UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

MEMORANDUM & ORDER
02-CV-5194 (DRH) (WDW)

DREYFUS SERVICE CORPORATION,

Defendant.
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A P P E A R A N C E S:

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HURLEY, District Judge:

INTRODUCTION

The EEOC filed the present age discrimination suit against the Dreyfus Service Corporation on behalf of four of its former employees. Dreyfus has moved for summary judgment. For the reasons that follow, its motion is GRANTED.

BACKGROUND

The defendant sells mutual funds and other financial services. Prior to being laid off in August 1999, Kevin Allen (age 60 at the time of the events in question), Richard Fisherman (age 59), Manuella Gilmore (age 68), and Jayne Ryan (age 41) were all employed in Dreyfus's "Inbound Sales Department," meaning their primary responsibility was to handle incoming telephone calls from individuals seeking to invest in mutual funds. At all times relevant to this case, the Inbound Sales manager was Peter Horacek; Horacek's superior was Irene Pappas, Senior Vice President of Regional Sales; Pappas in turn reported to Executive Vice President Bill Santos.

The parties agree that at least one of Horacek's responsibilities included managing the staffing of Inbound Sales to ensure that there were "enough sales representatives to handle calls that came into the department but not so many that sales representatives sat idle." The parties further agree that at least one of the ways in which Horacek managed staffing levels was by monitoring the department's "call capacity," with the aim of maintaining at least a 98% "service level" — meaning that "98% of incoming calls were answered before the caller disconnected." The parties do not dispute that Dreyfus maintained a "Workforce Management" department that gathered statistical data on Inbound Sales in order to "determine whether staffing levels were sufficient and would be sufficient in the future," and that "Horacek and Pappas reviewed this data on a daily basis."

According to Dreyfus, in the spring of 1999 Inbound Sales experienced a higher than expected volume of incoming sales calls, and a higher than expected attrition rate among its existing employees, which led to a decline in the department's "service level." Dreyfus

asserts that its managers expected the high attrition rate to continue, and decided to hire additional sales representatives. On March 15, 1999, Horacek, Pappas, and Santos signed a "Staffing Requisition" to hire several additional employees. The parties agree that five individuals already working as sales representatives in Dreyfus's Service Department were hired. All five were under age 30 at the time. These five individuals entered Inbound Sales on May 17, 1999, although the EEOC notes that "they were considered 'in training' and not counted as sales persons until June."

The parties agree that by some point in the spring of 1999 the volume of calls to Inbound Sales had significantly declined, that as a result, the "available time" in which sales representatives were idle increased from 31.7% in March 1999 to 55.82% in June 1999, and that by July 1999, Pappas and Santos decided that several sales representative positions in the department needed to be eliminated in order to cut costs. According to Dreyfus, Horacek chose the employees to be laid off based on their placement on "final warning" status or their poor "Rolling 12-month Sales Ratings." The seven sales representatives with allegedly "marginal" performance ratings were slated for elimination: Allen, Gilmore, Ryan, and four other individuals not involved in the present lawsuit (whose ages were 52, 36, 26, and 25). According to Dreyfus, the five recent transferees "had just arrived in the department" and had no twelve-month ratings from Inbound Sales, but Horacek "learned that each of them had been rated 'fully meeting and above' with respect to his sales performance" in the Service Department, and they were thus passed over for elimination. Fisherman, who had a "fully meeting" sales rating, had been placed on "Final Written Warning" on May 18, 1999, following

"several months of Marginal/Unsatisfactory Telephone Presentations," including failing to provide "[f]ull disclosures, fact-finding, and product presentation" during his sales calls. Although Fisherman's warning status apparently ended on June 17, 1999, he too was slated for elimination.

According to Dreyfus, Horacek had the "Quality Assurance Department," which kept performance statistics on Inbound Sales, print a list of the ratings for each department member. The result was a "Sales Reduction Analysis" or "Sales Performance Chart," essentially a chart showing the past sales performance ratings and various other data for each of the department's employees, including the employees' "Rolling 12-month Sales Ratings." However, there is some uncertainty as to the history of the Staff Reduction Analysis. An earlier version of the chart had been created on July 20, 1999. It listed the seven marginal employees noted above, but also indicated that two other employees (Reddo and Scicutella), both age 32 and both on disability leave, had similar "marginal" ratings, but were not slated for elimination. According to Dreyfus, this was an error, and the second and correct version of the chart, created on July 26, 1999, indicates that both of the 32-year olds actually had "outstanding" sales performance ratings, and listed neither as being on disability leave. The EEOC states that it "did not learn until after formal discovery had closed . . . that there was a previous version of the SRA that designated two additional employees as marginal."

