

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

RONALD L. ASHBY,	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HANGER PROSTHETICS & ORTHOTICS,	:	NO. 02-630
INC. and HANGER ORTHOPEDIC	:	
GROUP, INC.,	:	
	:	
Defendants.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 7th day of November, 2003, upon consideration of the Motion of Defendants Hanger Prosthetics & Orthotics, Inc. and Hanger Orthopedic Group, Inc. for Summary Judgment (Document No. 14, filed February 18, 2003), the Response of Plaintiff, Ronald Ashby, to Defendants' Motion for Summary Judgment (Document No. 16, filed March 4, 2003), and Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment (Document No. 18, filed March 12, 2003), **IT IS ORDERED** that the Motion of Defendants for Summary Judgment is **GRANTED** with respect to Count III of the Complaint and **DENIED** with respect to Counts I and II of the Complaint.

MEMORANDUM

I. BACKGROUND

In 1964, plaintiff, Ronald Ashby, began working for Frank Malone & Sons as a prosthetic technician. Plaintiff's Response to Defendants' Motion for Summary Judgment ("Pl.'s Resp."), at 3. Through a series of corporate acquisitions, plaintiff became an employee of Hanger Prosthetics & Orthotics, Inc. and Hanger Orthopedic Group, Inc. ("defendants") in 1999. Defendants' Motion for Summary Judgment ("Defs.' Motion"), at 2-3. On November 30, 2000, defendants discharged plaintiff. At that time, plaintiff was fifty-nine years old. Pl.'s Resp., at 2.

Plaintiff brought a lawsuit against defendants alleging violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.; the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C.S.A. § 951 et seq.; and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq.. Plaintiff's Complaint (Document No. 1, filed February 6, 2002) ("Pl.'s Compl."), at ¶¶ 46, 49, 51. ADEA and PHRA prohibit age discrimination in employment. 29 U.S.C.A. § 621(b); 43 Pa. C.S.A. § 952(b). ERISA provides safeguards for the establishment, operation, and administration of employee benefit plans. 29 U.S.C. § 1001(a).

Defendants moved for summary judgment alleging that plaintiff failed to establish a prima facie case of age discrimination. Defs.' Motion, at 11. In the alternative, defendants argued in their motion that they had a non-discriminatory reason for terminating plaintiff. Defs.' Motion, at 12-14. Defendants further argue that there is no evidence to support plaintiff's claim that the denial of ERISA benefits was a motivating factor in plaintiff's discharge. Defs.' Motion, at 15.

II. DISCUSSION

A. STANDARD FOR SUMMARY JUDGMENT

“[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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[,]” summary judgment should be granted. Fed. R. Civ. P. 56(c). The Supreme Court describes the summary judgment determination as "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Therefore, "a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir., 1987).

"[O]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-588 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. "If reasonable minds can differ as to the import of proffered evidence that speaks to an issue of material fact, summary judgment should not be granted." Gelover v. Lockheed Martin, 971 F.Supp. 180, 181 (E.D.Pa.,1997).

B. AGE DISCRIMINATION IN EMPLOYMENT CLAIM

Plaintiff alleges in Count I of the Complaint that defendants violated the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 et seq. The framework for examining ADEA claims involves the presentation of evidence in three distinct steps and is based on the Supreme Court decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a racial discrimination case. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). First, the plaintiff must establish the elements of a *prima facie* case of age discrimination. Id. If the plaintiff satisfies this burden, the defendant has the burden of producing evidence of a legitimate, nondiscriminatory reason for the discharge – the burden of production, not persuasion. Id. If the defendant offers a legitimate reason for the discharge, the plaintiff can survive summary judgment by submitting evidence sufficient for a factfinder to “either (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.” Id. (quoting Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)). Defendants argue that plaintiff has failed to establish a *prima facie* case of age discrimination and that they had a legitimate, nondiscriminatory reason for plaintiff’s discharge.

1. Argument that Plaintiff Has Failed to Establish a Prima Facie Case of an ADEA Violation

To establish a *prima facie* case of age discrimination under the ADEA, plaintiff must offer proof that (1) plaintiff was age forty or older, (2) plaintiff was discharged, (3) plaintiff was qualified for the job, and (4) plaintiff was replaced by a sufficiently younger employee. See Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 234 (3d Cir. 1999). If a plaintiff is

terminated during a reduction in force, the fourth factor can be satisfied by allegations showing that the employer retained sufficiently younger workers. Id. at 235. Although no set age difference is required to satisfy the “sufficiently younger” standard, the Third Circuit has ruled that an eight year differential is sufficient. Id. at 236. The parties do not dispute that plaintiff satisfies the first three elements of the *prima facie* test, but defendants argue that plaintiff did not offer evidence of the fourth element sufficient to defeat summary judgment.

Defendants raise two arguments regarding the sufficiency of plaintiff’s evidence on the fourth prong of the test. First, defendants argue that plaintiff was not replaced. According to defendants, the Island Avenue facility where plaintiff worked continues to employ only the three workers who were employed when plaintiff was discharged. Defs.’ Motion, at 11. Second, defendants argue that the average age of workers retained in the Philadelphia market did not change during the reduction in force that led to plaintiff’s release. Id. at 11. The Court concludes that these arguments do not warrant granting summary judgment on this issue.

