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

FRANK DONOFRIO, *on behalf of himself individually and on behalf of those similarly situated,* Plaintiff, v. IKEA US RETAIL, LLC, Defendant.	CIVIL ACTION No. 2:18-cv-00599-AB **FILED UNDER SEAL**

May 15, 2019 **Anita B. Brody, J.**

MEMORANDUM

Plaintiff Frank Donofrio ("Donofrio") is a 55-year-old employee of Defendant IKEA US Retail, LLC ("IKEA"). Donofrio, on behalf of himself and all others similarly situated, brings this collective action lawsuit against IKEA. Donofrio asserts that IKEA violated the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") by discriminating against him and other similarly situated employees on the basis of his and their age.[1] Specifically, Donofrio alleges that IKEA adopted and implemented internal promotion practices that discriminated against older IKEA employees in favor of their younger colleagues. Donofrio now moves to conditionally certify a collective action class on disparate impact and disparate treatment ADEA causes of action.[2]

Donofrio's burden at this stage is minimal, and his factual showing satisfies the requirements for conditional certification of his proposed class. I will therefore conditionally certify Donofrio's proposed collective action class and authorize notice to all potential opt-in Plaintiffs.

[1] Donofrio also brings claims under state law which are not before the Court on this motion.

[2] I refer to the group of potential opt-in plaintiffs as the "collective action class" or the "class."

I. Background

Defendant IKEA is a home goods retailer with locations across the United States. *See* Compl. ¶ 19. In February 2011, Plaintiff Donofrio was hired into a staff-level non-management position at IKEA. *Id.* ¶ 3.[3] Plaintiff was over the age of 40 when he was hired. *See id.* ¶ 2. Over the course of the following years, Donofrio unsuccessfully applied for several promotions at IKEA. *See id.* ¶ 77.

On November 15, 2016, Donofrio filed a Charge of Discrimination with the Equal Employment Opportunity Commission. *Id.* ¶ 14. The charge alleged, on behalf of Donofrio and a class of those similarly situated, that IKEA had engaged in age discrimination in its promotion practices and that Donofrio was denied promotion as a result. *See* Pl.'s Br. (ECF No. 36) at 2.

On February 12, 2018, Donofrio filed this lawsuit against IKEA. Donofrio asserts three counts on behalf of himself and all others "similarly situated." Two counts are relevant here.[4] First, Donofrio asserts a disparate treatment cause of action under the ADEA based on Donofrio's allegation that IKEA "intentionally discriminated against [Donofrio] and Older Coworkers because of their age" through "a pattern and practice of age discrimination against [Donofrio] and Older Coworkers through its policy of promoting younger employees while denying positions to its older employees" and "providing leadership development opportunities

[3] Evidence submitted for the purposes of this motion indicates that IKEA has a distinctive nomenclature for categorizing management positions and non-management positions. *See* Pl.'s Br. at 6-7. Specifically, IKEA distinguishes between non-management employees, referred to as "coworkers," and management employees, referred to variously as "managers," "shopkeepers," and "team leaders." *Id.* Management employees report up to corporate-level managers with retail and human resources responsibilities. *Id.* Given the limited scope of the factual inquiry at this stage, this opinion refers to and distinguishes only between IKEA's management and non-management employees without specific reference to IKEA's internal naming system.

[4] In Donofrio's brief in support of his motion for conditional certification, he clarifies that "[i]n light of discovery conducted to date, Plaintiff has refined the class definition and also narrowed and limited the scope of his disparate impact claim." Pl.'s Br. at 3. Specifically, Donofrio has narrowed his motion for conditional certification to the two claims described in this memorandum.

to its younger employees while denying such opportunities to its older employees." *See* Compl. ¶¶ 94-107. Second, Donofrio asserts a disparate impact cause of action under the ADEA alleging that IKEA's "policy and/or practice of identifying the 'potential' of its employees . . . has resulted in a statistically significant disparity in the promotion rates" of older employees that harmed Donofrio and other older IKEA employees in violation of their rights under the ADEA. *See* Compl. ¶¶ 117-125.

II. Legal Standard

"The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995). "The ADEA prohibits age discrimination in employment against an individual over age 40." *Barber v. CSX Distribution Servs.*, 68 F.3d 694, 698 (3d Cir. 1995) (citing 29 U.S.C. § 623(a)(1)).

"The ADEA incorporates some features of . . . the Fair Labor Standards Act of 1938," including the FLSA's collective action provision. *See McKennon*, 513 U.S. at 357. Under the ADEA, employees may bring an action on their own behalf and on behalf of other employees similarly situated. 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b)). "A suit brought on behalf of other employees is known as a 'collective action.'" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013).

