

I. Background

A. Undisputed Facts

Ruth Ann Adams first began working for the Borough of Ridley Park as a part-time Office Clerk in the summer of 1981. In September 1981, she began to work full-time as an Administrative Assistant. In 1982, her title was changed to Assistant Secretary/Treasurer. In this capacity, she worked for two successive Borough Managers. In 1990, the Borough dismissed the Borough Manager and decided not to refill the position. Adams was then promoted to Borough Secretary/Treasurer. Adams continued to work as Borough Secretary/Treasurer until 1995 when she was not reappointed. Between 1990 and 1995 the composition of the Council changed significantly. Most of the Council Members who had appointed Adams in 1990 were no longer on the Council in 1995.¹ (Def. Ex. C, 41-3.) These changes also developed along political party lines. (Fasy, Dep., Def. Ex. D, 6; Wolff Dep., Pl. Ex. 7, 54.)

In September 1994, the Personnel Committee of the Borough issued a warning letter, citing Adams for her behavior during an August 11, 1994 altercation with Jack Petrie, the President of the Council. The altercation was based on the plaintiff's refusal to

¹ Hereinafter, defendants' exhibits attached to their motion for summary judgment will be labeled "Def. Ex." followed by the exhibit letter and a page number. Exhibits attached to plaintiff's response to defendants' motion for summary judgment will be labeled "Pl. Ex." followed by the exhibit number and page number. Exhibits attached to defendants' reply to plaintiff's response to defendants' motion for summary judgment will be labeled "Def. Ex. Supp." followed by the exhibit letter and page number.

comply with two requests made by the Council President, Jack Petrie. First, the plaintiff refused to send a "get well" card to two prominent Borough residents despite Petrie's repeated requests that a card be sent. Second, the plaintiff refused to provide information regarding a Borough project to Petrie upon his request, claiming that it was not public information. According to the September 1994 letter, the plaintiff later agreed that Petrie should have had access to the information in his position as Council President and as a Borough tax-payer. In its letter, the Personnel Committee "issues [Adams] a First Warning that, if the behavior reflected in your actions of August 11, 1994, as described above, persists, further warnings leading toward eventual dismissal from your position as Ridley Park Borough Secretary will be issued." (Def. Ex. H.) Adams received and read the letter.²

In December 1995, the Council-members decided not to reappoint Adams to the position of Borough Secretary/Treasurer as part of an upcoming biennial Borough reorganization. Two of the seven Council Members, Gail Heinemeyer and Ken Braithwaite, were not present at the meeting at which this decision was taken. Gail Heinemeyer was unable to attend due to a medical problem, and Ken

² The September 1994 letter was not placed in the plaintiff's personnel file until after she had left the Borough. The reasons for this lapse are in dispute. The fact that Adams read and received the letter in 1994 is not in dispute.

Braithwaite was out of town as a member of the Navy Reserves. (Def. Ex. D, 114.) The Council President, Jack Petrie, had received their consent to the decision not to reappoint the plaintiff prior to the meeting. (Def. Ex. D, 115.) One Council Member voted to retain Adams. The four remaining council members - Jack Petrie, Richard Fasy, Barbara Smith, and Edward Wolff - voted not to reappoint Adams. These four council members are named defendants. Mayor Kennedy, the fifth named defendant, did not have a vote at the meeting. After the decision not to reappoint Adams, the Council employed a woman, Louise Mason, as an interim/temporary borough secretary. (Pl. Ex. 9, 13.) In 1996, the Borough then hired Robert Poole, a 32 year old man, as Borough Manager/Secretary/Treasurer, who - at the time this law suit was brought - was still employed in this capacity by the Borough.

