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

Plaintiff,

-against-

MEMORANDUM & ORDER
03-CV-4990(JS)(ARL)

FIRST WIRELESS GROUP, INC.,

Defendant,

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Appearances:

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SEYBERT, District Judge:

INTRODUCTION

On September 30, 2006, the Equal Employment Opportunity Commission ("EEOC") commenced this action on behalf of several former Hispanic employees of First Wireless Group, Inc. ("First Wireless" or "Defendant"). EEOC alleged that First Wireless violated Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C. § 2000e et seq., ("Title VII") by compensating Hispanic employees at a lower pay rate than Asian employees performing the same or substantially similar work, subjecting Hispanic employees to unequal terms, conditions, or privileges of employment, and terminating some of the employees in retaliation for protesting the wage disparity. On August 18, 2004, the Court granted two separate motions to intervene filed by, respectively, twelve former employees, and Adriana Torres, a past employee. The Intervenor-Plaintiffs filed an Amended Complaint on July 13, 2005, alleging essentially the same acts of discrimination and retaliation that the EEOC alleged. The action now involves a total of thirty-eight former employees, collectively referred to as "Plaintiffs" or "Claimants."[1] Presently pending is Defendant's motion for summary judgment. For the reasons below, the Court DENIES Defendant's motion in part and GRANTS it in part.

BACKGROUND

The following facts are taken from the Parties' 56.1 Statement and Counter-Statement and the exhibits thereto.

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[1] The Claimants are Karla Aguilera, Idalia Araujo, Raidy Alvarez, Sonia Arzayus, Estela del Carmen Barahona (a/k/a Andrea Rodriguez), Mireya Bautista, Beatriz Buitrago, Fidelina Caceres, Gloria Cardenas, Ann Maria Castaneda, Carlos Fuentes, Edwin Garcia (a/k/a Wervin Julian Garcia), Beatriz Garcia, Nely Hernandez, Dilber Jimenez, Ivonne Leon, Ligia Lozano, Milton Misnaza, Olga Morales, Mariana Moran, Carlos Morcillo, Natalia Naranjo, Blanca Penaranda, Edis Reyes, Rocio Rodriguez, Erika Romero, Zorayda Salcedo, Jhon Sanchez, Luis Sanchez (a/k/a Oscar Morales), Elizabeth Santana, Francisca Santana, Nora Lucia Sosa, Luz Adela Torres (a/k/a Adela Ardila), Adriana Torres, Sonia Uribe, Reina Vega, Ruth Vidal, and Maria Zamora.

First Wireless is an electronic company that repairs and refurbishes cellular phones. (Def's. R. 56.1 Statement ¶ 3 ("Def's. Stmt.").)

In or about April 20, 2001, Claimant Adriana Torres ("Torres") learned that a newly-hired Asian co-worker was being paid more than Torres. (EEOC R. 56.1 Statement ¶ 82 ("Pls.' Stmt.").) Torres raised her concerns with Claimant Dilber Jimenez ("Jimenez"), Manager of the second shift. (Id. ¶ 209.) Jimenez informed his supervisor, General Manager Andrew Ng about the alleged pay disparity. (Id. ¶ 209.)

Shortly thereafter, Torres, along with other Hispanic employees, drafted a letter to management requesting information about the alleged difference in pay (the "Memorandum"). (Id. ¶ 209.) The employees attached a second page with the names of the employees who supported sending the Memorandum (the "Petition"). (Id. ¶ 209). Jimenez was unaware of both the Memorandum and Petition. (Id.)

The parties dispute the events that occurred next. Plaintiffs contend that Torres took the Memorandum home, translated it into English, and brought the Memorandum and Petition to work on Monday, April 23, 2001, to gather extra signatures and present it to Eileen Lever ("Lever"), Director of Human Resources. (Id. ¶ 209.) When Torres returned to work, Lever approached her and asked Torres about both documents. (Id.) After reading the Memorandum, Lever allegedly told Torres that she should come directly to her if

Torres had a problem. (Id.) As this was happening, Jimenez arrived at work and saw Lever holding the Memorandum in her hand. (Id.) After asking an employee what was happening, Jimenez was informed that the employees had prepared a letter addressing the alleged pay disparity. (Id.) Within an hour, Lever, Ng, and Brunilda Calderon, a customer service director, told Jimenez that they were terminating him because First Wireless was reorganizing and/or downsizing. (Id. ¶¶ 165, 209.) On that day or the next, Defendants also terminated Torres and Rosa Garcia ("Garcia"), who helped Torres circulate the Memorandum and Petition. (Id.)

