

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

JOSEPH HARRY,
Plaintiff,

vs.

**NATIONAL RAILROAD PASSENGER
CORP.**
Defendant.

CIVIL ACTION

NO. 03-4704

MEMORANDUM AND ORDER

Tucker, J.

August _____, 2005

Plaintiff Joseph Harry (“Plaintiff”) brings this action pursuant to the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101, *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Pennsylvania Human Relations Act (“PHRA”), 43 P.S. §§ 951 *et seq.* This action stems from Plaintiff’s employment with Defendant National Railroad Passenger Corporation t/a Amtrak (“Defendant”).

Presently before this Court is Defendant’s Motion for Summary Judgment (Doc. 12), Plaintiff’s Opposition thereto (Doc. 15), Defendant’s Reply (Doc. 17), and Plaintiff’s Sur-reply (Doc. 20). Upon consideration of the parties’ briefing and oral argument, this Court will grant Defendant’s motion for summary judgment.

BACKGROUND

In 1983, Plaintiff Joseph Harry began his employment with Amtrak as a conductor and then yardmaster. In 1992, Plaintiff was promoted to the position of Transportation Manager. In 1994, Plaintiff held the position of Terminal Trainmaster. In October 1996, Amtrak’s management noticed Plaintiff’s physical problems (speech and gait) and asked Plaintiff to take a

breathalyzer test, which Plaintiff passed. Amtrak granted Plaintiff a leave of absence in order to assess his physical condition. Plaintiff was diagnosed with multiple sclerosis (“MS”). Upon Plaintiff’s return to work, Amtrak’s management created a Project Trainmaster position for Plaintiff, which required less walking than the Terminal Trainmaster position. As Project Trainmaster, Plaintiff performed well. In 2000, Plaintiff took a medical leave of absence because of acute pancreatitis. In August 2001, Plaintiff worked independently, while his co-worker, Jeff Machalette (“Machalette”), was assigned to the Movement Office. In April 2002, Defendant underwent a reduction in force. During that time, Plaintiff’s position as Project Trainmaster was eliminated; Machalette, the other Project Trainmaster, was retained. In September 2002, after another reduction in force, Defendant restructured and created the Road Trainmaster position. In **October** 2002, Plaintiff applied for and was denied the Road Trainmaster position.

STANDARD OF REVIEW

Summary judgment is appropriate “if 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 judgment as a matter of law.” **Fed. R. Civ. P. 56(c)**. An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it

believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). **Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.”** Celotex, 477 U.S. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial.” **Id.** That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the opponent, even if the quantity of the movant’s evidence far outweighs that of its opponent.” Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). The court must view the evidence presented in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

With respect to summary judgment in discrimination cases, the court’s role is “to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff.” Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987).

DISCUSSION

A. McDonnell Douglas¹ Analysis

The burden-shifting framework of McDonnell Douglas applies to ADA claims when there is no direct evidence of discrimination.² See Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 667-68 (3d Cir. 1999). Under the McDonnell Douglas analysis, the plaintiff must first establish a *prima facie* case of discrimination. Then, the burden of production shifts to the defendant who must present a legitimate non-discriminatory reason for its actions. The final burden of persuasion is on the plaintiff, who must present evidence that the defendant's proffered reasons for its actions are a pretext for discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973).

1. *Prima Facie Case*

To establish a prima facie case of discrimination under the ADA, Plaintiff must show that (1) he is disabled within the meaning of ADA; (2) he is otherwise qualified to perform the essential functions of the job; and (3) he has suffered an adverse employment decision as a result of discrimination. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999). In this case, Plaintiff claims that he is disabled under the ADA because he has MS; that he was qualified, with or without reasonable accommodation; and he suffered an adverse employment

¹ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973).

