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Sousa v. Orient Arts Inc.
 S.D.N.Y., 1999.

United States District Court, S.D. New York.
 Rosalind SOUSA, Plaintiff,

v.

ORIENT ARTS INCORPORATED, Jay Shahani,
 Mahesh Lala and Vicki Katz, Defendants.
 No. 97 CIV. 0819(BSJ).

March 16, 1999.

MEMORANDUM & ORDER

JONES, District J.

*1 Plaintiff brings claims under the Age Discrimination in Employment Act (the "ADEA"), the Family and Medical Leave Act (the "FMLA"), and the New York Human Rights Law.^{FN1} Defendants moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendants motion for summary judgment is granted.

FN1. The cover to plaintiff's complaint indicates an intention to allege discrimination based on disability under the Americans with Disability Act (the "ADA"). However, plaintiff's typewritten complaint contains no claim under the ADA, nor does plaintiff ever allege any facts that would support an ADA claim. The Court does not, therefore, consider any claims under the ADA.

The ADEA makes it unlawful for an "employer" to discriminate on the basis of age in making certain employment decisions. *See* 29 U.S.C. § 623(a). To be an "employer" for purposes of the act, a person must have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29

U.S.C. § 630(a). Independent contractors are not counted as employees for the purpose of establishing whether a person is an employer under the act. *See Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir.1993).

To be an "employer" for purposes of the FMLA, one must have employed "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i).

It is undisputed that defendant Orient Arts Incorporated had no more than 15 employees on its payroll at any time during the two calendar years when plaintiff was associated with the corporation. (*See* Lala Affidavit ¶ 6; *id.* Ex. O.) Accordingly, the Court grants summary judgment to the defendant on the plaintiff's claims under the ADEA and the FMLA.^{FN2}

FN2. In addition, I would likely find that the plaintiff is not an employee within the meaning of the ADEA or the FMLA. There is substantial and uncontroverted evidence that the plaintiff was never an employee of defendants, but was instead an independent contractor. Plaintiff was not listed on Orient Arts Incorporated's payroll; did not receive a W-2 form from Orient Arts Incorporated; and had no federal, state or FICA taxes withheld by Orient Arts Incorporated. (*See* Shahani Aff. ¶¶ 8, 9, 13; Dansickler Decl. Ex. L, O-Q.) Orient Arts Incorporated made payments to Attitudes by SO-USA, a corporation established by plaintiff, and plaintiff received her wages and benefits from Attitudes by SO-USA. (Dansicker Decl. Ex. Q.) These factors militate heavily toward finding that plaintiff was an independent contractor, rather than an employee, of the defendants. *See Frankel*

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v. Bally, Inc., 987 F.2d 86, 91 (2d Cir.1993); *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir.1992); *Tagare v. Nynex Network Systems Co.*, 994 F.Supp. 149, 154 (S.D.N.Y.1997). However, because I have decided that the defendants are not employers within the meaning of the ADEA or the FMLA, I need not decide whether the plaintiff was an employee within the meaning of those statutes.

Because the Court has granted summary judgment over each of plaintiff's federal law claims, the Court declines to exercise supplemental jurisdiction over the plaintiff's claims under the New York Human Rights Law and dismisses the state law claims without prejudice.

As this decision dismisses all of the plaintiff's claims, the Clerk of the Court is directed to close this case.

SO ORDERED.

S.D.N.Y.,1999.

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