

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

<b>FRANK BALLO,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>ADECCO,</b>	:	
<b>Defendant.</b>	:	<b>No. 05-5734</b>

**MEMORANDUM AND ORDER**

**Schiller, J.**

**July 5, 2006**

Plaintiff, Frank Ballo, is a Caucasian male over seventy years of age. Plaintiff sought a job with a company that makes crayons through Defendant, Adecco, a temp agency. Ballo was not placed with the crayon manufacturer. He claims that he was not placed with the company because of his age, race, and disability. Adecco counters that Ballo was not placed because he failed a drug test. Presently before the Court is Adecco's motion for summary judgment. For the reasons that follow, the Court grants the motion.

**I. BACKGROUND**

Drawing on the submissions of the parties, the undisputed facts are as follows. Adecco is a temp agency that places temporary and full-time employees with various employers. (Br. in Supp. of Def.'s Mot. for Summ. J. [hereinafter Def.'s Br.] Ex. A [hereinafter Fitter Decl.] ¶ 2.) One of Adecco's customers was Binney & Smith, a crayon manufacturer.

In March of 2002, Ballo spotted an ad in the Allentown Morning Call seeking workers to make crayons. (Def.'s Br. Ex. B [hereinafter Ballo Dep.] at 55-56.) The ad, which did not identify Binney & Smith as the employer, stated that a drug and background check was required of

applicants. (Def.'s Br. Ex. C [hereinafter Fitter Dep.] at Ex. 1 (copy of newspaper ad).) The ad instructed interested applicants to call or visit one of Adecco's nearby offices. (*Id.*)

On March 14, 2002, Ballo walked into Adecco's Allentown, Pennsylvania office and encountered Susan Arndt, an office supervisor at Adecco. (Ballo Dep. at 69-70.) Ballo and Arndt discussed Ballo's questions about the job, including the drug test requirement. (*Id.* at 70.) Ballo spent at least one hour at Adecco's office that day and filled out numerous forms, including a form in which he consented to be drug tested. (*Id.* at 63-64, 70-71, 82-84 & *Id.* at Ex. 10 (Release & Consent for Drug Testing).) Ballo also signed a commitment sheet, which among other items, stated that he was an at-will employee of Adecco. (*Id.* at Ex. 8 (Commitment Sheet).) As Ballo understood the commitment sheet, it identified him as an employee of Adecco. (*Id.* at 75-76, 81, 83.)

Ballo returned to Adecco's Allentown office on March 15, 2002 to provide Adecco with a copy of his social security card. (*Id.* at 100-101.) Ballo also communicated with Arndt regarding his required drug test, which he had not yet taken. (*Id.* at 96.) Arndt replied that Adecco was "going to wait on the drug screens until we have an actual start date. Will [sic] call you when you need to go in for the drug screen." (*Id.* at Ex. 15 (e-mail correspondence between Ballo and Arndt).)

On March 19, 2002, Ballo took the required drug test. (*Id.* at 103-04.) Shortly thereafter, Ballo picked up a sealed envelope which contained the results of his drug test. (*Id.* at 114.) Ballo delivered the results of his drug test to Adecco without opening the sealed envelope. (*Id.* at 114-15.)

In addition to a drug test, Ballo was also required to attend an orientation session at Binney & Smith. (Def.'s Br. Ex. D [hereinafter Berrios Decl.] ¶ 4.) On March 22, 2002, Ballo attended the required orientation session. Ballo estimated that the orientation session included thirty-five to forty attendees, who were aged forty to forty-five years old and comprised of roughly equal numbers of

males and females and roughly equal numbers of Caucasians and Hispanics. (Ballo Dep. at 117-19.) At the orientation, numerous instructive vignettes and safety videos or slides were shown to the attendees, who were required to answer questions about what they viewed. (*Id.* at 119-20.)

During the orientation session, one of the applicants asked a question in English of an Adecco office supervisor. (*Id.* at 122.) One of the people running the orientation responded to the question in Spanish, prompting Ballo to raise his hand and ask whether speaking Spanish was a job requirement.<sup>1</sup> (*Id.*) It was not. (*Id.*)

On March 25, 2002, Adecco was informed that Ballo failed his drug test because he tested positive for barbiturates and propoxyphene. (Fitter Decl. ¶ 6 & *Id.* at Ex. 1 (Ballo's drug test results).) Ballo's positive drug test result served as a reason Adecco did not place Ballo in a position with Binney & Smith, although Ballo did not learn of the test result until the Pennsylvania Human Relations Commission ("PHRC") fact-finding process. (Ballo Dep. at 131, 157.)