Defendant disputes Plaintiffs narration of the events. According to Defendant, Lever did not see the Memorandum and Petition until First Wireless corporate counsel gave it to her. (Def's. Stmt. ¶ 232.) Next, Defendant contends that it had to let go of Jimenez, Torres, and Garcia because the company needed to reorganize after a downturn in business. (Id. ¶ 209.) Defendant states that it chose these employees because of the reorganization and because each had work performance problems. (Id. ¶¶ 208-218.) Plaintiffs dispute that any of the employees had performance issues. (Pls.' Stmt. ¶ 210.)

Shortly after their termination, Jimenez, Torres, and Garcia filed charges of discrimination with the Suffolk County Human Rights Commission ("SCHRC"). (Id. ¶¶ 228, 234.) In December of 2001, a SCHRC investigator began calling First Wireless employees to inquire about the claims raised in the charges. (Id.

¶ 234.) Again, the parties dispute the events that transpired next. Plaintiffs contend that Calderon, Lever, and Lever's assistant, Nancy Juarez ("Juarez"), listened in on the conversations between the SCHRC investigator and the employees. (Id.) Defendant states that Lever was not aware of the phone calls until after the depositions of the Claimants. (Def's. Stmt. ¶ 234.)

At some point in early 2002, Defendant decided to eliminate the second shift. (Id. ¶ 251; Pls.' Stmt. ¶ 251.) Defendant contends that it offered all employees an opportunity to transfer to the day shift through postings and a memorandum included with the employees' paychecks, and states that it granted the request of every employee who requested a transfer to the day shift. (Def's. Stmt. ¶ 251.) According to Defendant, the employees who remained on the second shift were aware that there were positions available during the day, but choose not to transfer. (Id. ¶ 252.) Plaintiffs allege that the Claimants were not told that the night shift would be eliminated and were "falsely misled into believing that their jobs were secure," whereas Asian employees were told that the second shift would be eliminated. (Pls.' Stmt. ¶ 251.)

The parties agree that at some point in late January, a letter was sent to Hispanic workers on the night shift asking the workers to recant their signature from the 2001 Petition. (Id. ¶¶ 314, 315, 318; Def's. Stmt. ¶¶ 314-321.) However, Defendant

asserts that Juarez wrote the letter because she wanted employees to express their concerns in writing, and Juarez did so without any assistance from anyone else, and without the knowledge of First Wireless managers, officers, or owners. (Def's. Stmt. ¶¶ 314-321.) Plaintiffs contend that Juarez wrote the letter in response to SCHRC's investigation and with the knowledge of managers at First Wireless.

At approximately the same time, Defendant locked the bathroom. (Def's. Stmt. ¶¶ 310, 311.) Defendant contends that it locked the bathroom during both shifts because of unsanitary conditions caused by some of the employees. (Id.) Plaintiffs counter that the bathroom was locked in response to the SCHRC investigation, and state that the bathroom may have been locked only during the night shift. (Pls.' Stmt. ¶ 310-311.)

In February of 2002, Defendant laid off several employees from the second shift. Defendant contends that the terminations were part of a reorganization necessitated by a downturn in business, and the second shift employees were chosen because these lay-offs would produce higher savings. (Def's. Stmt. ¶¶ 271-275.) Plaintiffs state that there was no downturn in business, and that the employees who were terminated were chosen because they signed or had their names associated with the 2001 Petition. (Pls.' Stmt. ¶ 271-275.)

In August of 2002, the case was transferred from SCHRC to the EEOC, and on September 30, 2002, EEOC commenced the instant

action. EEOC contends that Defendant paid Asian employees more than Hispanic employees, and then retaliated against the Hispanic employees for raising the pay disparity in the Memorandum and Petition. Defendants deny these allegations, and assert that the employees' pay rates depended on their experience and educational background. (Id. ¶¶ 88-89.) Moreover, Defendant states that it treated all of its employees well and even sponsored English classes for at least some of the Claimants. (Id ¶¶ 325, 329). EEOC disputes this, but does agree that two claimants, W. Garcia and Olga Morales, attended a few English classes sponsored by Defendant. (Pls.' Stmt. ¶ 329.)

