IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE STRANGE, et al.,	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	
NATIONWIDE MUTUAL INSURANCE COMPANY, et al.,	:	
Defendants.	:	**NO. 93-6585**

M E M O R A N D U M

Reed, J. **August 21, 1997**

Plaintiffs Lawrence Strange, Howard Silver, Warren Pine, Edward Sheehan, and Samuel Vassallo have brought this action against defendants Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide General Insurance Company and Nationwide Property and Casualty Insurance Company (collectively "Nationwide"). Plaintiffs are asserting various claims arising out of the termination of their relationships as insurance agents with Nationwide, including a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1332, as the parties are of diverse citizenship and the amount in controversy is in excess of $50,000.00, exclusive of interest and costs.

Currently before this Court is the motion by defendants for summary judgment on the age discrimination claim in Count I of the amended complaint (Document No. 72). For the following reasons, the motion will be granted.

I. BACKGROUND

Plaintiffs are five former Nationwide insurance sales agents. Plaintiffs brought this action against Nationwide after their agency contracts with Nationwide were cancelled. At the time their agency contracts were cancelled in 1992, all five plaintiffs were over the age of

forty (40). Prior to filing this action, each plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") charging Nationwide with violation of the ADEA. The complaints of Lawrence Strange, Howard Silver, Warren Pine, and Edward Sheehan were referred to the EEOC for investigation; the EEOC dismissed their complaints, concluding that they were independent contractors and not employees within the meaning of the ADEA. The EEOC complaint of plaintiff Samuel Vassallo was dismissed because of the pendency of this action.

After filing their complaints with the EEOC and PHRC, the plaintiffs filed a complaint in this Court alleging that defendants discriminated against them on the basis of age when defendants cancelled their agency contracts. Plaintiffs also assert various other claims against defendants relating to the cancellation of the agency contracts and to the alleged basis for those cancellations. Specifically, Counts I and II of the amended complaint assert federal claims of age discrimination and violation of the federal Fair Housing Act, and Counts III, IV, V and VI of the amended complaint assert state claims of wrongful discharge,[1] fraudulent misrepresentation, breach of contract, and defamation.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable factfinder could return a verdict for the nonmoving party, and for a fact to be "material" it must be one "that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[1] Plaintiffs have apparently withdrawn their wrongful discharge claims.

The nonmoving party must produce evidence to support its position, and may not rest on conclusory allegations or bare assertions alone. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

III. DISCUSSION

In Count I of the amended complaint, plaintiffs state that Nationwide discriminated against them on the basis of age in violation of the ADEA when Nationwide terminated their employment. Nationwide argues that the ADEA only protects persons who are "employees" and that the plaintiffs were not employees but independent contractors.[2]

It is well settled that the ADEA protects only employees and not independent contractors. 29 U.S.C. § 623(a); E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 35 (3d Cir. 1983). Whether an plaintiff is an employee within the meaning of the ADEA is a question of law to be determined by the court in the absence of material disputed facts. See Cox v. Master Lock Co., 815 F. Supp. 844, 845 (E.D. Pa. 1993). Unfortunately, the ADEA defines "employee" in a less than helpful manner. See 29 U.S.C. § 630(f) ("'employee' means an individual employed by any employer"). The Supreme Court of the United States recently stated that as a general rule the common-law agency test should be used to define the term "employee" for the purposes of statutes which do not helpfully define the term. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992). While the Darden case involved ERISA, courts have extended this general rule to ADEA cases as well. See, e.g., Sempier v. Johnson & Higgins, 45 F.3d 724, 728 n.4 (3d Cir.) (implying that test adopted in Darden applies to ADEA cases), cert. denied, 115 S. Ct. 2611 (1995); Stouch v. Brothers of Order of Hermits of St. Augustine, 836 F. Supp. 1134, 1139 (E.D. Pa. 1993) (relying on Darden in explicitly adopting the common law agency test in the context of an ADEA claim).

