UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KENNETH BERKOWITZ, pro se, **Plaintiff,** **v.** **LOCKHEED MARTIN CORP.,** **ROBERT J. STEVENS, and** **BETTYE SMITH,** **Defendants.**	)))))))))	**Civil Action No. 07cv12379-NG**

GERTNER, D.J.

MEMORANDUM AND ORDER RE: MOTION TO DISMISS
July 17, 2008

I. INTRODUCTION

Plaintiff Kenneth Berkowitz ("Berkowitz"), pro se, brings this lawsuit against Defendants Lockheed Martin Corporation ("Lockheed"), Robert J. Stevens ("Stevens"), and Bettye Smith ("Smith"), alleging that Defendants terminated his employment due to his age and because he complained to Lockheed's Ethics Office about alleged age discrimination. Plaintiff claims that Defendants' actions violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), which makes it unlawful for an employer to discriminate against an individual based on the individual's age. Defendants Stevens and Smith now move this Court to dismiss Plaintiff's claims against them on the grounds that 1) Plaintiff's Complaint contained no allegations of wrongful conduct against Stevens and Smith, and 2)there is no individual liability for age discrimination under the ADEA.

For the reasons set forth below, I conclude that Plaintiff has not alleged facts as to the two individual defendants

sufficient to state a claim under the ADEA. As such, Robert Stevens and Bettye Smith's Motion to Dismiss (document # 8) is **GRANTED.**

II. BACKGROUND

Plaintiff, a 63-year-old engineer, was terminated from Lockheed on April 10, 2007. Plaintiff claims that Lockheed terminated his employment in retaliation after Plaintiff contacted Lockheed's Ethics Office on April 1, 2007, to complain of "workplace harassment and personal discrimination" based on his age. Compl. at ¶ 7 (document # 1); Exh. B to Compl. (document # 1-2). Defendants deny any discriminatory intent and argue that Plaintiff was terminated for mischarging labor, inappropriate behavior during an investigation into the "suspicious" labor charges, and insubordination. See Exh. C to Compl. (document # 1-2). Following his termination, Plaintiff contacted Smith, Lockheed's Director of Ethics and Business Conduct on April 11, 2007, to inform the department of his situation and allegations. Days later, he wrote to Stevens, Chairman, President and Chief Executive Officer of Lockheed, proposing various solutions to the matter.

Plaintiff alleges that when he failed to receive satisfactory responses from either Stevens or Smith, he contacted the Equal Employment Opportunity Commission ("EEOC") on July 12, 2007, and filed a complaint alleging that Lockheed had terminated

him because of his age and replaced him with a younger engineer. The EEOC issued a right to sue letter on November 1, 2007; Plaintiff filed this lawsuit on December 27, 2007.

III. STANDARD OF REVIEW

Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where the complaint fails to state a claim upon which relief can be granted. See Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006). In evaluating a motion under Rule 12(b)(6) the Court must assume "the truth of all well-pleaded facts contained in the operative version of the complaint and indulg[e] all reasonable inferences in the plaintiff's favor." Id. (citing McCloskey v. Mueller, 446 F.3d 262, 266 (1st Cir. 2006)). A complaint must allege "a plausible entitlement to relief." Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007) (citing Bell Atl. Corp. V. Twombly, 127 S. Ct. 1955, 1967 (2007)).

IV. DISCUSSION

The challenge currently before the Court is to determine whether Plaintiff has alleged sufficient facts to support a claim under the ADEA against the two individual defendants. The ADEA states that it is "unlawful for an employer to fail to or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

Putting aside for the moment the question of whether there is individual liability under the ADEA, even viewing the facts set forth in the pleadings as true, Plaintiff simply does not allege that Smith or Stevens personally engaged in any conduct that would violate the ADEA. He does not claim that they directly participated in his termination; nor does he allege that they individually discriminated against him in any other way while he was employed at Lockheed. Rather, Plaintiff claims that he spoke to Smith one day following his termination regarding his discrimination allegations and that he wrote to Stevens several days following his termination regarding the same concerns. These facts simply do not give rise to a "plausible entitlement to relief" under the ADEA against the two individual defendants. Twombly, 127 S. Ct. at 1967.[1]

As Plaintiff has not alleged sufficient facts to make a claim against the individual defendants, the Court leaves for another day the question of whether there is individual liability under the ADEA.[2]

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[1] It is important to note that this ruling does not reflect the Court's view on the substance or likelihood of success of Plaintiff's discrimination claim against Lockheed as a corporation. The Court's ruling today concerns only the actions of the individual defendants which led up to Plaintiff's claim.

[2] Though the First Circuit has not ruled on the issue, See Orell v. Univ. of Mass. Med. Ctr., Inc., 203 F. Supp. 2d 52, 64 (D. Mass. 2002), the Court recognizes that numerous courts across the country have held that the ADEA does not allow individual liability. See e.g. Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511 (4th Cir. 1994); Stults v. Conoco, Inc., 76 F.3d 651, 655 (5th Cir. 1996); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995).

V. CONCLUSION

For the foregoing reasons, I find that Plaintiff has not alleged sufficient facts to make out a claim under the ADEA against defendants Stevens and Smith. Thus, Robert Stevens and Bettye Smith's Motion to Dismiss (document # 8) is **GRANTED.**

SO ORDERED.

Date: July 17, 2008

/s/Nancy Gertner
NANCY GERTNER, U.S.D.C.

In a Title VII case, however, this Court came to the opposite conclusion. See Ruffino v. State St. Bank & Trust Co., 908 F. Supp. 1019 (D. Mass. 1995); see also Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (courts routinely treat ADEA and Title VII claims similarly when deciding issues of individual liability). In Ruffino, I reasoned that a reading of the statute that denies individual liability also "denies the plain meaning [of the statute] that both employers, as entities, and their agents, as individuals, are to be bound by Title VII's dictates." 908 F. Supp. at 1048. Most courts, however, have looked to legislative intent and concluded that the ADEA and similar statutes do not support individual liability: "[t]he ADEA limits liability to employers with twenty or more employees . . . . If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." Miller, 991 F.2d at 587. The continuing relevance of Ruffino may need to be addressed in the future. However, given the facts of this case, now is not the time to do so.