

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

ROY FULLARD,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 00-509
	:	
ARGUS RESEARCH LABORATORIES,	:	
INC.,	:	
Defendant.	:	

Reed, S.J.

December 6, 2001

M E M O R A N D U M

Plaintiff Roy Fullard (“Fullard”) filed this lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging that he was terminated from his position with Argus Research Laboratories, Inc. (“Argus”) because of his race. Argus brought a motion for summary judgment which this Court granted. Plaintiff now files this motion to reconsider. (Document No. 24). For the following reasons, the motion will be denied

I. Standard

Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(g) of the United States District Court for the Eastern District of Pennsylvania allow parties to file motions for reconsideration. The purpose of these motions is “to correct manifest errors of law or fact or to present newly discovered evidence.” Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Motions for reconsideration will be granted only upon one of the following grounds: (1) an intervening change in controlling law; (2) the emergence of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent a manifest injustice. See General Instrument Corp. v. Nu-Tek Elecs. & Mfg., 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998),

aff'd, 197 F.3d 83 (3d Cir. 1999). Fullard brings forth his motion based on the third criterion.¹

II. Analysis

I observe at the outset that it is abundantly clear that this Court granted the motion of Argus for summary judgment because I concluded that no reasonable factfinder could conclude that Fullard had proven by a preponderance of the evidence that plaintiff suffered racial discrimination. It is less clear whether this Court grounded that holding in a conclusion that Fullard failed to make out a *prima facie* case or whether Fullard failed to raise a genuine issue of material fact as to whether defendant's stated reason for the termination was pretextual. This confusion stems from the fact that because I concluded that Fullard's similarly situated argument failed, I was left to determine whether Fullard had adduced evidence showing that there was an inference of discrimination. See Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 356-57 (3d Cir. 1999) (determining that plaintiff can make out a *prima facie* case without demonstrating that employees outside of the relevant class were treated more favorably, or that the plaintiff was replaced by someone outside of the relevant class; *prima facie* case requires "only 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion'" (quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996))). In order to determine whether this inference existed in the record, I delved into the stated reasons of Argus for its actions. Thus, the analysis was concerned with whether plaintiff had sufficiently demonstrated pretext. I now clarify, that while I based my prior ruling on Fullard's failure to make out a *prima facie* case, for the purposes of this motion, I will assume a *prima facie* case was established and explain why

¹ I review only the portions of my prior opinion which are relevant to the motion at hand. The full background relevant to this adjudication can be found in this Court's prior ruling. See Fullard v. Argus Research Lab., Inc., No. Civ. A. 00-509, 2001 WL 632932 (E.D. Pa. June 6, 2001).

Fullard fails to create a triable issue with respect to his burden of demonstrating pretext.

1. *Statements of Kathleen Moran*

Fullard's first argument is that this Court incorrectly relied on statements made by Kathleen Moran ("Moran") to others concerning Fullard's performance which constitute inadmissible hearsay evidence. Of plaintiff's long list of evidence it characterizes as inadmissible, the only evidence which was actually cited in my prior ruling was the statement by Marie DiDaniels ("DiDaniels") in her affidavit that: "After the six month review, Ms. Moran continued to consult with me about Mr. Fullard's performance. She indicated that the problems persisted, that he continued to work insufficient hours and that he continued to be very vocal in challenging her management of the department." (DiDaniels Aff. at ¶ 8, Def.'s Ex. Q.) Specifically, my opinion provided: "His [Fullard's] hours did not increase, and Moran continued experiencing problems with him" with citation to the affidavit of DiDaniels.

Even assuming that plaintiff is correct and that this Court should not have relied upon the assertions of the affidavit of DiDaniels as true,² this Court will only change its previous ruling upon a showing that the mistake of law would impact the Court's legal determination. See See Holtzman v. World Book Co., No. Civ. A. 00-3771, 2001 WL 1450599, at *2 (E.D. Pa. Nov. 13, 2001) ("Despite the discovery of a mistake of fact, 'the court can only disturb its prior ruling if the newly apparent facts would alter the Court's legal conclusion.'") (quoting Hudson United Bank v. Berwyn Holdings Inc., Civ. No. 00-4168, 2000 WL 1595961, at *1 (E.D. Pa. Oct. 25, 2000)).