In sum, Horacek recommended terminating eight of the 33-member Inbound Sales staff. Again, the ages of the terminated individuals were 25, 26, 36, 41, 52, 59, 60, and 68. Pappas and Santos approved Horacek's choices, and apparently so did Dreyfus's Human

Resources Department, and the legal department of its parent company. On August 2, 1999, the eight individuals previously mentioned were laid off "due to technological change or other business reason not related to individual performance," and provided with full "displacement benefits." Of the remaining 25-member Inbound Sales staff, only four individuals were over age 40 (specifically, ages 51, 54, 62, and 68).

Allen and Fisherman filed discrimination charges with the United States Equal Employment Opportunity Commission (EEOC). Following an investigation and unsuccessful attempts at "conciliation," in September 2002 the EEOC filed the present suit pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34. In April 2004, Dreyfus filed the present motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

DISCUSSION

I. *Relevant Legal Standards*

A. *Summary Judgment:*

Summary judgment is generally appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." *Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 716 (2d Cir. 1994) (quoting Fed. R. Civ. P. 56(c)). The relevant governing law in each case determines which facts are material; "only disputes over facts that might affect the outcome of the suit

under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuinely triable factual issue exists when the moving party demonstrates, on the basis of the pleadings and submitted evidence, and after drawing all inferences and resolving all ambiguities in favor of the non-movant, that no rational jury could find in the non-movant's favor. *Chertkova v. Conn. Gen'l Life Ins. Co.*, 92 F.3d 81, 86 (2d Cir. 1996) (citing Fed. R. Civ. P. 56(c)).

To defeat a summary judgment motion properly supported by affidavits, depositions, or other documentation, the non-movant must present more than a "scintilla of evidence," *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (quoting *Anderson*, 477 U.S. at 252), or "some metaphysical doubt as to the material facts." *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir.1993) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). The opponent cannot rely on the allegations in his or her pleadings, conclusory statements, or on "mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (internal citations omitted). Rather, the non-movant must offer similar materials setting forth specific facts that show that there *is* a genuine issue of material fact to be tried. *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir.1996).

At summary judgment in an employment discrimination case, a court should examine the record as a whole, "just as a jury would"; an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, viewed in the light most favorable to the non-moving party. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 102 (2d Cir.

2001) (internal quotations omitted). Thus, in discrimination cases in which an employer's intent is at issue, summary judgment is ordinarily inappropriate and should be granted with caution. *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000). But notwithstanding the caution that a court must exercise before granting summary judgment in such cases, "summary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact." *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 40 (2d Cir. 1994). "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo*, 22 F.3d at 1224.

B. *The Age Discrimination in Employment Act:*

The ADEA makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (1988). The Act protects persons 40 years of age or older. *See id.* § 631(a) (Supp. IV 1993). Thus, "[t]he ultimate issue in an ADEA case is whether the plaintiff has proved by a preponderance of the evidence that 'her age played a motivating role in, or contributed to, the employer's decision.' " *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 76 (2d Cir. 2001) (quoting *Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997)). Phrased differently by the Seventh Circuit, the ultimate question is "whether the same events would have transpired if the employee had been younger than 40 and everything else had been the same." *Gehring*

v. Case Corp., 43 F.3d 340, 344 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995).

Where, as here, an ADEA claim is based on indirect evidence (that is, absent any explicitly or overtly discriminatory acts or statements by the defendant), and the defendant moves for summary judgment, a federal district court must apply the analytical framework formulated by the U.S. Supreme Court for Title VII discrimination cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). *See Holtz*, 258 F.3d at 76. First, the plaintiff must present a prima facie case of age discrimination, which means demonstrating that the purported victim of age discrimination (1) was within the protected age group, (2) qualified for the position in which he worked, and (3) was discharged, (4) under circumstances giving rise to an inference of age discrimination. *Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 715-16 (2d Cir. 1994).[1] Once the plaintiff has established a prima facie case of discriminatory action, the defendant employer must proffer a legitimate, non-discriminatory rationale for its actions. *Id.* at 716. If the employer does so, any presumption of discrimination evaporates, and the burden shifts back to the plaintiff, who must prove that the defendant's purportedly legitimate reasons were but a pretext for discrimination. *Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2d Cir. 2001).

