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Aug. 26, 2002.

Duncan v. New York City Transit Authority  
C.A.2 (N.Y.),2002.

This case was not selected for publication in the Federal Reporter. RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: " (SUMMARY ORDER)", UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED. Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 s 0.23.)

United States Court of Appeals, Second Circuit.  
Sheila DUNCAN, Plaintiff-Appellant,

v.

NEW YORK CITY TRANSIT AUTHORITY and  
Manhattan and Bronx Surface Transit Operating  
Authority, Defendants-Appellees.

Docket No. 01-7198.

Public transit authority employee, who was over 40 years old when terminated as part of reduction in force (RIF), sued authority for, inter alia, age discrimination. The United States District Court for the Eastern District of New York, Nina Gershon, J., 127 F.Supp.2d 354, granted summary judgment for transit authority, and employee appealed. The Court of Appeals held that evidence did not support inference that age was factor in termination decision.

Affirmed.

West Headnotes

[1] Civil Rights 78 ⇨1207

78 Civil Rights

78II Employment Practices

78k1199 Age Discrimination

78k1207 k. Public Employment. Most

Cited Cases

(Formerly 78k171)

Public transit employee, terminated as part of division-wide reduction in force (RIF), failed to establish age discrimination claim; scoring system used to determine terminations had not resulted in disproportionate rejection of older workers, employee's score closely matched her previous performance evaluations, and workers hired by authority post-termination possessed skills which employee did not have. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[2] Civil Rights 78 ⇨1539

78 Civil Rights

78IV Remedies Under Federal Employment  
Discrimination Statutes

78k1534 Presumptions, Inferences, and  
Burden of Proof

78k1539 k. Age Discrimination. Most

Cited Cases

(Formerly 78k380)

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Public transit authority's failure to rehire laid-off worker for positions which opened eighteen months after her termination, which was six months after her priority consideration eligibility period expired, did not support inference that her termination was motivated by age discrimination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

Appeal from the United States District Court for the Eastern District of New York (Nina Gershon, Judge).

Joel Field, White Plains, NY, for Appellant.  
 Dorothea W. Regal, Hoguet Newman & Regal, LLP, New York, NY, for Appellees.

Present WINTER, F.I. PARKER and POOLER, Circuit Judges.

#### SUMMARY ORDER

**\*\*1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said District Court be and it hereby is AFFIRMED.**

Plaintiff-appellant Sheila Duncan ("Duncan") appeals from the district court's judgment granting summary judgment in favor of defendants-appellees New York City Transit Authority ("NYCTA") and Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA"). Duncan had brought suit against her former employers, who had terminated her employment after twenty-four years pursuant to a division-wide reduction in force ("RIF"), for alleged discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq., and the New York State Human Rights Law ("HRL"), New York State Executive Law §§ 290 et seq., and on the basis of race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the HRL. Duncan appeals the district court's judgment only as to her age discrimination claims. We review the district court's grant of summary judgment de novo. *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir.1998).

Duncan argues that the district court erred in granting summary judgment in favor of NYCTA and MaBSTOA because she set forth sufficient evidence from which a jury could have rationally concluded that her termination was motivated, at least in part, by age discrimination. We disagree.

A plaintiff who was discharged pursuant to a RIF must prove the following to establish a prima facie case of disparate treatment: (1) she belongs to a protected class, (2) she was performing satisfactorily, (3) she was discharged, and (4) the decision to discharge occurred under circumstances giving rise to an inference of discrimination based on her membership in the protected class. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994). Once a plaintiff makes a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for the termination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir.1999). If the employer does so, then the presumptions established by the prima facie case fall away, and the plaintiff "must demonstrate by a preponderance of the evidence that the stated reasons are merely a pretext for discrimination." *Levin v. Analysis & Tech., Inc.*, 960 F.2d 314, 317 (2d Cir.1992). "In meeting this ultimate burden, an ADEA plaintiff need not show that age was the only factor in the employer's discharge decision, but [only] that age was a determinative factor." *Id.*

We assume arguendo that Duncan set forth a prima facie case. In response, the defendants-appellees proffered a legitimate, non-discriminatory reason for the termination: a division-wide RIF. An RIF may be a legitimate, non-discriminatory reason for termination. *Parcinski v. Outlet Co.*, 673 F.2d 34, 36-37 (2d Cir.1982) ("The [ADEA] does not forbid essential corporate belt-tightening having no discriminatory motivation... The [ADEA] does not authorize the courts to judge the wisdom of a corporation's business decisions."). *But see Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir.1983) ("[E]ven during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful

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discriminatory reasons.”). Thus, the burden shifted back to Duncan to prove that the RIF was pretext and, in fact, she was terminated because of her age.