In September of 2002, Ballo filed a PHRC complaint, claiming that Adecco's failure to place him with Binney & Smith constituted racial and aged-based discrimination. (Fitter Decl. ¶ 7 & *Id.* at Ex. 2 (PHRC Compl.)) In September of 2003, Ballo sought to include a claim that he was discriminated against because he was disabled. (Fitter Decl. at Exs. 3, 5, & 7 (correspondence regarding amendment).) On November 3, 2003, he filed an amended PHRC complaint including a claim for discrimination based on disability. (Fitter Decl. ¶ 9 & *Id.* at Ex. 8 (Amended PHRC Compl.))

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<sup>1</sup> Ballo claims that this was the only statement he made during the entire orientation. (*Id.*) Adecco alleges that: (1) Ballo was disruptive; (2) he complained that he should not be required to attend the orientation; and (3) he stated that "talking in a language other than English is just not right." (Berrios Decl. ¶¶ 6-8.) For purposes of this motion, the Court credits the nonmovant Ballo's testimony and accepts that his behavior was not off-color and was appropriate.

Ballo filed a five-count Complaint in the Court of Common Pleas of Lehigh County on September 23, 2005. Counts I and II are brought under the Age Discrimination in Employment Act of 1967 (“ADEA”), alleging both disparate treatment and disparate impact. Count III is a reverse racial discrimination claim under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Count IV is a claim under the Americans with Disabilities Act (“ADA”), and Count V is a Pennsylvania Human Relations Act (“PHRA”) claim. The case was removed to this Court on October 28, 2005.

## **II. STANDARD OF REVIEW**

Summary judgment is appropriate “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). The moving party bears the initial burden of identifying those portions of the record that it believes illustrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party makes such a demonstration, then the burden shifts to the nonmovant, who must offer evidence that establishes a genuine issue of material fact that should proceed to trial. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). “Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.” *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

When evaluating a motion brought under Rule 56(c), a court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant’s favor.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). A court must, however, avoid making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

### **III. DISCUSSION**

#### **A. Ballo's ADEA Claims**

##### *1. Ballo's Disparate Treatment Claim*

The ADEA forbids employers and employment agencies from discriminating against those individuals age forty and older based on their age with respect to hiring, firing, and conditions of employment. 29 U.S.C. § 623(a)(1) & (b) (2005); 29 U.S.C. § 631; *see also Monaco v. Am. Gen. Assurance Co.*, 359 F.3d 296, 299-300 (3d Cir. 2004). When a plaintiff relies upon indirect evidence of discrimination, courts evaluate such ADEA claims under a “slightly modified version” of the three-step burden-shifting test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 249 (3d Cir. 2002); *see also Connors v. Chrysler Fin. Corp.*, 160 F.3d 971, 973 (3d Cir. 2002). Under this test, a plaintiff must first establish a prima facie case of age discrimination. *Anderson*, 297 F.3d at 249. If the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a nondiscriminatory explanation for its adverse employment action. *See Showalter v. Univ. of Pittsburgh Med. Ctr.*, 190 F.3d 231, 235 (3d Cir. 1999). If the employer sets forth such an explanation, the burden reverts to the plaintiff to point “to some evidence, direct or circumstantial, from which a factfinder could reasonably 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." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

*a. Plaintiff's prima facie age discrimination case*

To establish a prima facie case of age discrimination, Plaintiff must demonstrate that: (1) he was a member of a protected class; (2) he was qualified for the position sought; (3) he suffered an adverse employment decision; and (4) the decision was made under circumstances that permit an inference of age discrimination. *See Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d Cir. 2001); *see also Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 410 (3d Cir. 1999). "[T]he plaintiff must produce evidence that is sufficient to convince a reasonable factfinder to find all of the elements of a prima facie case." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997).