DISCUSSION

I. Standard Of Review On Summary Judgment

"Summary judgment is appropriate where there is no genuine dispute concerning any material facts, and where the moving party is entitled to judgment as a matter of law." Harvis Trien & Beck, P.C. v. Fed. Home Loan Mortgage Corp. (In re Blackwood Assocs., L.P.), 153 F.3d 61, 67 (2d Cir. 1998)(citing Fed. R. Civ. P. 56(c)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

"The burden of showing the absence of any genuine dispute as to a material fact rests on the party seeking summary judgment." McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997); see also

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). "In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." McLee, 109 F.3d at 134.

"Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must 'set forth specific facts showing that there is a genuine issue for trial.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson, 477 U.S. at 256). "Mere conclusory allegations or denials will not suffice." William v. Smith, 781 F.2d 319, 323 (2d Cir. 1986). Indeed, when a motion for summary judgment is made, it is time to "to put up or shut up. . . . [U]nsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41 (internal citations omitted).

When ruling on a motion for summary judgment in a discrimination case, "additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when . . . its intent is at issue. . . . Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show

discrimination." Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1224 (2d Cir. 1994). Thus, a court should not grant an employer's motion for summary judgment unless "the evidence of discriminatory intent is so slight that no rational jury could find in [the P]laintiff's favor." Id. at 1226. Although this is a deferential standard, it should not be applied so as to create a de-facto bar on summary judgment in all employment discrimination cases. See Weinstock v. Columbia Univ., 224 F.3d 33, 41-42 (2d Cir. 2000) ("the 'impression that summary judgment is unavailable to defendants in discrimination cases is unsupportable.'" (quoting McLee v. Chrysler Corp., 38 F.3d 67, 68 (2d Cir. 1994)).

II. Disparate Pay Claim

A. Timeliness

On June 1, 2007, Defendant filed a letter with the Court urging the Court to find that Claimants' disparate pay claims are untimely because the majority of Claimants filed a charge of discrimination outside of the charging period. Defendant argues that the charges should have been filed within 300 days of the date on which First Wireless hired each individual Claimant at an allegedly lower salary. In support of this argument, Defendant cites to a recent Supreme Court case, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162; 167 L. Ed. 2d 982 (2007).

Defendant's argument is without merit because the facts and holding of Ledbetter are distinguishable from the instant case. Ledbetter did not involve a discriminatory pay structure, but

rather involved discrete instances of discrimination against a specific plaintiff that affected the plaintiff's paychecks. The plaintiff in Ledbetter alleged that her supervisors discriminated against her during her employee evaluations, and gave her lower ratings than she deserved. Ledbetter claimed that her paychecks were lower than they would have been had she been evaluated in a nondiscriminatory manner, and she was unfairly denied a raise in 1998 because of the past poor evaluations. The Supreme Court held that Ledbetter's claim of reduced paychecks was time-barred because the complaint relied on discrete acts of past discrimination. "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her" rather than waiting until 1998 to file a charge with the EEOC. Id. at 2169.

Unlike Ledbetter, the present case does not involve specific acts of past discrimination, but rather deals with an ongoing discriminatory pay structure. In addressing this distinction, the Supreme Court clearly explained that "when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees." Id. at 2173 (emphasis added). The claims in this case were filed within 300 days of the last issued paycheck, and are therefore timely because "an employer violates Title VII and triggers a new EEOC charging period whenever

the employer issues paychecks using a discriminatory pay structure." Id. at 2174.

B. Standard Of Review

Plaintiffs claims of disparate pay in violation of Title VII are analyzed under the McDonnell Douglas burden-shifting paradigm. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Cabrera v. New York City, 436 F. Supp. 2d 635, 643 (S.D.N.Y. 2006). Under McDonnell Douglas, Plaintiffs must first establish a prima facie case of discrimination by showing that: (1) Claimants were members of a protected class; (2) Claimants were paid less than similarly-situated non-members of the protected class; and (3) evidence of discriminatory animus. See Belfi v. Prendergast, 191 F.3d 129, 139 (2d Cir. 1999); Trotman v. CBS Radio, Inc., No. 06-CV-3389, 2007 U.S. Dist. LEXIS 73641, at *22-23 (S.D.N.Y. 2007).