B. Defendants' Stated Reasons for Decision

1. Personality Conflicts

Petrie, Fasy, Smith, and Wolff testified that there were conflicts between Adams and the council members. "I was constantly getting calls and having other members of council come to me and complain about things ruth Ann was doing or not doing on an ongoing basis." (Petrie Dep., Def. Ex. D, 11.) Fasy stated that Adams "was not able to solicit, gain, and retain the

trust of Council." (Pl. Ex. 6, 49.) Smith described Adams as "difficult to deal with" and stated that "there was discord that she would create between the council people." (Def. Ex. F, 12.) Wolff stated: "She could not get along with the Council that was there." (Def. Ex. E, 5.)

2. Change in Responsibilities

Wolff and Kennedy stated that the Borough wanted to create a Borough Manager position with greater responsibilities than those taken on by Adams. According to Kennedy, "the management of boroughs were changing and I certainly didn't believe that she had the managerial skills to take the borough to the next level ... It was only after my readings and I actually began to see the shifts in government decision making and government funding apparatus that it became very critical that we find someone that could continue the work that we had done and that the ideal candidate would have a degree in public administration. That's how much I thought the changes were coming" (Def. Ex. G, 43. See also Wolff Dep., Def. Ex. E, 22.)

3. Grant Writing

Petrie, Smith, Wolff, and Kennedy testified that Adams' lack of involvement in the Borough's grant and funding work was a factor in their decisions. "Obviously one of the reasons that we were

interested in a borough manager is for doing things like writing grants and whatever. I don't believe Ruth Ann had that background." (Petrie Dep., Def. Ex. D, 39.) Smith testified that she wrote grant applications herself without help from Adams: "It would have been, in the very least, her responsibility to furnish background data for a grant that needed to be written.

I don't know that the direct responsibility would have fallen on her to, per se, write the whole thing, but she should have at least participated in its preparation." (Def. Ex. F, 15.) With respect to a washed-out damn in town, Kennedy stated that "my biggest concern was the fact here was a major, major problem in the town and that she did not even understand the possibility of that funding existed there." (Def. Ex. G, 8. See also Wolff Dep., Def. Ex. 8.)

4. Financial Skills

Fasy, Petrie, and Kennedy pointed to Adams' budgeting and bookkeeping skills as a problem: "But bottom line was, you would expect that the borough secretary/treasurer would understand money and would understand budgeting and would understand ... budget fund maintenance. And over time, we discovered from incident to incident, that she didn't have a handle on any of that." (Fasy Dep., Def. Ex. Supp. D, 8.) Adams made a reporting error with respect to liquid fuel reimbursements that cost the

Borough several thousand dollars (Petrie Dep., Pl. Ex. 9, 86-87; Fasy Dep., Pl. Ex. 6, 26-27) and a reporting error with regard to the police pension fund that lead to a citation from the Auditor General. (Fasy Dep., Def. Ex. Supp. D, 50; Kennedy Dep., Pl. Ex. 8, 91-92.) Fasy and Kennedy also testified that Adams frequently transferred money between funds without being able to explain the need for the transfers to Fasy's and Kennedy's satisfaction. (Fasy Dep., Pl. Ex. 6, 26; Kennedy Dep., Def. Ex. Supp. A, 25.)

5. Miscellaneous

In addition to the above reasons, the defendants cited other specific incidents or problems. Petrie, Fasy, Wolff, and Kennedy all stated that their understanding of Adams' role in interfering in an ongoing drug investigation in which her son-in-law was involved was a factor in their decision. (Petrie Dep., Def. Ex. D, 5-7; Fasy Dep., Pl. Ex. 6, 66; Wolff Dep., Pl. Ex. 7, 55-56; Kennedy Dep., Def. Ex. Supp. A, 71-72.) Petrie cited resident complaints as well as personality conflicts between Adams and the Assistant Fire Chief and the head of a local senior citizen's organization. (Def. Ex. D, 9-10.) Smith and Kennedy testified that Adams frequently took late lunches and was hard to reach in her office in the afternoon. (Smith Dep., Def. Ex. F, 13; Kennedy Dep., Def. Ex. G, 32.) Smith and Fasy stated that Adams appointed a seasonal employee without the approval of the council

or of a council member. (Smith Dep., Def. Ex. F, 4-6; Fasy Dep., Pl. Ex. 6, 64.) Smith stated that Adams failed to send out sidewalk ordinances to residents by certified mail as required by ordinance. (Def. Ex. F, 9.) Fasy testified that Adams had made a salt purchase for the Borough without the necessary approval. (Def. Ex. Supp. D, 69.)

