

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

EDGAR Q. BULLOCK, III : CIVIL ACTION  
: :  
v. : :  
: :  
BALIS & CO., INC., : :  
a/k/a GUY CARPENTER & CO., INC. : No. 99-748

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**DECEMBER , 2000**

Presently before the Court is a Motion for Summary Judgment filed by the Defendant, Balis & Co., Inc., a/k/a Guy Carpenter & Co., Inc. ("Balis"). The Plaintiff, Edgar Q. Bullock, III ("Bullock") filed suit in this Court alleging age and disability discrimination. Balis now seeks summary judgment in its favor pursuant to Federal Rule of Civil Procedure 56 because, among other things, it believes Bullock was unqualified for his job and was fired for a legitimate non-discriminatory reason. For the following reasons, Balis's motion is granted in part and denied in part.

**I. BACKGROUND**

Relying on the parties' stipulations of fact, and otherwise accepting as true the evidence of the nonmoving party and all reasonable inferences that can be drawn therefrom, the facts of the case are as follows. Bullock began working at Balis as a broker trainee on May 1, 1979, and was promptly promoted to treaty broker. Bullock received two more promotions, first to

Assistant Secretary and then to Assistant Vice President.

Bullock continued in this position for another ten years, until his termination on March 31, 1997. Bullock had worked as a treaty broker at Balis for nearly eighteen years.

Bullock's employment record at Balis was far from spotless. Among other noteworthy problems, Bullock: (1) persisted in scheduling golf outings on business trips despite his supervisor's repeated requests that he not do so; (2) had his secretary prepare a professional memorandum that exceeded her scope of expertise; (3) failed to meet project deadlines; (4) intentionally delayed paying his company credit card in order to earn the interest on Balis's expense reimbursement; (5) regularly left work early whenever his supervisor was out of town; (6) would read the newspaper while at work; (7) took a vacation while one of his clients was going out of business; and (8) failed to bring in as much new business as his colleagues. Bullock had received several poor evaluations and was earning a salary that placed him at the low end of the pay scale for similarly situated employees at Balis.

On September 23, 1996, Donald Johnston, Bullock's supervisor, sent Bullock a letter informing him that his job was in jeopardy. On February 27, 1997, Johnston sent the President, William Fox, a memorandum questioning whether Bullock should remain at Balis. On March 17, 1997, Bullock requested a transfer

to a brokering team not supervised by Johnston. Fox met with Bullock to discuss his transfer request and told him that a transfer was not possible because no other supervisor wanted to work with Bullock. Bullock asked Fox for a second chance, and Fox gave Bullock the weekend to reconsider his future at Balis.

After the weekend, on March 24, 1997, Bullock and Fox met a second time. Among the many reasons Bullock offered for his poor performance,<sup>1</sup> he stated that he might suffer from Attention Deficit Disorder ("ADD").<sup>2</sup> Bullock believed he might suffer from ADD because his son had just been diagnosed with the condition. Bullock had not yet been diagnosed with it himself. Bullock requested a year of continued employment during which he could seek treatment and, as a result, improve his work performance.

Johnston and Fox then met outside the presence of Bullock to discuss his future at Balis. They decided to fire him. They later told Bullock that, pursuant to his contractual right to six

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<sup>1</sup> Bullock also stated that he was afraid of making appointments with strangers over the phone and that his family's medical history of serious heart disease had caused him to adopt a relaxed attitude toward work. Bullock also told Johnston later that day, outside the presence of Fox, that he had begun "coasting" at work after a colleague received a promotion that he felt should have gone to Bullock.

<sup>2</sup> Bullock has since been diagnosed as having Attention Deficit Hyperactivity Disorder ("ADHD"), which is related to ADD. ADHD is commonly characterized by a persistent pattern of unusually frequent and severe bouts of inattention, impulsiveness or hyperactivity not commonly seen in those without the disorder.

months notice, he could remain at Balis for six more months and receive salary and benefits for six months thereafter. They also informed Bullock that, during his final six months of employment, Johnston could reinstate Bullock if his performance dramatically improved. A few days later, however, Fox changed his mind; he apparently believed Bullock would not improve his performance and it would be unproductive to have a terminated employee remain in the work environment. On March 31, 1997, Fox told Bullock that he could not return to work. His salary and benefits package would not be altered.