If a plaintiff is able to satisfy this initial burden, a rebuttable presumption exists that the employer unlawfully discriminated. McPherson v. New York City Dep't of Educ., 457 F.3d 211, 215 (2d Cir. 2006). The burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment decision. Cabrera v. New York City, 436 F. Supp. 2d 635, 643-44 (S.D.N.Y. 2006). Once a defendant articulates such a purpose, the burden shifts back to plaintiff to show that the proffered reason set forth by defendant is pretextual. Id. at 644.

A. Prima Facie Case

It is undisputed that Claimants are members of a protected class. The Court's analysis therefore turns on whether Plaintiffs can establish the remaining two elements of a prima facie case of disparate pay. Defendant argues that Plaintiffs cannot establish a prima facie case because the Claimants were not similarly situated with Asian employees receiving a higher pay, and there is no evidence of discriminatory animus.

1. Similarly Situated

In deciding whether employees are similarly situated, the Court may consider several factors, including the employees' work duties, education, seniority, and performance history. Trotman, 2007 U.S. Dist. LEXIS 73641, at *24. The key determinant is whether the circumstances of the employees is "similar in significant respects." Lizardo v. Denny's, Inc., 270 F.3d 94, 101 (2d Cir. 2001).

Defendant asserts that Plaintiffs cannot identify any Asian employee with a higher wage that was similarly situated to the Claimants. According to Defendant, the Asian employees who were paid at a higher hourly rate had prior related employment experience or educational backgrounds in technology, engineering, and/or electronics-related fields, whereas the Claimants lacked prior employment experience in the electronics field, and had limited educational backgrounds. However, EEOC has named several Asian employees who performed similar work as the Claimants and

received a higher starting wage, despite having a limited educational background and limited prior experience.[2] A reasonable juror could infer that these Asian comparators were similarly situated to the Claimants.

2. Discriminatory Animus

In a disparate pay claim, the plaintiff "bears the burden of proving that defendant acted with an intent to discriminate against plaintiff on the basis of [plaintiff's] protected status." Simpson v. Metro-North Commuter R.R., No. 04-CV-2565, 2006 U.S. Dist. LEXIS 50331, at *26 (S.D.N.Y. July 20, 2006). Defendant argues that Plaintiffs have not satisfied this burden because they have not demonstrated that managers or executives at First Wireless

[2] EEOC lists eleven Claimants from the day shift that received a starting salary of $6.00, and one who received $7.00, as compared with twenty-five Asian comparators who started at a pay-rate of $8.00 per hour, three at $8.50 per hour, and three at $10.00 an hour. From the night shift, EEOC lists twenty-five Claimants who started at $7.00 an hour, versus one comparator who started at $7.00 and twenty-one comparators who started at the higher rate of $8.50 per hour. Many of the Claimants have had previous work experience, and several have had post-secondary education. Some of the comparators listed with a higher starting pay rate have had limited work experience and limited education. For example, Li Amei and Ming Ming Wu did not list any post-secondary education or prior work experience on their applications, yet were hired at the higher $8.00 an hour rate for the day shift. Claimants Beatriz Buitrago and Karla Aguilera similarly did not have any post-secondary education or prior work experience, yet were hired at $6.00 per hour for the day shift. Claimant Sonia Borrero had post-secondary education and experience in packing, yet was hired at $6.00 to work during the night shift in the shipping/receiving/quality control department; comparatively, Gar Kew Chan, also hired to work in the second shift shipping/receiving/quality control department, had prior experience but no post-secondary education, yet was hired at a starting salary of $8.50 per hour.

harbored any discriminatory animus towards Hispanic workers. Defendant cites to deposition testimony of several Claimants, who testified that First Wireless owners were kind and that the Claimants recommended the job to other Hispanic individuals. Plaintiffs argue that the pay disparity amongst the majority of Hispanic and Asian employees provides a strong inference of discriminatory animus.

