

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

ELEK A. FENYES,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 00-2823
	:	
v.	:	
	:	
ECS, INC., and	:	
	:	
ECS CLAIMS ADMINISTRATORS, INC.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

YOHN, J.

MAY 30, 2001

Plaintiff Elek Fenyes [“Fenyes”] brings this action against defendants ECS, Inc. and ECS Claims Administrators, Inc. [together, “ECS”] alleging age discrimination and retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq* [“ADEA”]. Presently before the court is defendants’ motion for summary judgment on all five counts of plaintiff’s second amended complaint (Doc. No. 16). Because plaintiff has failed to carry his burden of presenting evidence that defendants’ stated reasons for hiring other claims attorney candidates who responded to advertisements placed in April 1999, December 1999, and June 2000 are pretextual or that a discriminatory reason was more likely than not the motivating or determinative cause, defendants’ motion will be granted as to Counts I, II, and IV of plaintiff’s second amended complaint. Moreover, because plaintiff has failed to present evidence of the requisite causal link between his charge of discrimination to the Pennsylvania Human Relations

Commission [“PHRC”] in July 1999 and ECS’s decision to hire other candidates for claims attorney positions advertised in December 1999 and June 2000, judgment will be entered in favor of defendants as to Counts III and V.

I. Background

Mr. Fenyés is an attorney licensed to practice in the Commonwealth of Pennsylvania and the state of California and has 25 plus years of experience working as an attorney for the United States government. Plaintiff retired from government service in September 1998. Plaintiff was born September 7, 1943 and is currently 57 years old.

In April 1999, Fenyés applied to ECS for the position of claims attorney in response to an advertisement that stated in relevant part:

ECS Claims Administrators is currently seeking a Claims Attorney whose responsibilities will include analysis of coverage issues; investigation, evaluation and resolution of claims; and management of litigation on a nationwide basis. Qualified candidates should possess 1+ years of legal experience, JD degree, BS/BA (Engineering/Environmental Science preferred), be computer literate, and have excellent communication, analytical and negotiation skills.

Def. Statement of Uncontested Facts, Ex. A. In response to this advertisement, defendants received approximately 156 resumes, selected and interviewed nine candidates, and offered the position to Jeffrey Baldyga [“Baldyga”], a 37-year old male who possessed a Bachelor’s degree in oceanography from the United States Naval Academy, a Master’s degree in environmental engineering from the New Jersey Institute of Technology, and a J.D. degree from Widener University School of Law. Plaintiff was neither interviewed nor hired for this position. Accordingly, in July 1999, plaintiff filed a complaint with the PHRC alleging that ECS did not

hire him because of his age.

In December 1999, plaintiff applied to ECS for the position of claims attorney in response to an advertisement that was identical to the April 1999 advertisement. In response to this advertisement, defendants received approximately 130 resumes, selected and interviewed seven external and one internal candidate, and offered the position to Kerry Ann Ebersole [“Ebersole”], the internal candidate already employed by ECS in its Adjusting Division. Plaintiff was neither interviewed nor hired for this position.

In June 2000, plaintiff applied to ECS for the position of claims attorney in response to the following advertisement:

ECS, an XL Capital Company, providing environmental risk management solutions, is seeking a Claims Attorney whose responsibilities will include analysis of coverage issues; investigation, evaluation and resolution of claims; and management of litigation on a nationwide basis. Qualified candidates should possess 1-3 years of legal experience, JD degree, BS/BA (Engineering/Environmental Science preferred), be computer literate, and have excellent communication, analytical and negotiation skills.

Def. Statement of Uncontested Facts, Ex. J. In response to this advertisement, defendants received 53 resumes and offered the position to Kathleen Daly [“Daly”] who had experience in the insurance industry and in handling insurance coverage claims, as well as a Bachelor’s degree in environmental science, and a Master’s degree in marine affairs. Plaintiff was neither interviewed nor hired for this position.

On May 22, 2000, plaintiff initiated the instant action by filing a two-count complaint

against ECS, William Kronenberg, III, President of ECS, Inc.¹, and Does 1 through 10² alleging discrimination in violation of the ADEA, based upon plaintiff's failure to secure the claims attorney positions advertised in April and December 1999. On July 17, 2000, plaintiff filed a three-count first amended complaint, adding a retaliation cause of action against all defendants. On August 28, 2000, plaintiff filed a five-count second amended complaint alleging three instances of age discrimination (one for each ECS claims attorney advertisement to which he responded) and two counts of retaliation arising out of his failure to secure the positions advertised in December 1999 and June 2000.

