

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this Court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at <http://www.ca2.uscourts.gov/>). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on
3 the 15th day of October, two thousand nine.

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5 PRESENT:

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7 ROBERT D. SACK,
8 DEBRA ANN LIVINGSTON,
9 *Circuit Judges.*

10 ERIC N. VITALIANO,
11 *District Judge.**

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15 _____
16 PAUL BERUBE,
17 *Plaintiff-Appellant,*

18 -v.-

No. 08-1229-cv

19
20 GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
21 *Defendant-Appellee.*

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23
24 TODD STEIGMAN (Jacques J. Parenteau, *on the brief*), Madsen,
25 Prestley & Parenteau, LLC, New London, CT, *for Plaintiff-Appellant.*

*The Honorable Eric N. Vitaliano, of the United States District Court for the Eastern District of New York, sitting by designation.

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2 JOHN P. BARRY, Proskauer Rose LLP, Newark, NJ, *for Defendant-*
3 *Appellee.*
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6 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED
7 that the judgment of the district court be AFFIRMED in part, VACATED AND REMANDED in
8 part.

9 Plaintiff-Appellant Paul Berube (“Berube”) appeals from a judgment of the United States
10 District Court for the District of Connecticut (Bryant, *J.*), entered February 26, 2008, granting
11 summary judgment to Defendant-Appellee Great Atlantic & Pacific Tea Company, Inc. (“A&P”) on
12 his claims of discrimination under the Age Discrimination in Employment Act (ADEA) of 1967, 29
13 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and the
14 Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and
15 declining to exercise supplemental jurisdiction over his state law claims. Berube appeals only the
16 ADEA and ERISA claims.¹ We assume the parties’ familiarity with the underlying facts, procedural
17 history, and specification of the issues on appeal.

18 Berube was formerly employed by A&P as a liquor store manager, a position that included
19 bookkeeping responsibilities. At the time he was offered the position, he was promised by A&P that
20 he would receive progressive discipline before termination of his employment. A&P’s general,
21 although not universal, practice was to provide a four-step disciplinary process for continuing

1 ¹Berube did not contest summary judgment on the ADA claim below, which was
2 therefore properly granted. The district court’s observations with respect to the merits of his
3 ADA claim should not, however, be taken to have any collateral estoppel effect with respect to
4 any future claim under the Connecticut Fair Employment Practices Act (CFEPA), Conn. Gen.
5 Stat. § 46a-51 *et seq.*, that he might bring.

1 violations: a verbal warning, a written warning, a suspension, and finally termination. In 2003, A&P
2 changed its invoicing procedures. Berube initially failed to comply with the new procedures and
3 ultimately was transferred to a different store.² After an audit at the new store revealed that Berube
4 was still using the old inventory method, A&P verbally ordered him to use the new method. It is
5 undisputed that plaintiff complied with this instruction; nevertheless, A&P suspended Berube
6 approximately two weeks later and terminated his employment shortly thereafter. Although, before
7 he was terminated, Berube was shown a document regarding his alleged mismanagement of invoices
8 at his old store in Bristol and was suspended at that time, neither the document nor the suspension
9 cited Berube's conduct after he was specifically told to use the new inventory method. Moreover,
10 Berube was not given the opportunity to return to work after being shown the document and being
11 placed on suspension, and A&P does not rely on the document or the suspension to argue that
12 Berube received progressive discipline. *See* Defendant's Br. 35.

13 We review *de novo* a grant of summary judgment, which may be given where the record,
14 viewed in the light most favorable to the non-moving party, shows no genuine issue of material fact.
15 Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). On
16 summary judgment, plaintiff's ADEA claim is analyzed under the framework of *McDonnell Douglas*
17 *Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Plaintiff bears the initial burden to establish a *prima*
18 *facie* case of age discrimination by showing that "(i) at the relevant time the plaintiff was a member
19 of the protected class; (ii) the plaintiff was qualified for the job; (iii) the plaintiff suffered an adverse

1 ²The parties dispute the reason for the transfer. A&P asserts that an audit of Berube's
2 store indicated that he was adhering to the old guidelines, and it transferred him as a result.
3 Berube identifies at least some documentary evidence that the audit occurred after his transfer,
4 and thus could not have supplied the motivation.

1 employment action; and (iv) the adverse employment action occurred under circumstances giving
2 rise to an inference of discrimination.” *Rogue v. NYP Holdings*, 257 F.3d 164, 168 (2d Cir. 2001).
3 We have characterized plaintiff’s *prima facie* burden as “minimal” and “de minimis.” *Zimmermann*
4 *v. Assocs. First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001) (internal quotation marks omitted).
5 The burden of production then shifts to the employer to demonstrate a legitimate, non-discriminatory
6 reason for the adverse employment decision, and finally back to the plaintiff to show that the
7 proffered non-discriminatory reason is pretextual. *McDonnell Douglas*, 411 U.S. at 804-05.