The Court recognizes that "direct proof of [discriminatory animus] will often be lacking: smoking guns are rarely left in plain view." Brown v. DeFrank, No. 06-CV-2235, 2006 U.S. Dist. LEXIS 83345, at *88 (S.D.N.Y. Nov. 15, 2006) (quoting Garcia v. S.U.N.Y. Health Sciences Ctr., 280 F.3d 98, 112 (2d Cir. 2001)); see also Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 87 (2d Cir. 1996) ("Since it is rare indeed to find in an employer's records proof that a personnel decision was made for a discriminatory reason, whatever other relevant depositions, affidavits and materials are before the district court must be carefully scrutinized for circumstantial evidence that could support an inference of discrimination."). Although proof of discriminatory animus generally requires "evidence beyond the mere fact of unequal pay for equal work," David v. Comtech PST Corp., No 06-CV-6480, 2006 U.S. Dist. LEXIS 68208, at *45 (S.D.N.Y. Sept. 26, 2006), the Court notes that in this case, nearly all of the Hispanic workers were paid less than the Asian employees. A reasonable jury may infer a discriminatory animus from the large

number of Hispanic employees paid at lower rates and the amount of Asian employees receiving a higher salary. Accordingly, the Court finds that Plaintiff has met its minimal burden of establishing a prima facie case of discrimination.

B. Pretext

Defendant proffers several non-discriminatory reasons to rebut Plaintiffs' disparate pay claims. First, Defendant contends that it paid Hispanic employees less because of the specific qualifications and backgrounds of the employees. However, as noted above, EEOC has presented evidence to rebut this non-discriminatory reason, including a list of several Hispanic employees with backgrounds and qualifications similar to that of Asian employees who received a higher salary.

Next, Defendant contends that the Asian employees with a higher salary lived in the five boroughs of New York City, as opposed to Long Island. Defendant argues that it paid these employees more because the job market in New York City is more competitive and the cost of living is higher. While this may be a legitimate reason for the pay difference, Plaintiffs name several Asian employees who resided in Nassau County, yet were still paid at the higher rate. This creates an issue of fact as to whether locality was actually taken into consideration in determining wages. Viewing the facts in the light most favorable to Plaintiff, the Court finds that a reasonable juror could infer that

Defendant's pro-offered justifications for the difference in pay are pretextual.

Although Defendant may have paid the Hispanic employees less because of their work experience, educational background, and place of residence, whether Defendant's reasons for the lower pay rate were non-discriminatory or were pre-textual should be left to a jury. Accordingly, Defendant's motion for summary judgement on Plaintiffs' Title VII pay disparity claims is DENIED.

III. Retaliation

While Title VII retaliation claims, like Title VII discrimination claims, are analyzed under the McDonnell Douglas burden-shifting paradigm, the elements of a prima facie case are different. See Patane, 435 F. Supp. 2d at 316. In order to establish a prima facie case of retaliation under Title VII, Plaintiffs must show that (1) they engaged in protected activity, (2) Defendant was aware of this activity, (3) Defendant took adverse action against Plaintiffs, and (4) there exists a causal connection between the protected activity and the adverse action. See Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 206 (2d Cir. 2006); Patane, 435 F. Supp. 2d at 316.

A. Claimants Who Signed The Petition

The Court finds that the Claimants who signed the 2001 Petition participated in a protected activity. The Memorandum stated that the writers believed that First Wireless was violating their rights by paying Hispanic employees less than Asian

employees, and demanded a salary equivalent to that of the Asian employees. This is a clear example of a protected activity.

Although the first prong for a retaliation claim has been met, there are issues of fact that make the remaining prongs more difficult to determine. On the issue of whether Defendant had knowledge of the protected activity, EEOC submits deposition testimony from several Claimants who state that they either witnessed or overheard Lever discussing the Petition with Torres on April 23, 2001. Additionally, EEOC asserts that Santiago, another manager, was present when second shift employees discussed writing the Memorandum to management. Defendant denies that the above instances occurred, and maintains that First Wireless management did not receive, and was not aware of, the Petition and Memorandum at the time of the alleged adverse actions. Because there is a factual dispute related to Defendant's awareness of the protected activity, summary judgment is inappropriate.