II. Standard of Review

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “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). “Facts that could alter the outcome are “material”, and disputes are “genuine” if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmovant bears the burden of persuasion at trial, the moving party may meet its initial

¹ Plaintiff has withdrawn his claim against Kronenberg by filing his second amended complaint which does not include Kronenberg as a defendant.

²The Doe defendants were dismissed as parties by order of December 15, 2000 for failure of the plaintiff to comply with Federal Rule of Civil Procedure 4(m).

burden and shift the burden of production to the nonmoving party “by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. Once the movant has carried its initial burden, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. The non-movant must present concrete evidence supporting each essential element of its claim. *Ideal Dairy* 90 F.3d at 743. Thus, summary judgment will be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322.

When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* However, “[s]ummary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). At the same time, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

III. Discussion

Plaintiff's second amended complaint alleges in five separate counts that defendants violated the ADEA, 29 U.S.C. § 621, *et seq.* Specifically, Fenyes claims that ECS' decisions not to hire him for the positions of claims attorney advertised in April and December 1999 and June 2000 were based upon age discrimination (Counts I, II, and IV). Moreover, plaintiff asserts that the decisions not to hire him for the claims attorney positions advertised in December 1999 and June 2000 were also in retaliation for plaintiff's allegation of age discrimination to the PHRC (Counts III and V).

A. Age Discrimination Claims (Counts I, II, and IV)

As with other employment discrimination claims, ADEA claims can be established by means of either direct evidence or circumstantial evidence that creates an inference of discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). The analytical framework applied to such cases was set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, plaintiff has the burden of establishing a prima facie case of discrimination. *See Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000) (citations omitted). If plaintiff succeeds in presenting a prima facie case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the unfavorable treatment. *See McDonnell Douglas*, 411 U.S. at 802; *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997). Last, if the defendant produces a legitimate, nondiscriminatory reason, the plaintiff can defeat summary judgment by pointing to some direct or circumstantial evidence from which a factfinder could either reasonably: "(1) disbelieve the employer's

articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer's action.” *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 (3d Cir. 1998) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). Nevertheless, despite the shifting of intermediate evidentiary burdens, the ultimate burden of persuading the trier of fact that age was a determinative factor in a defendant’s decision to take an action adverse to plaintiff remains with plaintiff. *See Barber v. CSX Distrib. Serv.*, 68 F.3d 694, 698 (3d Cir. 1995).

1. Prima Facie Case

A prima facie case of unlawful discrimination under Title VII is comprised generally of four elements: 1) the plaintiff was over 40 years old; 2) the plaintiff was qualified for the job, 3) despite his qualifications, the employer rejected his application for employment or took an adverse action that affected the terms and conditions of the plaintiff’s employment, and 4) the position was filled or the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000); *Showwalter v. Univ. of Pittsburgh Med. Ctr.*, 190 F.3d 231, 234 (3d Cir. 1999).

Defendants contend that Fenyas fails to establish the second and third elements of his prima facie case of age discrimination. Specifically, defendants assert that plaintiff was not qualified for the claims attorney position, and ECS did not reject Fenyas’ application despite his qualifications. Defendants argue that Fenyas was not qualified for the position for two reasons: (1) he stated in his deposition that he does not have experience analyzing insurance coverage issues; and (2) he admitted in his deposition that his resume does not reflect his alleged

experience investigating insurance claims or managing litigation on a nationwide basis.³ Plaintiff responds that he was qualified for each of the positions because his resume reflected that he possessed the requisite degrees, legal experience, computer literacy and communication, analytical and negotiation skills, i.e. the qualifications set forth in the advertisements. Moreover, plaintiff submits that the portion of the advertisement to which defendants refer merely recited job responsibilities and not job qualifications. I conclude that a reasonable jury could find that the stated job responsibilities in the first sentence of the advertisements were not necessarily job qualifications (which were stated in the second sentence of the advertisements), that plaintiff, therefore, was qualified for the position for purposes of a prima facie case, and that ECS rejected Fenyés' application despite his qualifications. Accordingly, Fenyés states a prima facie case of age discrimination as to Counts I, II, and IV. *See generally Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 523 (3d Cir.) (“Because the prima facie case is easily made out, it is rarely the focus of the ultimate disagreement.”), *cert. denied*, 510 U.S. 826 (1993).

2. Defendants' Legitimate Reasons

The defendants, faced with a prima facie case of unlawful discrimination, may defeat the inference it creates by offering a non-discriminatory reason to explain the employment action.

