

temporary basis as a worker's compensation adjuster. Doc. 19 ¶ 1, 42. Plaintiff became a regular Harleysville employee on August 1, 1995 when he was hired for the position of Negotiator.¹ Doc. 19 ¶ 44. Plaintiff kept this position until July 28, 1999, when he was informed that Harleysville had adopted a plan to centralize its claims handling activities in a direct reporting center. Doc. 19 ¶ 27. As a result of this reorganization, the 23 claims offices were consolidated into five offices. The Chesapeake claims office in which plaintiff worked was closed and plaintiff's position was eliminated. Doc. 19 ¶¶ 33, 51. Plaintiff was 50 ½ years old at the time of this consolidation.

All employees affected by the restructuring were encouraged to apply for positions within Harleysville. Doc. 19 ¶ 40. Plaintiff applied for four jobs in connection with the reorganization: Southeast Regional Claims Manager,² General Liability/Litigation Manager, Nashville Negotiator, and Quality Assurance Manager.³ Doc. 19 ¶¶ 57, 60, 131; Doc. 24 ¶¶ 92, 112. Plaintiff was neither interviewed nor hired for any of the positions for which he applied. Doc. 1 ¶ 12.

Applicants for the General Liability/Litigation Manager position were evaluated on several job-related skills, including their technical, evaluative, and administrative competencies.

¹ At Harleysville, a Negotiator is the individual responsible for litigation management. A Negotiator's duties include evaluating insurance claims, working with counsel to prepare a case for trial and negotiating settlements. Doc. 19 ¶¶ 47, 48.

² Plaintiff has withdrawn his claim of age discrimination as to the Regional Claims Manager position.

³ The parties dispute whether plaintiff's application was received for the General Liability/Litigation Manager and the Negotiator positions. For the purposes of this summary judgment motion, the court must accept the evidence in the light most favorable to the plaintiff. Thus, the court will assume that plaintiff was in fact considered and rejected for each of the three positions in which plaintiff alleges age to have played an impermissible role in the selection process.

Doc. 19 ¶ 97. Steven Hursey (“Hursey”), the man selected to fill the General Liability/Litigation Manager position, was fully qualified. Doc. 19 ¶¶ 98-100. Hursey was 1 ½ years older than plaintiff. Doc. 19 ¶ 103.

Candidates for the Negotiator positions were evaluated on similar job-related criteria, such as technical and communication skills, decision making and problem solving abilities, time management and customer service. Doc. 19 ¶ 116; Doc. 20, Ex. M. Each of the five individuals chosen for a Negotiator position had prior claims experience and had received a high rating on each of the hiring criterion. Doc. 19 ¶ 122. Three of the individuals selected were in their thirties, one individual was in his forties, and one individual was in his fifties, over four years older than plaintiff. Doc. 19 ¶¶ 120, 126.

The three candidates considered for the Quality Assurance Manager position were chosen in part because they had supervisory or management experience within Harleysville. Doc. 19 ¶ 138; Lockwood dep. at 40. Plaintiff did not have such experience at Harleysville, and therefore he was not considered for the position. Doc. 19 ¶ 139. Of the three candidates, Toby Hittinger (“Hittinger”) was selected as the most qualified for the Quality Assurance Management position. Doc. 19 ¶ 140. Hittinger was 15 years younger than plaintiff. Doc. 19 ¶ 136.

Because plaintiff did not secure a new position with defendant, his employment was terminated on or about February 18, 2000. Doc. 1 ¶ 14. Plaintiff was 51 years old at the time of his termination. Doc. 1 ¶ 16. On October 26, 2000, plaintiff brought the present action against defendant alleging discrimination in violation of the ADEA, based upon both his discharge and defendant’s refusal to select him for another Harleysville position. Doc. 1 ¶ 17. Plaintiff maintains that defendant’s actions were based on his age. Defendant contends that plaintiff was

terminated as part of the consolidation and that plaintiff was not rehired because there were other qualified applicants for each of the positions to which plaintiff applied.

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). 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).

DISCUSSION

The ADEA “prohibits employers from discriminating against an individual in hiring, discharge, compensation, term, conditions, or privileges of employment on the basis of age.” *Connors v. Chrysler Fin. Corp.*, 160 F.3d 971, 972 (3d Cir. 1998) (citing 29 U.S.C. § 623(a)(1)). ADEA claims can be established by means of either direct evidence or circumstantial evidence that creates an inference of discrimination. *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 discrimination 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. *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. *McDonnell Douglas*, 411 U.S. at 802; *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997). Once the defendant has produced 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 reasons; or (2) believe that an invidious discriminatory reason was more likely than not a 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 adverse employment action remains on the plaintiff. *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 the ADEA is comprised of four elements: 1) the plaintiff was over forty years old; 2) the plaintiff was qualified for the position, 3) despite the plaintiff's 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 person sufficiently younger to create an inference of age discrimination. *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).

