IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ANITA GUPTA,

Plaintiff

v. **Docket No. 07-cv-0234**

SEARS, ROEBUCK AND CO. ; and,
SEARS HOLDINGS CORPORATION,

Honorable Nora Barry Fischer
United States District Court Judge

Defendants.

BRIEF IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

AND NOW, come the Plaintiff, Anita Gupta, by and through her counsel, Monte J. Rabner, Esquire, RABNER LAW OFFICES, P.C., and respectfully represents the following for the consideration of this Honorable Court:

On December 27, 2005, Anita Gupta filed a Charge of Discrimination with the Equal Employment Opportunity Office. The Complaint filed by Ms. Gupta with the EEOC was based upon age discrimination and based upon discrimination based upon her race/national origin.

On November 28, 2006, the EEOC issued a right-to-sue letter to Ms. Gupta, after which the present action was instituted. Presently, the Defendants have filed for Summary Judgment to which this present response is directed.

FACTUAL BACKGROUND

Anita Gupta is a native of India who emigrated to this country in 1979, subsequently obtaining American Citizenship; and, who, at all relevant times, was an employee of Defendant Sears, Roebuck and Co. She was born August 2, 1956, having attained the age of 50 at the time the events occurred herein occurred. Although she speaks English well, Ms. Gupta has a noticeable accent and appearance which would associate her origin from India or the surrounding region.

Sears Roebuck and Co., is a New York corporation with its principal place of business located at 3333 Beverly Road, Hoffman Estates, Illinois, 60179. As we all know, Sears operates retail stores throughout the country. Among these stores it operates, is one located in this District at 300 South Hills Village, Bethel Park, Pennsylvania, 15241. This is the store at which Ms. Gupta spent her entire career with Sears, a span of almost 20 years.

Ms. Gupta was hired by Defendants to work as a sales person at the Sears Store, located in Bethel Park, County of Allegheny, Pennsylvania, on October 29, 1986. Through the years, she progressed in grade and pay with Sears being a Lead Cashier at the time of the matters complained of herein.Prior to the incident upon which her discharged was alleged to have been based, Ms. Gupta's employment record was without blemish, there being no evidence of any reprimands, warnings, poor job performance evaluations or other adverse employee notations.

On November 13, 2005, Sears was having a "Family & Friends Night." On such nights, associates, their family and friends are entitled to discounts on items purchased which are normally not available to them. Prior to such sale, Ms. Gupta placed a pair of

earnings on hold to purchase them on the night of the announced sales. The earnings in question were marked as an "Introductory Offer" which would have exempted them from any additional discounts, including an employee discount.

On the night of such sale, Ms. Gupta went to purchase the earnings she had placed on hold with the purchase being processed by another sales associate, namely a Christina Freehan. During the processing of the sale, the computer system of the Defendants automatically granted an employee discount to the purchase. Such discount resulted Ms. Gupta being granted an additional $18.50 off the purchase price of the subject earnings of approximately $185.00. When Ms. Gupta was shown that an employee discount was granted, she immediately brought it to the sales associate's attention; and, requested that it be reversed or removed as the same was incorrectly applied. In response to such request, the sales associate handling the transaction stated that the computer had automatically applied the discount in question to the purchase, so it must have been appropriate; and, that she had no way of removing the same or overriding the discount granted.

In her deposition, Ms. Freehan, the sales associate who handled the subject sale to Ms. Gupta, stated that she recalled the sale in question; but could not remember any details of the same. She noted that she did speak with someone from loss prevention after the sale, but was never asked for a written statement nor did she give one. She recalled Ms. Gupta putting the earnings on hold and purchasing the same on the noted sales night. She characterized Ms. Gupta as a good, hard worker.

Judith Forbes, a part-time sales associate at the time of the matters complained of herein, and is believed to have been the individual that reported to Loss Prevention that

Ms. Gupta had placed the earnings in question on hold to purchase them on the upcoming sales night to receive an improper additional employee discount. However, at the time of her deposition, Ms. Forbes stated that she not recall any specific conversations with Ms. Gupta prior to her purchase of the subject earnings; and, had no interaction with her on the date of the sale or thereafter.

David Marquis, the General Manager of the Store at the time of the subject sale, noted that he respected Ms. Gupta as a hard working, good employee. Prior to the subject incident, he did not know of any adverse employee actions or reports concerning her. Mr. Marquis did indicate that the sales computer system would automatically grant an employee discount even though the same was not applicable.

