

I. BACKGROUND

Shellhammer was employed as a shoe salesperson by LaCrosse from 1982 to 1992, at which time LaCrosse terminated Shellhammer's employment. Shellhammer sued LaCrosse, alleging age discrimination. The parties settled the case in 1993. The terms of the settlement, memorialized in a Settlement Agreement and Release, included payments over time to Shellhammer and Shellhammer's agreement not to apply to work for LaCrosse.

In 1993, Shellhammer started a business selling shoes as a manufacturer's representative. In 1994, he started to represent PRO-TRAK Corporation ("PRO-TRAK"), selling the Lake of the Woods product line. Shellhammer received 1099 forms from PRO-TRAK and deducted expenses from gross receipts to determine his profit. Shellhammer also represented other manufacturers between 1994 and 1996.

In 1997, LaCrosse acquired PRO-TRAK, including the Lake of the Woods product line. LaCrosse continued to facilitate sales through PRO-TRAK's network of independent sales representatives, including Shellhammer. David Flaschberger ("Flaschberger"), LaCrosse's Vice President of Human Resources, recognized Shellhammer's name at the time of the PRO-TRAK acquisition because Flaschberger was responsible for maintaining the Settlement Agreement. Flaschberger reviewed the Settlement Agreement and concluded that Shellhammer's continued

representation of the Lake of the Woods line would not violate it. Shellhammer testified that LaCrosse prevented him from representing other shoe lines.

In 1998, LaCrosse eliminated the Lake of the Woods product line and decided to consolidate the Lake of the Woods products and sales force. Lake of the Woods representatives were allowed to apply for sales positions as employees of LaCrosse. Shellhammer applied for one of the sales positions. Flaschberger told Shellhammer that LaCrosse would not consider him for a position because of the Settlement Agreement.

II. DISCUSSION

A. Shellhammer's Former and Current Customers

First, LaCrosse argues that any testimony by Shellhammer's current and former customers should be excluded. LaCrosse asserts that those witnesses have no personal knowledge regarding Shellhammer's claims in this case and, therefore, are irrelevant. To establish a prima facie case of retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-626 (1994), a plaintiff must show: (1) that he engaged in protected activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action. Barber v. CSX Distrib'n Servs.,

68 F.3d 694, 701 (3d Cir. 1995). Accordingly, such testimony is irrelevant to Shellhammer's retaliation claim.

Shellhammer also claims, however, that LaCrosse violated the ADEA by improperly refusing to hire him for an employment position in 1998. Under an ADEA claim, a plaintiff establishes a prima facie case by demonstrating that: (1) he is over 40; (2) he is qualified for the position in question; (3) he suffered an adverse employment decision; and (4) he was replaced by a sufficiently younger person to create an inference of age discrimination. Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995). Testimony by Shellhammer's former and current customers may be relevant as to his qualifications. Such testimony, however, should be limited to Shellhammer's customers in 1994 to 1998 and should not include customers dating back to his initial employment with the LaCrosse from 1982 to 1992.

B. Shellhammer's Previous Employment With LaCrosse

Second, LaCrosse argues for the exclusion of testimony concerning Shellhammer's employment with LaCrosse from 1982 to 1992. Specifically, LaCrosse wants to exclude testimony regarding Shellhammer's performance and the circumstances of his termination in 1992. LaCrosse is not opposed, however, to allowing Shellhammer to testify that: (1) he was employed by LaCrosse from 1982 to 1992; (2) he was terminated in 1992; (3) he

filed an EEOC charge and lawsuit claiming age discrimination in 1992; (4) he dismissed the lawsuit and entered into a Settlement Agreement with LaCrosse in 1993; and (5) the terms of that Settlement Agreement.

The specific circumstances of Shellhammer's employment with LaCrosse from 1982 to 1992, and the details of his termination, are irrelevant to his present claims, the prima facie elements of which are outlined above. Shellhammer sued LaCrosse in 1992 and subsequently settled in 1993. Therefore, Shellhammer is barred from reasserting his original 1992 claims and may not introduce evidence beyond what is necessary to state his present claims.

C. Manager's Statements

Third, LaCrosse argues for the exclusion of evidence concerning statements regarding Shellhammer's retirement made by a LaCrosse manager in 1991 or 1992. Shellhammer agrees with LaCrosse's request for exclusion and will not offer evidence of those specific statements.

D. Evidence That Shellhammer Was An Employee

Fourth, LaCrosse argues that Shellhammer should be precluded from offering any evidence or testimony that contradicts his deposition testimony that he was an independent contractor from 1994 to 1997. LaCrosse, in a previous Motion for Summary

Judgment, asserted that Shellhammer was unable to produce sufficient evidence to demonstrate that he was an employee of LaCrosse. While Shellhammer's opinion as to whether or not he was an employee of LaCrosse is relevant as to his credibility, the issue will be decided based upon those factors enumerated in Cox v. Master Lock Co., 815 F. Supp. 844 (E.D. Pa.), aff'd, 14 F.3d 46 (3d Cir. 1993). The District Court denied LaCrosse's Motion for Summary Judgment, concluding that a reasonable jury could find that Shellhammer was a LaCrosse employee entitled to protection under the ADEA. The question of whether Shellhammer was a LaCrosse employee or an independent sales representative is therefore a triable issue that is essential to his claim. Shellhammer will be permitted to introduce evidence at trial in support of his argument. Accordingly, evidence of Shellhammer's claim that he was an employee of LaCrosse in 1997 and 1998 will not be excluded.

JAMES MCGIRR KELLY, J.