First, plaintiff submitted sufficient evidence to establish that he was replaced by a younger employee as required under McDonnell Douglas. Showalter, 190 F.3d at 234. Tom Kernan was hired on Nov. 8, 2000, shortly before plaintiff was discharged on November 30, 2000. At that time, Kernan was 39.5 years old, and plaintiff was 59 years old. Pl.’s Resp., at 13. Plaintiff points out that defendants’ market manager, Ernest Gramaglia, testified he was aware of the need to downsize as early as the latter part of September or early October 2000, at least one month before Kernan was hired in early November. Pl.’s Resp., at 11 & Exhibit I (Deposition of Ernest Gramaglia, at 84). Thus, as plaintiff argues, based on the evidence that Gramaglia knew he needed to downsize before hiring Kernan, a jury could infer that Gramaglia hired Kernan as a

replacement for plaintiff. The fact that Kernan was hired before plaintiff's actual termination does not alter that conclusion. If an older employee could only be replaced by a younger person hired after his discharge, employers would be able to avoid ADEA scrutiny by hiring a younger employee shortly before the termination of an older employee. See Shager v. Upjohn Co., 913 F.2d 398, 400 (7th Cir. 1990).

Second, plaintiff adequately demonstrates that sufficiently younger employees were retained when he was discharged. In Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994), the Third Circuit determined that the requirement that an employee be replaced was not adequate to deal with a force reduction by a defendant. Id. at 777. If a plaintiff is discharged during a reduction in force, the plaintiff must show that he was laid off and other "sufficiently younger" employees were retained to satisfy the fourth element of the McDonnell Douglas test. Showalter, 190 F.3d at 235. In this case, both Kernan, age 39, and Bryan Stell, age 44, were retained during the force reduction in which plaintiff lost his job. Pl.'s Resp., at 13. Plaintiff was fifty-nine years old at that time. This age difference is significantly more than the eight years the Third Circuit found adequate to satisfy the "sufficiently younger" standard in Showalter. See Showalter, 190 F.3d at 235.

Defendants' argument that the average age of employees in the Philadelphia market remained constant during the force reduction is relevant to this inquiry, but it is not dispositive. Plaintiff has satisfied the burden of establishing the fourth prong of a *prima facie* age discrimination case by demonstrating that defendants replaced plaintiff with a younger employee and retained two sufficiently younger employees during a reduction in force.

2. Argument That Defendants Had a Legitimate, Nondiscriminatory Reason for Plaintiff's Discharge

Because plaintiff has satisfied the requirements for establishing a *prima facie* case, the Court's focus shifts to defendants. Defendants are required to produce evidence of legitimate, nondiscriminatory reasons for plaintiff's discharge. Keller, 130 F.3d at 1108. Defendants point to two reasons for plaintiff's discharge. First, defendants state they wanted to retain employees with higher skill levels and the flexibility to work with state of the art componentry. When making this determination, defendants compared plaintiff with Kernan. According to defendants, Kernan was more qualified because Kernan was both a practitioner and a technician, and plaintiff was only a technician. Defs.' Motion, at 12-13. Practitioners see and treat patients, but technicians only build componentry. Defs.' Motion, at 5, n. 3. Second, salary was a "key component" in Gramaglia's decision to terminate plaintiff because plaintiff's salary was "one of the highest technician salaries in the Philadelphia market." Defs.' Motion, at 12-13. Based on defendant's evidence, the court concludes defendants have satisfied their burden of articulating legitimate, nondiscriminatory reasons for plaintiff's discharge. See Keller, 130 F.3d at 1108.

At this step in the analysis, plaintiff can survive summary judgment by submitting evidence sufficient for a factfinder to "either (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." Keller, 130 F.3d at 1108 (quoting Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)). To meet this burden, plaintiff offers evidence to show defendants' proffered reasons are a pretext for illegal racial discrimination.

First, plaintiff argues that he only received positive performance evaluations from his supervisors, and that he was certified to work with the latest technology and best selling prosthetics. Pl.'s Resp., at 4-5, 15 and Exhibit D (Mickle Deposition, at 17). On this issue, defendants did not offer evidence of plaintiff's performance reviews or the types of products built by plaintiff, and they did not produce any documentation of the reason for plaintiff's firing. *Id.*, at 9, 15. Plaintiff also disputes that Kernan was certified as a practitioner, pointing to Gramaglia's testimony that Kernan was not certified as a practitioner and thus could not see patients. *Id.*, at 8 and Exhibit I, J (Gramaglia Deposition, at 65; DiGiovanni Deposition, at 37). Second, plaintiff argues that salary was not a valid justification for his firing because Kernan's yearly salary was \$2000 higher than plaintiff's. Defs.' Motion, at 5 and Exhibit B, K (Philadelphia Market Technicians Chart, Tom Kernan Personnel File). All such evidence raises a genuine issue of material fact as to defendant's alleged nondiscriminatory reasons for terminating plaintiff.

