IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOUGLAS M. HODCZAK, JAMES M. CROSSAN, THOMAS J. MAGDIC AND JOSEPH A. LITVIK, on behalf of themselves and all others similarly situated,	)	Civil Action No. 08-CV-00649
Plaintiffs,	)	Judge Terrence F. McVerry and Magistrate Judge Amy Reynolds Hay
v.	)	*Electronically Filed*
LATROBE SPECIALTY STEEL COMPANY,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ALL COLLECTIVE ACTION CLAIMS

Defendant Latrobe Specialty Steel Company ("LSS") moves pursuant to Fed.R.Civ.P. 56(b) to dismiss plaintiffs' collective action claims, stating as follows:

1. Plaintiffs filed a two-count Complaint alleging LSS violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").

2. Count I alleged disparate treatment, and count II alleged disparate impact based upon LSS's "employment practices which discriminate against older workers." Compl. ¶ 70.

3. Specifically, Plaintiffs sought to proceed with a nationwide collective action by claiming LSS engaged in a pattern and practice of involuntarily separating Plaintiffs (and presumably other employees) from their employment with LSS because of their age and not because of the sexually offensive emails that they were sending. Compl. ¶¶ 22, 25-26, 35, 39-40, 49, 53-54, 63, 66-67, 81-82, 89-90.

4. On June 16, 2008, Plaintiffs voluntarily moved to withdraw their ADEA disparate impact claims, and this Court dismissed them on June 17, 2008, leaving Plaintiffs' alleged nationwide class disparate treatment claims. (Doc. No. 14).

5. While not a model of clarity, Plaintiffs' disparate treatment, collective claims appear to allege that LSS has intentionally discriminated against its older workers by terminating their employment under the pretext that they violated the Electronic Communications Policy. Compl. ¶¶ 22, 25-26, 35, 39-40, 49, 53-54, 63, 66-67, 81-82.

No Pattern and Practice Prima Facie Case

6. Those remaining allegations, however, do not satisfy the applicable pattern and practice *prima facie* case requiring Plaintiffs to allege and show, by a preponderance of the evidence, that "discrimination was the company's standard operating procedure - the regular rather than the unusual practice." *International Board of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

7. Since December 9, 2006, when Watermill Group and Hicks Holdings purchased Timken Latrobe Steel, and it became LSS, other than Plaintiffs, only two other salaried employees age 40 or older have been involuntary separated (an Accounting Processor employee whose job was eliminated on March 30, 2007 and the Manager- Customer Service, Purchasing and Production Planning who resigned in connection with violation of accounting procedures on March 11, 2008). Facts ¶¶ 9-11.[1]

8. Besides Plaintiffs, no other LSS employee has filed an EEOC Charge alleging age discrimination. *Id.* at ¶ 14.

9. Besides Plaintiffs, no other LSS employee over the age of forty has been involuntarily separated in connection with the Electronic Communications Policy. *Id.* at ¶¶ 7-8.

10. As there are no other LSS employees involuntarily separated in connection with the Electronics Communications Policy, Plaintiffs cannot demonstrate a consistent history of

[1] LSS cites to the paragraphs contained in its Concise Statement of Material Facts that is simultaneously filed in support of this motion and refers to them as "Facts ¶ _____."

discriminatory decision-making based on age with the alleged pretextual reason involving the Electronic Communications Policy. *See Lilly v. Harris-Teeter Supermarket,* 720 F.2d 326, 328, 338 (4th Cir. 1983) (testimony of nine witnesses who had prevailed on their individual promotion claims established too few instances of direct discrimination to support inference of a companywide pattern or practice of discrimination with respect to promotions), *cert. denied,* 466 U.S. 951 (1984).

11. Put simply, Plaintiffs cannot establish a *prima facie* pattern or practice case because the involuntary separation of them in connection with LSS's Electronic Communications Policy fails to establish a standard operating procedure -- they are four, isolated employment separations. *See International Board of Teamsters*, 431 U.S. at 336.

No Similarly Situated Employees

12. There are no other similarly situated salaried employees who ***could*** opt-in to the class described, in part, by Plaintiffs as "former salaried employees . . . who were at least 40 years of age at the time of such termination." Compl. ¶ 71.