As already noted, Ms. Gupta completed the purchase as recorded by the system paying the net sales price noted on the receipt. However, on the day after the sale, Ms. Gupta stated that she again brought the inappropriate discount to the attention of other sales associates and other lead cashiers, all of whom stated that the discount granted by the computer system was correct and that such discounts had been granted to other associates under similar circumstances without any problems or concerns.

Subsequently, Ms. Gupta was confronted by the Store Manager and Loss Prevention Officer concerning the discount of $18.50, which was granted her at the time of her purchase of the earrings in question. Although it was never disputed that the discount had been granted by the computer system of the Defendants Ms. Gupta was discharged. Much is made of the fact that Ms. Gupta signed a statement admitting that she had accepted an employee discount where the same should not have been given. However, such statement does not admit an intent to deceive or that the action was

deliberate in nature. Additionally, it was represented that the making of such statement would bring an end to the matter without any adverse employee action. As we now, the contrary was true as Ms. Gupta was subsequently discharged.

Other employees, all of whom were younger than 40 years of age and not of the origin or race of Ms. Gupta had made inappropriate use of the employee discount; however, in each instance such employees were not disciplined or discharged. In particular, the noted employees are Patricia Haber-Borden and Lorri Muic each of whom violated the employee discount in purchases they made for themselves or others yet were not given any adverse employee action let alone discharged.

Ms. Gupta has alleged that the reason for her discharge was pretextual. She has alleged that she was actually discharged so that the Defendants could hire a sales associate who was much younger than her and at a substantially reduced salary. In fact, a younger sales associate did replace Ms. Gupta after her discharge, which has not been refuted by the Defendants.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that if the pleadings, depositions, answers to interrogatories admissions and affidavits, if any, show that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law," that summary judgment shall be properly granted in favor of the moving party. The moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett***,** 477 U.S. 317 325, 106 S. Ct. 2548 (1986); *Bowersfield v. Suzuki Motor Corporation*, 111 F. Supp. 2d 612 (E.D. Pa. 2000).

In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. However, the non-moving party cannot merely rest upon allegations in its pleadings but must set forth facts that would allow a reasonable jury to find in non-moving party's favor. A motion for summary judgment will not defeated by the mere existence of some disputed facts but will be defeated only when there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249-50, 106 S.Ct. 2505 (1986).

In determining if there is a genuine issue of fact, the court's function is not to weigh the evidence or to determine the truth of the matter but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the non-moving party. *Horta v. Sullivan,* 4 F.3d 2, 8 (1st Cir. 1993); *Marino v. Maytag Corporation,* 2005 U.S. Dist. Lexis 22377 (W.D. Pa. 2005).

ARGUMENT

The Age Discrimination in Employment Act (ADEA) prohibits an employer from discharging any individual or otherwise discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a)(1). The core issue in an ADEA claim is whether the employer intentionally discriminated against the Plaintiff based upon the Plaintiff's age. In Order to establish a prima facie case of age discrimination, an individual must show that (1) they are over 40 years of age; (2) that the individual was qualified for their position; (3) that they suffered an adverse employment decision; and, (4) that they were replaced by a sufficiency younger individual person thereby permitting an inference of age discrimination. If a plaintiff establishes these four elements, this

creates a presumption of age discrimination which the employer can rebut by providing a legitimate, nondiscriminatory reason for the adverse employment decision. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3rd Cir 1995).

To make out a prima facie case of discrimination under Title VII, Section 1981, a plaintiff must show that she belonged to a protected class, that she was qualified for the job from which she was discharged; and that the discharge was based upon her race as the job in question was then offered to someone outside of the protected group. Richmond v. Board of Regents of University of Minnesota, 957 F.2d 595 (8th Cir. 1992). Under Title VII, it is an unlawful employment practice for an employer to discharge or otherwise discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Kanaji v. Children's Hospital of Philadelphia. 276 F. Supp.2d 399 (E.D. Pa. 2003). In the decision rendered in Sinai v. New England Tel. & Telegraph Co., 3 F.3d 471, 475 (1st Cir. 1993) the Second Circuit affirmed a jury's finding of race discrimination under U.S.C. § 1981 based on evidence of national origin discrimination under Title VII because plaintiff's national origin was Israeli, and thus, the jury could have also found race discrimination based on the fact that Israel's populace is primarily Jewish. As such, Count I should not be dismissed to the extent that it alleges discrimination based on the Plaintiff's National Origin.

Ms. Gupta was hired by Defendants to work as a sales person at the Sears Store, located in Bethel Park, County of Allegheny, Pennsylvania, on October 29, 1986. Through the years, she progressed in grade and pay with Sears being a Lead Cashier at the time of the matters complained of herein. Prior to the incident upon which her discharged was alleged to have been based, Ms. Gupta's employment record was without

blemish, there being no evidence of any reprimands, warnings, poor job performance evaluations or other adverse employee notations.

