

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

JOHN S. RIZZO,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
PPL SERVICE CORPORATION,	:	
Defendant	:	NO. 03-5779

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GREGORY GORSKY,	:	
Plaintiff	:	
	:	
v.	:	
	:	
PPL SERVICE CORPORATION,	:	
Defendant	:	NO. 03-5780

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KIM GORSKY,	:	
Plaintiff	:	
	:	
v.	:	
	:	
PPL SERVICE CORPORATION,	:	
Defendant	:	NO. 03-5781

**MEMORANDUM**

Gene E.K. Pratter, J.

June 10, 2005

Plaintiffs in these three related matters filed a Joint Motion for Reconsideration on April 25, 2005 following the Court's grant of summary judgment to Defendant PPL Service Corporation ("PPL") in all three matters on April 19, 2005. Plaintiffs make four arguments in their Joint Motion. First, they contend that the Court erred by not examining the circumstantial evidence of discrimination under a mixed motive standard. Second, Plaintiffs claim that they should be granted leave to amend their complaints to advance the theory of disparate impact and

to take limited discovery under the new theory of liability. Third, Plaintiffs argue that the Court inappropriately relied on PPL's Corporate Policy that is dated April 11, 2001, while the punitive employment actions taken against Plaintiffs occurred in February of 2001. Finally, the Joint Motion includes the argument that the Court erred in holding that Plaintiffs had proffered no evidence that PPL has a progressive discipline policy.

PPL filed a Memorandum of Law in Opposition to the Joint Motion on May 9, 2005. In response to PPL's Memorandum of Law, Plaintiffs filed a Joint Motion Seeking Leave of Court to File a Memorandum of Law in Reply<sup>1</sup> to which PPL filed a response.

For the reasons discussed below, the Court denies the Joint Motion for Reconsideration.

#### **I. STANDARD OF REVIEW**

The purpose of a motion for reconsideration 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), cert. denied, 476 U.S. 1171, 106 S. Ct. 2895, 90 L. Ed. 2d 982 (1986). A court should grant a motion for reconsideration "only if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." Drake v. Steamfitters Local Union No. 420, No. 97-585, 1998 WL 564486, at \*3 (E.D. Pa. Sept. 3, 1998) (citing Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)). "Because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Industries, Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

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<sup>1</sup> The Court grants this Motion and has considered the arguments made in both Plaintiffs' Memorandum of Law in Reply and PPL's Surreply in Opposition.

The moving party must show more than mere disappointment with the Court's ruling for reconsideration to be granted. Burger King Corp. v. New England Hood and Duct Cleaning Co., 2000 WL 133756, at \*2 (E.D. Pa. Feb. 4, 2000); Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D.Pa.1993).

## **II. DISCUSSION**

At the outset, the Court observes that none of the grounds contained in the Joint Motion for Reconsideration relate to Plaintiff Kim Gorsky's complaint or the basis on which summary judgment was granted against her. As to Ms. Gorsky's claim, the Court held that summary judgment was proper due to Ms. Gorsky's failure to produce evidence that she suffered an adverse employment action. Even if the Court were to accept all of the arguments in the Joint Motion for Reconsideration, there would be no basis to reconsider the finding that Ms. Gorsky had not suffered an adverse employment action and, thus, had not established a *prima facie* case of discrimination. Therefore, for purposes of the remainder of this Memorandum, reference to "Plaintiffs" means Plaintiffs Gregory Gorsky and John Rizzo.

### **A. Circumstantial Evidence of Discrimination Using Mixed Motives Standard**

Plaintiffs contend that the traditional McDonnell-Douglas model that the Court applied in this case has been modified by Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), to allow plaintiffs to demonstrate discrimination by showing it was "a motivating factor" for an employment-related action, not necessarily the only factor. Desert Palace, 539 U.S. at 92-94; see also, Lloyd v. City of Bethlehem, 2004 WL 540452, at \*3 (E.D. Pa. Mar. 3, 2004); Campetti v. Career Educ. Corp., 2003 WL 21961438, at \*7 (E.D. Pa. June 25, 2003). Plaintiffs then argue that "[h]ad the Court applied a mixed motives analysis in the case at bar, it would have become

evident that one of the Defendant's motivating reasons for the investigation of a very small group of older employees may have been to rid itself of older workers." (Pls.' Jt. Motion for Reconsideration, at 4).

