

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN McCORMACK, MARK LINGL & RON
SHELTON, ON BEHALF OF A CLASS OF
SIMILARLY-SITUATED IBM EMPLOYEES
AND FORMER EMPLOYEES,

14 cv 3242 (KMK)

Plaintiffs,

CLASS ACTION

FIRST AMENDED
COMPLAINT

vs.

IBM,

Defendant.

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Plaintiffs, JOHN McCORMACK, MARK LINGL, RON
SHELTON, ON BEHALF OF A CLASS OF SIMILARLY-SITUATED IBM
EMPLOYEES AND FORMER EMPLOYEES, and through their
counsel, Michael H. Sussman, Esq., hereby allege as
follows:

I. **INTRODUCTION**

1. This is a case of age discrimination against
IBM based upon notorious and open practices which
disfavor older workers and favor, explicitly, younger
members of the labor market.

2. Plaintiffs are each older members of the work force who have been involuntarily separated from IBM at the same time the company is exclusively recruiting younger workers for positions they are qualified to fill.

II. **PARTIES**

3. John McCormack is a former employee of IBM who was laid off in December 2013.

4. Mr. McCormack was born on September 25, 1967 and is 46 years of age and he resides within this judicial district.

5. Plaintiff Ron Shelton is a former IBM employee who was laid off in July 2013.

6. Mr. Shelton was born on July 14, 1964 and is 49 years of age.

7. Mr. Shelton resides in Riverview, Florida and worked from his home office and from an office in Tampa, Florida.

8. Plaintiff Mark A. Lingl is a former IBM employee who was terminated from his position as an Advanced IT Specialist effective July 12, 2013.

9. Mr. Lingl's last place of employment with IBM was 3031 North Rocky Point Dr., West Tampa, Florida 33607.

10. Mr. Lingl currently resides in Ponte Vedra Beach, Florida and his date of birth is March 16, 1956, making his 58 years of age.

III. JURISDICTION

11. As plaintiffs have timely filed charges of employment discrimination with the EEOC and initiated this matter at least two months thereafter, this Honorable Court has jurisdiction over this case pursuant to 42 U.S.C. 1331 & secs. 1343(3)&(4) and the Age Discrimination in Employment Act.

IV. FACTUAL ALLEGATIONS

12. In 2013, IBM adopted and publicized a corporate policy of advertising for vacancies in a manner directed to, and only to, young, recent

college graduates.

13. Such advertisements were nationwide in scope and reflected a like policy to discriminate against older workers and to exclude them from consideration from a whole range of jobs for which many would qualify.

14. Before his termination, plaintiff McCormack worked at the IBM Semiconductor Manufacturing Facility at 2070 Route 52, Hopewell Junction, New York.

15. After being advised several months before his termination that he would be laid off in December 2013, McCormack searched for a comparable position and identified at least fifteen internal positions at IBM.

16. However, when he actively sought these positions, he was denied every one of them.

17. IBM managers and supervisors told Mr. McCormack that these positions had been targeted for young persons who had graduated college in 2012 or

2013.

18. Though 46 years of age, McCormack responded that he was a recent college graduate [2012], but he still received no offers allowing for an internal transfer.

19. Although he had the qualifications and technical skills to successfully fill many of these positions, on the basis of plaintiff McCormack's age, IBM uniformly rejected McCormack for them without particularized consideration.

20. IBM's policy to hire young college graduates proximately causes McCormack's economic and non-economic damages.

21. IBM hired plaintiff Shelton as a Technical Solutions Architect on September 12, 2011.

22. Shelton satisfactorily performed the duties assigned to him but, nonetheless, IBM terminated him effective July 12, 2013.

23. In advising him of his termination, Shelton's supervisor offered no explanation and began crying, stating that she would never have accepted her own promotion if she knew that she would have to fire him.

24. Before he was terminated, plaintiff Shelton's second line manager emailed him and other employees suggesting that they congratulate a first line manager who, he claimed, was retiring.

25. Later, plaintiff learned that this first line manager, a woman over 55 years of age, did not voluntarily retire, as had been represented by a higher level manager, but was forced to leave IBM and was replaced by a younger Lab Services manager.

26. After plaintiff Shelton was terminated and signed a severance agreement and general release, IBM sought candidates for his former position and filled it with a much younger person.

27. At the time he signed the general release, Shelton did not know that his position was being

continued and understood, from IBM's public representations, that he had been terminated as part of a major corporate down-sizing.

28. At the time of, and following his termination, plaintiff Shelton qualified for other positions which IBM advertised.

29. However, while plaintiff Shelton sought these positions, in fact, he was never offered a chance to compete for any of them because he was not a "recent" college graduate.

30. Plaintiff Lingl worked for IBM most recently since October 16, 2006 and, before that, between June 1, 1998 and June 28, 2002, when he was initially laid off.

31. On June 12, 2013, IBM terminated Lingl's employment by and through an email from his supervisor, Dawn Mack. This communication made no reference to any performance issues and, instead, claimed that plaintiff Lingl was being terminated as part of a broader fiscally-driven "resource action,"

identified as the "S&D Global Techline and Channel Technical Sales Resource Action (STGE)" which IBM allegedly was implementing "to streamline operations and increase business productivity."