Generally speaking, in order to demonstrate pretext, "[a] plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment

[1] The standards discussed herein are the same regardless of whether the plaintiff is the actual victim of discrimination, or the EEOC, suing on his behalf. *Compare Viola*, 42 F.3d at 715-16, *with E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2d Cir. 1994).

decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995). Because defendant employers rarely, if ever, provide explicit or direct evidence that supports the plaintiff's claim, affidavits and depositions "must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). A discrimination claimant may show pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Bombero v. Warner-Lambert Co.*, 142 F. Supp.2d 196, 203 n.7 (D. Conn. 2000) (quoting *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999), and citing *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996)). That is, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

II. *The EEOC Has Failed To Present Sufficient Evidence that Dreyfus's Rationale for Reducing Its Workforce Is a Pretext for Age Discrimination.*

A. *The EEOC has stated a prima facie case of age discrimination.*

The burden of establishing a prima facie case has been described as "modest," *Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 716 (2d Cir. 1994), or even "minimal."

Roge v. NYP Holdings, Inc., 257 F.3d 164, 168 (2d Cir. 2001). Because Dreyfus concedes, however grudgingly, that the EEOC has met this burden, no further analysis is required on this point.

B. *Dreyfus has asserted a non-discriminatory rationale in response to the EEOC's prima facie case.*

Dreyfus asserts that its decision to fire the eight sales representatives in question was necessitated by a "dramatic and consistent decrease in call volume" — essentially a downturn in its business. A staff reduction implemented for economic reasons is a legitimate, non-discriminatory business justification for discharging an employee. *Blanchard v. Stone Safety Corp.*, 935 F.2d 18, 19 (2d Cir. 1991). As the EEOC concedes, however grudgingly, Dreyfus has sufficiently alleged a legitimate, non-discriminatory business justification for terminating some of its employees. "Even within the context of a legitimate reduction-in-force, however, an employer may not discharge an employee 'because' of his age." *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 136 (2d Cir. 2000), *cert. denied*, 530 U.S. 1261 (2000). Thus, resolution of the present summary judgment motion necessarily turns on the final step in the *McDonnell Douglas* inquiry: whether Dreyfus's claimed rationale for the terminations in question was actually a pretext for unlawful age discrimination.

C. *The EEOC has failed to demonstrate any pretext behind Dreyfus's response.*

Answering Dreyfus's purportedly legitimate rationale for terminating the individuals at issue, the EEOC argues that the reduction in force was indeed pretextual. Age discrimination claims that arise out of a lay-off, downsizing, or "reduction-in-force" ("RIF")

commonly turn on the pretext prong of the ADEA analysis, "[g]iven the 'minimal requirements' for establishing a prima facie case of employment discrimination, and the ease with which employers can point to the down-sizing procedure to justify any single termination." *Viola*, 42 F.3d at 716.

In practice, federal courts addressing ADEA cases generally find sufficient potential pretext in a reduction in force to deny summary judgment where there is evidence that: (1) the RIF is simply pretextual overall; (2) the grounds offered for an employee's termination are inconsistent with the employer's stated RIF criteria; or (3) the employer's evaluation of the employee was falsified to cause termination. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000). These criteria are not exclusive, *id.*, and the EEOC's briefings suggest variations on all three. According to the EEOC, Dreyfus or its managers masterminded and engineered the reduction in force as a scheme to reduce the number or proportion of older workers in the Inbound Sales department. As evidence of this scheme, the EEOC points both to various purported inequities in the manner in which Dreyfus carried out the RIF that allegedly maximized the number or proportion of older workers that were terminated, as well as some evidence that evaluations of other (younger) employees were falsified. But the EEOC falls short on all three points.

1. *The EEOC fails to show that Dreyfus's RIF was pretextual overall.*

An employer should not be able to avoid ADEA scrutiny by hiring younger employees shortly before the termination of older employees. *Ashby v. Hanger Prosthetics & Orthotics, Inc.*, No. 02 Civ. 630, 2003 WL 22797562, at *3 (E.D. Pa. Nov. 7, 2003). The

major thrust of the EEOC's case is that Dreyfus's entire decision to undertake a reduction in its workforce must have been a pretext for doing exactly that. However, absent discriminatory intent, a company's decision to add personnel when it should reasonably anticipate subsequent layoffs merely indicates poor business judgment, or at worst, callousness. *See Viola*, 42 F.3d at 718.