6. Reasons Given to EEOC

During the EEOC proceedings, counsel for the defendants stated that the council members did not reappoint Adams for two reasons: first, the Council Members decided to eliminate the position of Borough Secretary and hire instead a Borough Manager; second, the Council was displeased with the plaintiff's performance. The performance deficiencies included:

(a) Complainant's failure to submit information to the Commonwealth of Pennsylvania pursuant to Act 205 leading to citations from the Auditor General;

(b) Failure by Complainant to advise Borough Council of these notices of deficiencies which were discovered by Mayor Kennedy;

(c) The unilateral hiring of a seasonal employee without approval by Ruth Ann Adams without authority from Borough Council;

(d) Complainant's breach of confidentiality;

(e) Complainant's payment for salt without approval;

(f) Complainant failure to advise Borough Council of a request by the Auditor General for information pertaining to

the Police Pension Fund and failing to provide this information to the Commonwealth;

(g) Complainant's mistakes in ordering liquid fuel which resulted in a cost to The Borough of \$22,000 in 1995; and

(h) Complainant's failure to comply with The Borough's sidewalk ordinance by failing to send notices by certified mail. (Pl Ex. 5.)

II. Discussion

A. Legal Standard for Summary Judgment

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3rd Cir. 1993).

B. Summary Judgment under Title VII and the ADEA

The decision whether to grant or deny summary judgment in an

employment discrimination action under Title VII and the ADEA is governed by the Supreme Court's burden-shifting analysis in McDonnell-Douglas v. Green, 411 U.S. 792 (1973), recently clarified in Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2097 (2000).³ Under this analysis, the plaintiff must first make out a prima facie case of discrimination. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the employment decision. Because the ultimate burden must always rest with the plaintiff, the defendant is not required to show by a preponderance of the evidence that he was, in fact, motivated by this particular reason. Rather, the defendant must merely present a reason for the action, which, if believed, would be legitimate and non-discriminatory. In order to survive summary judgment, the plaintiff must then show that the reason presented by the defendant is pretextual either by showing that the defendant's reason is "unworthy of credence", Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256

³ The Supreme Court has not directly addressed whether the McDonnell Douglas analysis, initially applied to Title VII cases, also applies to ADEA cases. However, in Reeves, the Court itself did apply the analysis to ADEA cases: "This Court has not squarely addressed whether the McDonnell Douglas framework, developed to assess claims brought under ... Title VII of the Civil Rights Act of 1964, also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the McDonnell Douglas framework is fully applicable here." Reeves, 120 S.Ct. at 2105. The Third Circuit has repeatedly applied the McDonnell Douglas analysis to ADEA cases. See e.g. Simpson v. Kay Jewelers, 142 F.3d 639 (3d Cir. 1998); Sempier v. Johnson & Higgins, 45 F.3d 724 (3d Cir. 1995). In Keller v. ORIX Credit Alliance, 130 F.3d 1101, 1108 (3d Cir. 1997)(in banc), the Third Circuit stated that "our court has applied a slightly modified version of this scheme in ADEA cases," in which the last of four factors necessary to establish a prima facie case of discrimination consists of showing that the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination. Id.

(1981), or by showing that the real motivation was more likely than not discriminatory. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994); Reeves, 120 S.Ct. at 2108.