PPL responds to this argument by noting initially that the Desert Palace reasoning has not been formally applied to ADEA claims, such as those at issue in these cases. PPL further argues that, even if circumstantial evidence is permissible to show a mixed motive, the Court has already ruled on this issue by finding that "neither Mr. Gorsky nor Mr. Rizzo have produced evidence that age was a factor in any manner in PPL's decision to terminate their employment." Further, PPL contends that Plaintiffs have not demonstrated any "manifest error of law or fact" that would require the Court to reconsider the original decision.

The "mixed-motives" test was originally described in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Under this test, the plaintiff has the initial burden to demonstrate that the adverse employment action was "the result of mixed motives (i.e. that it is the 'result of multiple factors, at least one of which is illegitimate' and the illegitimate factor played 'a motivating part' in the adverse decision)." Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 215 (3d Cir. 2000) (quoting Price Waterhouse, 490 U.S. at 244-45). If the plaintiff satisfies this initial burden, "the burden shifts to the employer to persuade the jury by a preponderance of the evidence that it would have reached the same decision even if the protected trait had not been considered." Id. In Desert Palace, the Supreme Court found that, in a Title VII discrimination case, either direct or circumstantial evidence can be used to satisfy the plaintiff's burden to show a "mixed-motive." Desert Palace, 539 U.S. at 100. However, the Court of Appeal for the Third Circuit in Monaco v. American Gen. Assurance Co., 359 F.3d 296 (3d Cir. 2004), held that direct

evidence was still required in ADEA cases to show “mixed-motive” without any discussion of Desert Palace. Monaco, 359 F.3d at 300.

The Court finds that neither the circumstantial evidence nor the direct evidence presented by Plaintiffs satisfied their initial burden of demonstrating that PPL’s motivations in the termination of Messrs. Gorsky and Rizzo were illegitimate. Therefore, the Court has no reason to decide whether Plaintiffs could have satisfied their burden by presenting circumstantial evidence. As stated in the earlier Memoranda and Orders, after examining all evidence tendered to the Court, including circumstantial and direct evidence, the Court found that no genuine issue of material fact exists to support an inference of any discrimination. Plaintiffs simply have failed to produce any evidence showing that discrimination was a factor, let alone a motivating factor, in the termination of Messrs. Gorsky and Rizzo.

**B. Leave to Amend Complaint to Include Disparate Impact Claim**

Plaintiffs note that the recent Supreme Court opinion in Smith v. City of Jackson, 125 S.Ct. 1536 (2005), recognizes a plaintiff’s right to bring a disparate impact claim under the ADEA. Therefore, Plaintiffs request leave to file an Amended Complaint and to reopen discovery for the limited purpose of pursuing the alleged disparate impact claim. Plaintiffs argue that leave to amend should be granted, according to Rule 15(a) of the Federal Rules of Civil Procedure, “when justice so requires,” and the burden is generally on the non-moving party to demonstrate why leave to amend should not be granted. Foman v. Davis, 371 U.S. 178, 182 (1962). In fact, a court should generally allow amendment of a complaint “absent undue or substantial prejudice... unless ‘denial [can] be grounded in bad faith or dilatory motive, truly undue or unexplained delay, repeated failure to cure deficiency by amendments previously

allowed or futility of amendment.” Lundy v. Adamar of New Jersey, Inc., 34 F.3d 1173, 1196 (3d Cir. 1994) (quoting Bechtel v. Robinson, 886 F.2d 644, 652-53 (3d Cir. 1989)). As to the reopening of discovery, Plaintiffs specifically request the opportunity to perform statistical analysis to determine if the investigation at issue did target a disproportionate number of over forty-year-old employees and to determine the average age of the PPL’s employees.<sup>2</sup>

PPL argues that leave to amend a complaint after summary judgment has been granted makes “the interests in judicial economy and finality of litigation... particularly compelling.” Beverly v. Desmond Hotel & Conference Ctr., 2004 WL 632707, at \*4 n.2 (E.D. Pa. Feb. 25, 2004). PPL further contends that Plaintiffs have not offered any legitimate reason for having delayed in requesting leave to amend. PPL asserts that the Smith v. City of Jackson opinion did not change the law of the Third Circuit, where the Court of Appeals had not specifically precluded disparate impact claims in ADEA claims prior to the Smith opinion. See Massarsky v. Gen. Motors Corp., 706 F.2d 111, 121 (3d Cir. 1983). Further, PPL argues that Smith was issued on March 30, 2005 and Plaintiffs, who was aware of the Smith opinion, did not seek leave to amend their complaint until nearly a month later and after the Court had issued an order granting summary judgment. Finally, PPL contends that granting leave would be highly prejudicial to PPL, because PPL would need to do additional burdensome and expensive discovery after many