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On the night of the sale, Ms. Gupta went to purchase the earnings she had placed on hold with the purchase being processed by another sales associate, namely a Christina Freehan. During the processing of the sale, the computer system of the Defendants automatically granted an employee discount to the purchase. Such discount resulted Ms. Gupta being granted an additional $18.50 off the purchase price of the subject earnings of approximately $185.00. When Ms. Gupta was shown that an employee discount was granted, she immediately brought it to the sales associate's attention; and, requested that it be reversed or removed as the same was incorrectly applied. In response to such request, the sales associate handling the transaction stated that the computer had automatically applied the discount in question to the purchase, so it must have been appropriate; and, that she had no way of removing the same or overriding the discount granted.

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was never asked for a written statement nor did she give one. She recalled Ms. Gupta putting the earnings on hold and purchasing the same on the noted sales night. She characterized Ms. Gupta as a good, hard worker.

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Ms. Gupta completed the purchase as recorded by the system paying the net sales price noted on the receipt. However, on the day after the sale, Ms. Gupta stated that she again brought the inappropriate discount to the attention of other sales associates and other lead cashiers, all of whom stated that the discount granted by the computer system was correct and that such discounts had been granted to other associates under similar circumstances without any problems or concerns. Subsequently, Ms. Gupta was confronted by the Store Manager and Loss Prevention Officer concerning the discount of $18.50, which was granted her at the time of her purchase of the earrings in question.

Although it was never disputed that the discount had been granted by the computer system of the Defendants Ms. Gupta was discharged.

Because Ms. Gupta is colored and was born in India, Plaintiff is a member of a protected class, both in terms of her race and national origin. The termination of Ms. Gupta's employment by the Defendants, ostensibly because she violated the Sears Store's concerning the acceptance of an inappropriate employee discount on her purchase of an item, constitutes an adverse employment action

Ms. Gupta was the only colored person from India working in such Department of the Defendants. All of her co-workers were white males or females; and, yet Ms. Gupta was the only person fired because she violated Defendants' policy by her acceptance of an employee discount, even though other co-workers had violated that same policy to one extent or another without being discharged or disciplined. In particular, fellow employees, Patricia Haberborden and Lorri Muic had violated the employee discount in purchases they made for themselves or others yet were not given any adverse employee action let alone discharged.

In firing Ms. Gupta for the one-time violation of a policy, which was uniformly ignored by other employees of the Defendants, the Defendants intended to discriminate against her on the basis of her race and national origin. As such, it is submitted that Ms. Gupta has established a prima facie case of discrimination against her by the Defendants on the basis of her color and national and that a genuine issue of material fact exists on such question.

Concerning her age discrimination claim, Ms. Gupta also submits that she has made a prima facie case that her discharge was based upon her age in that she was 50

years of age at the time of her discharge and she was subsequently replaced by a younger worker being paid less. Other employees, all of whom were younger than her had made inappropriate use of the employee discount; however, in each instance such employees were not disciplined or discharged. In particular, the noted employees are Patricia Haberborden and Lorri Muic each of whom violated the employee discount in purchases they made for themselves or others yet were not given any adverse employee action let alone being discharged.

Ms. Gupta has alleged that the reason for her discharge was pretextual. She has alleged that she was actually discharged so that the Defendants could hire a sales associate who was much younger than her and at a substantially reduced salary. In fact, a younger sales associate did replace Ms. Gupta after her discharge, which has not been refuted by the Defendants.

While the employer may advance a basis for the adverse action against Ms. Gupta being a legitimate nature, sufficient evidence exist that the members of a jury could conclude that it is more likely than not that Ms. Gupta was terminated that Sears terminated her based upon her age and/or race/national origin. It is submitted that s reasonable fact finder's disbelief of the reasons put forward by an employer for an adverse employer action together with the elements of a prima facie case of discrimination based upon age or race/nationals origin can be sufficient to warrant a verdict in favor of the Plaintiff. St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502,511 (1993).

In considering the evidence must be considered in the light most favorable to the non-moving party, it is submitted that facts exists that would allow a reasonable jury to

find in the favor of Ms. Gupta in this matter, the non-moving party. Therefore, the Defendants' motion for summary judgment should be denied as there exists genuine issues of material fact

CONCLUSION

WHEREFORE, Plaintiff asks this Honorable Court to deny the Motion for Summary Judgment filed by the Defendants as genuine issues of material fact exists so that a reasonable jury could return a verdict in favor of the Plaintiff.

Respectfully submitted:

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