\*\*2 [1] To rebut the proffered, nondiscriminatory reason for her termination, Duncan argued that there are three good reasons why a jury could conclude that the RIF rating was pretext. First, Duncan relied on the failure rates of age-protected employees as evidence that the rating system used by defendants-appellees to determine which employees would be terminated was applied prejudicially against age-protected procurement specialists like herself. Yet the number of failing employees was in this case, as it is usually, too small to produce statistically reliable results. *EEOC v. Joint Apprenticeship Comm.*, 164 F.3d 89, 97 (2d Cir.1998). More telling is the ratio of passing age-protected employees to passing non-age-protected employees, which was 97%. Duncan's statistics do not support an inference of age discrimination.

Duncan also takes issues with the points she received in the RIF ranking. The fact that Duncan's RIF ranking matches closely with her previous performance evaluations undercuts Duncan's argument that her RIF ranking was discriminatory.

Next, Duncan argues that the transfer and hiring of non-age protected procurement specialists prior to and after the RIF indicates that her termination was discriminatory. As for those brought into Materiel prior to the RIF, Duncan has offered no evidence that those responsible for hiring or transferring the non-age-protected procurement specialists knew, at the time they decided to bring in the new procurement specialists, whether the RIF would be implemented later that year and, if so, how many positions would be eliminated as a result. As for the procurement specialist who began work shortly after Duncan received notice of her termination, the record indicates that new employee was specifically brought in for special outsourcing \*17 skills which Duncan did not possess. These transfer and hiring decisions do not support an inference of age discrimination.

[2] Lastly, Duncan argues that defendants-appellees'

failure to consider or rehire her in 1997 or 1998 indicates that her termination was discriminatory. We assume, for the sake of argument, that Duncan did apply for the openings in 1997 and 1998. An inference of discrimination might have been raised had defendants-appellees failed to rehire Duncan shortly after terminating her. *See Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1226-27 (2d Cir.1994) (denying employer's motion for summary judgment where, among other factors, employer failed to rehire plaintiff within nine months of her RIF termination). The positions for which Duncan complains she was not rehired opened a minimum of eighteen months after she was terminated and six months after her post-termination priority consideration eligibility period expired pursuant to the defendants-appellees' policy. We agree with the district court that this long temporal gap between Duncan's termination and the defendants-appellees' decision not to rehire Duncan does not support an inference of age discrimination.

\*\*3 For the reasons set forth above, the judgment of the district court is AFFIRMED.

C.A.2 (N.Y.),2002.  
 Duncan v. New York City Transit Authority  
 45 Fed.Appx. 14, 2002 WL 1964401 (C.A.2 (N.Y.))

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United States District Court,  
E.D. New York.

**Sheila DUNCAN, Plaintiff,**

v.

**NEW YORK CITY TRANSIT AUTHORITY and  
Manhattan and Bronx Surface Transit  
Operating Authority, Defendants.**

**No. 97 CV 4651(NG).**

Jan. 24, 2001.

African-American former employee of transit authority, who was over 40 years old and was terminated as part of reduction in force (RIF), sued former employer under Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law. Former employer moved for summary judgment. The District Court, Gershon, J., held that: (1) former employee failed to show disparate impact on protected groups of which she was member, resulting from RIF; (2) former employee failed to show disparate treatment based on fact that her scores on scale devised for RIF purposes was lower than her most recent pre-RIF evaluation; (3) no disparate treatment occurred when employee transferring into her department shortly before RIF was retained, while she was terminated; (4) there was no disparate treatment when employee with negotiating skills she lacked was hired shortly after RIF; and (5) there was no disparate treatment arising from fact that she was not hired to fill vacancies occurring two and three years after RIF.

Judgment for former employer.