The Supreme Court of the United States summarized the common-law agency test

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[2] In accordance with the Order of Magistrate Judge Angell of July 26, 1996 (Document No. 69), plaintiffs were permitted to depose three Nationwide managers on the issue of plaintiffs' employment status. The managers were Robert Leo ("Leo"), James Vajda ("Vajda"), and Steven Huebner ("Huebner").

in Darden:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-24 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (footnotes omitted)). This list of factors is nonexhaustive, as "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

Having considered all of the evidence of record, this Court concludes that this evidence, even when viewed in the light most favorable to plaintiff, establishes that, as a matter of law, plaintiffs were independent contractors. With regard to many of the factors contained in the common law test, control was shared between defendants and plaintiffs, with the balance tipping toward independent contractor status more often than not. In reaching this conclusion, I have applied the factors articulated by the Supreme Court in the common law agency test to the following analysis. In the interest of thoroughness, I have also included factors from the superseded Third Circuit test.[3] The results I reach today are the same under either test. For

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[3] Before Darden was decided, the Court of Appeals for the Third Circuit in E.E.O.C. v. Zippo Manufacturing Co. adopted a so-called hybrid test for determining whether an individual is an employee or independent contractor. Zippo, 713 F.2d at 38. This test combined the traditional test for common law agency with modern economic realities. Id. The Zippo court articulated the following factors for making this determination:

> (1) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties.

organizational purposes only, I have categorized the factors into four parts: intent of parties, right to control, nature of work, and compensation.

1. Intent of Parties

Where parties have reduced their agreement to writing, courts may ascertain the parties' intent by examining the writing. See Duquense Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995). Thus, I will begin my analysis by examining the Agent's Agreement, which each plaintiff entered into with Nationwide in either the mid or late 1980s.[4] While some provisions in the Agent's Agreement suggest employee status, namely that plaintiffs were required to "represent [Nationwide] exclusively in the sale and service of insurance,"[5] and plaintiffs, upon termination were subject to a restrictive covenant,[6] other provisions indicate independent contractor status, such as provisions stating that plaintiffs were to be paid on a commission basis[7] and that plaintiffs were expected to "pay all expenses in connection with [his] Nationwide insurance agency"[8] and "be responsible for securing and keeping in effect any required license to represent [Nationwide] as an agent."[9] While these provisions appear to neutralize one another, when considering the Agreement as a whole, the parties agreed to the

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Id. at 37.

[4] See Def. Exhs. A, B, C, D, and E.

[5] Agent's Agreement ¶ 4.

[6] Plaintiffs were prohibited from being "licensed as an agent, solicitor, representative, or broker, or from being in any way connected with the fire, casualty, health or life insurance business within a 25 mile radius of [their] last business location for a period of one year from the . . . cancellation of this Agreement . . . ."

Agent's Agreement ¶ 12.

[7] Agent's Agreement ¶ 7, 11.

[8] Agent's Agreement ¶ 2.

[9] Agent's Agreement ¶ 3.

independent contractor status of plaintiffs in light of the Agreement's provisions explicitly identifying each plaintiff as an "independent contractor" and stating that each plaintiff was to act in the capacity of an "independent contractor."[10]

The length of time in which plaintiffs were insurance agents for Nationwide, ranging from twelve years to thirty years,[11] is suggestive of an employer-employee relationship. However, because I find it clear that the intent of the parties was to establish an independent contractor relationship, the effect of the length of service is *de minimis*.

2. Right to Control

Overall, I find that plaintiffs were given wide latitude in the conduct of their insurance businesses and Nationwide's right to control the plaintiffs' performance was minimal. Each plaintiff maintained his own office, which was separate from the offices of other Nationwide sales agents as well as from Nationwide management. It is true that Nationwide sometimes restricted office locations geographically within a larger designated area or community.[12] However, plaintiffs were free to choose the exact building and location of their

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[10] The Agent's Agreement states, in pertinent part:

> Independent Contractor. The parties agree that the purpose of this Agreement will best be served by your acting as an independent contractor. Therefore, it is agreed that you are an independent contractor for all purposes. . . . As an independent contractor, you have the right to exercise independent judgment as to the time, place and manner of soliciting insurance, servicing policyholders, and otherwise carrying out provisions of this Agreement. . . . We may offer to you, from time to time, training, counsel and guidance based upon our accumulated experience in the sale and servicing of business. However, it is understood that you may reject or accept such offers at your discretion.