Bullock was 49 when Balis fired him. Balis did not replace Bullock or fill his position; instead, his superiors distributed his accounts to other employees. These employees included: (1) Charles Tull, age 53 at the time of Bullock's termination; (2) David Thomas, age 38; (3) John Paven, age 37; and (4) James Gardner, age 33. Balis also suggests that Johnston, age 59, and James Baxendale, age 57, assumed many of Bullock's responsibilities.

After pursuing administrative remedies, Bullock filed suit against Balis on February 12, 1999. Bullock's Complaint originally contained five Counts. Counts I and II alleged age and disability discrimination, respectively. Counts III, IV and V alleged violations of Pennsylvania law and intentional infliction of emotional distress.

During a March 23, 2000 deposition of Bullock, it came to light that Bullock had lied on his job application and résumé. The résumé Bullock had given to Balis while originally seeking a job there implied that he was currently employed. He also stated on his job application that he was leaving his former employer because of a "lack of career development," and left the "date terminated" section of the application blank. In fact, Bullock's previous employer had fired him, but Bullock was too scared to inform his potential new employer. The job application stated that "any false answer or statements made by me on this application, or any supplement thereto, will be grounds for immediate discharge." Balis did not discover these falsehoods until after it had fired Bullock.

Balis filed a Motion to Dismiss on April 19, 1999. By Order of July 22, 1999, the Court dismissed Counts III, IV and V of Bullock's Complaint. Counts I and II, however, remained in effect. Balis then filed this Motion for Summary Judgment on the remaining Counts of Bullock's Complaint on July 18, 2000, which the Court will now consider.

## **II. STANDARD OF REVIEW**

Pursuant to Federal Rule of Civil Procedure 56, a court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show 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. P. 56(c). The movant bears the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant fails to meet this burden under Rule 56(c), its motion must be denied.

If the movant adequately supports its motion, however, the burden shifts to the nonmoving party to defend the motion. To satisfy this burden, the nonmovant must go beyond the mere pleadings by presenting evidence through affidavits, depositions or admissions on file to show that a genuine issue of fact for trial does exist. Id. at 324; Fed. R. Civ. P. 56(e). An issue is considered genuine when, in light of the nonmovant's burden of proof at trial, the nonmovant produces evidence such that a reasonable jury could return a verdict against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding whether a genuine issue of fact exists, the court is to believe the evidence of the nonmovant, and must draw all reasonable inferences in the light most favorable to the nonmovant. Id. at 255. Moreover, a court must not consider the credibility or weight of the evidence presented, even if the quantity of the moving party's evidence far outweighs that of the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Nonetheless, a party opposing summary

judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

If the nonmoving party meets this burden, the motion must be denied. If the nonmoving party fails to satisfy its burden, however, the court must enter summary judgment against it on any issue on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322-23.

### **III. DISCUSSION**

#### **A. What Evidence the Court May Consider**

Before turning to the merits of Balis's Motion for Summary Judgment, the Court must first determine, as a threshold matter, what evidence it may consider. After Bullock and Balis filed, respectively, their Response and Reply to the instant Motion for Summary Judgment, Bullock also filed a Sur-reply. Bullock filed the Sur-reply without seeking leave of the Court, in direct violation of the Court's standing order that parties may not file sur-replies without prior express leave from the Court. Because leave was neither requested nor granted, the Court will not consider evidence presented in Bullock's Sur-reply to the extent that it was not already presented in Bullock's Response. For similar reasons the Court will not consider any response by Balis

to Bullock's improper Sur-reply.

B. The Employment Discrimination Burden Shifting Scheme

Bullock's two remaining claims allege age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 629 et seq., and disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. In those claims, Bullock alleges that Balis subjected him to intentionally disparate treatment because of his age and perceived disability. The complicated McDonnell Douglas scheme of shifting burdens of production and proof controls the analysis of individual disparate treatment claims brought under the ADA or ADEA. See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106-09 (2000).