West Headnotes

**[1] Civil Rights** ⇨ 153  
78k153

**[1] Civil Rights** ⇨ 168.1  
78k168.1

Claimant seeking to establish claim of "disparate impact" discrimination, under Title VII, Age Discrimination in Employment Act and New York Human Rights Law, must show that facially neutral employment practice falls more harshly on protected group. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621

et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

**[2] Civil Rights** ⇨ 153  
78k153

**[2] Civil Rights** ⇨ 168.1  
78k168.1

Claimant seeking to establish claim of "disparate treatment" discrimination, under Title VII, Age Discrimination in Employment Act and New York Human Rights Law, must show that employer intentionally discriminated against member of protected class. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

**[3] Civil Rights** ⇨ 153  
78k153

**[3] Civil Rights** ⇨ 168.1  
78k168.1

In order to establish a prima facie case of disparate impact employment discrimination, under Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law, claimant must demonstrate that she is member of protected class, and challenged employment practice had significant disparate impact on that class, so as to evidence causal connection between specific factor challenged and disparate impact. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

**[4] Civil Rights** ⇨ 153  
78k153

**[4] Civil Rights** ⇨ 168.1  
78k168.1

Under the disparate impact theory for establishing employment discrimination under Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law, proof of disparity

can be demonstrated through statistical analysis which compares impact of particular employment action on protected class with impact upon qualified employees in relevant labor pool. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

[5] Civil Rights ⇨382.1  
78k382.1

[5] Civil Rights ⇨388  
78k388

[5] Civil Rights ⇨453  
78k453

Claimant can prove employment discrimination through significant disparate impact, under Title VII, Age Discrimination in Employment Act (ADEA) or New York Human Rights Law, either through showing of gross statistical disparity between protected and nonprotected classes in relevant employment pool, or statistically significant adverse impact coupled with other evidence of discrimination.

[6] Civil Rights ⇨153  
78k153

[6] Civil Rights ⇨171  
78k171

African-American transit employee, who was over 40, did not state claim for disparate impact employment discrimination, under Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law, by claiming that scoring system used to determine terminations pursuant to reduction in force (RIF) resulted in disproportionate rejection of older and African-American workers; relevant comparison was with larger groups which survived RIF, in which ratio of passing African-American to passing non African American workers was 97% and ratio of passing age protected to passing non age-protected workers was 94%. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's

Executive Law § 290 et seq.

[7] Civil Rights ⇨153  
78k153

[7] Civil Rights ⇨170  
78k170

To establish employment discrimination based on disparate treatment, in violation of Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law, claimant must show (1) she belongs to a protected class, (2) she was performing satisfactorily, (3) she was discharged, and (4) decision to discharge occurred under circumstances giving rise to inference of discrimination based on her membership in protected class. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

[8] Civil Rights ⇨153  
78k153

[8] Civil Rights ⇨171  
78k171

African-American transit authority employee, who was over 40 years old, failed to establish that she was subjected to disparate treatment, in violation of Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law, when she was terminated pursuant to reduction in force (RIF) based upon significantly lower RIF evaluations than those achieved in pre-RIF evaluation; she received "good" overall ratings on both, and was scored comparably on subcategories of performances on both evaluations. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

[9] Civil Rights ⇨153  
78k153

[9] Civil Rights ⇨171  
78k171

Transit authority's transfer of two new employees into complaining employee's area, both of whom were outside of protected categories, when reduction in force (RIF) was imminent, and retention of those employees after RIF while protected complaining employee was terminated, did not establish disparate treatment in violation of Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law; new employees were subjected to grading process applied to all employees pursuant to RIF, and outsourced complaining employee. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

[10] Civil Rights ☞ 153  
78k153

[10] Civil Rights ☞ 171  
78k171

Transit authority's hiring of new employee, who was not member of any protected class, shortly after protected complaining employee was terminated pursuant to reduction in force (RIF), did not establish disparate treatment in violation of Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law; new employee had negotiating expertise that complaining employee lacked. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

[11] Civil Rights ☞ 153  
78k153

[11] Civil Rights ☞ 171  
78k171

Failure of transit authority to rehire black former employee, who was over 40 years old, after her termination pursuant to reduction in force (RIF), did not establish disparate treatment under Title VII, Age Discrimination in Employment Act (ADEA), and New York Human Rights Law; two to three years passed between RIF and new hirings, allowing for many intervening business considerations, and former employee failed to establish that she formally

applied for positions in question. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law § 290 et seq.