The Court assumes that Plaintiff has met the first three prongs of the prima facie case. The Court also recognizes that the hurdle of establishing Plaintiff's prima facie case is not high. *See Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, Plaintiff has produced no evidence from which a reasonable fact finder could find that the circumstances permit an inference that Adecco's failure to place Ballo with Binney & Smith resulted from his age. The only evidence before this Court is the fact that Ballo, who is older than forty, did not receive a placement with Binney & Smith. Ballo has presented no information regarding who Adecco did place with Binney & Smith. Indeed, it is possible that only persons older than forty were placed with Binney & Smith.<sup>2</sup> The Court will not infer discrimination simply because a member of a protected class suffered an adverse employment decision. Ballo must present evidence – not merely unsupported assertions –

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<sup>2</sup> The Court draws no conclusions regarding who was placed with Binney & Smith but merely notes that Plaintiff lacks evidence sufficient to establish a prima facie case.

to establish a prima facie case.

Plaintiff focuses on the fact that he was not contacted about the results of his drug test, was not offered an opportunity to explain the positive drug test, and was not provided the chance to take another drug test. (Pl.'s Mem. of Law in Opp'n to Def.'s Summ. J. Mot. at 11.) But the record contains no evidence that Adecco's policy regarding positive drug tests was applied differently to Ballo because of his age nor any evidence that Adecco treated Ballo differently from other persons who failed a drug test.

Plaintiff relies on statements from John Fitter, Adecco's regional vice president for the Delaware Valley region. (Fitter Dep. at 10.) Fitter testified that if an Adecco employee failed a drug test, it was possible for an employee to retest and that the Medical Review Officer would typically have a conversation with the employee to determine if any prescription medicine could have caused the positive result.<sup>3</sup> (Fitter Dep. at 51-52.) The fact that Adecco did not contact Ballo about his positive drug test does not permit an inference of discrimination. First, there is no evidence that such a failure had anything to do with Ballo's age. As Fitter testified, it was typically the Medical Review Officer who would contact the donor, and there is no evidence that the Medical Review Officer knew Ballo's age. Second, there is no evidence that the Medical Review Officer is an Adecco employee or is controlled in any way by Adecco. Finally, even accepting that Adecco regularly permitted retests or explanations for failing a drug test, Ballo has not produced a single shred of

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<sup>3</sup> The parties do not dispute that Ballo was not informed of the results of his drug test. The Court notes, however, that the form indicating Ballo tested positive for drugs includes the comment: "UNABLE TO CONTACT DONOR." (Fitter Dep. at Ex. 6 (Drug test results).) Given the procedural posture of this case, the Court will presume that any blame for such failure lies with Adecco. That fact alone does not raise an inference of discrimination because there is no evidence that those responsible for discussing Ballo's positive test results with him were aware of his age.

evidence that would allow an inference that he was treated less favorably because of his age.

Ballo's belief that Adecco discriminated against him based on his age is due, in part, to the facts that Arndt knew his age and that he was required to complete an I-9 form requesting his date of birth. (Ballo Dep. at 144.) Ballo also states his belief that he was approximately twenty-five years older than others at the orientation. (*Id.*) Based on these limited facts, Ballo concluded that a conversation or staff meeting took place where it was decided he would not be placed due to his age. (*Id.* at 145.) Conspiracy theories aside, Ballo produces no evidence suggesting that Arndt played any role in the decision not to place Ballo or that any relevant decision maker reviewed his I-9 form. In fact, the Court has not been informed who the relevant decisionmaker(s) is (are). Furthermore, merely disclosing one's age does not give rise to an inference of age discrimination. Finally, a reasonable fact finder could not infer discrimination based solely on Ballo's bald assertion that he was one of the oldest persons at the orientation. This is particularly true in light of his deposition testimony, which indicates that all the attendees were over forty. (*Id.* at 118.)

Plaintiff has not made out a prima facie case of age discrimination, and, therefore, Adecco's motion for summary judgment on Plaintiff's disparate treatment claim is granted. The Court will proceed with its analysis pursuant to *McDonnell Douglas* because, even assuming Ballo had established a prima facie case, the Court would still grant summary judgment in favor of Defendant.