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<sup>2</sup> In the Court’s earlier Memoranda and Opinion, at page 17, reference is made to “the demonstrable fact that the average age of PPL employees is 46 years old” as one of the points raised by PPL to demonstrate that the investigation affected predominantly older people. Plaintiffs correctly have noted that this age was provided by counsel for PPL during oral argument and is not evidence. However, the Court did not rely on this number as evidence, but merely was a reference point for discussing PPL’s arguments in their brief and at oral argument. Further, Plaintiffs may wish to review the earlier Memoranda and Opinions, as the Court rejected PPL’s argument in this regard.

years and after completing extensive discovery already in these matters.

In Foman v. Davis, the Supreme Court clarified the role of the district court in deciding whether to grant such leave:

In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman, 371 U.S. at 182.

After consideration of Plaintiffs' request and with full recognition of the principle that generally leave should be granted, the Court declines to grant leave in any of these cases for the filing of an amended complaint.

The Court finds that three of the reasons enumerated in Foman apply here and supply compelling grounds for denying the requested leave to amend. First, the Court finds that Plaintiffs' delay in requesting leave to amend the complaints was undue. Prior to the Court's grant of summary judgment, Messrs. Gorsky and Rizzo were aware of the Smith decision. Nonetheless, Messrs. Gorsky and Rizzo did not request leave to amend their complaints at that time, but only made such a request after the Court had granted summary judgment against them. Although it may well be, as PPL suggests, that the law in the Third Circuit was such that Plaintiffs could have originally alleged disparate impact claims, it is clear that, once Smith was issued on March 30, 2005, a plaintiff would not have had to deal with any ambiguity and could have filed a disparate impact claim under the ADEA. These Plaintiffs simply failed to request

leave to amend their complaint in a prompt manner and have not presented any reason for that delay. As a result, both PPL and the Court have expended resources in connection with the summary judgment motion.

Reopening this matter via amended pleadings to advance new theories would result in undue prejudice to PPL. The Court has little doubt that all parties have expended a great deal of time, resources, and energy in these matters. To reopen them now would not only require PPL to expend even more time, resources, and energy, but, at this extremely late stage, also requires all parties and witnesses to try to recall events and dates now several years in the past.

Finally, the Court finds that disparate impact claims by these Plaintiffs are futile, because the proposed Amended Complaints and the evidence do not support a disparate impact claim. In Smith, the Supreme Court held “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is ‘responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.’” Smith, 125 S.Ct. at 1545 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988))). In Smith, the Supreme Court found that a pay plan that was “relatively less generous to older workers than to younger workers” did not disparately impact the older workers because “the plan was based on reasonable factors other than age.” Id. The test established by the Supreme Court is not whether “there may have been other reasonable ways” to accomplish a goal, but whether the method used was reasonable. Id. at 1546.

In these cases, Messrs. Gorsky and Rizzo rely solely on the assertion that because the internal PPL investigation that resulted in their termination included mostly older employees, it

had a disparate impact on older employees. Further, Plaintiffs contend that PPL should have had a larger investigation that did not “target” older workers. Although Plaintiffs’ proposal may be a reasonable method for PPL to achieve the goal of preventing misuse of its email services and ensuring that offensive material is not displayed on its computers, the Court finds that the method used by PPL, namely tracking certain inappropriate emails and investigating the distributors and recipients of those emails, was reasonable (and effective). Even if Plaintiffs were to produce evidence that the investigation affected older employees at a disproportionate rate, the Court finds that Plaintiffs cannot show that the investigation was a specific employment practice that illegally disparately impacted older employees.

Any of the individual reasons discussed alone may have been sufficient to overcome the prejudice in favor of granting leave to amend where possible, but all of the foregoing reasons combined lead the Court to the conclusion that allowing leave in this situation would be an unwarranted disservice to the parties and the Court.