8 Berube seeks to raise the inference of discrimination required for his *prima facie* case by
9 showing, *inter alia*, that A&P treated younger, similarly-situated employees more favorably than he.
10 Employees used as comparators in such an analysis need not be identically situated, but only must
11 be similarly situated in all material respects. *See, e.g., McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-
12 54 (2d Cir. 2001). “What constitutes ‘all material respects’ . . . varies somewhat from case to case
13 and, as we recognized in *Norville*, must be judged based on (1) whether the plaintiff and those he
14 maintains were similarly situated were subject to the same workplace standards and (2) whether the
15 conduct for which the employer imposed discipline was of comparable seriousness.” *Graham v.*
16 *Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2001) (citing *Norville v. Staten Island Univ. Hosp.*, 196
17 F.3d 89, 96 (2d Cir. 1999)). “Ordinarily, the question whether two employees are similarly situated
18 is a question of fact for the jury.” *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003).

19 We find that plaintiff has proffered sufficient evidence to make out a *prima facie* claim of
20 discriminatory intent by demonstrating that younger, similarly-situated employees received
21 progressive discipline for transgressions of comparable seriousness while he did not. Berube
22 identifies at least four comparators, Brian Badlowski, Ryan Fleet, Sid Prasad, and Frank Sengotta,

1 who were liquor store managers younger than he and who were cited for violating A&P's workplace
2 rules around the same time plaintiff was fired. Each of the comparators received written warnings
3 as a disciplinary method, and none were terminated for disciplinary violations. Under the standard
4 set forth in *Graham*, the fact that Berube had a different supervisor from the employees he cites as
5 comparators does not appear sufficient in itself to preclude Berube from showing that he was subject
6 to the same workplace standards and disciplinary procedures. *See id.*; *Norville*, 196 F.3d at 97.
7 Although Berube's district manager may not have given written warnings to employees as a general
8 practice, Berube has produced substantial evidence that progressive discipline was a general practice
9 at A&P and that managers expected to receive such discipline. We cannot say as a matter of law
10 that the employees Berube cites were not similarly situated in terms of workplace standards and
11 disciplinary procedures.

12 Nor is it sufficient simply to point out, as A&P does, that the comparators were disciplined
13 for issues "not related to a failure to comply with the new recordkeeping procedures." Appellee's
14 Br. 37. Rather, Berube need only demonstrate that the conduct for which the comparators were
15 disciplined was of "comparable seriousness" to his recordkeeping transgressions. *Graham*, 230 F.3d
16 at 40. There are certainly differences between the evinced conduct and that of Berube: Badlowski
17 had a smaller invoice discrepancy and Fleet and Prasad were mostly cited for being "sloppy," while
18 Sengotta's larger inventory discrepancy may have been partially due to the conduct of coworkers.
19 Yet these differences are not so significant that a reasonable juror would be precluded from deciding
20 that these employees engaged in conduct of comparable seriousness. Fleet and Prasad's messiness
21 resulted in the loss of "Rip logs" used to track the store's performance, much like Berube's invoices.
22 To determine relative severity of conduct between Berube and Badlowski, it is difficult to tell

1 whether the \$2,300 discrepancy in a single week of Badlowski's invoices should be compared to the
2 \$15,000 swing in Berube's "inventory," or rather to the \$1,395.97 discrepancy reflected in random
3 invoices selected from a month of Berube's records. As for Sengotta, even if other co-managers
4 were partially responsible he was still the only store manager at a store with a \$95,000 short
5 inventory, making his conduct facially similar to if not more serious than Berube's. This is a
6 sufficient showing to meet the minimal burden imposed by *McDonnell Douglas*'s first step. We
7 express no view as to steps two and three, which the district court did not reach.

8 We agree with the district court's grant of summary judgment on plaintiff's ERISA claim.
9 Section 510 of ERISA makes it "unlawful for any person to discharge . . . or discriminate against a
10 participant or beneficiary for exercising any right to which he is entitled under the provisions of an
11 employee benefit plan." 29 U.S.C. § 1140. To succeed on a Section 510 claim, a plaintiff must
12 demonstrate the employer specifically intended to interfere with benefits. *See Ingersoll-Rand Co.*
13 *v. McClendon*, 498 U.S. 133, 140 (1990). Moreover, to defeat summary judgment a plaintiff must
14 adduce some evidence from which a reasonable jury could conclude that an employer intended to
15 reduce benefits under ERISA. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 906 (2d Cir. 1997);
16 *see also Dister v. Cont'l Group, Inc.*, 859 F.2d 1108, 111 (2d Cir.1988) ("An essential element of
17 plaintiff's proof under the statute is to show that an employer was at least in part motivated by the
18 specific intent to engage in activity prohibited by § 510."). Plaintiff has failed to meet this burden,
19 merely speculating that the cost of his skin cancer treatments was the cause of his termination. No
20 reasonable jury could conclude based on the record before us that A&P intended to deprive Berube
21 of his medical benefits.

1 All arguments not otherwise discussed in this summary order are found to be moot or without
2 merit.

3 For the foregoing reasons, the judgment of the district court granting summary judgment on
4 the ERISA claim is hereby affirmed. The judgment is reversed as to the district court's finding that
5 plaintiff has not made a prima facie case of discrimination and remanded for further proceedings
6 consistent with this opinion, including further analysis under *McDonnell Douglas*.

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8 FOR THE COURT:
9 Catherine O'Hagan Wolfe, Clerk

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11 By: _____
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