\*357 Joel Field, New York City, for plaintiff.

Dorothea Regal, Hoguet Newman & Regal, LLP, New York City, for defendants.

### ORDER

GERSHON, District Judge.

Plaintiff Sheila Duncan brings this action against defendants New York City Transit Authority, and Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA") (collectively "Transit"), alleging discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") as amended, 29 U.S.C. §§ 621 et seq., and the New York State Human Rights Law ("HRL"), New York State Executive Law §§ 290 et seq.; and discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") as amended, 42 U.S.C. §§ 2000(e) et seq., and the HRL.

Defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56(b) dismissing plaintiff's claims in their entirety. Defendants argue that plaintiff has failed to establish a prima facie case of age or race discrimination in violation of the ADEA, Title VII and the HRL, and, alternatively, that plaintiff cannot show that the stated legitimate, non-discriminatory reason for her termination was a pretext for discrimination.

### Facts

Unless otherwise indicated, the following facts are undisputed.

Plaintiff Sheila Duncan is an African-American female who was born on January 12, 1949. Plaintiff has a High School diploma, but did not attend college. She began working for MaBSTOA, a subsidiary of the New York City Transit Authority, on February 22, 1971, as a clerk typist in the Personnel Department of the Materiel Division ("Materiel"). Then on August 25, 1971, plaintiff was transferred to the Purchasing Department of

Materiel, where she remained until her termination in 1995. During her employment, plaintiff was promoted from clerk typist, to assistant buyer, to buyer, to senior buyer, to supervising buyer, and finally to procurement specialist. In 1994, Bonnie Hickey, plaintiff's supervisor, carried out a series of evaluations. On three occasions, plaintiff received a good, the second highest score on a scale of four, for her job quality, initiative, and overall performance. On two evaluations, under the heading "initiative," Ms. Hickey comments that plaintiff shares ideas and suggestions, and on the third evaluation, Ms. Hickey comments that "[w]hen called upon, Ms. Duncan will offer suggestions and ideas." However, in 1987, plaintiff was disciplined for tardiness. Further, in March 1995, Ms. Hickey reprimanded plaintiff for excessive absenteeism, and reduced plaintiff's paycheck, because plaintiff took approximately 9 sick days in 1990; 18 sick days in 1991; 24 sick days in 1992; 19 sick days in 1993; 22 sick days in 1994; and 10 sick days in the first half of 1995.

On July 1, 1995, plaintiff and five other procurement specialists were terminated pursuant to a reduction in force ("RIF"). Earlier that year, Materiel had determined that it would eliminate 6 of its 115 procurement specialists to comply with a general RIF that Transit was carrying out for budgetary reasons. In order to make these cuts, defendants set up an RIF Task Force, which in turn designed a ranking system. The ranking system gave job knowledge, education, experience, and computer skills a weight of 5 each; absenteeism, communication, initiative, and analytical and interpersonal skills a weight of 10 each; and quality and quantity of output a weight of 15 each. The ranking system then gave employees a score of one

to eight in each category, and multiplied \*358 that score by the category's weight. Finally, the ranking system added the weighted scores in each category, and terminated the six employees with the lowest total scores. In weighing education, college graduates received a good or better (over 25 points); employees with some college work but not a degree received a marginal (15 to 20 points), and employees with only a high school education received a poor (10 points). In weighing experience, the ranking system equated experience acquired in Materiel with other transit experience.

Plaintiff tied for the sixth lowest overall score at 450. Her weighted scores in each category were as follows: education (10); experience (30); absenteeism (10); computer skills (25); job knowledge (25); communication skills (50); analytical skills (50); interpersonal skills (60); quantity of output (75); quality of output (75); and initiative (40). Because plaintiff challenges her quality of output and initiative scores as inconsistent with her previous rankings, I note that the quality of output score corresponds to a "good," which is the second highest score on a scale of four, and plaintiff's initiative score corresponds to a "marginal," the third highest score, which describes an employee who "[f]requently avoids more difficult assignments. More comfortable with status quo. Occasionally extends his/her role with prodding." Thus, on June 7, 1995, defendants' informed plaintiff that she would be terminated at the end of the month.