² At oral argument, Plaintiff conceded that this is not a direct evidence case and that McDonnell Douglas is the applicable standard. The analysis for the ADA, PHRA, and Rehabilitation Act claims are similar. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999). As such, the Court will focus on the ADA claim.

decision because of his disability. Pl.'s Resp., p. 12. Defendant concedes that Plaintiff has established a prima facie case of discrimination. Def.'s Mot., p. 12.

2. *Defendant's Legitimate Non-Discriminatory Reason*

Once a prima facie case has been established, the burden of production shifts to Defendant to articulate a legitimate, non-discriminatory reason for its employment action. Defendant satisfies its burden of production by introducing evidence that, if taken as true, would permit the conclusion that there was a non-discriminatory reason for its decision. See Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 235 (3d Cir. 1999). Here, Defendant contends that Plaintiff was terminated in April 2002 in response to a reduction in force that required that one trainmaster position be eliminated. Plaintiff's termination was based on the comparison of the two Project Trainmasters, Plaintiff and Machalette, most recent performance evaluations. Def.'s Mot., p. 13. Mr. Machalette fared better by one (1) point on the most recent performance evaluation and had an overall higher rating on previous evaluations.

In October 2002, there was another reduction in force and reorganization that resulted in the creation of two Road Trainmaster positions. Plaintiff applied for and was denied the newly created position. Defendant contends that the awardees (Machalette and Mr. Manger) were more qualified and performed better in the interview process. Def.'s Mot., p. 19.

3. *Pretext*

Plaintiff must show that Defendant's articulated non-discriminatory reason is a pretext for discrimination by pointing to some evidence that demonstrates that there is reason to disbelieve the employer's explanation. **Plaintiff points to a host of circumstantial evidence attempting to show that Defendant's reason is pretextual: (1) discriminatory remarks to a third-party; (2)**

Plaintiff's seven-day work schedule; (3) disclosure of Plaintiff's disability to a manager; (4) rumors of a reduction in force and the timing of performance evaluations, which were determinative in the adverse action; (5) Plaintiff's submission of a doctor's note; (6) Defendant's inconsistent statements about the relevant decision maker; and (7) Defendant's failure to interview and rehire Plaintiff for a comparable position. Pl.'s Resp., pp. 15-16.

B. Plaintiff's Evidentiary Showing

This Court's analysis centers on whether Plaintiff has presented sufficient evidence to support a finding that Defendant's reason for his termination is pretextual and motivated by discriminatory animus. In order to discredit the employer's articulated reason, the plaintiff need not produce evidence that necessarily leads to the conclusion that the employer acted for a discriminatory reason. See Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-9 (3d Cir. 1997) ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination"). Plaintiff may survive summary judgment by submitting evidence from which a fact-finder could reasonably either: (1) disbelieve the employer's articulated reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's actions. See Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). Specifically, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them "unworthy of credence," and hence infer that the employer did not act for the asserted non-discriminatory reasons. Fuentes, 32 F.3d at 765.

1. Discriminatory Remarks and Work Schedule

Plaintiff asserts that Dave Nichols (“Nichols”), his supervisor and relevant decision maker, made discriminatory remarks and scheduled him excessively – seven days per week. The only evidence of discriminatory remarks are revealed in Plaintiff’s deposition testimony. In Weldon v. Kraft, the court maintained that uncorroborated deposition testimony may create a genuine issue on the question of discriminatory intent. 896 F.2d 793, 800 (3d Cir. 1990). Specifically, the court maintained, “there is no rule of law the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination that could withstand a summary judgment motion. Id. In that case, Weldon, an African-American employee, testified that he was unfairly assigned to one of the toughest managers who had a record of difficulty with other African-American trainees. Weldon further testified in his deposition that he was reassigned to another inexperienced trainer who had similar issues with minority trainees. Weldon relied on his experience and that of other minority employees to contend that Kraft never intended nor expected him to succeed. Id. at 799. Weldon further relied on statistical evidence regarding the involuntary termination of minority employees. Id. The court, overruling the lower court, concluded that the evidence proffered by Weldon could support an **inference of pretext**.

