

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

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ERNEST MERRIWEATHER,

Plaintiff,

v.

PHILADELPHIA FEDERATION OF  
TEACHERS HEALTH & WELFARE FUND,

Defendant.

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CIVIL ACTION

NO. 01-476

**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

NOVEMBER 7, 2001

Presently before this Court is the Motion for Summary Judgment, filed by the Defendant Philadelphia Federation of Teachers Health & Welfare Fund (“the Fund”). In this action, the Plaintiff, Ernest Merriweather (“Merriweather”), alleges that he has been discriminated against on the basis of his age by his employer, the Fund, in violation of The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (“ADEA”), and the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 955(a) *et seq.* (“PHRA”). Merriweather further alleges that the Fund inflicted emotional distress on him when it terminated him. The Fund claims that summary judgment is appropriate because Merriweather cannot prove a *prima facie* claim of age discrimination, or intentional or negligent infliction of emotional distress. For the following reasons, the Motion is granted.

**I. BACKGROUND**

Merriweather was employed as a Benefits Coordinator with the Fund from March 5, 1985 until his position was eliminated on June 2, 1999. Merriweather was fifty-five years old at the time of his termination. The other Benefits Coordinator, Philip Petrone (“Petrone”), was

seven months older than Merriweather and was not terminated. According to the Fund, Merriweather's position was eliminated for economic reasons. Merriweather has a Bachelor of Science degree, a certification in elementary education, and completed a Masters equivalency allegedly focusing on education research and development in 1996.<sup>1</sup>

According to the Fund, after perceiving a lack of properly trained teachers, the Fund decided to provide training and development programs for the school district's teachers. The Fund's initial foray into this area was in the Reading Recovery program in 1997. In the Spring of 1999, the Fund decided to expand its training and development programs. According to the Fund, in order to do this, it needed professionals who had knowledge and experience in these areas. The Fund alleges that it initially considered training some of its current employees to run the new programs. However, the Fund determined that this was not financially feasible due to the cost of schooling the employees and the delay in implementing the programs. Therefore, the Fund decided to eliminate one full-time Retirement Counselor position and one full-time Benefits Coordinator position and add two professionals who would work part of the time in Benefits Coordination and part of the time implementing the new teacher training and development programs. Of the two Benefit Coordinators, Merriweather and Petrone, the Fund decided to eliminate Merriweather's position. The Fund alleges that this decision was made because, although the two men earned the same salary, the scope of Petrone's responsibilities was broader. In August 1999, the Fund hired Crystal Barnett ("Barnett")(age 42) and James Madgey ("Madgey")(age 50) to do Benefits Coordination for half of their time and implement the

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<sup>1</sup> Despite various requests by the Fund, Merriweather has not provided a transcript detailing his masters work, and thus, his claims cannot be verified.

new programs for the other half of their time. According to the Fund, letting Merriweather go and hiring new qualified employees was the only way that it could expand its programs within its budgetary constraints. The Fund further alleges that this decision in fact saved the Fund \$6,155.17 in wages and enabled it to expand its programs.

According to Merriweather, the true reason for his termination was that he was being discriminated against because of his age and that the Fund wanted to replace him with younger employees. Merriweather alleges that the fact that Madgey's salary was higher than his is evidence that the Fund was not having financial difficulties. Merriweather does not dispute that the Fund saved \$6,155.17 in wages overall, however. Merriweather also claims that, despite the Fund's allegations to the contrary, he was qualified for the new position and thus should have been allowed to continue his employment with the Fund.

On October 19, 1999, Merriweather filed a charge of discrimination with the Philadelphia Commission on Human Relations ("PCHR") in which he alleged that he was discriminated against on the basis of his age when the Fund eliminated his position as a Benefits Coordinator. The charge of age discrimination was then dual filed with the Equal Employment Opportunity Commission ("EEOC"). On August 10, 2000, the PCHR advised Merriweather by letter that his case was dismissed with a finding of "Charge Not Substantiated." The EEOC adopted the findings of the PCHR and issued a Dismissal and Notice of Rights on October 30, 2000.

On January 24, 2001, Merriweather filed his Complaint in this Court. The Complaint alleges that the Fund discriminated against him based upon his age in violation of the ADEA and the PHRA and upon his race in violation of Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000e, et seq. (“Title VII”). The Complaint also includes a claim for emotional distress. On June 19, 2001, this Court granted the Fund’s partial Motion for Summary Judgment on Merriweather’s Title VII claim. Merriweather v. Phila. Fed’n of Teachers Health & Welfare Fund, No. 01-476, 2001 WL 695042 (E.D. Pa. Jun. 19, 2001). On July 2, 2001, this Court granted the Fund’s Motion to Compel Plaintiff to Respond to Discovery Requests and Appear at Deposition. The Court also ordered Merriweather to pay the fees and costs incurred in pursuit of the Motion. While Merriweather did appear at the deposition, he did not provide discovery responses nor did he pay the ordered fees and costs. Because of Merriweather’s continued failure to provide discovery responses or pay the fees and costs, this Court granted the Fund’s Motion for Sanctions on October 31, 2001. Merriweather did not oppose this Motion. The discovery deadline, which had been extended, ended on August 31, 2001. Merriweather did not engage in any discovery on his own behalf during this time period. The present Motion for Summary Judgment was filed on October 15, 2001.