The number of procurement specialists of each class (and the percentage of Materiel procurement specialists of each class) before and after the RIF were:

	Before the RIF	After the RIF
African-American	41 (36%)	37 (34%)
Non-African-American	74 (64%)	72 (66%)
Age-Protected	62 (54%)	58 (53%)
Non-Age-Protected	53 (46%)	51 (47%)

Thus, 90% of African-American procurement specialists in Materiel passed the RIF, while 97% of non-African-American procurement specialists in Materiel passed. The ratio of African-American procurement specialists who passed to non-African-American procurement specialists who passed is

93%. In addition, 93% of age-protected procurement specialists in Materiel passed the RIF, while 96% of non-age-protected procurement specialists in Materiel passed. The ratio of age-protected procurement specialists who passed to non-age-protected procurement specialists who

passed is 97%.

Plaintiff, rejecting the significance of these figures, relies on the fact that, of the six terminated procurement specialists, four were African-

American, and four were age-protected. Further, plaintiff relies on the fact that the number of Materiel procurement specialists of each class (and the percentage of that class) with a college degree prior to the RIF was:

	College Graduate	Not College Graduate
African-American	20 (49%)	21 (51%)
Non-African-American	55 (74%)	19 (26%)
Age-Protected	32 (52%)	29 (48%)
Non-Age-Protected	43 (80%)	11 (20%)

\*359 While the Task Force was in place, Materiel hired two non-African-American and non-age-protected procurement specialists. Transit hired Mr. Havaldar straight into Materiel on January 9, 1995, and transferred Mr. Nisnevich into Materiel on April 22, 1995. However, Materiel evaluated both new employees under the RIF. Further, on June 12, 1995, several days after plaintiff was informed of her termination, defendants transferred Carlos Torres, a non-African-American, non-age-protected procurement specialist, into Materiel. However, Mr. Torres was hired as a negotiator for his outsourcing skills, which plaintiff did not possess. Pursuant to Transit policy, plaintiff received a one year hiring preference, but there were no vacancies between June 1995 and June 1996. Several times in 1997 and 1998, Materiel sought applications for procurement specialists. Materiel hired six new procurement specialists and rehired one specialist who had been laid off under the RIF. Six of the seven new procurement specialists were non-African-Americans, and six of the seven new procurement specialists were non-age-protected.

Plaintiff alleges that she applied for several of these positions. In her deposition, plaintiff states that she "probably" applied for three positions that were not limited to current employees. However, there is no documentary evidence that plaintiff applied as required by the employer. She was represented by an attorney during the period that Transit was seeking applications. Her attorney wrote a letter to Transit requesting priority for his client in obtaining these positions. Plaintiff's counsel also stated that "this letter is to be considered as an application by Sheila Duncan for each and every vacant procurement position in the Materiel Division." Transit responded that, pursuant to Transit policy, plaintiff received priority in rehiring only for one

year and that, if she wished to apply, she would have to follow procedure and submit a formal written application for each position. However, plaintiff supplies no documentation that plaintiff did so.

#### Discussion

##### Summary Judgment Standard

Motions for summary judgment are granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir.1995). The moving party must demonstrate the absence of any material factual issue genuinely in dispute. *See id.* The court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, the non-moving party may not "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir.1986). The party must produce specific facts sufficient to establish that there is a genuine factual issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In a discrimination action such as this, it is important to note that:

[a] victim of discrimination is ... seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence .... Consequently, in a Title VII action, where a defendant's intent and state of mind are placed at issue, summary judgment is ordinarily

inappropriate.

*Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir.1991) (citations omitted). On the other hand, "[t]he summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985).

**\*360 Race and Age Discrimination Under Title VII, the ADEA, and the HRL**

[1][2] Plaintiff proceeds under both disparate impact and disparate treatment theories. Under a disparate impact theory, a plaintiff must show that a facially neutral employment practice falls more harshly on a protected group. Under a disparate treatment theory, a plaintiff must prove that an employer intentionally discriminated against a member of a protected class. *See Dist. Council 37, American Fed. of State, County & Municipal Employees, AFL-CIO v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir.1997). The standard of proof governing an employment discrimination claim raised under the New York HRL is the same as the standard of proof for a Title VII or an ADEA claim. *See Sogg v. American Airlines, Inc.*, 193 A.D.2d 153, 155-56, 603 N.Y.S.2d 21 (1st Dep't 1993).