**C. Date of Corporate Policy No. 405**

Plaintiffs argue that Corporate Policy No. 405, which prohibited non-business use of email, was dated April 11, 2001. Further, even if PPL’s statement that the actual date the Corporate Policy was issued was November 8, 2000, the investigation at issue began in September of 2000. Therefore, Plaintiffs contend that this Policy was not available to them at the time of the investigation and their eventual termination. In other words, Plaintiffs contend that the Court evaluated Plaintiffs’ conduct by using a PPL standard that was not even in effect at the time.

The Court is willing to consider, taking the evidence in the light most favorable to

Plaintiffs and making all inferences in favor of Plaintiffs, that Corporate Policy No. 405 may not have been available to Plaintiffs at the time of the investigation. However, the Court finds that the removal of Corporate Policy No. 405 from evidence presented here does not have any impact on the Court's granting of summary judgment in favor of PPL. Corporate Policy No. 405 simply stated that "the use of company e-mail or internet [was] for only business purposes." The PPL Standards of Conduct and Integrity states substantially the same policy. Further, both Mr. Gorsky and Mr. Rizzo admitted that they were aware that the PPL email facility was intended for only business purposes. (Greg Gorsky Deposition Transcript, at 37-38, 56-58, 61-62, 70-71; John Rizzo Deposition Transcript, at 32-33, 35, 48-49, 51). Therefore, the Court finds that the mention of Corporate Policy No. 405 in the Memoranda and Orders granting summary judgment was not a "manifest injustice," and did not control the outcome of the Court's decision granting summary judgment in favor of PPL.

**D. Progressive Discipline Policy**

Plaintiffs argue that the Court erred by finding that there was no evidence of a progressive discipline policy. Plaintiffs assert that the "Responsible Behavior Program," which lists various levels of discipline, is a progressive discipline policy. Additionally, Plaintiffs now proffer PPL's answer from an interrogatory in another, unrelated, litigation in which PPL answers the question "Does [PPL] have a progressive discipline policy? If so, how and when was the progressive discipline policy applied to Plaintiff prior to his termination?" by stating "Yes. Consistent with PPL's Responsible Behavior Program, which permits termination as the first step under certain circumstances...."

PPL argues that Plaintiffs are merely attempting to relitigate an issue that has already

been decided by the Court. Further, PPL contends that the evidence, in these cases, clearly shows that the PPL Responsible Behavior Program was not a “progressive discipline policy,” as Plaintiffs try to characterize it, because, although it contains five levels of discipline, the Program does not mandate that the steps be utilized progressively, i.e. the least drastic step used as a first effort of discipline. Further, PPL asserts that the interrogatory answer provided by Plaintiffs should not be considered by the Court now because it was information available to Plaintiffs prior to the Court’s granting summary judgment and Plaintiffs failed to produce it for the Court’s consideration at that time.

The Court declines to speculate as to the meaning of an interrogatory answer in an unrelated case. If Plaintiffs wanted the Court to consider that material here, they should have made it part of the record here in a timely fashion. They did not. The Court found that there was no evidence that PPL had a “progressive” disciplinary policy that precluded PPL’s termination of these Plaintiffs in response to their email abuses and infractions. Nothing presented by Plaintiffs has convinced the Court that the earlier conclusion was erroneous.

### **III. CONCLUSION**

For the foregoing reasons, the Court denies the Plaintiffs’ Motion for Reconsideration. An Order to be entered consistent with this Memorandum follows.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

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

KIM GORSKY,	:	CIVIL ACTION
Plaintiff	:	
	:	
	:	
v.	:	
	:	
	:	
PPL SERVICE CORPORATION,	:	
Defendant	:	NO. 03-5781

**MEMORANDUM**

Gene E.K. Pratter, J.

June 10, 2005

AND NOW, this 10th day of June, 2005, upon consideration of the Plaintiff Kim Gorsky's Motion for Reconsideration (Docket No. 33), Ms. Gorsky's Memorandum of Law (Docket No. 34), Defendant PPL Service Corporation's Response in Opposition (Docket No. 35), Ms. Gorsky's Motion for Leave to File Memorandum of Law in Reply (Docket No. 36) and the accompanying Memorandum of Law, and PPL's Reply to Response to Motion (Docket No. 37), it is hereby ORDERED that:

1. Plaintiff Kim Gorsky's Motion for Leave to File Memorandum of Law in Reply is GRANTED; and
2. Plaintiff Kim Gorsky's Motion for Reconsideration is DENIED.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE