UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEV GRIGORYOU,

Plaintiff,

v.

PALLET SERVICES, INC.

Defendant.

1:13-CV-526-RJA-MJR
AMENDED
REPORT AND
RECOMMENDATION

INTRODUCTION

This case has been referred to the undersigned pursuant to Section 636(b)(1)(A) and (B) of Title 28 of the United States Code, by the Honorable Richard J. Arcara, for the hearing and reporting of dispositive motions for consideration by the District Court. Plaintiff Lev Grigoryou ("plaintiff"), a former employee of defendant Pallet Services, Inc. ("defendant" or "Pallet"), claims that he was harassed and unlawfully terminated on the basis of his age, in violation of the Age Discrimination in Employment Act ("ADEA").

Before the Court is defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Dkt. Nos. 57-61). For the following reasons, it is recommended that defendant's motion for summary judgment be granted and that plaintiff's complaint be dismissed.

PROCEDURAL BACKGROUND

Plaintiff, who is proceeding *pro se*, filed this lawsuit on May 17, 2013 after receiving a right to sue notice from the Equal Employment Opportunity Commission on February 20,

2013.[1] (Dkt. No. 1). Defendant filed a motion to dismiss on July 29, 2013 (Dkt. Nos. 6-8). and plaintiff filed a motion for appointment of counsel on July 31, 2013 (Dkt. No. 9). On May 2, 2014, the Court denied plaintiff's motion for appointment of counsel and granted defendant's motion to dismiss without prejudice to plaintiff filing an amended complaint. (Dkt. No. 17). Plaintiff filed an amended complaint on June 2, 2014 (Dkt. No. 18) and defendant filed another motion to dismiss on June 26, 2014 (Dkt. Nos 19-21). Plaintiff filed another motion to appoint counsel on July 25, 2014. (Dkt. No. 23). On April 14, 2015, the Court denied the motion to appoint counsel without prejudice and denied the motion to dismiss. (Dkt. No. 28).

Defendant filed a motion for summary judgment on August 29, 2016. (Dkt. Nos. 51-54). However, defendant did not serve plaintiff with a Rule 56 Notice for *pro se* litigants, as required. In response to the summary judgment motion, plaintiff submitted a statement of material facts wherein he disputed certain facts in defendant's statement of material facts. (Dkt. No. 55). However, plaintiff submitted no affidavits, affirmations, evidence, or memorandum of law in support of his opposition. This Court then denied the summary judgment motion without prejudice for defendant to refile the motion with the required Rule 56 Notice, which defendant did on October 17, 2016. (Dkt. No. 57-61). Plaintiff then resubmitted the same document he had previously filed (Dkt. No. 62), and defendant filed a reply (Dkt. No. 63). Oral argument was scheduled before this Court on January 19, 2017, and notice was mailed to plaintiff. (Dkt. No. 56). Plaintiff did not appear for the oral argument, and the Court considered the matter submitted on the papers.

[1] Plaintiff was granted leave to proceed *in forma pauperis* on June 13, 2013. (Dkt. No. 4).

SUMMARY OF FACTS AND CLAIMS

Pallet sells recycled, repaired or manufactured pallets to third parties.[2] (Dkt. No. 60, ¶3). Plaintiff, who was 51 years old at the time he filed his amended complaint, was employed at Pallet's Buffalo plant from September 1, 2011 through April 16, 2012 as a member of the "break-up" crew. (Dkt. No. 18; Dkt. No. 60 at ¶¶3, 4). One of the plant operations consists of breaking down or cutting broken pallets purchased by defendant as part of the recycling or remanufacturing process. (*Id*.). The break-up crew is comprised of seven people and is tasked with cutting or breaking down the broken pallets. (*Id*. at ¶5). Within the crew, four employees operate two saws. (*Id*.). The saw operators cut up the pallets into three different sizes, and the cut pieces of wood slide down a conveyor belt to a rotating table. (*Id*.). Two sorters take the pallet pieces from the table and place them in three nearby bins according to their size. (*Id*.). A forklift operator then moves the bins to another room for further processing. (*Id*.). Saw operators and sorters are paid the same hourly wage, however the saw operators receive additional payments based on a "piecework calculation" that depends on the number of pallets processed. (*Id*. at ¶6). Because of this, the saw operators regularly "encourage" the sorters to keep up with the assembly line operations. (*Id*. at ¶7).