In this case, Plaintiff states that Nancy Barrett, clerk to him and Nichols, relayed comments that Nichols made about the Plaintiff. In Plaintiff’s deposition, he states, “Nancy Barrett told me lots of comments he was making about me that were not – how should I put it – friendly or – I don’t know. I just – the guy just didn’t like me.” Pl.’s Dep. at 65. Plaintiff further stated, “she said that he made a statement that he would get rid of me either by working me to

death or having me resign. And that's when the seven-day schedule started." Pl.'s Dep. at 67. Plaintiff's evidence is not comparable to the evidence presented in Weldon. Plaintiff's deposition testimony, standing alone, can not defeat summary judgment because it relies on inadmissible hearsay. Plaintiff does not refute that inadmissible hearsay may not be considered by the Court. Fed. R. Civ. P. 56(e). Rather, Plaintiff argues that the statements are admissible pursuant to Fed. R. Evid. 801 and 802. Specifically, Plaintiff contends that the statements are admissible as admissions by a party opponent pursuant to Fed. R. Evid. 801(d)(2).³ See Pl.'s Sur-reply, p. 2. Plaintiff maintains that, "Nichols as a manager and Harry's direct supervisor was clearly an agent or servant of defendant Amtrak concerning a matter within the scope of his employment during the existence of the relationship." Id. Plaintiff further maintains that placing Plaintiff on a seven-day work week corroborates the evidence of disability-based animus provided by those statements. Pl.'s Sur-reply, p. 3.

While Plaintiff's attempt to have these statements come within an exception to the hearsay rule is creative, it is unconvincing. Even if the work schedule somehow **substantiated** the alleged discriminatory remarks, the statements are inadmissible hearsay not within an exception. There is no contextual support that allows the statements to be admitted - there is no indication of when or where these comments were made. This Court is not certain that the statements were made within the scope of employment. Also, **the statements do not necessarily reflect discriminatory animus in the decision-making process.** See Pivrott v. Innovative Systems, Inc., 191 F.3d 344, 359 (stating that "stray remarks by non-decision makers or decision makers that

³ Rule 801(d)(2) provides that a statement is not hearsay if the statement is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

are unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision”). **Accordingly, these unsupported assertions are inadmissible hearsay and thus beyond the Court’s consideration in a motion for summary judgment.**

Moreover, the record shows that Plaintiff devised his own work schedule. Nichols testifies that the Plaintiff was responsible for crafting his own work schedule and indicated that he would take time off as needed during the week. Nichols Dep. at 43 - 44, 52. Nichols acknowledged that Plaintiff worked seven days per week when his co-worker, Machalette, was temporarily placed in another division. Nichols testified that:

Because I asked Mr. Machalette to do some special work for me, which meant we’d have one train master, which was not that unusual, so I asked Joe, I said, what days off do you want? He said, just put me down for all days of the week. In reality, train master jobs, the days off mean nothing. They are responsible for all those crews that work all different hours. It’s impossible for anybody to be there all the time. A lot of it’s done over the phone, a lot of it’s done over the phone, a lot of it’s done in the office, some of it’s done in the field. Nichols Dep. at 45.

Kevin O’Connor, the general manager and Nichols’ boss confirms that the schedules were based on the employee’s request. O’Connor Dep. at 39-40. Plaintiff does not refute this claim and does not offer any contradictory evidence.

Plaintiff raises the issue of Mr. O’Connor stating that, Plaintiff was not “dependable enough.” There is no indication that this particular statement impacted the decision making process or that it concerned Plaintiff’s disability. Plaintiff claims that Nichols made a point of disclosing his disability to O’Connor, but did not disclose information about other employees. Addressing this issue, O’Connor testifies that when he became manager, Nichols informed him that Plaintiff had MS and that it did not affect his ability to perform the job function. O’Connor

was told about other employees as well, but Plaintiff was the only person with a medical issue. See O'Connor Dep. at 37-38. Informing management about an employee's medical condition does not automatically amount to discriminatory animus.⁴ There is no evidence of record that could raise an inference of disability discrimination as there has been no causal link established between the alleged comments and the adverse employment decision.