Plaintiff takes issue with this Court's reliance on the affidavit of DiDaniels because he

² Argus argues that the testimony of DiDaniels should be admissible for purposes other than the accuracy of the facts stated therein, which I will not decide here.

asserts that: “The only person who can testify with direct, personal knowledge regarding Fullard’s alleged performance deficiencies is simply unable to recall.” (Pl.’s Mem. at 7.) This statement is simply not accurate. The following exchange occurred at Moran’s deposition:

- Q. Does reviewing this document [referring to Fullard’s termination letter] refresh your recollection as to the reasons why Mr. Fullard’s employment was terminated?
- A. The exact reasons I can’t recall specifically, but I do know at the end of the extended time period we did review where he was based on the recommendations that were provided to him in his six month review.
- Q. So explain how that related to his six month review, the termination decision.
- A. There were recommendations on the six month review that were provided to Mr. Fullard, giving him the opportunity to improve. When his extension came up for the next review, we pulled the old – the six month review out and went over the recommendation to see whether or not any changes did occur.
- Q. And what was your conclusion?
- A. That there – I believe there were no changes, or even an effort to change.

(Moran Dep. at 80.) While Moran needed to have her memory refreshed, that does not mean her testimony is inadmissible. Nor does the fact that she needed her memory refreshed with respect to events that occurred over two and a half years prior mean that her testimony is “unworthy of credence.” (Pl.’s Mem. at 8.) Moran authenticated the January 28, 1998 termination letter sent from her to Fullard, (*id.* at 79), which reads: “After examining your status at the end of this additional time, we have, unfortunately, come to the conclusion that we do not wish to continue your employment with Argus. . . .” (Def.’s Ex. T.) Moran also authenticated her six month review of Fullard, (*id.* at 63), in which the following areas were outlined as goals for improvement: (1) regular attendance, (2) devoting the needed time, (3) accepting responsibility, (4) cooperating with all coworkers, (5) maintaining a courteous professional manner with all coworkers, (6) working as a team member, and (7) functioning on a stage that plans and sets

appropriate priorities rather than from a directive. (Def.'s Ex. 0.) Thus, Moran could testify as to Fullard's performance. I also note that the statement in DiDaniels' affidavit is simply that problems persisted between Moran and Fullard.³ Plaintiff concedes that he disagreed with and refused to accept the criticism in his review.⁴ In light of Fullard's outright rejection of his review, it is obvious that problems persisted between Fullard and Moran. Accordingly, I conclude that Fullard has failed to show how, even if this Court were not to have relied in part upon the substance of this portion of the affidavit of DiDaniels, the legal outcome would be different. Indeed, the same information imparted to DiDaniels by Moran regarding plaintiff's performance became clearly known to the decisionmakers, which included Moran herself, in due course.

2. *The Written Review*

Fullard next argues that this Court erroneously found no inference of discrimination in the fact that Fullard was put on probation despite the fact that he was never told he would be subject

³ Plaintiff also argues for the first time that the affidavits submitted to this Court fail to comply with the requirements of 28 U.S.C. § 1746. It appears to this Court that since the affidavits were signed under the penalties of perjury, they would comply with the substance of section 1746. Nonetheless, as this argument was not raised in the response to the motion for summary judgment, I will not now address the claim. See Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1231 (3d Cir. 1995); Federico v. Charterers Mut. Assurance Ass'n Ltd., 158 F. Supp. 2d 565, 578(E.D. Pa. 2001) (“[a] motion for reconsideration is not an opportunity for a party to present previously available evidence or new arguments.”) (alteration in original; citation omitted); Bradford Hosp. v. Shalala, 136 F. Supp. 2d 428, 430 (W.D. Pa. 2001). This issue is also of less significance in light of my conclusion that even if this Court erred in relying in part on the DiDaniels statement, such is not a mistake of law which would alter the Court's ultimate legal determination.

