminated Wolochuk not because of poor performance, but because of discriminatory animus.

A. The timeliness of Wolochuk's claims.

Vollmer argues that Wolochuk knew as early as May 29, 1996 that he would lose his position as Connecticut branch manager. Vollmer further argues that Wolochuk knew on that date that he had "no choice" but to take a new position as supervisor of the firm's construction inspection work. Vollmer alternatively argues that Vollmer knew of his termination at least by the week of June 12, 1996, when he first suspected that Vollmer wanted to terminate him because of his age. Vollmer asserts that Wolochuk's knowledge of termination can be further inferred from the fact that during June of 1996 Wolochuk looked for other employment and contacted an attorney. Vollmer thus concludes that Wolochuk's claims are time barred because he failed to file

a complaint with the Commission on Human Rights and Opportunities within 180 days (and with the Equal Employment Opportunities Commission within 300 days) after he became aware, in May or June of 1996, that Vollmer intended to fire him because of his age.[1]

Although the evidence presented by Vollmer may indicate that Wolochuk knew his job was in danger as early as May or June of 1996, and suspected at that time that Vollmer's motivation was discriminatory, it does not necessarily demonstrate that Wolochuk received notice sufficient to trigger the applicable limitations periods at that time. The limitations periods did not begin to run until the date that Wolochuk received a definite notice of termination. Economu v. Borg Warner Corp., 829 F.2d 311, 315 (2d Cir. 1987); Smith v. United Parcel Service of America, 65 F.3d 266, 268 (2d Cir. 1995). Vollmer must also have made it apparent to Wolochuk that the notice represented the "official position" of Vollmer. Id. In other words, whether or not Wolochuk was aware that his job was in jeopardy in May or June of 1996 is not determinative. The salient issue is whether Wolochuk received definite notice of his termination that sufficiently apprized him that termination represented Vollmer's official position.[2]

Vollmer has failed to show the absence of genuine issues of material fact concerning when Wolochuk received definite official notice of his termination. For example, Vollmer has presented

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[1] There is no dispute that Wolochuk filed his discrimination claims with both the CHRO and the EEOC on June 9, 1997.

[2] Vollmer incorrectly argues that this distinction is "mere semantics." In fact, the distinction is not only supported by legal precedent, but also comports with logic and common sense. An employee could certainly be aware that a superior desired his termination for discriminatory reasons, but not also know whether the supervisor had the authority to carry out the desired termination and therefore whether he would in fact be terminated. The rule urged by Vollmer would lead to many premature and unnecessary protective filings with the CHRO and EEOC.

no evidence from which a reasonable juror could infer that the partners who informed Wolochuk that he would be terminated actually had authority to speak for the entire Vollmer partnership. The evidence offered by Vollmer permits the opposite conclusion. For example, the final notice of termination (when Wolochuk was asked to immediately leave the firm on January 30, 1997), is the only notice referenced by Vollmer as having been made by the "entire partnership." (Correale Aff. ¶ 24). Similarly, Vollmer has failed to proffer evidence demonstrating that, under the circumstances, it would have been reasonable for Wolochuk to believe that the partners who spoke with him in May and June represented Vollmer's official position. For example, the June 1996 notice was not in writing and did not provide a specific date of termination. See Morgan v. Pitney Bowes Inc., 1994 WL 30938, *2 (D. Conn. Jan. 26, 1994) (limitations period not triggered where, *inter alia* there was no written termination notice and employee was not given a specific termination date).

A genuine dispute also exists concerning whether the notice in May or June of 1996 was sufficiently definite, because Wolochuk has presented evidence from which a reasonable juror could infer that Vollmer acted equivocally. For example, Wolochuk received a positive performance review and a salary increase in July 1996 and a positive performance review again in October 1996. Both reviews were but a few months after the events that Vollmer now argues put Wolochuk on notice of his termination for poor performance. Similarly, although the partners expressed displeasure with Wolochuk's performance as branch manager in May and June of 1996, they did not indicate that he would be terminated as an employee of Vollmer. Rather, the partners offered Wolochuk the construction supervisor job, which would require him to supervise more employees, provide him greater bonus potential, and would represent no loss of seniority status.