Poor business judgment is generally not actionable under the ADEA. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988). The Second Circuit has cautioned that it is not the role of courts or factfinders in employment discrimination cases to "intrud[e] into an employer's policy apparatus," *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985), "second-guess an employer's business judgment that it makes in good faith," *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1226 (2d Cir. 1994), or "question a corporation's means to achieve a legitimate goal." *Dister*, 859 F.2d at 1116. "Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons." *Id.*

Neither is mere callousness actionable.[2] *See Boucher v. Edgcomb Metals Co.*, No. 94 Civ. 185, 1995 WL 767364, at *10 (D.N.H. Oct. 24, 1995). An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for

[2] The EEOC does not argue that the "disparate impact" doctrine, recognized by the Second Circuit in certain ADEA cases, is applicable here.

discrimination. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). And the use of termination criteria that tend to be "correlated with age," such as pension status, does not amount to unlawful disparate treatment under the ADEA, so long as it was actually the correlated criteria, and not age itself, that governed the decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993).

In sum, if a terminated employee is alleging that, in the context of a pretextual RIF, she was fired for ageist reasons after other employees were preemptively hired as her replacements, she should offer some evidence suggesting as much, if her claim is to survive the employer's summary judgment motion. *See, e.g.*, *Brown v. Mfrs. Hanover Trust Co.*, No. 92 Civ. 4732, 1993 WL 138823, at *4-5 (S.D.N.Y. April 23, 1993). However, the Second Circuit has held that where a reasonable factfinder could conclude that the defendant's proffered business-related reason for a termination is "so lacking in merit as to call into question its genuineness," then a "business decision" may be viewed as a "reason manufactured to avoid liability." *Dister*, 859 F.2d at 1116. The EEOC is essentially making this sort of a "so dumb it has to be a pretext" argument.

As noted previously, Dreyfus claims that its Inbound Sales department received a higher-than-expected amount of incoming calls, coupled with a steeper than average employee attrition rate, in the early part of 1999. Dreyfus claims that together, this necessitated expanding its staffing. According to Dreyfus, the post-April drop in incoming sales volume, whose severity was similarly unanticipated, then necessitated a reduction in staffing. Dreyfus insists that no discriminatory subtext can possibly be construed from this

sequence of events.

According to the EEOC, however, the steep decline in Inbound Sales' call volume was not "sudden and precipitous," as Dreyfus claims, but entirely predictable. The EEOC notes that Dreyfus, with its close monitoring of its workforce and efficiency, was bound to know that "sales volume always decline[s]" in April. Thus, suggests the EEOC, Dreyfus transferred five additional (younger) employees into Inbound Sales during the predictably temporary March 1999 spike in incoming call volume, knowing full well that the subsequent and inevitable April downturn would give it an excuse to terminate several (predominantly older) employees. That is, instead of firing some of its older employees and then hiring younger replacements (a series of events more likely to raise red discrimination flags), Dreyfus preemptively hired the replacements, and then went through the motions of a pretextual RIF in order to terminate some older employees.

Dreyfus does not dispute that call volume always declines significantly after the end of the tax season in mid-April; Dreyfus also admits that it requires at least 4-6 weeks to train new Inbound Sales staff, and that, since the requisition forms for new staff were submitted in mid-March and early April of 1999, the new departmental hires could not have started working until after the traditional downturn began. But Dreyfus argues that it had no way of anticipating the extent to which incoming call volume would decline, and more importantly, the extent to which Inbound Sales' high attrition rate would continue. The EEOC's own data clearly shows that Inbound Sales "call volume" was significantly lower in April, May, June, and July of 1999 than it had been in each equivalent month of the previous year. And as Dreyfus

notes, by March 31, 1999 it had lost eight Inbound Sales representatives,[3] and at that rate expected to lose at least eight more by mid-May. According to Dreyfus, Horacek "had reason to believe that the rate of attrition would remain high because a new sales department geared toward high net worth individuals was being started and some employees wanted to transfer into it."

Considering the entirety of the evidence, it cannot fairly be stated that Dreyfus's conclusion that it needed to hire additional staff for Inbound Sales, even before a traditional slowdown period, was so inherently foolish as to be suspect per se. The underlying burden of proving Dreyfus's discriminatory intent remains with the EEOC. The EEOC offers no evidence suggesting that Dreyfus knew, or had reason to know, that the 1999 slowdown in incoming sales calls would be significantly steeper than its 1998 equivalent. The EEOC argues that "[w]ith all the constant measurements and monitoring it took of workplace performance," Dreyfus *should have known* that call volume would decline more steeply than it did, and that the high attrition rate would level off. But Dreyfus's undisputed ability to monitor its workforce and produce reams of raw data did not render its managers incapable of misjudging the implications of that data. In sum, the EEOC has, at worst, shown that Dreyfus was foolish — but foolishness and discrimination are not synonyms under federal ADEA jurisprudence.