See McDonnell Douglas, 411 U.S. at 802; *Keller*, 130 F.3d at 1108. However, “[t]his burden is

³All three advertisements state the same job responsibilities. The April and December 1999 advertisements likewise set forth the same position qualifications. The main substantive difference regarding qualifications between the 1999 advertisements and the June 2000 advertisement is that the requisite legal experience is expressed as 1-3 years, instead of 1+ years. While a literal reading of the June 2000 advertisement might suggest that ECS would consider applications only with 1-3 years of legal experience, it is just as reasonable to interpret this qualification as stating the minimum legal experience required. Therefore, my discussion as to plaintiff's qualifications will address all three advertisements.

one of production, not persuasion: it ‘can involve no credibility assessment.’” *Reeves*, 530 U.S. at 142 (citation omitted).

a. April 1999 Advertisement

Defendants submit the following non-discriminatory reasons for the decision to hire Baldyga: (1) Baldyga possessed an excellent education, including a Master’s degree in environmental engineering; (2) Baldyga participated in the Environmental Law Clinic and the Delaware Valley Environmental Inn of Court while in law school; (3) Baldyga previously worked as an environmental engineer for both Canonie Environmental Services, Inc., and Environmental Resources Management; and (4) Baldyga previously worked as a litigator in a private law firm. Each of these reasons is non-discriminatory. Therefore, the burden shifts back to plaintiff to demonstrate that defendants’ proffered reasons are pretextual. *See Fuentes*, 32 F.3d at 763 (describing the employer’s burden of production as “relatively light burden” and stating that “[t]he employer need not prove that the tendered reason *actually* motivated its behavior.”) (emphasis in original).

b. December 1999 Advertisement

Defendants submit the following non-discriminatory reasons for the decision to hire Ebersole: (1) Ebersole was already employed by ECS in its Adjusting Division and possessed a proven record of success with the company; and (2) Ebersole had worked for four years as a claims adjuster for U.S.F. & G. Insurance Company, where she was responsible for investigating automobile coverage issues, determining liability, and negotiating automobile and medical insurance claims. Both of these reasons are non-discriminatory. Therefore, the burden shifts back to plaintiff to demonstrate that defendants’ proffered reasons are pretextual.

c. June 2000 Advertisement

Defendants submit the following non-discriminatory reasons for the decision to hire Daly:

(1) Daly had significant experience in the insurance industry and in handling insurance coverage claims; (2) Daly had earned a Bachelor's degree *cum laude* in environmental science and a Master's degree in marine affairs; (3) Daly had several years experience as a maritime lawyer responsible for investigating and researching maritime claims involving oil pollution, cargo damage and loss, and shipboard personal injury, and managing litigation in both state and federal court; (4) Daly had experience working in the insurance industry as a Loss Control Specialist where she conducted loss control evaluations, developed corrective recommendations, and provided technical reports on risk pricing and selection; and (5) Daly had experience in the United States Coast Guard where she worked as a Marine Safety Officer responsible, *inter alia*, for supervising an eight-person pollution response team that monitored clean-up operations. Each of these reasons is non-discriminatory. Therefore, the burden shifts back to plaintiff to demonstrate that defendants' proffered reasons are pretextual.

3. Pretext Analysis

Once a defendant articulates legitimate reasons for the employment action, a plaintiff must point to evidence that those reasons are pretextual. To do so, the plaintiff must produce some direct or circumstantial evidence from which a factfinder could either reasonably: "(1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer's action." *Simpson*, 142 F.3d at 644 (quoting *Fuentes*, 32 F.3d at 764). "[A]n employer [will] be entitled to judgment as a matter of law if the record conclusively reveal[s] some other

nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148 (citation omitted). The employee "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for the asserted non-discriminatory reasons.'" *Fuentes*, 39 F.3d at 765.