As a result of the type of work, machinery and materials handled, as well as the noise in the plant, workers are required to wear safety glasses and ear covers. (*Id*.). Therefore, it is almost always necessary for workers on the plant floor to yell in order to be

[2] The facts and claims discussed herein have been taken from the amended complaint, affidavits and evidence submitted in support of defendant's motion for summary judgment, plaintiff's response to the summary judgment motion, and plaintiff's deposition.

heard. (*Id*.). Michael Hanel, plant manager at Pallet's Buffalo plant for the past 18 years, states that given the nature of work and pay scale, the turnover rate for plant employees is high. (*Id*.). As a result, Pallet does not have extra employees to join the break-up crews when someone is absent or has left their position. (*Id*.). Because two employees are needed to operate the saw, when a member is absent the break-up crew must work with one sorter as opposed to two. (*Id*.). In those instances, the job of sorter is more difficult because they are working alone. (*Id*.).

Break-up crew employees work from 6:00 a.m. to 3:30 p.m., with a half hour lunch break, a fifteen minute break in the morning and a fifteen minute break in the afternoon. (*Id*. at ¶8). Employees regularly work overtime. (*Id*.).

Hanel states that plaintiff was not a good employee. (*Id*. at ¶9). Specifically, Hanel states that plaintiff did not work hard and had difficulties getting along with other employees. (*Id*.). When hired, plaintiff was initially assigned to operate the saw but had to be moved to the sorter position, after two months, because he could not get along with the other saw operators. (*Id*.). Hanel states that while working as a sorter, plaintiff would frequently leave his work station during non-break times. (*Id*.). This resulted in back-ups of the pallets, and conflicts between plaintiff and other members of the crew. (*Id*.). Hanel states that he had to tell plaintiff regularly to return to his work station during non-break times. (*Id*. at ¶10). Hanel states that on April 16, 2012, he observed plaintiff away from his work station drinking coffee during a non-break time. (*Id*.). Hanel told plaintiff to return to work and plaintiff refused. (*Id*.). Hanel again told plaintiff to return to work or he would be fired. Plaintiff again refused and Hanel terminated plaintiff for insubordination. (*Id*.). Hanel states that plaintiff became angry and would not turn over his safety equipment or

leave the plant. (*Id*.). Hanel states that plaintiff approached him in an aggressive manner, he pushed plaintiff away from him, and plaintiff eventually left the plant. (*Id*.).

Plaintiff states, in his response to the summary judgment motion, that he was intimated and harassed during his employment. (Dkt. No. 62). He states that he worked alone as a sorter on eight occasions, and, in his complaint, claims that younger employees were not required to work alone. (*Id*.; Dkt. No. 18). Plaintiff states that he and other sorters had to run from the sorting table to the bins with the pallet pieces, and that other employees constantly yelled at him "let's go" when the conveyor belt was stopped. (Dkt. No. 59, Exh. C; Dkt. No. 62). He refers to an incident in November when he was working alone as a sorter and a supervisor yelled at him and threatened him with dismissal and an incident in January when two younger workers told him he should work as well or efficiently as they do. (Dkt. No. 62). Plaintiff states that these younger employees would regularly yell at him. (*Id*.). With respect to his termination plaintiff disputes Hanel's description of the events. Plaintiff states that he poured a cup of coffee and attempted to return to work, but Hanel swore at him, pushed him and fired him without explanation. (Dkt. No. 59, Exh. C; Dkt. No. 62).

Defendant submitted an affidavit from Umbare Umbare ("Umbare"), a 59 year old employee of Pallet. (Dkt. No. 61). Umbare has worked at the Buffalo plant since 2007. (*Id*. at ¶2). He regularly worked with plaintiff on the break-up crew during plaintiff's employment. (*Id*. at ¶3). He states that neither he nor plaintiff ever had to run while sorting the pallets. (*Id*. at ¶4). He states that plaintiff was not a good worker and that other crew members were often upset with plaintiff because he would fall behind on his work or would be away from his work station. (*Id*. at ¶5). Umbare states that he never witnessed plaintiff

being treated differently due to age and that he has never been discriminated against or treated differently on account of his age. (*Id*. at ¶6).