⁴ As explained in my prior ruling, soon after receiving his review, Fullard sent an e-mail to Moran stating, “I will return the review but I will not sign this document because I do not agree at all.” (Def.'s Ex. P.) He testified at his deposition as follows:

- Q: Did you interpret the . . . review [] as requiring you to take certain steps to improve your performance?
A: I didn't interpret anything, because I did not agree.
Q: Did you interpret it as meaning if you didn't do certain things, you might not be employed by the company?
A: As I just stated, I did not interpret it any way, because I did not agree. It was a simple I do not agree.

(Fullard Dep. at 121.)

to a probation period.⁵ Fullard contends that he was told by other members of his department that there had never been a written six month review in his department before. (Fullard Dep. at 113.) Fullard could not, however, specify which person told him he was the first to receive a review. (Id.) Thus the admissibility of his testimony on this issue is in serious doubt. Fullard argues that the fact that DiDaniels testified at her deposition that she never received a written review is evidence that his review was discriminatory. Defendant contends, however, that there would not have been a need for a written review of DiDaniels' performance if there had been no problems with her work.

Most damaging to Fullard's argument, however, is the fact that at around the same time that Fullard received his written review, Sharyn Gogel ("Gogel"), a white co-employee was similarly reviewed. The goals outlined for Gogel were as follows: (1) keeping to business issues rather than interpersonal goals, (2) working for the good of the department rather than on a personal level, (3) bringing problems/concerns through the proper channels, (4) slowing down and thoroughly comprehending the processes of your work, (5) completing the training file documentation, (6) revising the critical phase forms, and (7) revise two chapters in the critical phase training manual. (Def.'s Ex. N.) Thus, I conclude that Fullard has not raised a genuine issue as to whether his review was unprecedented and therefore sufficient evidence of discrimination.

Connected to this argument is Fullard's position that he did not deserve to be placed on probation. In other words, he appears to argue that he did not sign the review because he disagreed with the validity of the criticism and that his state of mind is therefore an issue for the

⁵ Specifically, Fullard testified at his deposition that he could not remember being told about a six month review, not that he was absolutely not told about the review. (Fullard Dep. at 69.)

jury to decide. In order to prove pretext, Fullard must provide either direct or circumstantial evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons or (2) believe that a discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 521-22 (3d Cir. 1992)). In order to prove this, the plaintiff "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.'" Fuentes, 32 F.3d at 765 (quoting Ezold, 983 F.2d at 531). "[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Id.

By Fullard's own admissions, and with the benefit of all inferences in his favor, his probation period was followed by the following events: (1) leaving work without first seeking permission; (2) questioning Moran's authority at a staff meeting; (3) leaving work early a second time without seeking permission and without completing his assignment; (4) working fewer hours than the other full-time co-employees. See Fullard, 2001 WL 632932, at **4-5. The record also contains evidence that Moran was struggling to manage her unit. Id. at *7. In addition, as explained, a white employee, Gogel, was placed on probation at around the same time. While the goals for improvement set out for these two employees were not precisely the same, they shared similar attributes. For instance, Fullard was asked to cooperate with all coworkers and work as a team member, while Gogel was asked to work for the good of the

department rather than on a personal level. Fullard was asked to devote the needed time, while Gogel was asked to slow down and thoroughly comprehend the processes of her work. It may well be that the decision of Argus to place Fullard on probation might have been wrong in a business sense; however, as stated, Fullard has to prove either that the stated reasons outlined in Fullard's review were likely not the true reasons or that discrimination was more likely than not a motivating or determinative factor in that decision. See Fuentes, 32 F.3d at 765. Fullard failed to demonstrate a triable issue with respect to any implausibilities or inconsistencies in the reasons stated by Argus, or with respect to whether Argus was racially motivated in its decision to place him on probation. Demonstrating Fullard's state of mind as to why he did not agree to comply with the mandates of the review, fails to satisfy his burden because the focus mandated by law is upon why *Argus* took certain actions, not upon why *plaintiff* took certain actions.