*b. Defendant's proffered nondiscriminatory reason*

Defendant's burden to show a legitimate nondiscriminatory reason for its action is not an onerous one. *See Fuentes*, 32 F.3d at 763. In fact, Defendant is required only to "introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." *Id.*

Defendant proffers two reasons for its actions. First, Ballo failed a pre-employment drug test. (Def.’s Br. at 11.) Second, Ballo made inappropriate remarks and behaved inappropriately at the Binney & Smith orientation session. (*Id.*; Berrios Decl. ¶¶ 6-8.) The Court will only credit Defendant’s first reason, which is not denied by Plaintiff.<sup>4</sup> As to the second reason, Ballo denies being disruptive at the orientation; he also denies making inappropriate comments. (Ballo Dep. at 122.) At the summary judgment stage, the Court may not determine the credibility of witnesses. However, because Defendant has asserted a legitimate nondiscriminatory reason for its action – Ballo’s failed drug test – the Court moves to the third step of the *McDonnell Douglas* test.

*c. Pretext*

Having articulated a legitimate nondiscriminatory reason for its actions, the burden returns to Ballo, who must create a genuine issue of material fact that Defendant’s reason is pretextual. *See Fuentes*, 32 F.3d at 763. That is, Ballo must go beyond merely showing that Adecco was “wrong or mistaken” in not placing him with Binney & Smith and must “present evidence contradicting the core facts put forward by the employer as the legitimate reason for its decision.” *Id.* at 765; *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005). The Third Circuit has stated, “the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable

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<sup>4</sup> The second step of the *McDonnell Douglas* test merely requires a defendant to produce a legitimate, nondiscriminatory reason for its action. In fact, “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.” *Burdine*, 450 U.S. 248, 254 (1981). Accordingly, this Court could credit Adecco’s assertion that Ballo’s poor behavior at the orientation was a reason he was not placed at Binney & Smith and then move to a pretext analysis. However, it would require a factual determination by the Court – inappropriate at the summary judgment stage – to decide if Ballo was disruptive or Adecco’s claim that he was disruptive was merely pretextual. Therefore, viewing the evidence in a light most favorable to Ballo, the Court will address the pretext issue only with regard to Ballo’s failed drug test.

factfinder *could* rationally find them ‘unworthy of credence.’” *Fuentes*, 32 F.3d at 765 (emphasis in original) (quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992)). A plaintiff may show that the employer’s action was likely not based on its stated reason by putting forth evidence that the articulated reason: (1) lacked a factual basis; (2) was not a motivating factor for the action; or (3) was insufficient to motivate the action. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)).

Plaintiff has not presented any evidence that Adecco’s reason for its action is unworthy of belief. Adecco’s refusal to place him because of his positive drug test result has a factual basis because Ballo tested positive for drugs. Ballo adduced no evidence challenging Adecco’s claim that his positive drug result motivated its decision. First, Binney & Smith required a drug test before it would hire an Adecco employee, and the ad Ballo responded to clearly stated that a drug test and background check were required. Second, Ballo signed a form consenting to a drug test and absolving both Adecco and Binney & Smith from liability from use of the test in making employment-related decisions. Third, the evidence is undisputed that Adecco was waiting for the results from Ballo’s drug test before providing him a start date at Binney & Smith. In fact, until he failed the drug test, Ballo continued with the orientation process “with the expectation that he was going to be placed at Binney.” (Fitter Dep. at 60.) These undisputed facts lead the Court to conclude that a positive drug test was a valid reason to refuse to place an applicant with Binney & Smith.

Ballo’s argument that Adecco’s application of its drug policies to him demonstrates pretext is meritless. A violation of company policy can be a pretext for actionable discrimination if other similarly situated individuals were treated differently under the policy. *See Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 203-204 (3d Cir. 1996). However Ballo has presented no evidence that Adecco

applied its drug policies to favor similarly situated younger or minority employees. Finally, Ballo has not argued that a failed drug test is insufficient to motivate Adecco's refusal to place him. It was Adecco's customer, Binney & Smith, that required the drug test. Requiring a drug test would be pointless if Adecco could place those applicants who tested positive for drugs with Binney & Smith.