DISCUSSION

Plaintiff has submitted no admissible evidence, in the form of deposition transcripts, affidavits, or documentary evidence, in response to defendant's statement of undisputed material facts. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, if a party fails to properly support an assertion of fact or fails to address another party's assertion of fact, a court may: "(1) give [the party] an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials show that the movant is entitled to relief; or (4) issue any other appropriate order." *See* Fed. R. Civ. P. 56(e). Here, even if the Court were to accept as true the allegations in plaintiff's complaint and his unsupported response to defendant's motion for summary judgment, plaintiff still has not established a viable claim of age discrimination or hostile work environment.

ADEA claims are governed by the burden-shifting framework set forth in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-04 (1973). *See Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 92 (2d Cir 2013). First, a plaintiff must establish a *prima facie* case of discrimination by demonstrating: (1) that he was within the protected age group; (2) that he was qualified for the position; (3) that he experienced an adverse action; and (4) that the action occurred under circumstances giving rise to an inference of discrimination. *Gorzynski v. JetBlue Airways Corp*., 596 F.3d 93, 107 (2d Cir. 2010). The burden then shifts to defendant to provide a legitimate, non-discriminatory reason for its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). If successful, the plaintiff

must then prove not only that the proffered legitimate reason was pretextual, but also that discrimination was the real reason. *Id.*; *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (At this third step, a plaintiff in an ADEA case must demonstrate that the discriminatory motive was a but-for cause of the adverse employment action, rather than merely a contributing or motivating factor.).

Plaintiff was within the protected age group at the time of the incidents alleged in the complaint. Defendant is not contesting that plaintiff was initially qualified for the job. Plaintiff's allegations that he was yelled at by other employees or supervisors, required to work as the only sorter on eight occasions, and that he had to run from the conveyor belt to the pallet bins do not constitute adverse employment actions for purposes of an ADEA claim. *See Galabya v. N.Y. City Bd. Of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (an adverse employment action, for purposes of the ADEA, is "more disruptive than a mere inconvenience or an alteration of job responsibilities" and can include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices...unique to a particular situation."); *Katz v. Beth Israel Medical Center*, 95-CV-183, 2001 U.S. Dist. LEXIS 29 (S.D.N.Y. Jan. 4, 2001) (Schwartz, D.J.) (holding, on motion for summary judgment, that "[b]eing yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments, and being told to retire or work part time...do not rise to the level of adverse employment actions"). Plaintiff's termination does constitute an adverse employment action for purposes of a *prima facie* claim of age discrimination.

However, plaintiff has failed to demonstrate that his termination occurred under circumstances giving rise to an inference of discrimination. An inference of discrimination

can be drawn from circumstances such as "the employer's criticism of the plaintiff's performance in...degrading terms; or its invidious comments about others in the protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the...adverse employment action." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001). Plaintiff offers no evidence of younger employees who engaged in similar behavior (namely insubordination or being away from their work station during non-break time) and were not disciplined or terminated, nor does he offer proof that any supervisors or other employees made comments, disparaging or otherwise, about his age. Indeed, Umbare, a co-worker in the same protected class, avers that he has never been discriminated against nor does he have knowledge of discrimination against plaintiff. Plaintiff's allegation that he was fired due to age is speculative, and seems to be based only on his assertions that younger co-workers or supervisors yelled at him over the course of his employment. The record clearly reflects that plaintiff's co-workers or supervisors yelled because they wanted him to work faster, and that no references were ever made to plaintiff's age. Indeed, the fact that plaintiff was employed only seven months and in the protected group at the time of his hire further belies his claim of age discrimination. *See Patterson v. J.P. Morgan Chase & Co.*, 01-CV-7513, 2004 U.S. Dist. LEXIS 17135 (S.D.N.Y. Aug. 26, 2004) (McKenna, D.J.) ("When a plaintiff is in the protected age class at both the beginning and the end of employment, there is a presumption against a finding of age discrimination, although it does not compel summary judgment."); *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) ("Employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."); *Renz v. Grey Adver., Inc.*, 135 F.3d 217, 224 (2d Cir. 1997).

(inference of discrimination is weaker "when the firing has occurred only a short time after the hiring").