32. At the time of his termination, Lingl's job performance was satisfactory as evidenced by the fact that he had received six "Excellence Awards" and a consequent bonus between November 30, 2011 and May 31, 2013 and his last annual assessment [for calendar year 2012] contains a highly position "overall assessment" from his manager.

33. At the time of their lay-offs, neither plaintiff Shelton nor plaintiff Lingl was aware that IBM intended to recruit and hire a large number of recent college graduates to take jobs they had filled, and could have continued to fill.

34. Rather, concurrent with their lay-offs and those of other similarly-situated workers, IBM announced that it was "streamlining" its work force, plaintiffs reasonably understood that they were

casualties of that resource action and defendant IBM had no other work opportunities for them.

35. In fact, in 2013, IBM cut its older work force and then implemented a nation-wide advertising campaign to replace the displaced older workers with recent college graduates.

36. As part of this policy, despite apparently encouraging displaced workers to locate other internal positions, IBM informed those it was terminating that it does "practice 'bumping rights'".

37. IBM implemented this termination, recruitment and hiring campaign, as a means of replacing older with younger workers. Said campaign was not informed by the specific and relative qualifications of recently displaced older employees like plaintiffs or those younger employees IBM intended to hire in their stead.

38. As part of the RIF process, IBM offered plaintiffs Shelton and Lingl severance packages which they could access only if, within thirty days, they

signed General Releases freeing defendant IBM from liability for, *inter alia*, age discrimination.

39. IBM offered said severance packages fraudulently and in bad faith as the premise of the offer was the claim that the company was engaging in a nationwide "resource action," not that the company was intentionally purging older employees and replacing them in a whole range of jobs with 2012/2013 college graduates.

40. Defendant IBM initiated the afore-cited advertisement and hiring process after terminating older workers and intentionally limiting their liability for ADEA claims through the signing of general releases and the payment of severance benefits.

41. Plaintiffs Shelton and Lingl would never have signed such general releases or accepted said severance payments had they known that IBM intended to replace them with recent college graduates in a

practice which so plainly reflected age discrimination.

42. As these plaintiffs' general releases were secured in bad faith and as part of a practice which explicitly discriminated against current employees on the basis of their age, the general releases should be set aside and given no force and effect as violative of public policy and offered in furtherance of a then unknown to plaintiffs, but intentional, scheme to rid IBM of "older workers."

43. Plaintiffs and those they seek to represent were satisfactorily performing their duties and responsibilities and terminated from employment on account of their ages only to be replaced in function by younger workers.

44. Their terminations occurred proximate in time to defendant IBM's launching of a nationwide hiring campaign directed at recent college graduates, i.e., younger workers.

45. Defendant IBM did not make the positions these recent hires were offered available to plaintiffs parties or those similarly situated workers they seek to represent by dint of, and only by dint of, their ages.

46. Plaintiffs are proper representatives of a class pursuant to F.R.Civ.P. 23(c)(2) and (b)(3).

47. Plaintiffs present claims which are common and typical to thousands of workers around the United States, meeting both the commonality and numerosity requirement set by F.R.Civ.P. 23(a)(1)-(3).

48. The issue plaintiffs raises explains the termination of thousands of IBM workers whose rights have been blatantly violated both by their age-dictated terminations and the defendant's unwillingness to allow them to laterally transfer to positions for which they have all necessary qualifications.

49. Plaintiffs are prepared to adequately represent the interests of the class.

50. Plaintiffs have selected class counsel who has successfully prosecuted other class actions in discrimination cases and is qualified to handle this complex litigation.

51. Like other members of the proposed class, plaintiffs have suffered pecuniary and non-pecuniary damages as a consequence of the discriminatory policy challenged herein.

V. CAUSES OF ACTION

52. Plaintiffs incorporate paras. 1-51 as if fully restated herein.

53. By adopting the policy referenced herein, defendant IBM violated the Age Discrimination in Employment Act, 29 U.S.C. sec. 621, et. seq. and caused compensable damages to plaintiffs and the members of the class of similarly-situated plaintiffs adversely affected by the same corporate policies set forth above.

54. By adopting the policy referenced herein, defendant IBM violated section 296 of the Executive

Law of the State of New York and caused compensable damages to plaintiffs and the members of the class of similarly-situated plaintiffs adversely affected by the same corporate policies set forth above.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Honorable Court:

- a. Accepts jurisdiction over this action;
- b. Certifies plaintiffs as class representatives;
- c. Appoints plaintiffs' counsel as class counsel;
- d. Vacates the severance agreements plaintiffs and other class members signed as against public policy;
- e. Awards to plaintiffs and class members compensatory damages as permitted by law;
- f. Awards to plaintiffs and against defendant punitive damages based upon the willful and wanton age discrimination in which defendant engaged;
- g. Declares the policy challenged herein to be discriminatory and unlawful on the basis of age and enjoin defendants, its officers, agents, assigns,

successors in officer and those acting in concert with them from implementing this policy or any like policy which discriminates against persons on the basis of their ages;

h. Award to plaintiffs' counsel the reasonable attorneys' fees and costs incurred in litigating this matter pursuant to 42 U.S.C. section 1988, and

i. Enter any other order which is required by law and/or equity.

Respectfully submitted,

MICHAEL H. SUSSMAN
SUSSMAN & WATKINS
PO BOX 1005
1 RAILROAD AVENUE, Suite 3
GOSHEN, NY 10924
(845)-294-3991

Counsel for Plaintiffs

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