## **II. STANDARD**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323

(1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322;Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

### **III. DISCUSSION**

#### **A. Age Discrimination**

In a discrimination case, the plaintiff may present either direct or indirect evidence to prove that he or she was subjected to unlawful discrimination. Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 352 n.4 (3d Cir. 1999). In an indirect evidence case such as this, the plaintiff must first set forth a *prima facie* case of discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000). Thereafter, courts apply a system of shifting evidentiary burdens; however, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

McDonnell Douglas established an allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases, which was clarified by subsequent cases. Reeves, 530 U.S. at 142. Once a *prima facie* case has been established, the defendant must produce some evidence of a legitimate nondiscriminatory business reason for its action. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). If this evidence is produced, the plaintiff may survive a motion for summary judgment only if he or she "produce[s] sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action." Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir. 1996)(*en banc*).

### **1. Employee's *Prima Facie* Case**

The plaintiff establishes a *prima facie* case of age discrimination by demonstrating by a preponderance of the evidence that he or she: (1) belongs to a protected class, *i.e.* is at least 40 years of age; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. Reeves, 530 U.S. at 142; Torre v. Casio, Inc., 42 F.3d 825, 830 (3d Cir. 1994).

### **2. Employer's Reason**

If the plaintiff can establish a *prima facie* case, the employer bears the burden of production with respect to a "legitimate, nondiscriminatory reason" for its actions. Id. at 143. Thereafter, the plaintiff has the burden of proof to establish that the employer's articulated reason for the adverse employment action is merely a pretext for discrimination. Id. at 146. Under

Fuentes, the plaintiff may establish pretext by presenting evidence from which a fact finder could “(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.” Fuentes, 32 F.3d at 764.

In order to avoid summary judgment, “the plaintiff’s evidence rebutting the employer’s proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer’s proffered nondiscriminatory reasons . . . was either a *post hoc* fabrication or otherwise did not actually motivate the employment action.” Iadimarco, 190 F.3d at 166 (quoting Fuentes, 32 F.3d at 764). Further, the plaintiff cannot simply show that the employer’s decision was unwise or wrong since the actual issue is whether the employer had a discriminatory motive. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3rd Cir. 1997)(*en banc*). The Plaintiff “must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer’s proffered legitimate reasons” that the fact finder could rationally find them unbelievable and could infer that the employer did not act for the non-discriminatory reasons proffered. Id.(quoting Fuentes, 32 F.3d at 765). In order to survive summary judgment, the plaintiff must show through admissible evidence that the employer’s articulated reason was not merely wrong, but that it was “so plainly wrong that it cannot have been the employer’s real reason.” Jones, 198 F.3d at 413 (quoting Keller, 130 F.3d at 1109).

### **3. Application**

#### **a. *Prima Facie* Case**

Merriweather bears the burden of establishing a *prima facie* case of age discrimination. Reeves, 530 U.S. at 142. The Fund argues that once it changed the Benefits

Coordinator position to include teacher training and development programs, Merriweather was no longer qualified for the position and thus he cannot make out a *prima facie* case of age discrimination. The Fund claims that the reorganization significantly altered the duties of the Benefits Coordinator position because in addition to Benefits Coordination, the new position included training teachers in Reading Recovery, math, reading, classroom management and classroom support, as well as developing new programs to achieve the Fund's training goals.

The Fund notes that Merriweather admitted that he lacked many of the necessary skills for the new position when he stated that he has not taught since 1985; he has not taken any courses in behavior modification since that time; he has limited or no computer skills; and has no knowledge of, or experience with, Reading Recovery. Furthermore, Merriweather stated that he would need further instruction in teacher mentoring and has no experience in peer intervention. It is undisputed that Merriweather's primary responsibility at the Fund was Benefits Coordination. Therefore, although he might not be qualified for some of the new position requirements, he would obviously be qualified for the Benefits Coordinator requirements. The Fund notes that both Barrnet and Madgey also had experience with Benefits Coordination.