2. *The EEOC fails to show that the manner in which Dreyfus applied its*

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[3] The EEOC argues that "[i]n fact, it was really the equivalent of 6 full-time employees since four of the eight who left were part-time employees." This is merely quibbling over numbers, and does not disprove Dreyfus's overall contention that the Inbound Sales workforce was shrinking relatively rapidly.

termination criteria to individual employees was suspect.

According to the EEOC, Dreyfus purposely "select[ed] the method that would result in the removal of the greatest number of older workers without using age directly," and subjectively applied its own standards inconsistently in order to further its discriminatory goals. The EEOC's various suggestions of discriminatory methodology on Dreyfus's part fall short, however.

The EEOC takes particular umbrage at the fact that while Dreyfus selected individuals already employed in Inbound Sales for elimination based on their twelve-month performance ratings, it vetted the new transferees instead on their apparently excellent sales performance in its Service Department. The EEOC protests that "these ratings were based upon a job that was not similar to the Inbound Sales position," because "the positions had different scorecards for sales and service and there was very limited sales in the Service department." Accordingly, the EEOC argues that the new transferees "were inexperienced and without a track record," and that "[i]f it was the goal to keep the best sales persons in Inbound Sales," Dreyfus should have transferred the five incoming individuals back to the Service Department.

An employer may generally base the decision to fire certain employees on subjective factors not easily quantified, including "future potential." *See, e.g., Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389-90 (7th Cir. 2000) (Posner, C.J.) ("in making RIF decisions an employer is free to decide which employees are likeliest to contribute most to the company over the long haul.") (citing cases from Sixth, Tenth, and

Eleventh Circuits). The extent to which an employee's prior performance in the "Service Department" is indicative of his high future potential in "Inbound Sales" seems to fall squarely within the realm of Dreyfus's "business judgment," and is not for a court to second-guess. However, "future potential" cannot serve as a proxy or surrogate for age, or a "vehicle by which impermissible age bias enter[s] into the process." *See Schanzer v. United Techs. Corp.*, 120 F. Supp.2d 200, 211 (D. Conn. 2000). Other indications of pretext, in combination with the defendant's use of "future potential" as an overarching termination criterion, might be sufficient for a jury to infer a discriminatory motive on the defendant's part. *Shannon v. Fireman's Fund Ins. Co.*, 156 F. Supp.2d 279, 293 (S.D.N.Y. 2001). But the EEOC's suggestions of additional pretext are inadequate.

First, the EEOC stresses the fact that although Dreyfus states that it could not apply the "Rolling 12-month Sales Rating" to the five new transferees, its own exhibits show that it applied that standard to two employees who had been in Inbound Sales for less than twelve months. Both employees apparently entered the department on September 16, 1998. One of them was Gilmore, 68 years old and allegedly terminated because of a "marginal" sales record; the other was a 28-year-old man, rated as "fully meeting," and not terminated. The EEOC suggests that because "Gilmore only ha[d] nine months to achieve her 12 month average," application of this standard to her was somehow discriminatory. This is specious. While the term "Rolling 12-month Sales Rating" was somewhat inaccurate as applied to Gilmore, the EEOC offers no reason to doubt Dreyfus's business judgment that an employee's nine-month sales average is sufficiently indicative of his competence to stand in for a twelve-

month average. Nor does the EEOC explain why Gilmore should be treated more favorably than the other employee whose "Rolling 12-month Sales Rating" was based on the exact same amount of time. The ADEA "is not a guarantee of tenure for the older worker." *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990) (Posner, J.).

The EEOC also argues that Dreyfus's claim to have chosen Fisherman for termination based on his prior "final warning" status is pretextual, since Fisherman was removed from final warning status on June 17, 1999, before his termination. The EEOC also notes that Fisherman had previously been given numerous awards for his (apparently stellar) sales performance. Dreyfus responds that Fisherman was on warning status at the time the layoff decisions were taken, although it does not respond to the EEOC's implicit point that Dreyfus should have changed its decision regarding Fisherman once his warning period ended. The discrepancy does not appear to matter. Where, as here, an employee displays consistently excellent results or abilities in some facets of his work, but is at the same time consistently inattentive to rules or incompetent in other respects, the decision to terminate him is within his employer's business discretion, and is not a pretext for age discrimination. *See Menzel v. Western Auto Supply Co.*, 848 F.2d 327, 328-30 (1st Cir. 1988) (no inference of age discrimination where 57 year old plaintiff's record "show[ed] awards based on his outstanding productivity," but that "he was persistently incapable of abiding by company guidelines regarding record keeping and other business practices.").

