

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

SUSAN FAIRWEATHER, )  
 )  
 Plaintiff, )  
 )  
 v. ) 2:13-cv-00111-JAW  
 )  
 FRIENDLY'S ICE CREAM, LLC, )  
 )  
 Defendant. )

**ORDER DENYING DEFENDANT'S MOTION IN LIMINE**

With trial looming in this age discrimination case, the Defendant has moved in limine to exclude trial testimony or arguments related to its alleged intentional hiring of younger wait staff in late 2011 and 2012. The Court denies the Defendant's motion because such evidence is relevant to Plaintiff's theory of the case.

**I. DEFENDANT'S MOTION**

**A. Background**

During her employment, Ms. Fairweather typically worked the "[b]reakfast" shift, meaning she worked from 6:30 a.m. to 2:00 p.m. *Def. Friendly's Ice Cream, LLC's Mot. in Limine to Exclude Test. or Arguments Regarding Purported "Demographic Evidence" or Friendly's Alleged Efforts to Hire Younger Waitstaff* (ECF No. 76) (*Def.'s Mot.*) Attach. 1 *Dep. Tr. of Susan Fairweather* at 3 (*Fairweather Dep.*). She stated during her deposition that her hours and "a lot of" wait staff's "hours started getting cut" during her final year of employment and she opined that this was a result of "[d]ifficulties in the company." *Fairweather Dep.* at 4. Ms. Fairweather

also testified that, while she was still employed, she saw Friendly's begin to hire younger wait staff in 2012. *Id.* at 5. Specifically, she recalled Friendly's hiring "two younger individuals" during this period, and they were assigned to work evening shifts. *Id.* at 6; *see also Def.'s Mot. Attach. 2 Dep. Tr. of Patricia N. Newell* 54:11-21 (explaining that Friendly's hired a wait staff that, on average, was under the age of 30 and most of them were assigned to evening shifts because that was where the job openings were) (*Newell Dep.*). In addition, Ms. Fairweather characterized herself and JoAnn Roberge as "older worker[s]" who were terminated in 2012. *Fairweather Dep.* at 6.

Friendly's argues that Ms. Fairweather should not be allowed to introduce evidence to support her position that it began hiring younger wait staff in 2012 because she

has failed to offer any evidence regarding: (1) Friendly's hiring practices in previous years; (2) the age makeup of Friendly's applicant pool; or (3) the shifts for which these individuals were hired . . . .

*Def.'s Mot.* at 1. Friendly's also contends that "it is typical that younger employees prefer to work night shifts, while older employees prefer to work day shifts," which explains why Friendly's hired individuals, on average, under the age of 30. *Id.* at 2 (citing *Newell Dep.* 54:11-55:2). Thus, according to Friendly's, "one year's worth of bare demographic information" is irrelevant, and even if it is relevant, it should be excluded under Rule of Evidence 403. *Id.* at 3.

In response, Ms. Fairweather counters that she intends to introduce “Friendly’s 2012 employee roster for” the South Portland location, which provides “the names, date of birth, date hired and date of termination of each employee” who worked there in 2012. *Pl.’s Opp’n to Def.’s Mot. in Limine to Exclude Test. or Arguments Regarding Purported “Demographic Evidence” or Friendly’s Alleged Efforts to Hire Younger Waitstaff* at 1 (ECF No. 89) (*Pl.’s Opp’n*). She says the purpose of introducing the roster is to establish “that in late 2011 and early 2012, Friendly’s, as part of its emergence from bankruptcy, intended to change its image.” *Id.* at 2. According to Ms. Fairweather, “[t]he roster, with the statistical information disclosing the employees hired in 2012 and their ages, would provide the jury with highly relevant and probative evidence to help determine whether Friendly’s did institute such a policy [of intentionally hiring younger wait staff].” *Id.* She contends that the roster indicates that Friendly’s hired 27 food servers in 2012, and 23 of them were under the age of 35. *Id.* In addition, Ms. Fairweather intends to introduce statements from Manager Bonnie Coutts, who, according to Ms. Fairweather, indicated that older wait staff were being replaced by younger individuals. *Id.* She also disputes Friendly’s assertion that the younger employees were only hired for evening shifts. *Id.* at 3.

## **B. Discussion**

In the context of the Age Discrimination in Employment Act (ADEA), the First Circuit has stated that “[w]hen no direct proof of discrimination

exists, the employee may rely on circumstantial evidence to prove discrimination.” *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 30 (1st Cir. 2007). Furthermore, “statistical evidence showing disparate treatment by the employer of members of the protected class” may be used to demonstrate pretext. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991). “[H]owever, that statistical evidence standing alone is rarely sufficient to prove pretext because ‘a company’s overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer [when deciding whether to [terminate]] a particular individual.’” *Deslauriers v. Napolitano*, 738 F. Supp. 2d 162, 183 (D. Me. 2010) (quoting *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 848 (1st Cir. 1993)).

Here, Ms. Fairweather proposes to introduce the roster in connection with other evidence, including Ms. Coutts’ alleged statement that Friendly’s was planning to replace older wait staff with younger wait staff, and that upon Ms. Fairweather’s termination, she was replaced by a 23 year old individual, presumably for the breakfast shift. *Pl.’s Opp’n* at 3. Therefore, when introduced in connection with these other alleged instances, the roster is proper under Rules of Evidence 401 and 403 to prove pretext.

Friendly’s additional arguments are without merit. First, Friendly’s claims that Ms. Fairweather has not adequately investigated Friendly’s hiring practices in previous years. However, the purpose of Ms. Fairweather’s evidence is to demonstrate that as it emerged from bankruptcy, Friendly’s

attempted to change its image by hiring predominantly younger wait staff, which seems plausible. *See, e.g., Newell Dep.* 54:11-21. Of course, Friendly's may introduce evidence that its hiring practices remained the same throughout the years, including as it emerged from bankruptcy. Second, Friendly's contends that Ms. Fairweather has provided no evidence regarding its applicant pool. Ms. Fairweather explains in her opposition, however, that when she requested the job applications during discovery, Friendly's refused to provide them. *Pl.'s Opp'n* at 4. The Court has no independent basis to assess Ms. Fairweather's assertion, but assuming that Ms. Fairweather is correct, Friendly's may not now use evidence against her that it refused to hand over in discovery. Finally, Friendly's says that Ms. Fairweather ignores the fact that these younger servers were hired predominantly for evening shifts, and she only worked breakfast shifts. Contrary to Friendly's position, Ms. Fairweather disputes this, and among other arguments, contends that she was replaced by a 23 year old individual, who may have started working her breakfast shift. Friendly's may introduce evidence to counter Ms. Fairweather's position, but at this point, the issue is a matter of proof for the jury to decide.

## II. CONCLUSION

The Court DENIES Defendant Friendly's Ice Cream, LLC's Motion in Limine to Exclude Testimony or Arguments Regarding Purported

“Demographic Evidence” or Friendly’s Alleged Efforts to Hire Younger Waitstaff (ECF No. 76).

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
UNITED STATES DISTRICT JUDGE

Dated this 23rd day of January, 2015

**Plaintiff**

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