Defendant contends that as to the General Liability/Litigation Manager position, plaintiff has failed to establish the fourth element of his prima facie claim of age discrimination.⁴ Doc. 20 at 20. Defendant claims that since this position was filled by Steven Hursey, who is 1 ½ years older than plaintiff, an inference of age discrimination does not arise. *Id.* Plaintiff counters that Ken Halvorsen, who is 16 years younger than plaintiff, was defendant's first choice for the General Liability/Litigation Manager position and that Hursey was only selected for the position once Halvorsen declined. Doc. 22 at 6-7. The only support plaintiff provides for this contention

⁴ Defendant has not challenged plaintiff's ability to establish a prima facie case under the ADEA as to the Quality Assurance Manager and Negotiator positions.

is an unauthenticated printout from the defendant's website that lists the recent staff changes at Harleysville. Doc. 20, attachment 1. According to this printout, Halvorsen was promoted from a Claims Supervisor to a Claims Service Center Manager, a completely different position from the General Liability/Litigation Manager position at issue. *Id.* Thus, the printout does not support plaintiff's claim that Halvorsen was initially selected for the General Liability/Litigation Manager position. In addition, plaintiff's contention contradicts the sworn deposition testimony of Sallyanne Donovan ("Donovan") and Francis Shea ("Shea"), the two individuals responsible for selecting and hiring the General Liability/Litigation Manager. Donovan and Shea maintain that Hursey was the first candidate offered the General Liability/Litigation Manager position. Donovan dep. at 90; Shea dep. at 33. Moreover, even if Halvorsen was their first choice for the position, it is an undisputed fact that the individual ultimately hired for the job was Hursey. Since Hursey is older than plaintiff, a prima facie case of age discrimination as to the General Liability/Litigation Manager position cannot be established. Accordingly, I will grant defendant's motion for summary judgment as to this position.

2. Defendant's Legitimate Reasons

Once a plaintiff has established a prima facie case of age discrimination, a defendant may defeat the inference of discrimination by offering a legitimate, nondiscriminatory reason to explain the adverse employment action. *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). This relatively light burden is one of production and not of persuasion. *Reeves*, 530 U.S. at 142.

Defendant submits legitimate, nondiscriminatory reasons for its employment actions that adversely affected plaintiff. First, defendant explains that plaintiff's termination was a result of

the reorganization and consolidation of Harleysville's claim handling process. Because of this restructuring, the Chesapeake office where plaintiff was employed was closed and all the claims department positions, including plaintiff's, were eliminated. Second, defendant explains that its selection of candidates for the positions for which plaintiff applied was based on legitimate criteria such as the candidate's administrative, evaluative and technical competencies and not the candidate's age. Defendant maintains that the selected individuals were all qualified for the position to which they were hired. Since an employer does not need to prove "that the tendered reason *actually* motivated its behavior," defendant has satisfied its burden simply by articulating these nondiscriminatory reasons for its action. *Fuentes*, 32 F. 3d at 763. Therefore, the burden shifts back to plaintiff to demonstrate that defendant's proffered reasons are merely pretextual.

3. Pretext Analysis

Once a defendant has offered nondiscriminatory reasons for its action, a plaintiff may only avoid summary judgment if he produces some direct or circumstantial evidence that either (1) discredits the defendant's proffered reasons for its adverse employment action, or (2) proves that discrimination was more likely than not the determinative cause of the defendant's action. *Fuentes*, 32 F.3d at 764. This evidence "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 (citations omitted).

As evidence that age was the determinative factor in defendant's hiring decisions,

plaintiff highlights the fact that three of the people chosen for the Negotiator position were in their thirties. Doc. 22 at 7. While this is true, it is also true that the other two people chosen for the Negotiator position were over the age of forty; in fact, one individual was in his fifties, more than four years older than plaintiff. Doc. 20 at 14. Moreover, defendant ignores the fact that these older individuals were chosen from a pool of candidates which included at least four others under the age of forty. Dft.'s Second Amended Response to Ptf.'s Interrogatory No. 5 (9/19/01) at 3-4. Thus, the evidence taken as a whole does not support plaintiff's contention that age played an impermissible role in defendant's selection of candidates to fill the Negotiator positions.