3. *Comparison to Gogel*

Plaintiff next contends that this Court failed to consider the fact that Gogel was treated more favorably because she was allowed to transfer out of the department before the conclusion of her probation period while plaintiff was not given the same opportunity. As fully addressed by this Court in its previous decision, the reason that Fullard's argument fails is that Gogel responded very differently to her review than did Fullard. As detailed above, and as fully admitted by Fullard, he refused to accept the terms of his probation. Gogel, on the other hand, even though she disagreed with Moran's assessment of her work, signed her review and worked on her identified weaknesses. (Gogel Dep. at 99-104.) Specifically, the following exchange occurred during Gogel's deposition:

Q. Now, I know you said you disagreed with this review. Did you ever tell Ms. Moran or Ms. DiDaniels or anyone else that you wouldn't take any action in response to this review?

.....

A. Absolutely not. . . . I take constructive criticism to heart. . . . I tried my best to do the things on here.

(Id. at 103-04.) Therefore, I again conclude that Gogel could not be compared as more favorably treated because her response to her probation was quite the opposite of Fullard's response. See Bullock v. Children's Hosp. of Philadelphia, 71 F. Supp. 2d 482, 490 (E.D. Pa. 1999) (defining "similarly situated" as those individuals who have engaged in the same conduct as plaintiff, "without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.")

4. *Overtime Hours*

Fullard's final argument is that the decision of Argus to place Fullard on probation and eventually terminate him was pretextual because it was a decision based in large part on his lack of overtime hours as compared to his co-employees. He now argues that he was the only employee in his division who did not get paid overtime, and that it was not until after he asked for overtime pay that he was placed on probation. I note first that Fullard did not present this argument in his response to the motion for summary judgement.⁶ As explained, "[a] motion for reconsideration is not an opportunity for a party to present previously available evidence or new arguments." Federico, 158 F. Supp. 2d at 578 (alteration in original; citation omitted). See also Bhatnagar, 52 F.3d at 1231; Bradford Hosp., 136 F. Supp. 2d at 430.

Fullard also testified at his deposition that he understood that overtime work would sometimes be required in his job. (Fullard Dep. at 58.) In addition, Heather Rabuttino ("Rabuttino") testified that at some point in 1997, the same year in which Fullard was hired, she

⁶ Fullard did raise this allegation in his complaint. (Am. Compl. ¶ 8.)

became a salary employee and stopped receiving overtime pay. (Rabuttino Dep. at 10-12.) Thus, even if this Court considered this newly presented argument, Fullard's statement that he was the only salaried worker not entitled to overtime pay is inaccurate, and Fullard admitted that he understood that overtime work would be necessary when he took the job.

Fullard also argues that he performed a computer validation which could not be recorded in the billing records produced by Argus. While this argument was brought forth in plaintiff's sur-reply, it was raised without citation to any factual evidence in the record, and without any explanation as to how long this study took to perform. (Pl.'s Sur-Reply at 7-8.) This Court is not obligated to consider "conclusory allegations" which are not based on "specific facts" in the record when determining a motion for summary judgment. See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999). Accordingly, I conclude that Fullard's arguments with respect to his hours worked either were not raised in his response filings or were raised in an unsupported manner.

III. Conclusion

Fullard has failed to demonstrate that this Court made any erroneous determinations that would upset the legal conclusions in this Court's previous ruling. This Court concludes that it is beyond doubt that no reasonable person could infer from the six month review that the reasons stated within were not the true reasons that Fullard was being placed on probation. It is further beyond doubt that those reasons were fully communicated to Fullard and that he rejected the review at the risk of losing employment with Argus.

Therefore, the motion for reconsideration of the grant of summary judgment in favor of Argus on the Title VII and 42 U.S.C. § 1981 claims will be denied. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
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ROY FULLARD,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 00-509
	:	
ARGUS RESEARCH LABORATORIES,	:	
INC.,	:	
Defendant.	:	

ORDER

AND NOW, this 6th day of December, 2001, upon consideration of the motion of plaintiff Roy Fullard for reconsideration (Document No. 24) of this Court's Order of June 7, 2001 (Document No. 23) and the response of defendant Argus Research Laboratories, Inc., and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of plaintiff is **DENIED**.

LOWELL A. REED, JR., S.J.