Under the general burden-shifting scheme in an individual disparate treatment claim where no direct evidence of discrimination exists, the plaintiff must begin by proving his prima facie case of discrimination by a preponderance of the evidence. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). The elements of the prima facie case will vary depending on the facts alleged and the type of claim presented. If the plaintiff cannot meet this burden, his claim must fail. Satisfying this burden, however, dispenses with the most common

non-discriminatory reasons for adverse employment actions and accordingly gives rise to a rebuttable presumption of discriminatory intent. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Burdine, 450 U.S. at 254. Although the ultimate burden of persuasion still remains with the plaintiff, the burden shifts to the defendant to produce a legitimate non-discriminatory reason for the adverse employment decision. Hicks, 509 U.S. at 507; Burdine, 450 U.S. at 254. This is merely a burden of production; the defendant need not prove that this was the actual reason for the adverse employment action. Burdine 450 U.S. at 260. In the unusual scenario where a defendant cannot produce such a reason, judgment in favor of the plaintiff is appropriate. If the defendant can, however, the presumption of discriminatory intent is rebutted and drops from the case entirely. Hicks, 509 U.S. at 507; Burdine, 450 U.S. at 255 & n.10. The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's motivation for the adverse employment action was discriminatory. Reeves, 120 S. Ct. at 2106-09. To do this, the employee must prove by a preponderance of the evidence that the employer's legitimate non-discriminatory reason was pretextual. Id. If he chooses, a plaintiff may rely solely on a showing of pretext in his attempt to prove discriminatory intent. Id. (rejecting the "pretext plus" requirement adopted by many courts). Of course, the

plaintiff may also produce any additional evidence of discriminatory animus in order to make this showing. The outcome of the case turns on whether the plaintiff can prove discriminatory intent; if he cannot, judgment in favor of the defendant is appropriate.

In the context of a motion for summary judgment, a defendant in this kind of case may prevail in one of two ways. First, the defendant may show that the plaintiff can raise no genuine issue of fact as to one or more elements of his prima facie case. Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988). Second, the defendant may present a legitimate non-discriminatory reason for its actions and then show that the plaintiff can raise no genuine issue of material fact as to whether the proffered reason is a pretext for discrimination. Id. Stated conversely, if the plaintiffs show that such genuine issues of fact do exist, summary judgment is inappropriate.

### C. Bullock's ADA Claim

The ADA states that a covered employer may not "discriminate against a qualified individual with a disability because of that disability in regard to discharge and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). Bullock's prima facie case under the ADA requires him to prove that: (1) he is "disabled" as that term is defined within the act; (2) he is

otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an adverse employment action. Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). Although Bullock's firing clearly constitutes an adverse employment action, Balis challenges his prima facie case because it believes he is neither disabled nor qualified for his position.

1. Bullock's Disability

A person is considered disabled under the ADA if he: (1) has a disability, a "physical or mental impairment that substantially limits one or more of the major life activities"; (2) has a "record of such an impairment"; or (3) is "regarded [by the employer] as having such an impairment." 42 U.S.C. § 12102(2). Bullock apparently concedes that he does not have a disability. Consequently, his claim hinges on whether Balis regarded him as having such an impairment.

If all reasonable inferences are to be made in favor of Bullock, a jury could find that Balis regarded him as having a disability. Although Balis had called his future with the company into question, Bullock informed his superiors of his possible disability before they decided to fire him. A jury could infer that, upon learning that Bullock might have a disability, Balis reviewed his history of performance problems,

considered it symptomatic of his ADD, and fired him because they regarded him as having a disability that substantially interfered with his ability to work.<sup>3</sup> This case involves more than mere notice to an employer of a disability. Cf. Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996) (holding that mere notice to employer of disability, without more, will not establish that employer regarded employee as disabled). In this case, the timing of the notice, not merely the fact of the notice itself, calls Balis's decision to fire him into question. A reasonable trier of fact could infer from these facts that Balis did regard Bullock as disabled before making the decision to fire him. Of course, Bullock's claim that he had ADD came contemporaneously with many excuses for his performance; a jury could infer that Balis disregarded Bullock's claim as merely an excuse for his performance or an attempt to win his employer's sympathy. This is a genuine issue of material fact, however, for a jury to resolve. Accordingly, Bullock has presented a genuine issue of fact as to whether Balis regarded him as having a disability.