13. Since LSS was acquired by the Watermill Group and Hicks Holdings on December 9, 2006, Plaintiffs Douglas Hodczak, James Crossan, Thomas Magdic, and Joseph Litvik are the only employees that LSS has involuntarily separated in connection with an application of its Electronic Communications Policy. Facts ¶ 8.

14. Since that time, other than Plaintiffs, LSS has only involuntarily separated two other salaried employees age forty or older: an Accounting Processor whose job was eliminated on March 30, 2007 and a Manager - Customer Service, Purchasing and Production Planning on March 11, 2008 in connection with a violation of accounting procedures. *Id.* at ¶¶ 10-12.

No Other Employees Have Exhausted Their Administrative Remedies

15. There are no LSS current or former employees capable of meeting the exhaustion requirement under 29 U.S.C. § 626(b).

16. Because Plaintiffs are the only LSS employees who have filed Charges alleging age discrimination, *see* Facts ¶ 14, for any employee to "piggyback" onto Plaintiffs' age discrimination Charges, such employee would have to have been involuntarily separated during the 300-day period preceding the date when Plaintiffs filed their "charges" and would have to be similarly situated to Plaintiffs. *Hipp v. Liberty National Life Insur. Co.*, 252 F.3d 1208, 1219-1221, 1225, 1227 (11th Cir. 2001); *see also Ruehl v. Viacom*, 500 F.3d 375, 386 (3d Cir. 2007).

17. Assuming that March 20, 2008 is the date that Plaintiffs first filed their "charges,"[2] the only former or current employee who could possibly piggyback is the Manager - Customer Service, Purchasing and Production Planning because he is the only salaried employee over the age of 40 who was involuntarily separated between May 25, 2007 and March 20, 2008. Facts ¶¶ 9-13.

18. Nevertheless, the Manager - Customer Service, Purchasing and Production Planning cannot "piggyback" on Plaintiffs' charges because he is in no way similarly situated to Plaintiffs because: (1) he was age 46 at the time of his separation -- approximately ten years

[2] In light of the Supreme Court's new, broad definition of the term "charge" as including affidavits and EEOC questionnaires that: (1) are in writing, (2) identify the prospective respondent and generally allege the discriminatory acts, and (3) can be "reasonably construed as a request for the agency to take some remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee" *see Federal Express Corp. v. Holowecki,* 128 S.Ct. 1147, 1154, 1158-60 (2008), the actual date that each of the Plaintiffs filed a "charge" with the EEOC likely occurred earlier than March 20, 2008 and most likely, it occurred before the Manager - Customer Service, Purchasing and Production Planning was involuntarily separated on March 11, 2008. Regardless, however, the Manager - Customer Service, Purchasing and Production Planning could not "piggyback" on Plaintiffs' charges as he is not similarly situated to them.

younger than Plaintiffs, (2) he was employed at a facility outside the Latrobe Plant -- at an entirely different location than Plaintiffs, (3) the reason for his separation had nothing to do with the Electronic Communications Policy -- it was in connection with admitted, well-documented violations of accounting procedures. Facts ¶ 11. *See Hipp*, 252 F. 3d at 1217 (requiring the named plaintiffs establish that the potential plaintiffs are similarly-situated before they may proceed as a collective action); *Haynes v. Singer, Co., Inc*., 696 F.2d 884, 887 (11th Cir. 1983) (holding unsupported allegations that FLSA violations were widespread and that additional plaintiffs exist are insufficient to establish that similarly situated employees exist).

Current Employees Lack Standing

19. Plaintiffs' class cannot include "all present salaried employees of Latrobe who are at least 40 years of age and who are, therefore, at risk of being terminated by Latrobe." Compl. ¶ 71.

20. Current employees who have not been involuntarily separated lack standing as any alleged risk of being terminated is purely speculative. *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990) (citations omitted) (requiring that any alleged harm be "actual or imminent, not 'conjectural' or 'hypothetical.'").

21. Logically, Congress did not intend for this court, or any other, to exercise general prophylactic supervision of every employer's future possible termination decisions by assuming that every employee, or applicant for that matter, could invoke the limited jurisdiction of the federal courts out of a generalized concern that at some time in the future, something unlawful might occur.

WHEREFORE, for these reasons as discussed more fully in LSS's Brief in Support of Motion for Summary Judgment on all Collective Action Claims, which is incorporated by

reference, LSS respectfully requests that the Court dismiss with prejudice plaintiffs' collective action in their complaint.

Dated: June 30, 2008

Respectfully submitted,

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