

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OTIS AND FIONA OLMAN,

Plaintiffs,

v.

Case No. 8-16-CV-00637

FULL MOON SPORTS, INC.,
& BRUCE BELCHER

Defendants.

ORDER

This cause comes before the Court for consideration of Defendant's Motion for Summary Judgment. The Court hereby orders as follows:

1. Defendant's motion for summary judgment on all claims of plaintiff Fiona Olman (counts six and seven) is GRANTED;
2. Defendant's motion for summary judgment on plaintiff Otis Olman's claims of age discrimination under the Age Discrimination in Employment Act ("ADEA") and the Florida Civil Rights Act (counts one and three) is GRANTED; and
3. Defendant's motion for summary judgment on plaintiff Otis Olman's claims of retaliation under the ADEA and the Florida Civil Rights Act (counts two and four) is DENIED.

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MEMORANDUM

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Plaintiff Otis Olman next claims that Full Moon acted with discriminatory motive when it replaced him as manager of the Jacksonville store and promoted Shockley to his position. Olman has adduced credible evidence that he was over the age of 40, that he was qualified to serve as manager of the Jacksonville store, and that he was replaced by a person under the age of 40. Full Moon, in turn, has responded with credible evidence that it replaced Olman and numerous other store managers in the southeast region to reduce salary costs and improve the economic performance of stores. Under the *McDonnell Douglas* standard governing this motion, Olman must produce credible evidence that Full Moon's economic explanation is a "pretext" to survive summary judgment.

Olman's evidence of pretext comes down to the following. First, he cites evidence that (a) Olman's regional manager, Belcher, and the employee who replaced Olman, Shockley, expressed ageist sentiments prior to Olman's replacement, (b) Belcher took no action to censure Shockley but instead recommended his promotion to store manager, and (c) Belcher's age-based recommendation to the Reorganization Committee led to the decision to replace Olman with Shockley. Second, Olman argues that the retaliatory action taken against him by company president, Lurch, evidences ageism on the part of Lurch, who participated in the decision to replace Olman.

This Court finds that the evidence of ageist remarks by Belcher and Shockley fall short of providing a reasonable basis for inferring that Belcher acted with ageist motive in failing to recommend Olman's retention as manager. Initially, it merits emphasis that the supervisor who is pivotal to Olman's argument—Bruce Belcher—is the same person who renewed Olman in 2012 at a substantial salary of \$85,000. As other courts have observed, when the same person charged with discrimination has previously taken favorable job action regarding the plaintiff the inference of ageism is unlikely. *See, e.g., Hennessey v. Good Earth Tools, Inc.*, 126 F.3d 1107, 1109 (8th Cir. 1997); *Horwitz v. Board of Educ.*, 260 F.3d 602, 611 (7th Cir. 2001).

In addition, the evidence suggesting that Belcher acted with ageist motive largely consists of remarks that were not made "proximate to or related to the employment decision." *Jackson v. Cal-Western Packing Co.*, 602 F. 3d 374, 380 (5th Cir. 2010). The sole remark made proximate to the time when the decision was made to replace Olman was Belcher's inquiry about Olman's interest in retiring. But a single stray remark, especially by someone who lacks final decisionmaking authority, is not sufficient to prove a claim of age discrimination. *See, e.g., Gonzalez v. El Dia, Inc.*, 304 F. 3d 63, 69-70; *Weichman v. Chubb & Son*, 552 F. Supp. 2d 271, 284 (D. Conn. 2008). This is true even assuming Belcher's inquiry about retirement is construed as an expression of ageist sentiment rather than a sincere inquiry into Olman's employment interests.

Nor does the Court agree that Lurch's possible retaliatory action—which will be examined later at trial—provides evidence that he acted with ageist motive in replacing Olman. Lurch, a 48-year-old man himself, may have acted rashly and even illegally in terminating Olman after receiving a letter complaining of age discrimination. But retaliation against an outspoken employee differs from age discrimination.

In sum, Olman has failed to produce evidence rebutting Full Moon's defense that it replaced him based on lawful, non-discriminatory factors. While this Court (a member of the age group protected by the ADEA) sympathizes with Olman, and questions the wisdom of corporate policy that penalizes the very employees who have helped an employer attain economic success, the ADEA provides no authority to second-guess that policy.

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DONE and ORDERED at Jacksonville, Florida, this 25th day of October, 2016.

Hon. Sarah Goodenough