[3][4][5] **1. Disparate Impact:** While the Supreme Court has not yet decided whether the disparate impact doctrine applies to ADEA claims, *See Hazen Paper v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Second Circuit continues to hold that disparate impact claims can be made under the ADEA. *See Dist. Council 37*, 113 F.3d at 351. In order to establish a prima facie case, plaintiff must demonstrate that 1) she is a member of a protected class; and 2) a challenged employment practice had a significant disparate impact on that class, so as to evidence a causal connection between the specific factor challenged and the disparate impact. The burden then shifts to the employer to show that the challenged practice had a legitimate purpose. Finally, if the defendant meets this burden, the plaintiff must show that the proffered purpose is pretextual. *See Fernandez v. U.S. Postal Service*, 804 F.Supp. 448, 452 (E.D.N.Y.1992); *Dist. Council 37*, 113 F.3d at 351-52. Under the disparate impact theory, proof of a disparity can be demonstrated through statistical

analysis which compares the impact of a particular employment action on a protected class with the impact upon qualified employees in the relevant labor pool. *See Diehl v. Xerox Corp.*, 933 F.Supp. 1157, 1165 (W.D.N.Y.1996). An employer has the "right to decide the qualifications it require[s]" in deciding which employees to terminate, so long as the terminations do not have a disparate impact. *Florence v. U.S. Vanadium Corp.*, 162 F.3d 1147, 1998 WL 639395, \*3 (2d Cir.1998). A plaintiff can prove significant disparate impact either through gross statistical disparity, or a statistically significant adverse impact coupled with other evidence of discrimination. *See Fernandez*, 804 F.Supp. at 452.

[6] Plaintiff is an African-American who is over forty years of age. Plaintiff argues that, as a result of the RIF giving education and experience the same weight, and its equating of internal experience with external experience, the RIF had a disparate impact on African-Americans and employees over forty years of age. Plaintiff relies on the administrative four-fifths rule of the Equal Employment Opportunity Commission. This rule, which has been looked to for guidance in gauging the significance of statistical evidence of discrimination, *Equal Employment Opportunity Commission v. Joint Apprenticeship Comm.*, 164 F.3d 89, 97 (2d Cir.1998), states that:

A selection rate for any race, sex, or ethnic group which is less than four-fifths ( 4/5 ) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nonetheless constitute adverse impact, where they are significant in both statistical and practical terms ....

*Id.*; 29 C.F.R. § 1607.4D. Plaintiff argues that the ratio of age-protected procurement \*361 specialists with a college education to non-age-protected procurement specialists with a college education prior to the RIF was 65%, and the ratio of African-American procurement specialists with a college education to non-African-American procurement specialists with a college education was 66%. Since both rates are below the 80% required by the four-fifths rule, plaintiff argues there is evidence of an adverse impact.

This is a misapplication of the four-fifths rule because the relevant selection factor is the pass rate of the RIF as a whole. When a component of an overall selection process is not dispositive, "the selection process as a whole, rather than any segment of it, should be examined for disproportionate impact in a Title VII case," because to "examine each component of an entire application process ... launches a court on a course that has no boundaries and no clear end.... The prospect of a court's examining subtests, sub-subtests, and even individual questions within test segments argues in favor of examining only the end result of an entire [ ] process." *Brown v. New Haven Civil Service Bd.*, 474 F.Supp. 1256,1261-62 (D.Conn.1979). A subtest is the relevant selection factor where the subtest is dispositive, but where "all of the candidates participate in the entire [employment] process, and the overall results reveal no significant disparity of impact, scrutinizing individual [steps] would, indeed, 'conflict[ ] with the dictates of common sense.'" *Dist. Council 37*, 113 F.3d at 353 (citation omitted). In this case, college education was not dispositive because the RIF was a multi-component process where an employee, who lacked a college education and thus received a low education score, was nevertheless not precluded from passing the overall test by scoring well in other components. Nor does *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370 (2d Cir.1991), compel a different result because, in that case, the test at issue was both a dispositive step, and a factor in the overall score. See *Dist. Council 37*, 113 F.3d at 354.