## 2. Bullock's Qualification Under the ADA

Bullock's prima facie case also requires him to show that he was "otherwise qualified" for his job. Under the ADA, an

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<sup>3</sup> Balis also notes that Bullock did not know for certain that he had ADD or ADHD when Balis fired him. While that may be so, whether an employer regards an employee as disabled does not turn on whether the employee knows he has a disability, or even had one; only the employer's state of mind is at issue.

employee is considered a "qualified individual with a disability" if he can prove by a preponderance of the evidence that he: (1) "satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc."; and (2) can "perform the essential functions of the position held or desired, with or without reasonable accommodations." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 311 (3d Cir. 1999); Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir. 1996). As both parties accept that Bullock satisfied the minimal prerequisites for employment as a treaty broker, his qualification for the job turns on whether he could perform its essential functions.<sup>4</sup> Balis contends that Bullock's persistently poor performance demonstrates that he could not perform the essential functions of a treaty broker. Bullock counters that he must have been able to because, were he not, he would not have held his position at Balis for almost 18 years and received several promotions.

The Court is satisfied that, at a minimum, Bullock has presented genuine issues of material fact that he was minimally qualified for his position. At the prima facie stage of a case, a plaintiff need only prove by some credible evidence, including

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<sup>4</sup> Because Bullock seeks relief as an employee "regarded as" disabled, the Court need not determine whether a reasonable accommodation was either requested or granted in this case. See, e.g., Deane v. Pocono Med. Ctr., 142 F.3d 138, 148-49 n.12 (3d Cir. 1998).

his own testimony, that he was minimally qualified for the position from which he was fired.<sup>5</sup> See, e.g., Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1084 (3d Cir. 1996). Given Bullock's long tenure at Balis, his several promotions and his maintaining the appropriate broker's license, Bullock was minimally qualified for his job despite what Balis considered his relatively poor performance. Moreover, Sempier v. Johnson & Higgins, 45 F.3d at 729 (3d Cir. 1995), on which Balis relies, instructs that "objective job qualifications" such as experience in a particular field may be considered as part of a plaintiff's prima facie case, but "subjective job qualifications" such as initiative and drive are "better left to consideration of whether the employer's non-discriminatory reason for discharge is pretext." Id. at 729; see also Equal Employment Opportunity Comm'n v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1193, 1195 n.7 (10th Cir. 2000) (stating that courts should not allow defendants to short circuit the McDonnell Douglas analysis by raising its subjective reasons for firing an employee as a challenge to the employee's prima facie case); Fowle v. C & C Cola, 868 F.2d 59, 64-65 (3d Cir. 1989). Finally, although Balis

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<sup>5</sup> Balis relies on two non-ADA cases, Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988) and Kohn v. AT&T Corp., 58 F. Supp. 2d 393, 409 (D.N.J. 1999). The Court finds that Bullock's long history with his employer and his several promotions distinguishes those cases factually from the case at bar.

lists at length Bullock's performance problems, it never suggests what it considers the essential functions of Bullock's position. Accordingly, the Court finds that there are genuine issues of fact concerning Bullock's qualifications for his job as a treaty broker. The Court will, of course, consider Bullock's performance issues when considering the strength of Balis's proffered non-discriminatory reason for firing him.

3. Balis's Legitimate Non-discriminatory Reason

In the instant case, Balis offers Bullock's poor performance as its legitimate non-discriminatory reason for firing him. Balis presents many instances of Bullock's deficient performance, clearly enough to satisfy its relatively slight burden of production on this issue. See, e.g., Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The disposition of this Motion for Summary Judgment therefore turns on whether there is a genuine issue of fact that this legitimate reason is pretextual; if Bullock can present a genuine issue of fact that Balis's reason is pretextual, summary judgment cannot be had.

Rather than pointing to specific facts in the record, Bullock concludes simply that "the record clearly and sufficiently reveals 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a

responsible fact finder could rationally find them unworthy of credence.'" See Plf.'s Mot. at 19 (citing Fuentes, 32 F.3d at 765). Bullock's confidence alone will not carry his burden under Rule 56, nor will mere reliance on conclusory arguments establish a genuine issue of material fact. Maquire v. Hughes Aircraft Corp., 912 F.2d 67, 72 (3d Cir. 1990); Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Bullock has failed to highlight any evidence that would show pretext or the existence of discriminatory animus. Accordingly, he has failed to sufficiently defend the instant motion for summary judgment.