2. *Performance Evaluations and Relevant Decision Maker*

Plaintiff claims that the performance evaluations were done in anticipation of a reduction in force that had been rumored on the railroad. The record, however, shows that there were no wide-spread rumors of the reduction in force. Nichols testified that "there were no rumors that I heard of. Within the week, I was told [by Kevin O'Connor] and then it happened." Nichols Dep. at 55. O'Connor testified that "there had been rumors for quite a while once we had a new regime come in...just like there is whenever anybody comes in, especially given Amtrak's continuing financial condition. But there was nothing firm or anything else. There are always rumors on the railroad." O'Connor's Dep. at 48. O'Connor further stated that it was not until March 2002 that he found out that there would be a reduction in force from Darryl Pesce ("Pesce"), the general manager. It was at that point, O'Connor learned that positions would be eliminated. The performance evaluations were based on the October 2000 to September 2001 time period; and completed and signed by Nichols and O'Connor in early January 2002. See Def.'s Exhibits 7 &

⁴ Plaintiff also claims that Nichols required Plaintiff to submit a doctor's note upon his return from his medical leave of absence, thus evidencing discriminatory animus. Summarily, that argument is unconvincing and Plaintiff misconstrues Nichols' testimony. Moreover, it appears that Defendant has a general policy that requires submission of a medical notice upon return to work. See Nichols Dep. at 39-41; see also Def.'s Reply, Exhibit A.

8. Plaintiff attempts to buttress his arguments by limiting his citation of the record to one phrase –“there are always rumors on the railroad.” Perhaps, there are always rumors on the railroad, just as there are rumors in other work environments. The existence of rumors does not mean that the parties conspired against Plaintiff in their evaluation of his performance. Further, Plaintiff has not provided any evidence that the events leading to the reduction in force transpired any differently than testified to by deponents Nichols and O’Connor.

Plaintiff further attempts to discredit the performance evaluation scoring by **claiming** that Machalette did not work in the Project Trainmaster position prior to the reduction in force and was moved back into that position just before the reduction in force. Pl.’s Resp., ¶2; see also Memo of Law, p. 15. In August 2001, Machalette was assigned to the train’s Movement Office when three of the four managers in that office resigned. When new managers were hired in January 2002, Machalette was placed back into the Project Trainmaster position. See Nichols Dep. at 46-49. There is nothing incoherent or implausible in Defendant’s reason for temporarily placing Machalette in the Movement Office. Plaintiff overstates his claim that this happened “weeks” before the reduction in force. The record indicates that Machalette was placed back in the Project Trainmaster position in January 2002 and the reduction in force became known in March 2002. Further, Defendant acknowledges that Plaintiff and Machalette had similar performance ratings. Machalette, however, distinguished himself in the management category by one point. When asked, “Do you recall why you rated Mr. Harry a six and Mr. Machalette a seven in management?” Nichols responded that he gave Plaintiff “kudos” for handling everything on his own when Machalette was in the Movement Office.” Referring to Machalette, Nichols stated, “I gave him kudos sort of on the same par as Joe [Plaintiff] since he agreed to take on his

temporary assignment and help out at CETC while we were short of management, and also he was still helping out in the trainmaster position.” Nichols Dep. at 64. Ultimately, Machalette received a higher rating because of “his movement off his experience in planning and manipulating stuff in the field.” Nichols Dep. at 65. Based on this, Plaintiff has not presented sufficient evidence that casts doubt on the evaluation process or the scoring method used by Nichols. Plaintiff has shown that he and Mr. Machalette were comparable, but Machalette’s assistance in the Movement Office when others resigned was considered valuable and garnered him a slightly higher rating. Plaintiff has presented no evidence that leads to an inference that his disability somehow factored into the timing or methodology of the performance evaluation.