In addition, plaintiff improperly relies upon the fail rate. The pass rate compares the number of protected employees who pass a test to the number of non-protected employees who pass the test. The Second Circuit has held that this method, rather than comparing the number of protected employees who fail a test to the number of non-protected employees who fail a test, should be used because the number of failing employees is usually too small to produce statistically reliable results. See *Joint Apprenticeship Comm.*, 164 F.3d at 97. Using the fail rate would produce a statistically unreliable result in this case, where only six employees were terminated. See *Pulitzer v. New Hartford Central Schools*, 1998 WL 187410 \*5-\*6 (N.D.N.Y.1998) (granting defendant's summary judgment motion in an ADEA case because a sample of six is too small

to be of probative value). While the fact that two-thirds of the terminated employees were African-American, and two-thirds were age-protected, initially may appear significant, the probative value of this evidence "is greatly diminished by the small number of people involved." *Coleman v. Prudential Relocation*, 975 F.Supp. 234, 240, 245 (W.D.N.Y.1997). The ratio of passing African-Americans to passing non-African-Americans is 93%, and the ratio of age-protected employees to non-age-protected employees is 97%. Both these ratios are above the 80% required by the four-fifths rule to show an adverse impact. Since this is the only statistical evidence plaintiff offers of disparate impact, plaintiff has failed to show a material factual issue genuinely in dispute as to a prima facie case under this theory.

In any event, even if plaintiff could make a prima facie showing of disparate impact, plaintiff fails to show a genuine issue of material fact to support her claim that her termination was pretextual. Defendants have shown a legitimate business reason for terminating the six procurement specialists, \*362 namely budgetary constraint. A "reduction-in-force and reorganization of staff constitutes a legitimate nondiscriminatory reason for employment related decisions....[but] even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons." *Maresco v. Evans Chemetics*, 964 F.2d 106, 111 (2d Cir.1992) (quotation omitted). The small changes in the composition of Materiel's workforce is clearly insufficient to show that this legitimate business reason was a pretext. See *Thayne v. New York State Electric & Gas Corp.*, 1997 WL 727617 \*8 (N.D.N.Y.1997). Thus, defendants are entitled to summary judgment under a disparate impact theory.

[7] **2. Disparate Treatment:** Under disparate treatment analysis, a plaintiff first must establish a prima facie case of disparate treatment by demonstrating that: (1) she belongs to a protected class; (2) she was performing satisfactorily; (3) she was discharged; and (4) the decision to discharge occurred under circumstances giving rise to an inference of discrimination based on her membership in the protected class. See *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir.1994). Once a prima facie case has been made, the employer must articulate a legitimate, non-

discriminatory reason for having taken the action of which the plaintiff complains. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If this is done, the *McDonnell Douglas* presumptions disappear, and the governing standard is whether the particular evidence, taken as a whole, reasonably supports an inference of the facts plaintiff must prove, particularly intentional discrimination. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000); *James v. New York Racing Assoc.*, 233 F.3d 149, 156-57 (2d Cir.2000). Plaintiff must "establish a genuine issue of material fact either through direct, statistical or circumstantial evidence as to whether the employer's reason for discharging her is false and as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision." *Gallo v. Prudential Residential Services Ltd., Partnership*, 22 F.3d 1219, 1225 (2d Cir.1994). Evidence satisfying the prima facie requirement, coupled with evidence of the falsity of the employer's explanation, may or may not be sufficient to satisfy a finding of discrimination in a particular case. The factors to consider include the strength of plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and other evidence that supports or undermines the employer's case. See *Reeves*, 120 S.Ct. at 2109; *James*, 233 F.3d at 156-57.

Even assuming that plaintiff makes a prima facie case of discrimination, the requirements of which are minimal, defendants, as described above, have proffered a legitimate reason for terminating plaintiff. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Thus, the issue is whether the circumstances will logically support an inference that plaintiff's age or race was a substantial motivating factor in defendants' decision to terminate her. See *Burger v. New York Institute of Technology*, 94 F.3d 830, 834 (2d Cir.1996).