The most that can be said for Ballo's argument is that Adecco might have avoided this litigation through better communication with Ballo about his drug test results. But federal anti-discrimination laws only prohibit employment decisions based on impermissible factors such as age, race, and gender. Unfair or incorrect business decisions are not covered. *See Fuentes*, 32 F.3d at 765; *see also Keller*, 130 F.3d at 1109 (“The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination.” (*quoting Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996))). Accordingly, the Court grants Adecco's summary judgment motion on Ballo's ADEA disparate treatment claim.<sup>5</sup>

## 2. *Ballo's Disparate Impact Claim*

Ballo also alleges disparate impact under the ADEA, claiming that even if he “is ultimately unable to prove that the Defendant had an actual intent or motivation to discriminate against him or to treat him differently because of his age, [Defendant's actions] have nonetheless had a disparate impact upon the Plaintiff due to his age.” (Compl. ¶ 35.)

Under a recent Supreme Court holding, disparate impact claims under the ADEA are cognizable. *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005) (“We . . . now hold that the ADEA does authorize recovery in ‘disparate-impact cases.’”). A disparate impact case involves a challenge

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<sup>5</sup> Ballo's age discrimination claim under the PHRA is also dismissed. *See Fasold v. Justice*, 409 F.3d 178, 184 n.8 (3d Cir. 2005) (PHRA interpreted as identical to federal anti-discrimination law unless language in statute dictates otherwise).

to an adverse employment action stemming from a specific, facially-neutral employment practice that disproportionately impacts members of the protected class. *See Embrico v. U.S. Steel Corp.*, 404 F. Supp. 2d 802, 828 (E.D. Pa. 2005). To survive a motion for summary judgment on a disparate impact claim, a plaintiff must point to a “specific test, requirement, or practice . . . that has an adverse impact on older workers.” *Id.* (citing *Smith*, 544 U.S. at 240-41 & *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989)). A plaintiff cannot sustain a disparate impact claim merely by showing an adverse effect on one or even a few employees. *Lit v. Infinity Broad. Corp.*, Civ. A. No. 04-3413, 2005 U.S. Dist. LEXIS 30969, at \*10 (E.D. Pa. Nov. 16, 2005) (citing *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 120 (3d Cir. 1983)). Furthermore, the plaintiff must show that the adverse affect on older workers was not due to reasonable factors other than age. *Embrico*, 404 F. Supp. 2d at 817.

Plaintiff’s entire argument in support of his disparate impact claim is as follows:

In the case at bar, Ballo testified that the average age of the employees at the Binney & Smith orientation averaged forty to forty-five years. (Ballo [Dep.] at 118). Ballo is 74 years old. Ballo was never called to work at Binney & Smith. There is certainly a sufficient factual basis for a trier of fact to determine that Adecco’s actions had a disparate impact on Ballo.

((Pl.’s Mem. of Law in Opp’n to Def.’s Summ. J. Mot. at 14.)

Plaintiff appears to argue that the record contains a genuine issue of material fact because Ballo is seventy-four years old and did not obtain a position at Binney & Smith. The Court disagrees that Plaintiff’s argument sets forth a disparate impact claim. Plaintiff has not cited a single Adecco policy, procedure, protocol, rule or regulation that disproportionately affects those protected under the ADEA. *See Embrico*, 404 F. Supp. 2d at 817. The failure of one worker over forty to obtain a certain job position is woefully insufficient evidence to support a disparate impact claim.

Accordingly, Adecco's motion for summary judgment on Ballo's ADEA disparate impact claim is granted.

### **B. Ballo's Reverse Discrimination Claim**

Plaintiff also brings a Title VII reverse discrimination claim based on race. Under Title VII, an employer may not fire or refuse to hire or discriminate against an individual based on race. 42 U.S.C. §2000e-2(a) (2005). The Court examines Plaintiff's reverse discrimination claim using the *McDonnell Douglas* burden-shifting approach discussed above in Part III. A.<sup>6</sup> See *Iadimarco v. Runyon*, 190 F.3d 151, 157-58 (3d Cir. 1999). In the Third Circuit, to establish a prima facie case of reverse discrimination, a plaintiff is only required "to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII." *Id.* at 161.