Similarly, plaintiff has not produced evidence that demonstrates a weakness in defendant's proffered legitimate reasons for hiring Hittinger instead of plaintiff for the Quality Assurance Manager position. Robert Lockwood ("Lockwood"), the individual responsible for selecting the person to fill the Quality Assurance Manager position, maintains that the three candidates seriously considered for the position were chosen because of their managerial or supervisory experience at Harleysville.⁵ Lockwood dep. at 40. Plaintiff contends that Lockwood's focus on internal managerial and supervisory experience when choosing the Quality Assurance Manager was improper, as the posting for the Quality Assurance Manager position did not explicitly require this experience to come from within Harleysville. Doc. 22 at 6. As the hiring employer, however, Lockwood had discretion to evaluate candidates based on the

⁵ Hittinger was selected from these three candidates as the individual most qualified for the position. Lockwood dep. at 72-73. Plaintiff claims that Hittinger's qualifications were "meager" compared to his "vast experience." Doc. 22 at 6. This bold statement is unsupported by any record evidence. In fact, plaintiff admits that Hittinger had the experience and skills necessary to perform successfully as a Quality Assurance Manager. Doc. 24 ¶¶ 141-145.

qualifications he considered to be most important for the Quality Assurance Manager position. In Lockwood's opinion, managerial and supervisory experience within Harleysville was more important than such experience with another insurance company. Lockwood dep. at 73. Whether or not plaintiff or this court agrees with Lockwood's criteria for evaluating the candidates is irrelevant. *Simpson*, 142 F.3d at 648. (In evaluating the merits of an ADEA claim, the court's proper focus is on the "criteria identified by the employer, not the criteria only the plaintiff thinks are important."). The "issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Fuentes*, 32 F.3d at 765. Thus, the wisdom of Lockwood's employment decisions is not for this court to decide. Even if plaintiff's experience in the insurance field qualified him for the Quality Assurance Manager position, the fact that Lockwood focused on the internal managerial experience of each candidate when selecting the individual to fill the Quality Assurance Manager position does not in anyway cast doubt on defendant's proffered nondiscriminatory reasons for its actions.⁶

Plaintiff argues that defendant's inconsistent responses as to who was responsible for the contested hiring decisions require this court to deny summary judgement.⁷ Doc. 22 at 4. However, defendant's varying responses as to who made the hiring decisions does not discredit defendant's explanation that candidates were hired based upon either their job-related

⁶ Plaintiff maintains that Lockwood lacked personal knowledge of plaintiff's extensive managerial experience with outside insurance companies. This lack of knowledge, however, does not discredit the nondiscriminatory reasons defendant expounded for its decision to hire Hittinger. At most this evidence demonstrates that Lockwood was not thorough in his review of each Quality Assurance Manager candidate. Although this may not be an admirable hiring practice, it is not evidence of age discrimination.

⁷ On three occasions, defendant amended its response to plaintiff's interrogatory of who was responsible for the contested hiring decisions. Doc. 22, attachment 4.

competencies or an expressed preference to fill a job position from those with internal managerial experience.⁸ Defendant has not wavered in its explanation that the selection of candidates for the positions to which plaintiff applied was based on each candidate's job-related qualifications. Thus, there are not inconsistencies in defendant's proffered legitimate nondiscriminatory reasons from which a reasonable factfinder could infer that these reasons were merely pretexts for employment actions that were truly motivated by discriminatory animus.⁹

CONCLUSION

In his complaint, plaintiff alleges discrimination in violation of the ADEA based upon both his discharge and defendant's refusal to select him for one of the four Harleysville positions to which he applied. Plaintiff has presented a prima facie case of age discrimination as to his discharge. Defendant responds that plaintiff was discharged from his original position because of the consolidation of Harleysville's claims offices. Plaintiff has not offered one piece of evidence to discredit this proffered legitimate nondiscriminatory reason for discharging plaintiff. Thus, as to plaintiff's claim of age discrimination with regard to his discharge, summary judgment will be granted.

Plaintiff has also established a prima facie case as to his failure to be selected for the Negotiator and Quality Assurance Manager positions. Defendant responds that the selection of

⁸ The issue of who bore the ultimate responsibility for making the contested hiring decisions is not material to plaintiff's claim of age discrimination. Therefore, this factual dispute does not present a genuine issue of material fact that will preclude summary judgment.

candidates for the Negotiator position was based on each applicant's job-related qualifications. Defendant further explains that its choice of Hittinger instead of plaintiff to fill the Quality Assurance Manager position was based on her prior management experience within Harleysville, and that because plaintiff did not have this internal managerial experience he was not seriously considered for the position. Plaintiff has failed to produce sufficient evidence to permit a reasonable factfinder to disbelieve defendant's legitimate reasons or to believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the defendant's actions. As plaintiff has not met his evidentiary burden, I will grant defendant's motion for summary judgment as to the Negotiator and Quality Assurance Manager positions.

Because the candidate selected for the General Liability/Litigation Manager position was older than plaintiff, a prima facie case of age discrimination has not been established as to this position. Accordingly, I will grant summary judgment as to the General Liability/Litigation Manager position. In addition, plaintiff has withdrawn his claim of age discrimination as to the Regional Claims Manager position, and therefore this court need not determine whether summary judgment is appropriate as to this position.

An appropriate order has been filed.

William H. Yohn, Jr., Judge