Agent's Agreement ¶ 1.

[11] See Pls. Exh. 7 (containing affidavits of plaintiffs). It is unclear from plaintiffs' affidavits and from their memorandum whether they were insurance agents for the entire period of time that they were with Nationwide. As noted earlier, the Agent's Agreements were entered into in the mid to late 1980s. Even assuming that plaintiffs were Nationwide sales agents since the mid to late 1980s, I find that this would still constitute a significant duration of a relationship between the parties.

[12] Pls. Exhs. 5, 6. For instance, at one point, Nationwide prohibited new or replacement agencies/offices in all of Philadelphia County and in some towns in Montgomery County. Id. The testimony of Huebner, however, demonstrates that this particular office location restriction implemented by Nationwide pertained to recruitment and placement of new employee agents; it did not address existing agencies and the ability of existing sales agents, like plaintiffs, to relocate their agencies. See Huebner Dep. at 195-97.

offices within the geographic boundaries set forth by Nationwide and plaintiffs were responsible for paying for their own office space.[13]

Plaintiffs exercised significant control over their office operations. Plaintiffs determined their daily work schedule and the length of hours worked. Nationwide neither required plaintiffs to work a set number of hours per week nor required them to be in their office at designated times. Plaintiffs were free to come and leave as they pleased.[14] Additionally, plaintiffs were generally free to determine how to search for and choose assistants.[15] Each plaintiff hired, paid and supervised his own office staff, with minimal input from Nationwide.[16] While plaintiffs' independence was curtailed by Nationwide's power to veto some hiring decisions,[17] Nationwide became involved in the hiring process when office staff sought to be licensed to sell Nationwide insurance. Associate agents and licensed agents had to be interviewed and endorsed by Nationwide to ensure that these individuals met the state licensing criteria. Efforts by Nationwide to ensure that its agents complied with state licensing criteria is not inconsistent with maintaining a company and independent contractor relationship. See North Am. Van Line, Inc. v. N.L.R.B., 869 F.2d 596, 599 (D.C. Cir. 1989).

As noted earlier, the Agent's Agreement expressly provided that plaintiffs "will

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[13] See Pine Dep. at 32-34 (plaintiff decided on his own to move his office several times; defendants never required him to relocate his office); Silver Dep. at 43 (plaintiff moved his rented office several times based in part on suggestions from defendants); Strange Dep. at 47-50 (plaintiff decided on his own to move his office several times and purchased a building for use as one of his offices); Vassallo Dep. at 44-46 (plaintiff decided on his own to move his office several times).

[14] See Strange Dep. at 65; Sheehan Dep. at 52; Pine Dep. at 47; Vassallo Dep. at 62; Silver Dep. at 42-43.

[15] See Pine Dep. at 44-45 (describing how he hired wives of his friends to be his secretaries); Sheehan Dep. at 47-49 (describing how it was his decision to hire and choose a secretary); Silver Dep. at 40-41 (describing how he chose and hired a secretary with input from defendants); Strange Dep. at 63-64 (describing how he advertised for and chose assistants without input from defendants).

[16] See Strange Dep. at 63, 64; Silver Dep. at 40-41; Vassallo Dep. at 59; Pine Dep. at 45; Sheehan Dep. at 47-48.