[8] Plaintiff points to four circumstances that she claims logically support an inference of discrimination. First, plaintiff points to discrepancies between plaintiff's 1994 performance evaluations and her score on the 1995 RIF regarding

her job quality and initiative. The first alleged discrepancy cannot be sustained because plaintiff received a "good" for job quality on both her performance evaluations and the RIF. As for her initiative, plaintiff received a good on her performance evaluations, but a raw score of four on the RIF. Four is "marginal" on the \*363 RIF, but only one point below good. Furthermore, the descriptions underlying these labels reveal no discrepancy sufficient to reasonably support a conclusion that plaintiff's RIF ranking was motivated in substantial part by discrimination. The RIF's description of a marginal employee as one who often avoids difficult assignments and occasionally extends her role with prodding is not significantly inconsistent with the comments plaintiff received on her performance evaluations, which include Ms. Hickey's comment that "[w]hen called upon, Ms. Duncan will offer suggestions and ideas."

[9] Second, plaintiff argues that a jury could reasonably infer that discrimination was a substantial motivating factor from Materiel's hiring of Mr. Havaladar and transfer of Mr. Nisnevich, both non-African-American and non-age-protected procurement specialists, when Materiel knew it would be making terminations pursuant to the RIF. Plaintiff acknowledged at oral argument that Mr. Havaladar and Mr. Nisnevich filled vacancies. No inference of discrimination can be drawn from the fact that defendants made a business decision to fill vacancies. Furthermore, unlike in *Burger*, 94 F.3d at 834, the RIF would have occurred whether or not Mr. Havaladar and Mr. Nisnevich came into Material. Finally, defendants treated plaintiff the same as Mr. Havaladar and Mr. Nisnevich, because it subjected them all to the same rating process. See *McDonnell Douglas*, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668.

[10] Third, plaintiff argues that transferring Mr. Torres, a non-African-American and non-age-protected employee, into Materiel several days after plaintiff received notice of her termination suggests that defendants acted with a discriminatory motive. Defendants offer evidence that Materiel hired Mr. Torres as a negotiator because of his outsourcing skills, which plaintiff did not possess. Plaintiff offers no evidence to demonstrate that plaintiff was qualified for Mr. Torres' position. Since Mr. Torres and plaintiff were not similarly situated and plaintiff has not even shown she was qualified for

the position he received, the transfer of Mr. Torres does not support a reasonable inference that intentional discrimination was a substantial motivating factor in plaintiff's termination. See *McDonnell Douglas*, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668.

[11] Fourth, plaintiff argues that defendants' failure to rehire plaintiff when defendants had procurement specialist vacancies in 1997 and 1998 supports an inference that discrimination was a substantial motivating factor in her termination. Plaintiff does not raise an independent claim of failure to rehire. Rather, she argues that defendants' failure to hire plaintiff when openings became available is circumstantial evidence that discrimination was a substantial motivating factor in the earlier decision to terminate her. However, defendants' business decision to hire seven employees two to three years after plaintiff's termination does not circumstantially and retroactively reflect on defendants' earlier decision to terminate plaintiff. "That an employer reconsiders its business strategy and consequently rehires an employee ... does not, without more, cast any doubt on the economic justification for the earlier termination." *Florence*, 1998 WL 639395, \*3. *Gallo*, 22 F.3d at 1227, does not compel a contrary conclusion because defendants undertook no obligation to rehire plaintiff beyond one year in

this case. See *Viola v. Philips Medical Systems of North America*, 42 F.3d 712, 718 (2d Cir.1994) (declining to apply *Gallo* where an employer undertook no obligation to rehire a former employee).

Furthermore, these subsequent hirings do not support a discrimination claim because no reasonable fact-finder could conclude from the evidence taken as a whole that plaintiff applied for the subsequent openings. Although plaintiff was represented by counsel and her attorney was \*364 told she had to submit written applications, plaintiff failed to do so. In sum, no reasonable fact-finder could conclude that age or race discrimination was a substantial motivating factor in plaintiff's termination. There is no direct evidence of discrimination and the circumstantial evidence relied upon by plaintiff is insufficient.

#### Conclusion

Defendants' motion for summary judgment is granted, and the Clerk of Court is directed to enter judgment for defendants.

**SO ORDERED.**

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