Plaintiff's reverse discrimination claim is meritless. In his Complaint, Plaintiff asserts his belief that the available jobs were awarded primarily to Hispanics despite the fact "that his qualifications far exceeded those of most if not all of the applicants." (Compl. ¶¶41-42.) However, Plaintiff does not offer any evidence of who was actually hired, and although Ballo provides his resume, he provides no basis upon which to compare his qualifications with other applicants. Not only has Plaintiff failed to provide any evidence of who Adecco actually placed at Binney & Smith, but he notes that approximately half of the attendees at the Binney & Smith orientation were also Caucasian. Furthermore, Ballo may not rely on his unsupported assertions and allegations to defeat a properly supported summary judgment motion. See *Celotex*, 477 U.S. 317.

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<sup>6</sup> Ballo also brings a § 1981 discrimination claim. The *McDonnell Douglas* framework is also applicable to § 1981 discrimination claims. See *Creely v. Genesis Health Ventures, Inc.*, Civ. A. No. 04-0679, 2005 U.S. Dist. LEXIS 10223, at \*7 (E.D. Pa. May 26, 2005).

Ballo's deposition testimony illustrates the unfounded nature of his reverse discrimination claim. Ballo asserts that he was discriminated against based on his race because, "[w]ell, if you look at the numbers, I'm vastly out-employed by other groups, none of which includes me." (Ballo Dep. at 145.) Ballo's unsupported assertion fails to draw a picture of pretext, and thus the Court concludes that he has not presented a colorable race discrimination claim. Summary judgment is therefore granted to Adecco on Ballo's reverse discrimination claim.<sup>7</sup>

### **C. Ballo's ADA Claim**

Ballo also asserts that Adecco discriminated against him based on his status as a disabled individual. The parties dispute the merits of Ballo's ADA claim as well as whether Ballo's ADA claim is barred by the statute of limitations. The Court will grant Adecco's motion for summary judgment on Plaintiff's ADA claim because Ballo has not produced sufficient evidence to establish a prima facie case of discrimination based upon disability.

The ADA prohibits covered employers from discriminating against "a qualified individual with a disability because of the disability" with respect to hiring, firing, conditions and privileges of employment. 42 U.S.C. § 12112(a). An individual is disabled under the ADA if he or she has: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) "a record of such an impairment;" or (3) "[is] regarded as having such an impairment." 42 U.S.C. § 12102(2)(A) - (C).

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<sup>7</sup> "Employer liability under the PHRA follows the standards set out for employer liability under Title VII." *Morris v. G.E. Fin. Assurance Holdings*, Civ. A. No. 00-3849, 2001 U.S. Dist. LEXIS 20159, at \*12 (E.D. Pa. Dec. 5, 2001) (citing *Knabe v. Boury Corp.*, 114 F.3d 407, 410 n.5 (3d Cir. 1997)). Accordingly, Plaintiff's PHRA claim for racial discrimination is also dismissed.

1. *Disability under the ADA*

The *McDonnell Douglas* burden-shifting analysis applies to ADA claims. *Walton v. Mental Health Ass'n of Se. Pa.*, 168 F.3d 661, 667-68 (3d Cir. 1999). To establish a prima facie case under the ADA, a plaintiff must show that: (1) he has a disability; (2) he is a “qualified individual;” and (3) he has suffered an adverse employment action because of that disability. *Buskirk v. Apollo Metals*, 307 F.3d 160, 166 (3d Cir. 2002). The plaintiff bears the burden of establishing that he is disabled under the ADA and must introduce evidence to sustain that burden. *Marinelli v. City of Erie*, 216 F.3d 354, 363 (3d Cir. 2000).

Ballo cannot establish the first prong of his prima facie case, namely that he is disabled or was regarded as disabled under the ADA. Ballo asserts that “[m]ental and physiological circumstances . . . impact[] the entire body’s ability to function. I used a cane for about six months.” (Ballo Dep. at 146.) Yet Ballo presents no evidence that he suffers from a physical or mental impairment that substantially limits a major life activity.<sup>8</sup> Major life activities include “functions

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<sup>8</sup> The Third Circuit has applied the EEOC’s definition of “substantially limits” in making individualized assessments of whether a particular person is disabled under the ADA. *See, e.g., Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3d Cir. 1999).