See, e.g., Verschuuren v. Equitable Life Assur. Soc., 554 F. Supp. 1188 (S.D.N.Y. 1983) (notice of termination was equivocal where employee told he would be terminated unless another position became available).

Vollmer has thus failed to demonstrate the absence of genuine issues of fact concerning when Wolochuk received official and definite notice of his termination. It will therefore be for the jury to determine whether Wolochuk's claims were timely filed.

B. Evidence of Vollmer's intent to discriminate[3]

Vollmer argues that summary judgment is also appropriate because Wolochuk can not make a *prima facie* case of discrimination, and can not demonstrate that Vollmer's stated reason for terminating him was pretext, because no genuine issue exists showing that he satisfactorily performed his duties a manager of Vollmer's Connecticut office, nor that dismissal occurred in circumstances giving rise to an inference of discrimination. More specifically, Vollmer argues that Wolochuk can demonstrate neither that he in fact performed his managerial responsibilities satisfactorily nor that his job performance was a mere pretext for age discrimination.

Vollmer argues that Wolochuk can not make a *prima facie* case of discrimination because he can not show that he "was performing his duties satisfactorily" and that "his discharge occurred in circumstances giving rise to an inference of discrimination." Reviewing the record in the light most favorable to Wolochuk, and recognizing the *de minimis* proof necessary to establish

[3] Connecticut courts look to federal discrimination law for guidance in determining liability under CFEPA. See State v. Commission on Human Rights and Opportunities, 211 Conn. 464, 470, 559 A.2d 1120 (1989); Levy v. Commission on Human Rights and Opportunities, 35 Conn. App. 474, 480, 646 A.2d 893 (1994). Specifically, Connecticut courts apply the standards set forth by the Supreme Court in McDonnell Douglas and Price Waterhouse. See Levy, 35 Conn. App. at 480, 646 A.2d 893. Thus, the court will not separately examine Wolochuk's federal and state claims.

a *prima facie* case, Weinstock v. Columbia University, 224 F.3d 33, 41 (2d Cir. 2000) Wolochuk has presented sufficient evidence supporting a *prima facie* case of age discrimination.

Wolochuk has presented evidence that his direct supervisor made age-related remarks to Wolochuk about another employee, including that Wolochuk should replace that employee with a "younger and cheaper" employee, that the worker was "old and tired," and that Wolochuk should hire "someone younger, and full of piss and vinegar."[4] Wolochuk has also presented evidence that he was replaced as branch manager by an employee who was not only younger than Wolochuk (in his mid-thirties while Wolochuk was forty-eight), but who also had no experience as a branch manager or in the Connecticut office.[5] Thus, Wolochuk has presented sufficient evidence to support a *prima facie* inference of discriminatory intent. For the reasons discussed below, Wolochuk has also presented evidence sufficient to support a *prima facie* showing that he was performing his job satisfactorily when he was terminated.[6]

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[4] Vollmer's characterization of these comments as mere "stray remarks" is of no import. As a preliminary matter, it is not clear that the remarks are "stray" because, while they did not directly relate to the firing of Wolochuk, they were uttered by his direct supervisor. Moreover, under the McDonnell Douglas standard, stray remarks not only are permissible in support of a *prima facie* case, but "may indeed persuade the factfinder that the plaintiff has carried his ultimate burden of persuasion." Kirschner v. The Office of the Comptroller of the City of New York, 973 F.2d 88, 93 (2d Cir. 1992).

[5] Because Vollmer is not entitled to summary judgment under the McDonnell Douglas test, the court need not decide, as Wolochuk urges, whether the "direct evidence" standard articulated in Ostrowski v. Atlantic Mutual Ins. Co., 968 F.2d 171 (2d Cir. 1992), applies.

[6] Wolochuk has also presented evidence that a co-worker told Wolochuk that Wolochuk's supervisor told the co-worker that Vollmer wanted to replace Wolochuk with someone "younger and cheaper." Obviously this evidence, if admissible and believed, would be highly probative of discriminatory intent. Vollmer argues, however, that the statement is hearsay and therefore can not be relied upon by Wolochuk to defeat summary judgment. Although Vollmer's arguments are strong ones, the court need not address the evidentiary issue at this time because Wolochuk has presented sufficient *prima facie* evidence aside from the alleged hearsay.