In a further attempt to show pretext (as well as in its statement of a prima facie case), the EEOC analyzes the statistical effects of Dreyfus's employment actions on the

percentage of older workers in Inbound Sales. As Dreyfus argues, any attempt to distill useful statistical information from a sampling size as small as the one involved in this case is doomed to fail. *See, e.g., Pirone v. Home Ins. Co.*, 559 F. Supp. 306, 312 (S.D.N.Y. 1983) (sampling size of 16-18 people in discrimination claim "too small for anything meaningful to be decided"). In sum, the EEOC offers nothing that suggests that Dreyfus's determination of which of its employees to fire was anything other than a non-discriminatory business judgment.

3. *The evidence suggesting that Dreyfus based its termination decisions on inaccurate or inconsistent information is insufficient to support an inference that the terminations were a pretext for age discrimination.*

As mentioned earlier, two versions of the "Staff Reduction Analysis" chart were produced by Dreyfus in the course of the events underlying this lawsuit. The earlier version indicates (mistakenly, Dreyfus insists) that two employees under age 40 who were not terminated had marginal performance ratings. The EEOC suggests that the earlier version of the chart, and Dreyfus's failure to timely produce it in response to discovery requests, indicates pretext or prevarication on Dreyfus's part. Dreyfus argues strenuously that the earlier version of the chart was simply the result of a clerical error, and that the difference is in any event irrelevant, because the Staff Reduction Analysis was only created after Horacek and Pappas had already decided who would be laid off, and was intended only to allow Dreyfus's Human Resources and legal departments to review the decision.

As discussed in Part I, *supra*, to defeat a well-supported summary judgment motion, the non-movant must present more than a "scintilla of evidence," or "some metaphysical doubt as to the material facts," and cannot rely only on the allegations in his

pleadings, conclusory statements, or "mere assertions that affidavits supporting the motion are not credible." At best, the EEOC's assertions that Dreyfus somehow doctored its Staff Reduction Analysis amount to a conclusory scintilla of evidence. The EEOC does not offer any evidence to disprove Dreyfus's underlying contention that Reddo and Scicutella were actually outstanding employees properly retained in their department — a fact that strongly supports Dreyfus's claim that it retained Inbound Sales employees based strictly on merit. As Dreyfus notes, the ADEA does not forbid an employer from making mistakes. "An employer does not violate the law by making an erroneous evaluation of an employee." *Rodriguez v. Am. Friends of Hebrew Univ., Inc.*, No. 96 Civ. 240, 2000 WL 1877061, at *5 n.7 (S.D.N.Y. Dec. 26, 2000). A simple clerical mistake or scrivener's error — especially one that was corrected — should not suffice, without more, to protect an otherwise unsupported claim from summary judgment.

D. *Overall, summary judgment is warranted.*

The EEOC does not dispute that the 1999 downturn in Dreyfus's business was more severe than in the previous year, and has offered no reason to doubt Dreyfus's contention that it expected the high attrition rate among Inbound Sales staff to continue. Nor does the EEOC dispute that three of the eight individuals fired were under age 40, or that this group included the seven lowest-performing salespeople among Inbound Sales's veterans, as well as an employee who had been repeatedly warned about his unsatisfactory sales technique. Finally, the EEOC has offered nothing, beyond speculation, to show that the EEOC somehow doctored evidence or data in order to preserve the jobs of two younger employees. All of the EEOC's

other arguments amount to complaints about the way in which Dreyfus ran its business, and do not suffice to indicate that Dreyfus's economic rationale for reducing the number of its employees, and the manner in which it carried out that reduction, were actually pretexts for unlawful age discrimination. Summary judgment is thus appropriate.

CONCLUSION

For all of the above reasons, the Defendants' motion is GRANTED, and the EEOC's complaint must be dismissed. The Clerk of Court is directed to CLOSE this case.

SO ORDERED.

Dated: Central Islip, New York
March 7, 2005

/s/
Denis R. Hurley
United States District Judge