The term “substantially limits” means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

Courts should examine the following factors when determining whether an individual is substantially limited in a major life activity: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2).

such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 512 (3d Cir. 2001) (quoting 29 C.F.R. § 1630.2(i)). Ballo’s statement that he used a cane for a short period of time does not raise a genuine issue of material fact as to a disability. Ballo has not clarified whether he used a cane before or after applying for the Binney & Smith position. Nor has Ballo explained whether he required a cane at all times, or rarely. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 187 (3d Cir. 1999) (employee who needed cane or crutch after standing or walking fifty minutes not disabled under ADA); *see also Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996) (man who limped, could not walk more than a mile and climbed stairs slowly not disabled under ADA).

Ballo’s claim of depression fare no better. In support of this claim, he presents a March 16, 2005 letter from Gerald Rodriguez, a social worker who has been treating Ballo for depression. (Ballo Dep. at Ex. 2 [hereinafter Rodriguez letter].) The letter notes the despair Ballo has experienced at being passed over for jobs and seeing his marriage dissolve. (*Id.*) The letter states that “life circumstances have significantly impacted his mood and mental status necessitating his need for ongoing Psychotherapy & Pharmacology.” (*Id.*) His deposition testimony also recounts his feelings of depression and the medication he has taken for depression. (Ballo Dep. at 24-26.)

Depression can be an impairment covered under the ADA. *See Shalbert v. Marcincin*, Civ. A. No. 04-5116, 2005 WL 1941317, at \*5 (E.D. Pa. Aug. 9, 2005). This Court does not wish to minimize Ballo’s condition, but the letter Ballo submitted states that Ballo has been treated for depression since 2004, which is well after Adecco failed to place him with Binney & Smith. (Rodriguez letter.) The letter does not permit an inference that Ballo was substantially limited in any major life activity. Furthermore, even if this Court could draw such an inference, the record lacks

evidence that Adecco was aware of Ballo's mental condition or medications. The record simply contains no evidence that Ballo's depression or his medications substantially limited any major life activities. Indeed, Ballo's resume indicates that he has worked in various positions from 1960 until the present.<sup>9</sup> (Ballo Dep. at Ex. 1 (Ballo's resume).) Ballo's application with Adecco also indicates that he was available to work seven days a week doing tasks without the need for reasonable accommodation, including lifting all day long, driving, loading and unloading, and stocking. (*Id.* at Ex. 7 (Ballo's Adecco application).)

Lacking evidence that he suffers from an impairment that substantially limits a major life activity, Ballo cannot establish a prima facie case of discrimination under the ADA.<sup>10</sup>

## 2. Adecco's Lack of Knowledge of Ballo's Disability

Additionally, fatal to all of Ballo's assertions under the ADA is the undisputed fact that Adecco was unaware of any disability from which Ballo allegedly suffered. *See Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002) (“[T]o establish discrimination because of a disability, an employer must know of the disability.”); *see also Jones v. UPS*, 214 F.3d 402, 406 (3d Cir. 2000) (“It is, of course, an axiom of any ADA claim that the plaintiff be disabled and that the employer be aware of the disability.”); *Server v. Henderson*, 381 F. Supp. 2d 405, 417 (M.D. Pa. 2005) (plaintiff must offer evidence that defendant was aware of disability since employer cannot take adverse employment action “because of” disability if employer is unaware of disability); *Meyer v. Qualex, Inc.*, 388 F. Supp. 2d 630 (E.D.N.C. 2005) (granting summary judgment to employer who

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<sup>9</sup> Ballo testified that since 2002, he has given up looking for work. (Ballo Dep. at 23.)

<sup>10</sup> Ballo also testified that he has suffered from intermittent headaches since the 1970s but he did not miss time from any of his jobs as a result. (*Id.* at 30-31.)

withdrew offer of employment after employee failed drug test because plaintiff produced no evidence defendant knew plaintiff was disabled).

Because disabilities under the ADA often are not obvious and the ADA requires employers to consider an employee's disability in order to fashion a proper accommodation, notification by the employee is of vital importance. *See Rogers v. CH2M Hill, Inc.*, 18 F. Supp. 2d 1328, 1334-35 (M.D. Ala. 1998); *see also Geraci v. Moody Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) (“[D]isabilities are often unknown to the employer, and, because of that, the plaintiff must demonstrate that the defendant employer knew of the disability to state a prime facie case of unlawful discharge.”). If Adecco was unaware that Ballo suffered from a disability, its refusal to place him could not have been because of that disability. The only information Adecco possessed was that Ballo tested positive for drugs; that fact alone is insufficient to show that Adecco believed that Ballo was disabled.