Furthermore, even if plaintiff could demonstrate that he was terminated under circumstances giving rise to an inference of discrimination, defendant has put forth a legitimate, non-discriminatory reason for his termination. Hanel, the plant manager, avers that he terminated plaintiff, who was not a good worker to begin with, after plaintiff left his work station during a non-break time, was told twice to return to work and refused. In response, plaintiff offers only his own self-serving statements that he did not refuse to return to work but that Hanel nevertheless pushed him, swore at him, and fired him without explanation. It is axiomatic that an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Hlinko v. Virgin Atlantic Airways, Ltd.*, 205 F.3d 1323 (2d Cir. 1999). Here, even if plaintiff's version of the events surrounding his termination was accepted as true, plaintiff, at most, alleges that he was yelled at unfairly, pushed and fired for no reason. Plaintiff offers no facts which would indicate that his age played any role in the termination, let alone that it was the but-for cause of his firing. *See also Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998) ("ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age."); *Niagara Mohawk Power Corp. v. Jones Chem.*, 842 F. Supp. 2d 171, 175 (2d Cir. 2003) ("Conclusory allegations, conjecture, and speculation...are insufficient to create a genuine issue of fact."); *Shah v. Motors Liquidation Co.*, 12-CV-8783, 2013 U.S. Dist. LEXIS 191827 (S.D.N.Y. June 3, 2013). (Oetken, D.J.) ("the mere fact that an employee is terminated does not raise an

inference of discrimination, even when that employee is unfairly singled out or fired for no reason at all").

In addition, plaintiff claims that he was "harassed and intimidated" due to his age. In order to defeat summary judgment on a hostile-work-environment claim, a plaintiff must provide evidence that "the workplace was permeated with discriminatory intimidation, ridicule, and insult, and was sufficiently severe or pervasive to alter the conditions of the victim's employment." *Patterson v. Cty. of Oneida*, 375 F.3d 206, 227 (2d Cir. 2004). Plaintiff alleges that he often had to work as the only sorter while younger employees worked in teams of two, that while working as a sorter he had to run from the conveyor belt to the sorting bins with the cut pieces of pallet, and that his co-workers or supervisors often yelled at him. To begin, many of these assertions are contradicted by credible evidence in the record. Hanel affirms that whenever a employee was absent, the break-up crew would work with only one sorter and that this arrangement had nothing to do with plaintiff's age. Umbare, who shared the same job duties as plaintiff, avers that sorters did not have to run from the conveyer belt to the bins for sorting pallets. Morever, even if these allegations were taken as true, they do not rise to the level of an actionable hostile work environment. *See Danzy v. Chao*, 177 F. App'x 133, 135 (2d Cir. 2006). (plaintiff failed to make out a hostile work environment claim where she alleged only annoyances and personal disagreements that were insufficient to show that her work environment was "so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered."); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (neither Title VII nor the ADEA set forth "a general civility code for the American workplace").

In order to sustain a hostile work environment claim, a plaintiff must also establish that he was subject to hostility because of his membership in a protected class. *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 316 (2d Cir. 1999). Here, plaintiff alleges that he was regularly yelled at by younger employees. However, he states only that they would yell "let's go" or other similar remarks about him needing to work faster or better. The record is completely devoid of evidence that plaintiff was subject to disparaging comments about his age, or that he was yelled at for any reason other than his co-workers or supervisors wanting him to work faster. In addition, plaintiff generally states that he had to work alone as a sorter while younger employees worked in teams. However, he does not offer any evidence to challenge defendant's assertions, supported by an affidavit from the plant manager, that all sorters were required to work alone when the break-up crews were understaffed. This lack of evidence of animus in the record also necessitates a dismissal of plaintiff's hostile work environment claim. *See Scott v. Mem'l Sloan-Kettering Cancer Ctr.*, 190 F. Supp 2d 590 (S.D.N.Y. 2002) (where plaintiff did not allege that anyone made comments related to her age, gender or race at any time, "she could not possibly base a hostile work environment claims on Title VII or ADEA").

CONCLUSION

For the foregoing reasons, it is recommended that defendant's motion for summary judgment be granted and plaintiff's complaint be dismissed.

SO ORDERED.

DATED: January 24, 2017

Buffalo, New York

/s/ Michael J. Roemer
HONORABLE MICHAEL J. ROEMER
UNITED STATES MAGISTRATE JUDGE