Rule 56 nevertheless requires the Court to conduct its own examination of whether granting summary judgment is appropriate. Fed. R. Civ. P. 56(e) ("If the [nonmovant] does not so respond, summary judgment, if appropriate, shall be entered against the [nonmovant]."). Although Bullock has failed to highlight any evidence that would discredit Balis's offered non-discriminatory reason as pretextual, such facts do exist on this record. For example, the timing of Bullock's disclosure that he might have a disability is enough to call into question the motivation behind his firing. Shortly after learning that Bullock had, or might have had, a disability, Balis made the decision to fire him. Although Bullock's future with Balis was uncertain, Bullock informed Balis that he might have a disability before Balis made the decision to fire him. Although it could be inferred from

this record that the decision to fire Bullock was imminent and inevitable, Bullock's promotions and tenure with the company, as well as Balis's seeming tolerance for his performance problems, could also lead a reasonable jury to infer that Balis would have allowed Bullock to remain in its employ had it not learned of his disability. Accordingly, because genuine issues of fact exist regarding whether Balis's proffered non-discriminatory reason for firing Bullock were pretextual, Bullock's ADA claim survives the instant Motion for Summary Judgment.

D. Bullock's ADEA Claim

The ADEA states that "it shall be unlawful for an employer to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." U.S.C. § 623(a)(1). Under his ADEA claim, Bullock's prima facie case requires him to prove that he: (1) was over 40; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was replaced by people sufficiently young enough to create an inference of age discrimination. See Sempier, 45 F.3d at 728. Although Bullock was clearly within the protected age group and suffered an adverse employment action, Balis contends that Bullock was

neither qualified for the job nor replaced by workers sufficiently young to create an inference of discrimination.

1. Bullock's Qualification Under the ADEA

As part of his prima facie case under the ADEA, Bullock must show that he was minimally qualified for the job of treaty broker. For the same reasons outlined above, the Court is satisfied that Bullock has presented genuine issues of material fact concerning his qualification for the job of treaty broker.

2. Absorption of Bullock's Work by Other Employees

Although Balis did not replace Bullock with new employees, younger or otherwise, Bullock contends that Balis's distributing his work to younger employees should give rise to an inference of discrimination. Absorption of work by younger employees can give rise to such an inference in certain circumstances, especially if an employee proves that it occurred as "part of a pattern of [the employer's] discharging employees over forty and distributing their work to younger employees." Morgan v. Arkansas Gazette, 897 F.2d 945, 950-51 (8th Cir. 1990); see also Frieze v. Boatmen's Bank of Belton, 950 F.2d 538, 541 (8th Cir. 1991) ("Employers often distribute a discharged employee's duties to other employees performing related work for legitimate reasons. [This] does not increase or decrease the likelihood that [an

employer discharges an employee] because of age." ). On the facts presented, however, no genuine issue of material fact exists regarding this element of Bullock's prima facie case. Bullock presented no evidence that his firing was part of a larger pattern of similarly motivated firings. Moreover, the evidence presented by both parties shows that some, perhaps most, of Bullock's work was assumed by workers older than he.<sup>6</sup> Bullock has failed to establish a genuine issue of fact regarding this element of his prima facie case.

### 3. Balis's Legitimate Non-discriminatory Reason

Assuming, however, that Bullock can establish a genuine issue of fact regarding his prima facie case under the ADEA, he cannot discredit Balis's legitimate non-discriminatory reason for firing him. Through methodical reference to the record, Balis has produced evidence showing that Bullock's poor performance might have been a legitimate reason for firing him. The burden therefore falls on Bullock to show that there is some genuine

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<sup>6</sup> Bullock admits that at least one older co-worker assumed some of his responsibilities. Balis suggests that two additional older workers assumed some of Bullock's work as well. Bullock does not present any evidence to refute this. Rather, Bullock implies that this testimony is unreliable because it was not revealed until late in discovery. This disagreement is irrelevant. Taken in a light most favorable to Bullock, the Court finds that, on the facts presented, even one older co-worker's assuming Bullock's duties would be enough to negate this element of Bullock's prima facie case.

issue of material fact that his performance was but a pretext for his age, the real motivation behind his firing.