Vollmer has come forward with a legitimate, non-retaliatory reason for terminating Wolochuk as required by the second prong of the McDonnell-Douglas test: Wolochuk's alleged poor performance as Connecticut branch manager. Thus, Wolochuk must demonstrate that there is "sufficient potential proof for a reasonable jury to find [Vollmer's] proffered legitimate reason merely a pretext for impermissible retaliation," in order to avoid summary judgment. Quinn v. Green Tree Credit Corp., 159 F.3d 759 at 764; see also Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106 (2000). Wolochuk has offered sufficient proof to avoid summary judgment.

Vollmer has presented undisputed evidence that the Connecticut branch did not perform well during Wolochuk's management.[7] Vollmer has not, however, presented evidence indicating in what specific ways Wolochuk failed to perform his duties adequately. Similarly, Vollmer has not demonstrated that Wolochuk was solely responsible for the branch's performance.[8] Thus, although a rational jury could infer from the branch's poor performance that Wolochuk performed poorly as manager, a rational jury could also fail to reach that conclusion. In other words, the branch's performance is strong evidence of Wolochuk's poor performance as manager of the branch, but it is not necessarily conclusive. See, e.g., Cronin , 46 F.3d at 204 ("unless the employer has come forward with evidence of a dispositive nondiscriminatory reason as to which

[7] For example, during the twelve years Vollmer managed the branch, it posted a profit in only three years and, during the last five years of Wolochuk's tenure, lost money each year. The branch also lost several employees under Wolochuk's management.

[8] Wolochuk's responsibilities as branch manager included hiring, firing, staffing the branch's engineering projects, developing business, preparing a budget and developing plans to improve the office's profitability. The parties dispute, however, whether Wolochuk was required to perform these tasks alone, or in corroboration with his direct supervisor.

there is no genuine issue and which no rational trier of fact could reject, the conflict between the plaintiff's evidence . . . and the employer's evidence of a nondiscriminatory reason reflects a question of fact to be resolved by the fact finder at trial.").[9]

Furthermore, Wolochuk has come forward with sufficient evidence from which a rational jury could conclude that Vollmer's proffered reason for termination was false. The United States Supreme Court has recently held that under the last step of the three-step McDonnell Douglas burden-shifting analysis, the plaintiff does not always need to "introduce additional, independent evidence of discrimination." Reeves, 120 S. Ct. at 2109. The plaintiff may attempt to show discrimination by "showing that the employer's proffered explanation is unworthy of credence." Id. at 2106. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Id. at 2108. "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id..

Wolochuk has presented evidence that, if believed, would allow a jury to conclude that Wolochuk performed his necessary job functions. For example, Wolochuk argues that the branch did not lose money because of his management, but because one of the branch's largest clients decided in 1996 to perform all construction projects costing less than five million dollars itself, rather than hire companies such as Vollmer to complete the work. Wolochuk further argues that,

[9] The court is mindful that it must not "intrud[e] into an employer's policy apparatus or second guess[] a business's decision-making process." Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985). The inquiry here, however, is limited to whether Wolochuk has proffered sufficient evidence to survive summary judgment, that is, whether a reasonable jury could find that Vollmer's stated reasons for discharging Wolochuk were false.

contrary to Vollmer's assertions, he did in fact bring new business into the branch. Wolochuk has also offered evidence that a jury could rely upon to doubt the veracity of the company's claim of poor performance. For example, during his July 10, 1996 performance review, Wolochuk received a positive performance review and was given a salary increase. In October of 1996, during his next review, Wolochuk again received a positive performance review. Notably, these two performance reviews were after Wolochuk was approached by the two partners in May and June of 1996 concerning the open position as construction inspection supervisor.

Similarly, it is undisputed that, rather than terminate Wolochuk outright, Vollmer initially offered him a new position in the company that would not only provide him with the same salary, benefits and seniority status, but would also give him responsibility for managing more employees and a potential for a higher bonus. Thus, the evidence offered by Wolochuk in support of his *prima facie* case, combined with the evidence he has offered to refute Vollmer's proffered reason for termination, is sufficient to preclude summary judgment.

IV. CONCLUSION

For the foregoing reasons, Vollmer's Motion for Summary Judgment **(doc. #12)** is denied.

It is so ordered.

Dated at Bridgeport this _____ day of November 2000.

Stefan R. Underhill
United States District Judge