In a well-reasoned opinion from the Middle District of Alabama, the court considered a summary judgment motion brought by an employer who argued that the employee's ADA claim should fail because the employee did not notify the employer about his clinical depression until after the adverse employment decision. *Rogers*, 18 F. Supp. 2d 1328. The court agreed with the employer and granted summary judgment because of the plaintiff's failure to notify defendant of his depression and anxiety. *Id.* at 1335. The ADA does not require employers to speculate as to which employees are disabled under the ADA or to provide accommodations to disabled employees that do not request them. *See id.* at 1339 (*citing Adams v. Rochester Gen. Hosp.*, 977 F. Supp. 226, 235-36 (W.D.N.Y. 1997)).

Lacking any evidence of Adecco's knowledge of Ballo's alleged disability, Ballo's ADA

claim fails as a matter of law.

3. *Ballo's "Regarded As" and Interactive Process Claims*

Ballo's "regarded as" claim also fails as a matter of law. An individual "is regarded as having [ ] an impairment [covered under the ADA]" if the individual:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or
- (3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

*Buskirk*, 307 F.3d at 166 (citing 29 C.F.R. § 1630.2(1) (2001)).

To sustain a "regarded as" claim, the employer must believe either that the employee has a substantially limiting impairment that he does not have, or that his impairment is more limiting than it actually is. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). For example, had Adecco believed that Ballo was unable to perform a wide array of jobs, he would establish a "regarded as" claim. *Pathmark Stores*, 177 F.3d at 188. Yet, Adecco harbored no such belief. In fact, Adecco remained willing to place Ballo in a number of jobs. (Fitter Dep. at 54.) Also, Ballo cannot rest his entire "regarded as" ADA claim on the fact that Adecco knew his age and that he failed a drug test.

Lastly, Plaintiff's argument that Adecco was required to participate in an interactive process with Ballo is without merit given the undisputed facts in this case. (Pl.'s Mem. of Law in Opp'n to Def.'s Summ. J. Mot. at 22-23.) This process is only required when the employer is aware of the employee's disability and the employee's desire for accommodation for that disability. *See Phoenixville Sch. Dist.*, 184 F.3d at 313, 319 (duty to participate in interactive process triggered only if employer notified of disability and employee requested accommodation); *Jones*, 214 F.3d at 408

(“Because there is no evidence from which a request for accommodation could be inferred, [the defendant] was under no legal obligation to engage in the interactive process.”); *see also* 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations for *known* disabilities). Here, Adecco was unaware of Ballo’s condition, and Ballo never requested an accommodation for a disability.

Accordingly, the Court grants Adecco’s motion for summary judgment on Ballo’s ADA claims.<sup>11</sup>

#### **IV. CONCLUSION**

For the reasons stated above, the Court holds that none of Ballo’s discrimination claims survive Adecco’s summary judgment motion and therefore dismisses all of Ballo’s claims. An appropriate Order follows.

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<sup>11</sup> Ballo’s disability claim under the PHRA is interpreted in a manner similar to his ADA claim. *See Buskirk*, 307 F.3d at 166 n.1; *see also Rinehimer*, 292 F.3d at 382. Accordingly, his PHRA claim is also dismissed.

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

<b>FRANK BALLO,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>ADECCO,</b>	:	
<b>Defendant.</b>	:	<b>No. 05-5734</b>

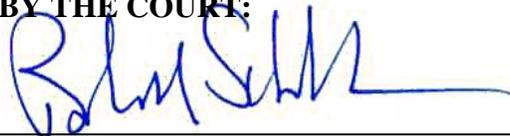
**ORDER**

**AND NOW**, this 5<sup>th</sup> day of **July, 2006**, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's response thereto, and for the foregoing reasons, it is hereby

**ORDERED** that:

1. Defendant's motion (Document No. 17) is **GRANTED**.
2. Judgment is entered in favor of Defendant.
3. The Parties' Consent to the Exercise of Jurisdiction by a United States Magistrate Judge (Document No. 25) is **STRICKEN**.
4. The Clerk of Court is directed to close this case.

**BY THE COURT:**



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**Berle M. Schiller, J.**