C. Plaintiff's Prima Facie Case

Adams must show (1) that she is a member of a protected class; (2) that she was qualified for the position in question; (3) that an adverse employment decision was rendered against her; and (4) that, after a continued search to fill the position, the position was filled by an individual of the "complainant's qualifications." McDonnell-Douglas, 411 U.S. at 802; Reeves, 120 S.Ct. at 2106. Burdine, 450 U.S. 248, 253-4 (1981).⁴

Adams has satisfied factors 1 and 3. Her arguments on factors 2 and 4 are weak. She has not demonstrated that she was qualified for the position in question or that the position was filled by a person of her qualifications. The difficulty is that Adams' position was not the same position as the one filled by her successor. Adams was Borough Secretary/Treasurer, while her successor, Robert Poole, was hired as "Borough Manager/Secretary/Treasurer". This difference in title is not

⁴ The Third Circuit has restated the factors necessary to prove a prima facie case as follows: (1) that the complainant be a member of a protected class; (2) that the complainant was qualified for the position; and (3) that the complainant was discharged under circumstances that give rise to an inference of unlawful discrimination. Waldron v. SL Indus., Inc., 56 F.3d 491, 494 (3d Cir. 1995).

dispositive; I must look at the actual functions performed. Poole performs at least one significant task - writing grant applications - that Adams did not perform during her tenure at the Borough. Adams has produced no evidence that she was qualified to perform this task.

Adams argues that she was qualified to take on the role of Borough Manager because she had essentially already performed the role of Borough Manager during her employment as Borough Secretary/Treasurer. Although it may be true that Adams performed the same role as previous Borough Managers, I must consider whether plaintiff was qualified for the position of Borough Secretary/Treasurer/Manager as it was created in 1996. "Good (or even excellent) performance in a lower level position does not necessarily imply success in a more competitive environment." Healy v. New York Life Insurance Co., 860 F.2d 1209, 1215 (1988). Even when viewing the evidence in the light most favorable to the non-moving party, Adams has failed to produce evidence establishing, first, that her position was the same as Poole's current position despite the change in title and, second, that she was qualified to perform this function.

The burden for establishing a prima facie case of discrimination, however, is not meant to be "onerous." Burdine, 450 U.S. at 253.

Sempier v. Johnson, 45 F.3d 724, 728 (1995). Despite my strong doubts as to whether Adams has established a prima facie case of discrimination, I will assume that she has and proceed to the next two steps in the McDonnell Douglas analysis.

D. Pretext Analysis

The Borough has satisfied the second prong of the McDonnell Douglas analysis by providing legitimate, non-discriminatory reasons for their decision not to reappoint Adams. The burden then shifts back to Adams to show that the reasons presented by the defendant are pretextual either by showing that the reasons are "unworthy of credence" or by showing that the real motivation was more likely than not discriminatory. Burdine, 450 U.S. at 256; Fuentes, 32 F.3d at 764.

In order to defeat a summary judgment motion, Adams must produce sufficient evidence to "allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons" was a pretext. Fuentes, 32 F.3d at 764. The plaintiff does not have to "cast doubt on each proffered reason in a vacuum. If the defendant offers a bagful of legitimate reasons, and the plaintiff manages to cast a substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder. That is because the factfinder's rejection of some of the

defendants' proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available." Fuentes, 32 F.3d at 764, Fn 7.

Adams makes two arguments supporting her claim that the defendants' reasons are pretextual. First, she contradicts or attempts to contradict some of the defendants' specific allegations. Second, she points to alleged inconsistencies in the defendants' evidence and testimony to undermine the credibility of the defendants' proffered reasons. I will address each of these arguments in turn.