The filing of a complaint containing collective action allegations "does not automatically give rise to the kind of aggregate litigation provided for in Rule 23. Rather, the existence of a collective action depends upon the affirmative participation of opt-in plaintiffs." *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016). Courts must determine

whether those who purport to join the collective action are "similarly situated," as intended by the statute. *Id.* Because there are no formal procedural rules mandating how to accomplish this task, the Third Circuit follows a two-step process for deciding whether an action may properly proceed as a collective action under the ADEA. *Id.*; *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013).

"The first step, so-called conditional certification, requires a named plaintiff to make a 'modest factual showing'—something beyond mere speculation—to demonstrate a factual nexus between the manner in which the employer's alleged policy affected him or her and the manner in which it affected the proposed collective action members." *Halle*, 842 F.3d at 224 (quoting *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 n.4 (3d Cir. 2012)). The court applies a "fairly lenient standard" at this stage. *Camesi*, 729 F.3d at 243. "If the plaintiffs have satisfied their burden, the court will 'conditionally certify' the collective action for the purpose of facilitating notice to potential opt-in plaintiffs and conducting pre-trial discovery." *Id.* The court does not evaluate the merits of a plaintiff's case when ruling on a motion for conditional certification. *See, e.g.*, *Viscomi v. Clubhouse Diner*, No. 13-4720, 2016 WL 1255713, at *4 (E.D. Pa. Mar. 31, 2016).

Although this stage is known as "conditional certification," it "is not really a certification." *Zavala*, 691 F.3d at 536. "The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Genesis Healthcare Corp.*, 569 U.S. at 75 (citation omitted). "Conditional certification, therefore, is not a true certification, but rather an exercise of a district court's discretionary authority to oversee and facilitate the notice process." *Halle*, 842 F.3d at 224.

The second step in the two-step process is known as "final certification." *Id.* at 226. "[W]ith the benefit of discovery, 'a court following this approach then makes a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff.'" *Camesi*, 729 F.3d at 243 (quoting *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011) *rev'd on other grounds*, 569 U.S. 66 (2013)). "Being similarly situated . . . means that one is subjected to some common employer practice that, if proved, would help demonstrate a violation of the [ADEA]." *Zavala*, 691 F.3d at 538. The Third Circuit "endorses an ad hoc approach to this analysis, considering all relevant factors and making a determination on a case-by-case basis as to whether the named plaintiffs have satisfied this burden by a preponderance of the evidence." *Halle*, 842 F.3d at 226.

Unlike at the conditional certification stage, a district court's decision to grant or deny final certification is not discretionary and must depend only on the court's factual findings as to whether the plaintiffs are in fact "similarly situated." *Zavala*, 691 F.3d at 535. If this factual finding is made in the affirmative, the statute mandates that the district court grant final certification. *Id.* If, however, the collective action is decertified, the court will decertify the class, dismiss the opt-in plaintiffs without prejudice and allow the named plaintiffs to proceed to trial. *Halle*, 842 F.3d at 226.

III. Discussion

Donofrio moves this Court to conditionally certify Donofrio's proposed collective action class and to allow Donofrio to proceed with discovery as a collective action. Donofrio's proposed class would include "any current hourly retail non-management employee of [IKEA] who, since January 20, 2016, was age 40 or over and rejected for promotion to a management

level position." *See* Pl.'s Rev. Mot. for Order Conditionally Certifying Class (ECF No. 62) at 3.[5]

At this stage, Donofrio need only make a "modest factual showing" to demonstrate "a factual nexus between the manner in which [IKEA's] alleged policy affected him or her and the manner in which it affected the proposed collective action members." *Halle*, 842 F.3d at 224. Donofrio has gathered and presented to the Court an initial round of testimonial and documentary evidence in support of his allegations that IKEA discriminated against him in promotion decisions because of his age and that the putative members of his proposed class were similarly affected by IKEA's allegedly discriminatory practices.

Donofrio's showing satisfies his minimal burden. Donofrio's evidence constitutes at least a "modest factual showing" in support his allegations about IKEA's policies and the similarity of their effects on the members of his proposed class. Although IKEA may raise legitimate questions as to the ultimate factual and legal viability of Donofrio's collective action class and the merits of Donofrio's claims, these questions are not yet before me. *See, e.g.*, *Viscomi*, 2016 WL 1255713, at *4. For the reasons described below, I will grant Donofrio's motion for conditional certification.