C. PENNSYLVANIA HUMAN RELATIONS ACT CLAIM

Based on the foregoing analysis, the defendants' Motion for Summary Judgment on plaintiff's claims under the Pennsylvania Human Relations Act ("PHRA") should also be denied. Pennsylvania courts analyze employment discrimination claims under the PHRA using the same framework formulated by the Supreme Court in McDonnell Douglas. Allegheny Hous. Rehab. Corp. v. Pa. Human Relations Comm'n, 516 Pa. 124, 128 (1987). Therefore, plaintiff's PHRA claims will be treated in the same manner as his ADEA claims. Ziegler v. Del. County Daily Times, 128 F. Supp. 2d 790, 793 (E.D. Pa. 2001) (quoting Campanaro v. Pa. Elec. Co., 738 A.2d 472 (Pa. Super. 1999)). Both parties agree that the summary judgment decision on the PHRA

claim should be the same as the decision on the ADEA claim. Pl.’s Resp., at 16-17; Defs.’ Motion, at 14. Thus, summary judgment on plaintiff’s PHRA claims is denied for the reasons set forth in Section II.B of this memorandum.

D. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 CLAIM

Plaintiff also claims that defendants fired him “in order to defeat his entitlement to ERISA benefits, including but not limited to health insurance and retirement benefits.” Pl.’s Complaint, at ¶ 51. The Court concludes plaintiff has not offered sufficient evidence to withstand summary judgment on this claim.

To establish a prima facie case of an ERISA violation, plaintiff must show (1) prohibited employer conduct; (2) taken for the purpose of; (3) interfering with the attainment of “any right to which the employee may become entitled.” DeWitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997). That burden requires plaintiff to establish that the employer acted with the “specific intent” to violate ERISA. Id. To do so, a plaintiff may use circumstantial evidence but must show more than a lost opportunity to accrue additional benefits. Id.

The Third Circuit decision in Turner v. Schering–Plough Corp., 901 F.2d 335 (1990) is particularly apposite to this case. In Turner, the court affirmed the granting of summary judgment on the ground that Turner failed to present evidence that his discharge was motivated by a desire to avoid paying employee benefits under ERISA. In support of his ERISA claim, Turner pointed only to the lost opportunity to accrue additional benefits, and he produced no evidence that the savings recognized by the company from stopping his benefits were significant enough to be a motivating factor in his termination. Id. at 348. Because every ERISA covered employee loses this opportunity when he is fired, the Third Circuit ruled that, to recover on such a claim, a

plaintiff must present evidence that interference with ERISA benefits was a motivating factor.

Id.

Plaintiff in this case faces the same problem as the plaintiff in Turner. Plaintiff has provided no evidence of the effect of the termination on his pension or the amount of money defendants would save by removing plaintiff from their insurance plan. The two pieces of evidence offered by plaintiff in support of this claim are insufficient to show that defendants had the intent to interfere with plaintiff's ERISA benefits. First, plaintiff miscites a statement by defendants' Human Resource manager, James Gillette, that the decision to terminate plaintiff "came down to the cost of salary and benefits." Pl.'s Resp., at 8 and Exhibit H (citing James Gillette deposition, at 83 and 53). In fact, Gillette stated that the cost of benefits would be only one factor considered in a hypothetical decision by defendants to terminate an employee. Id., at 50. According to Gillette, a supervisor would typically examine "the mix of business, the volume of work specifically identified to him, his specific productivity, the amount of revenue, his compensation and benefit's costs." Id. Significantly, plaintiff did not produce any evidence that defendants examined benefit costs when evaluating plaintiff's employment.

Second, plaintiff points to a statement by his direct supervisor, Kellen Mickle, that plaintiff was "close to retirement" and "at high risk for going out on medical disability." Pl.'s Resp, at 8 and Exhibit A (Ashby Deposition, at 90). On this issue, although Gramaglia discussed his decision with Mickle, he testified that Mickle did not assist him or offer any "input." Pls.'s Resp., at Exhibit I (Gramaglia Deposition, at 97). There is no evidence to the contrary.

Plaintiff also asks this Court to infer that plaintiff's significant medical conditions, including bone cancer and cardiomyopathy, motivated defendants' decision. Pl.'s Resp., at 17.

The Court declines to do so on the ground that there is no evidence that plaintiff's illnesses were more significant than those of other employees. Moreover, there is evidence that at least two other employees who were not terminated had serious medical problems. Defs.' Motion, at Exhibit E (Gramaglia Deposition, at 75-76).

Lastly, plaintiff was asked at his deposition whether he believed the decision to terminate him was motivated by a desire to cut off his ERISA benefits. In response, plaintiff said he "never made that claim." Plaintiff also stated that he did not believe his "termination from Hanger had anything to do with Hanger wanting to cut off [his] health benefits [or] disability benefits." Defs.' Motion, at Exhibit A (Ashby Deposition, at 98-99).

III. CONCLUSION

For the foregoing reasons, the Court denies defendants' Motion for Summary Judgment with respect to plaintiff's ADEA and PHRA claims and grants summary judgment as to plaintiff's ERISA claim.

BY THE COURT:

JAN E. DUBOIS, J.