B. Claimants Who Were Not Signatories To The Petition

Defendant argues that approximately 22 of the 38 Claimants were not signatories to the 2001 Petition and/or Memorandum, and therefore these Claimants did not engage in any protected activity.[3]

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[3] The Claimants whose name appeared on the Petition include Raidy Alvarez, Sonia Arzayus, Estela Barahona, Carlos Fuentes, Edwin Garcia, Olga Morales, Natalia Naranjo, Rocio Rodriguez, Erika Romero, John Sanchez, Luis Sanches, Adriana Torres, Luz Adela Torres, Sonia Uribe, Ruth Vidal, and Maria Zamora.

"The term 'protected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000). Although the objection need not rise to the level of a formal complaint, there must be, at the very least, "some form of professional indicia of a complaint made against an unlawful activity." Soliman v. Deutsche Bank AG, No. 03-CV-104, 2004 U.S. Dist. LEXIS 9087, at *37 (S.D.N.Y. May 19, 2004) (internal quotations and citations omitted).

Here, although Claimant Jimenez did not sign the Petition, he may have engaged in a protected activity by informing General Manager Ng that some of the employees were questioning the company's pay rates. The exact words Jimenez used are unknown to the Court. There is a question of fact as to whether Jimenez's conversation with Ng constituted some form of a complaint. A jury could conclude that Jimenez was protesting the alleged lower wages for Hispanic employees, or could conclude that Jimenez was merely informing Ng that other employees had come to Jimenez with concerns about the alleged pay disparity.

If the jury concludes that Jimenez's conversation amounted to a protected activity, the remaining prongs of the retaliation claim are also disputed. Defendant argues that a causal connection is lacking because Jimenez's termination was the result of company reorganization and Jimenez's unsatisfactory work performance. Similarly, Defendant contends that even if Jimenez

could establish a prima facie case of retaliation, the company's need for reorganization and Jimenez's performance issues constitute a legitimate, non-discriminatory reason for the termination. Because material questions of fact remain as to whether Jimenez has established a prima facie case, and whether Defendant had legitimate reasons for taking adverse employment action against Jimenez, Defendant's motion for summary judgment as to Jimenez's retaliation claim is DENIED.

Claimants Zorada Salcedo ("Salcedo") and Nora Lucia Sosa ("Sosa") also did not sign the Petition. However, both Salcedo and Sosa may have engaged in protected activity as their full names appear on the Petition, and this could be perceived as participation in the complaint.[4] Nonetheless, summary judgment is inappropriate for these two Claimants, as there is an issue of fact as to whether First Wireless had a legitimate, non-discriminatory reason for the layoff. First Wireless asserts that it had to reorganize and layoff employees after suffering a loss in business. EEOC disputes this contention, and argues that First Wireless did not undergo a financial loss in 2001, and did not need to reorganize the company. EEOC supports its contention with new hire forms indicating that several employees were hired on or around the same time that some of the Claimants were terminated. Because there is a material issue of fact as to a crucial element of a

[4] Salcedo and Sosa's full name appears on the Petition, but the signature line next to their names remains blank.

retaliation claim, summary judgment is DENIED as to Salcedo and Sosa's retaliation claims.

The remaining Claimants who did not sign the Petition are Karla Aguilera, Idalia Araujo, Mireya Bautista, Beatriz Buitrago, Fidelina Caceres, Gloria Cardenas, Ana Maria Castaneda, Beatriz Garcia, Nely Hernandez, Ivonne Leon, Ligia Lozano, Milton Misnaza, Mariana Moran, Carlos Morcillo, Blanca Penaranda, Edis Reyes, Elizabeth Santana, Francisca Santana, and Reina Vega ("remaining non-signatory Claimants"). The Court finds that the remaining non-signatory Claimants cannot establish a prima facie case of retaliation because they have not alleged any protected activity. The Claimants' names were not on the Petition or Memorandum, and they have not alleged any other activity protesting Defendant's treatment of Hispanic employees. Accordingly, the Court GRANTS Defendant's motion for summary judgment as to the remaining non-signatory Claimants' retaliation claim.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED in part and DENIED in part. Defendant's motion for summary judgment with respect to the claims of disparate pay in violation of Title VII is DENIED. Defendant's motion for summary judgment with respect to the retaliation claims of Jimenez, Salcedo, Sosa, and the sixteen signatory Claimants is also DENIED. Defendant's motion for summary judgment as to the remaining nineteen non-signatory Claimants' retaliation claim is GRANTED.

SO ORDERED

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
2/11, 2008