Adams has submitted an affidavit, supportive letters from community members, and petitions in which community members ask that Adams be reappointed. In Celotex Corp. v. Cartrett, the Supreme Court held that in defeating a motion for summary judgment, the non-moving party must "go beyond the pleadings and by her own pleadings or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." 477 U.S. at 324. The Third Circuit has interpreted this statement to mean that "self-serving testimony may be utilized by a party at

summary judgment." Waldron, 56 F.3d at 501. The Third Circuit, however, has also held that an employee's assertion of his/her own good performance is not sufficient to defeat a motion for summary judgment where the employer has produced performance reviews or documentary evidence of insubordination or poor performance. Sempier, 45 F.3d at 731, citing Billet v. CIGNA Corp, 940 F.2d 812, 818-22 (3d Cir. 1991).

Adams' affidavit contains very few specific facts; it consists largely either of uncontested facts - such as the dates of plaintiff's employment- or of general, unsupported contradictions of the defendants' allegations. Certain statements in the affidavit are contradicted by documentary evidence and Adams' deposition testimony: Adams claims to have "effectively and dutifully" performed her job duties (Pl. Ex. 1, ¶ 2) and never to have been given any warning of problems with her work performance prior to the 1995 decision not to reappoint her. (Pl. Ex. 1, ¶ 7.) These claims are undermined by the previously mentioned September 1994 letter from the Personnel Committee, which the plaintiff admitted receiving and in which the plaintiff was given a serious warning regarding her behavior at work. (Def. Ex. H.)

Adams does include in her affidavit the following statements that are responsive to the reasons given by the defendants' for their

decision. First, Adams claims never to have hired a seasonal employee without the permission of the council. (Pl. Ex. 1, ¶ 8.) I will assume, therefore, that plaintiff did not hire the seasonal employee without permission of the council. Second, plaintiff states: "In reference to the sending out of notices for the sidewalk ordinance, I was initially told to send out notices by certified mail, then the next day another Council person came in and told me to send out the notices by regular mail." (Pl. Ex. 1, ¶ 9.) Nothing in plaintiff's statements directly contradicts defendants' claim that Adams did not comply with the sidewalk ordinance, which required the notices to be sent by certified mail. But I will assume that the plaintiff has undermined this stated reason for the decision not to reappoint her. Third, presumably in reference to the defendants' claims of absenteeism, Adams notes that she had accumulated 120 sick days by the time she left the Borough. (Pl. Ex. 1, ¶ 10.) Defendants' main argument with regard to tardiness and absenteeism relates to the long lunches Adams allegedly took. Adams' statement about her accumulated sick days does not contradict this allegation. Fourth, Adams states that she "never told [her] son-in-law not to take a drug test." (Pl. Ex. 1, ¶ 11.) This claim relates to the defendants' allegation that the plaintiff breached confidentiality by speaking to her son-in-law and others about an ongoing drug investigation. Adams does not claim that she did

not talk to her son-in-law or give him advice, and she explicitly admits talking to others involved in the incident. (Pl. Ex. 1, ¶ 11.) Adams' affidavit, therefore, supports one of the defendants' reasons for their decision. Fifth, Adams states that she does "not recall there ever being a deficiency in the liquid fuels fund." (Pl. Ex. 1, ¶ 15.) Once again, this statement does not serve to contradict defendants' claims of deficiencies in the liquid fuel funds. She does not deny the defendants' allegation.

In addition to her affidavit, Adams has produced supportive letters and petitions from members of the community, commending her for a job well done. While these letters do challenge defendants' claims that Adams had personality problems with members of the community, they prove only that many community members did not have such problems. They do not contradict defendants' claims that other community members, including those specifically cited by the defendants, complained about Adams. However, even were I to hold that Adams has produced sufficient evidence to contradict defendants' claims concerning residents' complaints, these letters do not contradict the defendants' more general claim that Adams was not reappointed due to her poor performance. It is the defendants' view of Adams performance which is at issue in this case, not the community's view: "To discredit the employer's proffered reason, however, the plaintiff

cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Fuentes, 32 F.3d at 765.