Next, Plaintiff asserts that Defendant made inconsistent statements about who was the actual decision maker in the employment process. Plaintiff argues that “Amtrak now states that Mr. Pesce was the sole decision maker. This assertion is directly contradicted by Mr. Nichol’s testimony that he made the determination and that Mr. Pesce merely approved that decision” Pl.’s Resp. at 15. Plaintiff’s supervisor (Nichols), the product line manager (O’Connor), and general manager (Pesce), consistently state that they relied on the performance evaluations in making the employment decision. It is plausible that within the hierarchal structure of the railroad, in preparation for the reorganization, **that** Pesce identified Plaintiff and informed O’Connor of his determination. And then, subsequently, Nichols and O’Connor would meet with Plaintiff directly to inform him of his termination. See O’Connor Dep. at 55 (“I instructed [Nichols] to get me the last few performance evaluations, which he did. I was reviewing those over the next day or so, and in the interim Mr. Pesce called me because he had done the same thing and said that he had made the decision and based on the performance evaluations, Mr. Machalette was rated slightly

higher than Mr. Harry and that Mr. Harry's position was eliminated."); see also Nichols Dep. at 60-61; 66-69(confirming the termination process). The Court notes that Plaintiff was actually placed on short-term disability at that time. Plaintiff has not shown an inconsistency sufficient to create a genuine issue of material fact.

3. *Failure to Interview and Rehire*

Plaintiff claims that the evidence clearly demonstrates that Amtrak refused to consider Plaintiff for positions for which he applied and was qualified because of his disability. Defendant asserts that the available positions were awarded to the other applicants because the applicants were more qualified and performed better in the panel interviews.

Plaintiff has to present evidence to show that Defendant's proffered reason is pretextual. Plaintiff has failed to do so. Instead, Plaintiff **conclusorily** alleges that he was not hired because of his disability. Plaintiff has not relied on or cited any affidavits, depositions, or the like that point to evidence discrediting Defendant's reason. **A decision affecting an employee in the protected class does not become a discriminatory decision because it is made in the context of a reorganization or because someone else is retained or hired. Rather, the inquiry is whether the decision was motivated by the affected employee's disability. If the employer's decision was based on legitimate business concerns, i.e. choosing the person the employer believes is the best person for the job, the employee's disagreement with this decision does not prove pretext. As such, Plaintiff has not raised an inference of discriminatory animus regarding his failure to rehire claim to preclude summary judgment.**

CONCLUSION

After careful review of the record, this Court concludes that Plaintiff presents no evidence to create a genuine issue of material fact regarding the **credibility of** Defendant's legitimate non-discriminatory reasons for terminating Plaintiff's employment. Nor has Plaintiff presented evidence suggesting inconsistency, contradictions, incoherencies, or implausibilities in the Defendant's proffered reason for Plaintiff's termination. Plaintiff held his employer in high regard and felt that he had been treated well throughout his 20 year career with Amtrak. Plaintiff directly testifies as much. While Plaintiff's termination was unfortunate, the Court has not found any evidence of record to support an inference of discrimination. For all the foregoing reasons, the Court finds that Defendant is entitled to summary judgment because Plaintiff has not produced adequate evidence from which a fact-finder could reasonably conclude that Defendant's legitimate business reason was pretext or that its real motivation was discriminatory animus on the basis of disability.

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CIVIL ACTION

NO. 03-4704

ORDER

AND NOW, this _____ day of August, 2005, upon consideration of Defendant's Motion for Summary Judgment (Doc. 12), Plaintiff's Opposition thereto (Doc. 15), Defendant's Reply (Doc. 17), and Plaintiff's Sur-reply (Doc. 20), and oral argument held before this Court, **IT IS HEREBY ORDERED AND DECREED** that Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that the clerk of court shall mark this case **CLOSED**.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.