[17] Pine Aff. ¶ 12 (Nationwide interviewed his choices as secretaries); Pine Dep. at 45 (same); Sheehan Aff. ¶¶ 15-17 (Nationwide instructed him to hire his first secretary, required that she be licensed by defendants, and had veto power over the associate agents he chose); Sheehan Dep. at 48-49 (Nationwide recommended that he hire a secretary and required that she be licensed by them); Silver Aff. ¶ 14 (Nationwide had veto power over associate agents and subjected them to rules and regulations imposed by Nationwide); Strange Aff. ¶¶ 11-12 (anyone he hired who provided quotes had to be approved and licensed by Nationwide); Vassallo Dep. at 60-61 (Nationwide interviewed the associate agents chosen by Vassallo and subjected them to their rules and regulations).

pay all expenses in connection with [their] Nationwide Insurance agency."[18] Plaintiffs were free to select the type and quantity of office furniture and equipment and they had to pay for those purchases.[19] Nonetheless, Nationwide did provide plaintiffs with some office supplies, such as pre-printed forms, stationery, memo pads, rubber stamps, paper, camera, film, manuals, directories, and sales literature,[20] all of which were considered the property of Nationwide and had to be returned upon cancellation of the Agent's Agreement.[21] I find these instances to be *de minimis*, however, when compared to the overall requirements of the Agreement that agent's pay their own business expenses. In their memorandum, plaintiffs also argue that Nationwide's Expense Reimbursement Allowance program ("ERA Program"), under which qualifying agents were entitled to reimbursement for office expenses incurred in the production of life insurance and also received business cards and stationary, demonstrates employee status.[22] I do not agree with Nationwide's characterization of the ERA program as payments for office expenses. Rather, the ERA Program falls under the category of award, incentive, and bonus programs, which are discussed in more detail infra.[23] Moreover, this is a reimbursement, not a payment, program. As such, sales agents retain independent judgment and responsibility for procuring office supplies and then seeking reimbursement for only a portion of those supplies that are eligible under the program and that are related exclusively to the sale of life insurance. For these reasons, I find

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[18] Agent's Agreement ¶ 2.

[19] See Strange Dep. at 62; Sheehan Dep. at 46-47; Pine Dep. at 43-44; Vassallo Dep. at 58; Silver Dep. at 39-40.

[20] Sheehan Dep. at 47; Leo Dep. at 110, 118, 205, 210, 253; Huebner Dep. at 198.

[21] Leo Dep. at 323; Agent's Agreement ¶ 1.

[22] See Leo Dep. at 207-08; Pls. Exh. 9.

[23] See id. A Nationwide informational release on the ERA Program states, in pertinent part:

> The ERA Program is designed to emphasize quality and quantity life production and to *reward* those Nationwide career agents who have produced quality life insurance business.

Pls. Exh. 9 (emphasis added).

that the ERA Program did not curtail the independent judgment, or represent control of sales, strategies or techniques of plaintiffs by Nationwide in any way.

Plaintiffs had substantial latitude to advertise. For advertisements paid fully by plaintiffs, plaintiffs were free to control their advertising strategy in terms of content and where and when to advertise. For example, Strange advertised in the yellow pages, Vassallo advertised in the yellow pages and the telephone directory, Sheehan sponsored school sports teams, Pine advertised on the radio, and Silver advertised under his own name without the Nationwide logo, all of which was done without any pre-approval from Nationwide.[24] Nationwide offered a separate "cooperative advertising" program, which, if elected by plaintiffs, provided fifty percent reimbursement for advertisements that were approved by Nationwide and that met certain requirements.[25] Plaintiffs argue that Nationwide's involvement here indicates employee status. However, I observe that these requirements did not disturb the general Nationwide policy of allowing sales agents to make their own decisions as to advertising, and were only imposed under the separate cooperative advertising program, which plaintiffs were free to decline. Thus, I find that the cooperative advertising program does not indicate employee status. See Oestman v. National Farmers Union Ins., 958 F.2d 303, 306 (10th Cir. 1992) (requirement that agents receive permission from insurance company before advertising company's products did not create

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[24] See Strange Dep. at 64; Sheehan Dep. at 51; Vassallo Dep. at 61-62; Pine Dep. at 46; Silver Dep. at 41-42.

[25] Plaintiffs would have to comply with the following requirements under the cooperative advertising program:

> **Newspapers and Magazines**- daily, weekly, or monthly; they must have home delivery (carrier or mail) and have a paid circulation base that can be verified by an independent source.
> **Radio and TV**- requires prior approval from our Agent Advertising Department on all contracts (13 weeks or longer).
> **Billboards**- 30-sheet and 8-sheet posters require contracts from only full-service outdoor advertising companies.
> **Shelterall Signs**- can be used only in accordance with advertising companies that offer Shelterall Signs. (Shelterall Signs are not available in all states.)
> **Publications**-sports and theatrical programs; real estate, bank, school, church, neighborhood, civic, and fraternal publications.

Pls. Exh. 10 (1991-92 Advertising Guide).

employee status because company could be held liable for agent's misstatements or misrepresentations).

Plaintiffs argue extensively in their memoranda that Nationwide's voluminous meetings with sales agents and reports of their productivity demonstrate Nationwide's continuous and ample control over plaintiffs. It is true that Nationwide management met frequently in the field and elsewhere with sales agents[26] and that Nationwide issued numerous, periodic sales reports on each agent and on the operating regional districts, all of which reflected sales production.[27] In fact, one Nationwide manager published quarterly the "Honor Roll," which ranked the top twenty-five agents in terms of production.[28] It is also true that Nationwide required each plaintiff to use an automated computer system whereby information was retrieved daily regarding changes to a customer's file or coverage and other information relating to policy production.[29]

I find that these meetings, reports, and information exchanges were aimed at achieving profitable results for Nationwide, and did not control "the manner and means" by which plaintiffs reached the results which Nationwide was monitoring by these devices. Meetings and reports, no matter how copious, that serve to monitor, evaluate, and improve the sales production of agents will not establish employee status. See E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 38 (3d. Cir. 1983) (holding that monitoring of agent's sales did not amount to supervision over agent's work performance); Samson v. Harvey's Lake Borough, 881 F. Supp. 138, 143 (M.D. Pa. 1995) (finding that attendance of meetings and preparation of reports does not indicate employee status). Given the heavily regulated nature of the insurance industry, it is

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[26] Leo Dep. at 271-75; Huebner Dep. at 46-47; Vajda Dep. at 36, 181-82.

[27] Huebner Dep. at 49-51, 82-83, 88-89; Vajda Dep. at 221-22; Leo Dep. at 80-81; Plaintiffs' Exh. 17 (Agent's Office Management Guide).

[28] Leo Dep. at 318.

[29] Huebner Dep. at 387-88, 436, 442

essential for Nationwide to collect data and gather information from sales agents in order for the insurance company to manage its business within the confines of the law. Such continuous oversight is compatible with independent contractor status.

Plaintiffs argue that a letter dated June 7, 1976 from Nationwide to Vassallo demonstrates that Nationwide exerted control over the daily sales activities of the agents because the letter established quotas for Vassallo, which if he did not meet, would result in his termination. See Pls. Exh. 2 (Letter of June 7, 1976). Because Vassallo's sales records were apparently inadequate, Nationwide took an active role to assist Vassallo in improving them and outlining goals for Vassallo to reach in the next six months. Pls. Exh. 2 (Letter of June 7, 1976). Plaintiffs have submitted no evidence that sales agents were given such intrusive directives and quotas routinely; they only submit evidence of this one instance when the sales activities of an agent were found to be insufficient. Absent proof that Nationwide dictated specific, periodic, and continual methods and strategies for plaintiffs to follow, mere sporadic suggestions, goals, objectives, monitoring, or reporting issued to a sales agent, especially to one who is performing below par, will not convert the status as an independent contractor to an employee. Because the letter is unique to this particular plaintiff and because it dates from over twenty years ago, I find that no reasonable jury could infer from this letter a company-wide policy of establishing sales techniques or methodologies for plaintiffs.

With respect to training, the Agent's Agreement expressed the intention of the parties that, as career agents, plaintiffs would be entirely free to reject any training offered by Nationwide.[30] Plaintiffs contend that the training was mandatory, yet they present no evidence to support this conclusory statement. I also note that when plaintiffs first began work at Nationwide they were designated as "employee agents" and were subjected to a two-year training period under the Nationwide Agent Development Program or the Nationwide Business Agent

[30] Agent's Agreement ¶ 1; see supra note 10.

Program.[31] By the mid 1980s, that status of plaintiffs was converted to "career agents," and they were not subject to these mandatory programs. The distinction between "employee agents" and "career agents" further suggests that plaintiffs were not employees.[32]

In addition, plaintiffs were permitted by the consent of Nationwide to broker business with other insurance companies that did not qualify for and were rejected by Nationwide.[33] This meant that before a broker could do business elsewhere, Nationwide would first have to decline the business. Furthermore, plaintiffs were permitted to incorporate their agencies.[34]

Nationwide imposed various sales restrictions on plaintiffs. For example, Nationwide implemented certain programs that limited the number of policies plaintiffs could issue in a particular line of insurance or that prohibited those sales entirely.[35] Nationwide also supplied maps, graphs and other demographic information to plaintiffs to encourage them to solicit sales in certain geographic areas.[36] There is evidence that Nationwide devised "desirability" guidelines, which referred to characteristics of potential policyholders, such as credit rating and driving habits.[37] Nationwide determined the underwriting guidelines and

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[31] Plaintiffs discuss this issue in their memorandum and direct the Court to portions of Huebner's deposition, yet they fail to include that portion in their attached exhibits. Pls. Reply Mem. at 37 & n.12. In the absence of this evidence, I rely on the veracity of the plaintiffs' statements in their memorandum.

[32] This distinction is also apparent in the separate insurance plans Nationwide made available for "employee agents" and "career agents." See infra note 48 and accompanying text.

[33] Silver Dep. at 39; Vassallo at 57; Pine Dep. at 42-43; Sheehan Dep. at 46; Strange Dep. at 61; Vajda Dep. at 111-12.

[34] See Nationwide Agency Administrative Handbook at 11 ("Only career agents [*i.e.*, plaintiffs] may become corporate agencies because they are independent contractors. . . . The agent makes the decision to incorporate."). In its memorandum, Nationwide states that plaintiff Strange incorporated his agency business. Unfortunately, Nationwide failed to include that portion of Strange's deposition supporting that contention in its exhibits attached.

[35] Vajda Dep. at 163; Huebner Dep. at 420; Leo Dep. at 383.

[36] Vajda Dep. at 53-55, 81-82, 101; Leo Dep. at 164.

[37] Vajda Dep. at 117; Pls. Exhs. 14, 15.

eligibility criteria for each line of insurance Nationwide offered for sale through its agents.[38] Moreover, Nationwide ultimately determined whether to accept or reject insurance applications submitted by plaintiffs.[39] Plaintiffs contend that these restrictions on the type of insurance and on when, how much, and where the insurance may be sold, demonstrate Nationwide's pervasive control of plaintiffs' sale of insurance. I do not agree. These restrictions do not control the manner and means by which plaintiffs sell Nationwide products, but only the type and amount of the Nationwide product to be sold. As such, these restrictions constitute mere business decisions by Nationwide to ensure overall profitability. With respect to the desirability guidelines, I find that they do not deprive plaintiffs of independent judgment and strategies. In fact, Nationwide emphasized that these guidelines were "not mandatory," but a "suggestion."[40] While plaintiffs argue that the desirability guidelines were mandatory and submit the testimony of a Nationwide manager,[41] I find that the face of the guidelines shows they were not. Therefore, I find that no reasonable jury could find that Nationwide controlled the manner and means of plaintiffs' business when it limited, at times, the type and amount of insurance product to be sold. I note that other courts have found that restrictions on sales, without more, will not bar the conclusion that plaintiffs were independent contractors. See, e.g., Cox v. Master Lock Co., 815 F. Supp. 844, 845-47 (E.D. Pa.) (plaintiff found not to be an employee despite the fact that plaintiff was limited to selling alleged employer's products at prices set by alleged employer, and that alleged employer had the right to accept or reject order placed with plaintiff), aff'd, 14 F.3d 46 (3d. Cir.

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[38] Vajda Dep. at 55.

[39] Huebner Dep. at 412.

[40] Pls. Exh. 14 ("Attached, please find a auto desirability checklist [sic] you *may want* to utilize in your agency. . . . This is *not a mandatory* form for you to use!!!! It is a *suggestion* . . . ."); Pls. Exh. 15 ("[Nationwide] encourage[s] those who . . . understand that bad loss ratio's will no longer be acceptable to Nationwide . . . *think about* incorporating into their fielding writing the following [desirability checklist]. . . . [T]his is a *suggestion* to help keep you out of financial trouble or help get you out of trouble.") (emphasis added).

[41] See Vajda Dep. at 117.

1993).[42]

3. Nature of Work

There is no evidence that plaintiffs' position required special skills. Prior to 1993, Nationwide did not require its sales agents to have previous insurance experience; only a high school education was necessary.[43] Although plaintiffs were responsible for securing any license necessary to represent Nationwide as agents, I find that the apparent lack of special skills required for the sales agent position militates in favor of creating an employee-employer relationship. Additionally, there is no doubt that the selling of Nationwide insurance by plaintiffs was an integral part of Nationwide's regular business. Thus, these factors clearly indicate employee status.

4. Compensation

The independence of plaintiffs was further reflected in their compensation scheme. Plaintiffs did not receive a salary. They were compensated on commission or incentive basis only.[44] Plaintiffs were responsible for withholding their own federal personal income taxes, social security taxes, and state taxes.[45] Plaintiffs did not accrue vacation or sick leave benefits.

Plaintiffs devote a significant portion of their memoranda describing the numerous promotions bonus, incentive, award and recognition programs established by Nationwide. For example, plaintiffs were eligible for the following awards: "Champion Award," "President's Conference," "Agency Growth Achievement Award," "Agent of the Year," "Nationwide Service Awards," "Nationwide Life Eagle Award," "Chairman's Life Council," and

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[42] In their memorandum, plaintiffs briefly argue that Nationwide's implementation of corrective actions plans and systems constitute additional assigned projects, thus demonstrating employee status. Pls. Reply Mem. at 41. In support of this argument, plaintiffs refer the Court to the deposition of Huebner, yet they fail to include the relevant portion in their exhibits. Even if these programs, especially the Client Annual Review known as the "CARE" program, were mandatory, (as to which there is no evidence before the Court that it is), the result reached by the Court in favor of independent contractor status would remain unchanged.

[43] See Leo Dep. at 181-82; Huebner Dep. at 157.

[44] See Vassallo Dep. at 57-58; Sheehan Dep. at 46.

[45] Strange Dep. at 61-62; Silver Dep. at 39; Vassallo Dep. at 57-58; Pine Dep. at 43; Sheehan Dep. at 46.

"Million Dollar Round Table."[46] To receive these awards, plaintiffs had to have demonstrated commitment to service and a high production of sales. Recipients of these awards would procure plaques, fully paid get-away weekends, merchandise, or stationery and business cards containing the pertinent award designation.[47] Other programs entitled "Business Life Select Agent Program," "PA-25," "Thanksgiving Turkey Promotion," "Golf and Fish Promotion," "Super Bowl Contest," and "Myrtle Beach Promotion" were also implemented to promote the sale of Nationwide insurance. Plaintiffs argue that these programs demonstrate the effective control Nationwide exerted over plaintiffs to compel plaintiffs to production quotas and sell certain types of insurance. I disagree. I find that all of the above described programs are aimed at achieving positive results, and do not direct the manner and means by which plaintiffs achieve these results. These programs merely encouraged and awarded plaintiffs for achieving positive results. There is no evidence that such programs curtailed the independent judgment or strategies of plaintiffs.

And, finally, I note that the parties do not adequately address or present any verified information on the subject of retirement plans and group insurance programs for plaintiffs. Nationwide made available for optional enrollment separate insurance plans for "employee agents" and for "career agents."[48] Apparently the premiums for this coverage were paid by the plaintiffs individually. Because the parties address these issues in a cursory manner and did not deem them persuasive, I will not discuss them further, especially given that they would not likely alter the result reached here.