While Fenyes argues that the Supreme Court's decision in *Reeves* states that an inference of discrimination is supported sufficiently by evidence disputing the employer's legitimate reasons for hire, plaintiff nonetheless fails to proffer any facts from which a reasonable jury could find that he has succeeded in disputing defendants' proffered reasons. Indeed, in his memorandum, plaintiff concedes that Baldyga and Daly "were arguably well qualified for their positions." Pl. Mem. at 5. Plaintiff, nevertheless submits that this fact does not rule out age discrimination as the basis for defendants' hiring decision. While this may be true, plaintiff simply has proffered no direct or indirect evidence of age discrimination or that defendants' reasons were pretextual.⁴ As such, because plaintiff has not met his requisite evidentiary burden,

⁴In Plaintiff's Statement of Uncontested Facts, he attaches the resumes and cover letters of several candidates ECS interviewed for the claims attorney positions. It is clear from these documents that each of these candidates was younger than plaintiff. Of course, this does not constitute direct evidence of age discrimination. However, a plaintiff also may establish a claim of age discrimination using circumstantial evidence from which a finder of fact reasonably could disbelieve defendants' articulated non-discriminatory reasons or believe that discriminatory reasons more likely than not motivated the employer's action. *See Fuentes*, 32 F.3d at 764. Plaintiff's proffered evidence, however, neither demonstrates that ECS's stated reasons were pretextual, nor suggests that age discrimination was more likely than not a determinative cause of

defendants' motion will be granted.

Regarding the December 1999 candidate, Ebersole, plaintiff argues that she did not possess the same qualifying criteria that Baldyga, Daly and plaintiff possessed. However, "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 (citations omitted). Plaintiff has not demonstrated that hiring Ebersole pursuant to an expressed company preference to fill job vacancies from within the company was pretextual. Accordingly, I find that plaintiff has failed to proffer evidence sufficient to permit a reasonable factfinder rationally to disbelieve defendants' proffered legitimate reasons or to believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the defendants' actions.

Therefore, I conclude that Fenyes has presented a prima facie case of age discrimination in employment, that defendants have proffered legitimate reasons for the adverse employment action, and that Fenyes has failed to present evidence from which a reasonable factfinder rationally could conclude that the employer's proffered reasons are pretextual or to conclude that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the defendants' actions. As a result, I will grant defendants' motion for summary judgment as to Counts I, II, and IV.

B. Retaliation Claims (Counts III, and V)

To establish a prima facie case of retaliation, "a plaintiff must show that: (1) the employee engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a

the adverse employment decision.

causal link exists between the employee's protected activity and the employer's adverse action." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000).

Defendants contend that Fenyes admitted in his deposition that he has no evidence to support his retaliation claims, and instead simply opines that "ECS retaliated against him because 'employers frequently retaliate [against] people that cause them trouble by complaining to state agencies.'" *See* Defs. Mem. at 8 (citing Fenyes Dep. at 78-79, 106-107). Obviously, this would not be sufficient evidence to overcome summary judgment. Conversely, plaintiff argues that because defendants rejected summarily his offer to settle his PHRC complaint if Fenyes were "considered" for a claims attorney position then open at ECS, defendants were "motivated by a retaliatory animus." *See* Pl. Mem. at 6. Plaintiff alleges that it is not rational to reject summarily such an offer and therefore ECS was motivated by retaliation. I cannot conclude that a reasonable factfinder could so find. As such, I will enter judgment for defendants as to Counts III and V of plaintiff's second amended complaint because plaintiff has failed to make out a prima facie case of retaliation.⁵

⁵Were I to conclude that Fenyes had stated a prima facie case of retaliation, plaintiff additionally argues that because Ebersole, the successful applicant to the December 1999 advertisement, was less qualified than he for the claims attorney position, a jury may find that defendants' proffered non-discriminatory reasons for hiring Ebersole were not worthy of belief. This argument was addressed, *supra*, wherein I found that plaintiff failed to meet his burden of demonstrating that ECS' stated reason that it preferred an internal candidate with insurance experience was merely pretextual. Accordingly, plaintiff's argument must fail and had plaintiff stated a prima facie case, defendants would be entitled to judgment on the retaliation claims on this basis as well.

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

ELEK A. FENYES,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 00-2823
	:	
v.	:	
	:	
ECS, INC., and	:	
	:	
ECS CLAIMS ADMINISTRATORS, INC.,	:	
	:	
Defendants.	:	

ORDER

YOHN, J.

AND NOW, this day of May, 2001, upon consideration of defendants ECS, Inc. and ECS Claims Administrators, Inc.'s motion for summary judgment and memoranda in support thereof (Doc. Nos. 16, 17, 20, and 21) and plaintiff Elek A. Fenyes' response thereto (Doc. Nos. 18, 19), IT IS HEREBY ORDERED that the motion for summary judgment is GRANTED and judgment is entered in favor of defendants, ECS Inc. and ECS Claims Administrators, Inc., and against the plaintiff, Elek A. Fenyes, as to every count of plaintiff's second amended complaint.

The clerk is directed to close this action for statistical purposes.

William H. Yohn, Jr.