By failing to highlight any evidence that would counter Balis's non-discriminatory reason for firing him, however, Bullock has failed to sufficiently defend the instant Motion for Summary Judgment. Moreover, the Court is satisfied that summary judgment on this matter is appropriate. See Fed. R. Civ. P. 56(e). Unlike Bullock's ADA claim, in which the timing of the revelation that Bullock had a disability casts into question Balis's motivation, Bullock's ADEA claim gives rise to no such suspicion; Bullock's age came as no surprise to Balis as they deliberated whether to fire him. Given the weakness of Bullock's ADEA prima facie case and the lack of any other evidence discrediting Balis's non-discriminatory reason for firing him, there is no evidence that would suggest that Bullock's age played a part in Balis's decision to fire him. Accordingly, his ADEA claim must fail.

E. After Acquired Evidence and Bullock's Available Remedies

During discovery related to this case, Balis discovered several instances of dishonesty on Bullock's résumé and job application. Balis made these discoveries after it fired Bullock. Nonetheless, Balis seeks to limit the remedies available to Balis because of the "after-acquired evidence" of

his dishonesty with the company.

Because only the employer's motivation is paramount in an employment discrimination suit, after-acquired evidence of employee misconduct is not relevant in determining whether an employer is liable. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359-60 (1995). Such evidence is relevant, however, when determining the scope of that liability. Id. at 362-63. In other words, after-acquired evidence can affect the determination of remedies because, despite the employer's discriminatory action, the employee may have suffered no injury.

Before an employer can invoke the after-acquired evidence doctrine, it must prove that: (1) the employee actually committed the misconduct; and (2) the employer in fact would have terminated the employee on those grounds alone if it had discovered the wrongdoing. Id. The employer must prove that it would have fired the employee, not merely that it could have. Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995); Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691, 714 (D.N.J. 1994); Malone v. Signal Processing Tech., 826 F. Supp. 370, 375 (D. Colo. 1993). If the employer satisfies this burden, neither reinstatement nor front pay is an appropriate remedy. McKennon, 513 U.S. at 362. Instead, absent extraordinary inequitable circumstances, the remedy should include only backpay from the date of the unlawful discharge to the date the new information

was discovered. Id. This doctrine applies to résumé fraud of the type that occurred in this case. See Adelman v. GMAC Mortgage Corp., No. 97-691, 1998 WL 51131, at \*2-3 (E.D. Pa. Feb. 5, 1998); Reid v. Kraft Gen. Foods, Inc., No. 93-5796, 1995 WL 262531, at \*8 (E.D. Pa. Apr. 27, 1995).

In the instant case, Bullock concedes that his résumé and job application were false. Balis has presented the depositions of Fox and Barbara Kennedy, Balis's Vice President for Human Resources, that such lying was grounds for discharge at Balis. Bullock has done nothing to discredit these depositions or present his own evidence that, despite company policy to the contrary, he would not have been fired had Balis discovered his dishonesty. Because these depositions remain uncontroverted, they are sufficient to prove that Balis would have fired Bullock had it learned of his misconduct. See, e.g., Coleman v. Keebler Co., 997 F. Supp. 1102, 1123 (N.D. Ind. 1998). Accordingly, Bullock's remedy, if any, should be limited to backpay measured from the date of the allegedly unlawful employment action, March 24, 1997, to the date on which Balis discovered his misconduct, March 23, 2000.

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a/k/a GUY CARPENTER & CO., INC. : No. 99-748

**O R D E R**

**AND NOW**, this day of December, 2000, in consideration of the Motion for Summary Judgment filed by the Defendant, Balis & Co., Inc., a/k/a Guy Carpenter & Co., Inc. ("Balis") (Doc. No. 26), the Response thereto filed by the Plaintiff, Edgar Q. Bullock, III and the Reply filed by the Defendant, it is **ORDERED** that:

1. Balis's Motion for Summary Judgment on Bullock's ADEA claim, Count I of the Complaint, is **GRANTED**. Judgment is **ENTERED** in favor of Balis and against Bullock on Count I of Bullock's Complaint.
2. Balis's Motion for Summary Judgment on Bullock's ADA claim, Count II of the Complaint, is **DENIED**.
3. Any compensatory remedies awarded to Bullock in this matter

shall be limited to backpay calculated from March 24, 1997, to March 23, 2000.

BY THE COURT:

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JAMES MCGIRR KELLY, J.