CONCLUSION

I acknowledge that from the evidence provided by plaintiffs they can argue their status as employees, and not independent contractors. Plaintiffs also cite to case law in support

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[46] Pls. Exh. 4.

[47] See Huebner Dep. at 180; Leo Dep. at 208.

[48] Def. Exh. B (Administration Handbook at 101-10, 181-85).

of their contention of employee status.[49] Nonetheless, based on the evidentiary record, and taking all inferences in favor of plaintiffs, I find that no reasonable jury could conclude that Nationwide exercised control over the "means and manner" of plaintiffs' respective businesses. I have found no practices on the part of Nationwide in the evidentiary record that stray significantly from the express designations of independent contractor status set forth in the Agent's Agreement.

Under the law enunciated in Darden, I conclude, as a matter of law, that plaintiffs were independent contractors and thus do not qualify under the ADEA. Accordingly, I will grant the motion for summary judgment and dismiss with prejudice plaintiffs' ADEA claim.

[49] I have carefully scrutinized the case law cited by plaintiffs. None of the cases is binding authority. While I note that many of the facts pointing to employee status in those cases are present in the case at bar, I find that certain material facts present in those cases are absent here. See, e.g., Wilson v. United Farm Bureau Mut. Ins. Co., CIV. NO. 93-1460, 1995 WL 378521, at *7-9 (S.D. Ind. June 15, 1995) (insurance company supplied office, furniture, supplies, and secretarial services to sales agent, and sales agent was not allowed to advertise individually, leading court to deny summary judgment); Stouch v. Brothers of the Order of Hermits of St. Augustine, 836 F. Supp. 1134, 1140 (E.D. Pa. 1993) (monastery provided both equipment used and place of work, and plaintiff chef had no authority to hire and fire his assistants or to set their pay rates and plaintiff's ability to set his own work schedule was limited, compelling court from concluding that plaintiff was an independent contractor); Shapiro v. Sutherland, 835 F. Supp. 836, 838 (E.D. Pa. 1993) (corporation paid plaintiff a bi-weekly salary plus commission and required approval for all advertising material and plaintiff had no authority to hire or pay assistants); Penland v. Connecticut Mut. Life Ins. Co., CIV. NO. 92-3744, 1993 WL 204257 (N.D. Cal. June 9, 1993) (insurance company reimbursed sales manager for 85% of operating expenses, set the parameters for compensation of his support staff, controlled the location of office and its decor, and sales manager received a salary and other health care benefits, thus leading the court to deny summary judgment); Golden v. A.P. Orleans, Inc., 681 F. Supp. 1100, 1102 (E.D. Pa. 1988) (while contract identified plaintiff as an independent contractor and plaintiff was employed by a corporation he had created himself, employer's direct control over plaintiff's day-to-day activities, including providing work equipment, place of work, and work schedule, as well as paying plaintiff on a weekly draw basis, led to conclusion that plaintiff was an employee).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE STRANGE, et al.,	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	
NATIONWIDE MUTUAL INSURANCE COMPANY, et al.,	:	
Defendants.	:	**NO. 93-6585**

O R D E R

AND NOW, on this 21st day of August, 1997, upon consideration of the motion of defendants for partial summary judgment on the issue of plaintiffs' status as independent contractors (Document No. 72), and all responses of parties thereto, as well as the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, having found that there are no genuine issues of material, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of defendants is **GRANTED** and summary judgment is hereby **ENTERED** in favor of Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide General Insurance Company, and Nationwide Property & Casualty Insurance Company and against plaintiffs Lawrence Strange, Howard Silver, Warren Pine, Edward Sheehan, and Samuel Vassallo on all claims of plaintiffs relating to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634.

IT IS FURTHER ORDERED accordingly, that plaintiffs' claim under the Age Discrimination in Employment Act (Count I) is hereby **DISMISSED WITH PREJUDICE**.

This is not a final Order.

LOWELL A. REED, JR., J.