Although the community's view on Adams performance might arguably shed light on whether the Council was wrong or mistaken in not reappointing Adams, it does not shed light on the question of the Council's motivation. In deciding whether a fact-finder could determine that the defendants' reasons are pretextual, I must examine the qualifications and criteria considered by the defendants in terminating Adams, not Adams' view or the community's view of which qualifications are important. Simpson v. Kay Jewelers, 142 F.3d 639, 642 (1998).

Thus, viewing the evidence in the light most favorable to the plaintiff and taking her claims in her affidavit as true, a few of the defendants' arguments have been contradicted or at the very least seriously challenged. The defendants, nevertheless, have produced ample legitimate reasons to support a decision not to reappoint. Given the scope of the defendants' remaining, unchallenged objections, Adams has not produced sufficient

documentary evidence to show that each of the defendants' reasons is a pretext. Further, even viewing all the facts in her affidavit to be true, she has not managed to cast substantial doubt on a sufficient number of the reasons so as to seriously undermine the defendants' credibility. See Fuentes, 32 F.3d at 764, Fn7.

Adams also attempts to diminish the defendants' credibility by revealing inconsistencies in their evidence and testimony. Adams argues that not all the defendants gave the exact same reasons for their decision not to reappoint her. I am not troubled by the fact that all the defendants did not repeat each other's testimony word for word. Each defendant interacted with Adams on a different footing and concerning different matters of Council business. It is not surprising that the five defendants have differing reasons for their decision not to rehire her. There is sufficient overlap in the reasons provided by the Council-members as to render any inconsistencies insignificant. See above, pp. 3-6.

Adams places much weight on the inconsistencies between the reasons provided to the EEOC and the reasons given by the defendants in their depositions. Adams claims first that the defendants were not aware of and did not understand the reasons

provided to the EEOC by their Counsel. All of the reasons provided to the EEOC, however, find support in the deposition of at least one defendant. Although the language used by the defendants in describing these reasons may not precisely mirror the language used by Counsel in the EEOC complaint, the problems described are in fact the same.

The plaintiff also claims that the very fact that defendants have come up with additional reasons since submitting the EEOC document is sufficient to cast doubt on the veracity of defendants' reasons. I am not persuaded by this argument. The decision-makers were separate individuals, each with a vote and each with a different history of relations with the plaintiff. The fact that the lawyer representing the Borough did not list every single reason for the dissatisfaction of the five defendants does not undermine their credibility. Eight examples of the plaintiff's poor performance were given to the EEOC. The fact that there were several additional reasons for the Councilmembers' dissatisfaction that did not appear in the response to the EEOC is understandable. Counsel for the defendants was not getting information from one entity, but from several independent decision-makers.⁵ Counsel for the plaintiff conceded that the

⁵ Since these additional complaints arose and, in some cases, were discussed with Adams during her employment, they should not all be considered post hoc explanations. Nonetheless, even the use of post hoc explanations is not in and of itself sufficient to show pretext: "Post hoc explanations, like any self-helpful

defendants are not prohibited by law from raising additional issues in a lawsuit that were not raised in a prior EEOC filing. (Transcript of Oral Argument, September 11, 2000, p. 36-7.)

In conclusion, Adams has not produced sufficient evidence to enable a fact-finder to infer that the defendants' reasons are mere pretext for discrimination. I, therefore, grant summary judgment for the defendants.

An Order follows.

statement made after the initiation of a lawsuit, may be to some degree suspect. However, the mere fact that a defendant relies on a post hoc evaluation does not in and of itself create a factual dispute about whether the evaluation is pretextual . . . Unless the plaintiff introduces counter-affidavits and argumentation that demonstrate that there is reason to disbelieve this particular explanation, there is no genuine issue of material fact." Healy v. New York Life Insurance Company, 860 F.2d 1209, 1215-16 (1988). See also McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 374 (7th Cir. 1992) (declining "to bind ADEA defendants to the positions they initially assert in state administrative proceedings by rendering any different position a per se pretext for summary judgment purposes in subsequent proceedings.")