In one page, Merriweather states that he is qualified for the new position because he has "thirteen (13) years experience in the classroom, a bachelors's degree, elementary education certification, experience in behavior modification, as well as a Masters equivalency, which included coursework in education research and development taken as recently as 1996." (Pl.'s Resp. to Mot. for Summ. J., 9). However, Merriweather has not provided any evidence, other than his bald assertions, to reinforce his claim. For example, Merriweather has not provided a transcript or an adequate description of the courses that he took, despite numerous

requests for such information. Merriweather merely alleges that his duties would not have been significantly altered and that he would not have required substantial training to perform the new position. As stated, Merriweather cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams, 891 F.2d at 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325).

Merriweather also claims that he should have been allowed to keep his position because he possessed qualifications that were “roughly equivalent” to those of the two replacements. However, again, other than his statement to this effect, he provides no proof that this is so. Therefore, Merriweather has failed to prove that he was qualified for the position and thus has failed to prove his *prima facie* case of age discrimination. However, in order to be complete, we will discuss Merriweather’s argument that the Fund’s stated reason for his termination is simply a pretext for age discrimination.

**b. Pretext**

Even if Merriweather had been able to establish a *prima facie* case of age discrimination, he has not provided sufficient evidence which would allow a fact finder to reasonably infer that the Fund’s proffered nondiscriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the Fund’s action. Iadimarco, 190 F.3d at 166. Merriweather has not provided any evidence, other than his own testimony, that the Fund did not eliminate his position for economic reasons. First, Merriweather simply re-alleges that the Fund would not have been required to make a substantial investment of time or money in training him for the new position because he was already qualified for the position. However, he does not provide evidence to carry his burden of proof on this issue. In fact, as stated above,

Merriweather did not even engage in any discovery on his own behalf. Second, although Merriweather alleges that pretext is evidenced by the fact that Madgey's salary was greater than his, it is undisputed that the Fund saved \$6,155.17 in wages by eliminating two old positions and reorganizing the responsibilities for two new positions. Lastly, the fact that the Fund eliminated Merriweather, who was the younger of the two Benefits Coordinators, rather than Petrone who was the older, certainly helps to dispel any inference of age discrimination. Therefore, even if Merriweather had been able to establish a *prima facie* case of age discrimination, he could not establish that the Fund's legitimate reason for his termination was pretextual, and summary judgment on this claim is appropriate.

**B. Emotional Distress**

Merriweather claims that the Fund intentionally and negligently inflicted emotional distress on him when they terminated him and allegedly caused him to "suffer[ ] humiliation and embarrassment from having been fired, lied to about the reason, and replaced by younger individuals." (Pl.'s Resp. to Mot. for Summ. J., 16). In order to prove emotional distress, the plaintiff must prove, *inter alia*, that the conduct complained of was extreme and outrageous. Williams v. Guzzardi, 875 F.2d 46, 52 (3d Cir. 1989). Liability has been found only when the conduct "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998)(citations omitted).

Furthermore, the application of emotional distress claims in employment discrimination cases is severely limited. Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988); McCreeedy v. Fidelity Bank, No. 89-5136, 1991 WL 36247, at \*2, 55 Fair Empl. Prac.

Cas. (BNA) 1692 (E.D. Pa. Mar. 15, 1991). In Cox, the court held that "while loss of employment is unfortunate and unquestionably causes hardship, often severe, it is a common event and cannot provide a basis for recovery for intentional infliction of emotional distress." Cox, 861 F.2d at 395; Kelly v. Nat'l R.R. Passenger Corp., 731 F. Supp. 698, 700 (E.D. Pa. 1990). Similarly, in this case, Merriweather's termination and the perceived embarrassment derived therefrom are insufficient to support a claim for emotional distress.

Lastly, courts have held that claims for emotional distress resulting from employment discrimination are barred by section 481(a) of the Pennsylvania Workmen's Compensation Act, 77 Pa. C.S.A. § 1, et seq. Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997); Hampton v. Tokai Fin. Ser. Inc., No. 98-5074, 1999 WL 83934, \*2 (E.D. Pa. Feb. 18, 1999). Therefore, defendants' request for summary judgment on plaintiff's emotional distress claim shall be granted.

#### **IV. CONCLUSION**

No genuine issue of material fact remains concerning Merriweather's claim of age discrimination as he has failed to establish a *prima facie* case. Furthermore, had Merriweather been able to establish a *prima facie* case, he has not provided sufficient evidence by which the fact finder could determine that the Fund's proffered reason was merely a pretext for discrimination. Lastly, Merriweather's termination and the surrounding circumstances are not sufficiently extreme and outrageous to support a finding of emotional distress. Therefore, Merriweather's age discrimination claim and emotional distress claim fail and summary judgment in favor of the Fund is appropriate.

An appropriate Order follows.