A. Donofrio's factual showing in support of his allegations about IKEA's practices[6]

Donofrio alleges that IKEA has a far-reaching "corporate culture in which the preference for young employees as the company's future leaders is openly expressed and in which age bias infuses the promotion process from the top down." Pl.'s Br. at 22. In support of this allegation, Donofrio has put forward testimonial evidence that IKEA employees that were tasked with

[5] Donofrio proposed an initial class definition but, after oral argument, submitted the revised definition at issue here. *Compare* Pl.'s Mot. to Proceed as a Collective Action (ECF No. 35) *with* Pl.'s Letter to Court with Revised Proposed Order (ECF No. 62).

[6] Here, after a review of Donofrio's submitted deposition testimony and other materials, I selectively describe and summarize Donofrio's evidence in light of the lenient evidentiary standard at the conditional certification stage.

promotion decision-making were aware of and took into consideration what they perceived to be a broad organizational preference for the promotion of young employees to management positions. *See, e.g.*, Pl.'s Br. at 23-25 (citing, *e.g.*, Deposition of Laurie Gorbeck ("Gorbeck Dep.") at 84:12-85:24; Deposition of Nicholas O'Donnell ("O'Donnell Dep.") at 66:19-67:16; 73:1-74:2). Several IKEA employees testified about their perception that IKEA management was unhappy with the older average age of the management employees and wished to lower the average age of the Conshohocken store's management personnel. *See* Pl.'s Br. at 9-10 (citing Gorbeck Dep. at 87-94; O'Donnell Dep. at 56:13-77:11). Donofrio also presents evidence that IKEA tracked the ages of its management personnel beginning in 2012 and continuing thereafter. *See* Pl. Br. at 13 (citing Deposition of Cathy Blair ("Blair Dep.") at 49:2-50:15), 16 (citing St. Antoine Decl. Ex. A-28).

In addition to the above testimony about IKEA's corporate culture, Donofrio presents evidence to substantiate his allegation that IKEA had a potentially discriminatory "succession planning" policy in relation to promotion decision-making. *See* Pl.'s Br. at 8-19. One IKEA employee described the "succession" policy as "building the bench of talent for the future of IKEA." Pl.'s Br. at 8 (citing Blair Dep. at 46:18-24). Promotion decision-makers were instructed to review and consider a location's "succession plan" regarding which IKEA employees would be considered for promotion to leadership positions in the future. *See* Pl.'s Br. at 18 (citing IKEA's written "Promotions & Transfer Policy," Saint-Antoine Decl. Ex. A-9). Donofrio also alleges that as part of IKEA's policy, when a management position is open, the hiring personnel were instructed to consider "succession reports" that contained the year of birth of the IKEA employee being evaluated for promotion. *See* Pl.'s Br. at 18 (citing Saint-Antoine Decl. Ex. A-34). Donofrio presents evidence that the group of potential "successors" to a given

promotion position were broken down by age to "get an idea of who was in the pipeline" for promotion to the position, and age was therefore "one of the parameters" that IKEA looked at in considering who to promote. Pl.'s Br. at 12 (citing Blair Dep. at 262:20-263:12).

Donofrio also presents evidence that IKEA used "potential" ratings as a proxy for age-based assessments of promotability. Donofrio's evidence suggests that IKEA's corporate management requested that individual stores use an assessment of the "potential" of individual promotion applicants as part of their rating grid called the "Performance and Potential Grid" that was allegedly used by all stores nationwide. Saint-Antoine Decl. Ex. A-31. Donofrio alleges that the "potential" rating for an individual included information about the year in which the evaluated individual was born and was used as a pretext or proxy for age. The quality of "learning agility" that Donofrio alleges may have been a discriminatory codeword was a "huge component" of how IKEA assessed potential. *See* Pl.'s Br. at 20-21 (citing Blair Dep. at 146-147).

Finally, Donofrio presents evidence that IKEA's policies had a nationwide scope and could have affected putative class members nationwide. IKEA's corporate representative testified that IKEA's employment and promotion policies are applicable at IKEA's stores nationwide. *See* Pl. Br. at 7 (citing Deposition of Simon Lowes at 47:18-49:21). Donofrio's evidence suggests that IKEA's promotion preferences and policies were discussed at a national level and that location-specific hiring employees were potentially aware of and influenced by the national preferences. *See* O'Donnell Dep. at 66:19-67:16; 73:1-74:2 (testimonial evidence that there was a "national discussion at management level" to promote younger managers).

B. Analysis

Donofrio has presented sufficient evidence to meet the required "modest factual

showing" to demonstrate "a factual nexus between the manner in which [IKEA's] alleged policy affected him [] and the manner in which it affected the proposed collective action members." *Halle*, 842 F.3d at 224. Donofrio's evidence shows beyond mere speculation that IKEA may have discriminated against older employees in promotion decisions through a discriminatory corporate culture or through its succession planning and potential rating practices. Donofrio has also shown beyond mere speculation that IKEA's allegedly discriminatory policies and procedures could have affected all putative class members similarly. Although Donofrio's class definition and substantive allegations will be subject to more searching factual and legal scrutiny at the final certification and summary judgment stages, his showing here satisfies the lenient standard applicable to his motion for conditional certification.

IKEA objects that Donofrio possesses but has chosen to omit evidence that weakens his case. IKEA also puts forward its own evidence that Donofrio's claims will ultimately fail because IKEA's succession planning and potential rating policies were either never implemented or were not actually age-discriminatory. But IKEA's proposed evidence does not bear on Donofrio's motion here because inquiries into the merits of Donofrio's claims are inappropriate at the conditional certification stage. *See, e.g.*, *Viscomi*, 2016 WL 1255713, at *4. Instead, as noted above, Donofrio need only make a "modest factual showing" to demonstrate "a factual nexus between the manner in which [IKEA's] alleged policy affected him [] and the manner in which it affected the proposed collective action members." *Halle*, 842 F.3d at 224. Donofrio's evidence suffices to meet this lenient standard.

IKEA also objects that Donofrio's class should not be conditionally certified because a "class of unsuccessful promotion applicants will . . . necessarily include those who were qualified for the promotion and those who were not; and it will include those who sought a

promotion but lost out to a younger employee, and those who sought a promotion, but lost out to an older one." Def.'s Opp. at 1. In support of this argument, IKEA cites to two recent decisions from the Northern District of California with similar but not identical facts to this case: *Heath v. Google Inc.*, 215 F. Supp. 3d 844 (N.D. Cal. 2016) and *Rabin v. PricewaterhouseCoopers LLP*, No. 16-CV-02276-JST, 2018 WL 3585143 (N.D. Cal. July 26, 2018). *Heath* and *Rabin* are instructive.

Heath considered two proposed ADEA collective action classes. *See Heath*, 215 F. Supp. 3d at 855. The first class included all individuals who had applied for and were offered an on-sight interview for positions with the defendant; the second class included anyone who had applied for a position regardless of whether they had been offered an interview. *See id.* The court in *Heath* conditionally certified the class of interviewees but not the more expansive class of all applicants. *See id.* The court reasoned that the broader class definition failed because its members were not similarly situated: the broader class would have included more than half a million individuals without distinguishing between facially qualified and facially unqualified applicants. *See id.* In contrast, the first class succeeded because the definition contained an additional requirement that the class members must have been given an on-sight interview. *See id.* This additional condition sufficed to make the proposed class similarly situated for the purposes of conditional certification because on-sight interviewees were minimally qualified for the position, therefore making it plausible that they were similarly situated with respect to the defendant's allegedly discriminatory policies. *See id.*

In *Rabin*, the court denied conditional certification where, like the unsuccessful class in *Heath*, the plaintiff's proposed class did not distinguish between qualified and unqualified applicants. *Rabin*, 2018 WL 3585143, at *3. The Court in *Rabin* indicated, however, that two

plaintiffs who had both been screened for minimum qualifications like GPA would potentially be similarly situated for conditional certification purposes. *See id.*

Heath and *Rabin* ultimately undermine IKEA's position. Donofrio's proposed class includes only current IKEA employees who were denied promotions. Unlike the failed classes in *Rabin* and *Heath*—which proposed to include all internal and external job applicants, including individuals who were not employed by the defendant and who did nothing more than apply for a position—the proposed class in this case includes only IKEA employees who applied for and were denied internal promotions at IKEA. Because IKEA already hired all of Donofrio's putative class members to work for the company, Donofrio's proposed class is much more like the successful class of interviewees in *Heath*. As with that interviewee class in *Heath,* all putative members of Donofrio's proposed class are at least minimally qualified to be IKEA workers, indicating that they have at least met IKEA's minimum standards for employment and would be similarly situated with respect to any potentially age-discriminatory promotion policies.[7] For the limited purposes of conditional certification, this common thread renders the putative class members similarly situated with respect to their qualifications for promotion at IKEA. Although IKEA may raise this objection again at the more searching final certification stage with the benefit of opt-in discovery, for the purposes of this motion, IKEA's objection fails.

[7] IKEA ignores this fact when it argues that Donofrio "does not and cannot present any benchmark by which to determine whether a particular putative class member had the minimal qualifications of the particular applied-for position." Def.'s Br. at 10. At this stage, Donofrio's "benchmark by which to determine" whether a putative class member had the minimal qualifications is that the employee applicant already worked at IKEA.

IV. Conclusion

After a review of the evidence submitted in support of Donofrio's motion, I will conditionally certify Donofrio's proposed collective action class and authorize the Parties to initiate the process of notifying potential class members.

/s/ Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on May 16th, 2019