

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

PHIL ANGELICO : CIVIL ACTION
 :
 v. :
 :
 AGILENT TECHNOLOGIES : NO. 06-348

MEMORANDUM

Dalzell, J.

October 3, 2006

The Peter Principle, which Dr. Laurence J. Peter proposed in his 1969 book of the same name, observes that, "in a hierarchy every employee tends to rise to his level of incompetence." Laurence J. Peter, The Peter Principle 25 (1969). Despite plaintiff's attempt to make it otherwise, the case before us is merely another example of the Principle at work.

After a successful stint as an applications manager for Agilent Technologies, Phil Angelico was promoted to district sales manager, a job that he was simply unable to perform to his superiors' expectations. The only thing unusual about Angelico's case is that, rather than allowing him to remain in a position for which he showed little aptitude (as Dr. Peter would have predicted), Agilent chose to fire him. His attempts to recast his termination as age discrimination lack any basis in the factual record and so we will grant Agilent's motion for summary judgment.¹

¹Summary 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). In resolving a motion for summary judgment, the Court must draw all reasonable inferences in the non-movant's favor,

(continued...)

Factual Background²

In 2000 and 2001, plaintiff Phil Angelico was an Application Engineering District Manager (AEDM) in the Automated Test Group (ATG)³ of Agilent Technologies. In that position, Angelico had five applications engineers in the Integrated Device Manufacturing division reporting to him. That division was responsible for semiconductor testing. In 2001, Robert Bauer assumed a new position that included responsibility for ATG. Late in 2001, Bauer offered Angelico a promotion to District Manager, reporting directly to Bauer, with responsibilities for managing both the application engineers he had previously managed and a field sales team. The new position combined the roles of AEDM and District Sales Manager. After initially declining the promotion, Angelico eventually accepted.

Agilent's annual review process for its employees culminates in a Rank and Feedback Form (RFF) for each employee that the employee's direct manager generally completes. Each

¹(...continued)

Bartnicki v. Vopper, 200 F.3d 109, 114 (3d Cir. 1999), and determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where, as here, the nonmoving party bears the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if admissible, would be insufficient to carry the nonmovant's burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

² Because we are addressing Agilent's motion for summary judgment, we construe the facts in the light most favorable to Angelico.

³ ATG has since been spun-off from Agilent (itself a spin-off of Hewlett-Packard), and is now known as Verigy.

employee is assigned to one of three bands on the RFF: 1 for the best performers, 2 for average ones, and 3 for the weakest. In his last RFF as an AEDM, Angelico was ranked in band 1. In March, 2002, after just a few months in his new role, Bauer chose to move Angelico to band 2. By December of 2002, after a full year in the role, Angelico was ranked in band 3. In his deposition, Bauer pointed out that this happens often:

[H]e was taking on a new set of responsibilities, you know. He was moving from the AEDM to sales manager, a quantum leap in responsibilities, which called for effective leadership. And that's fairly classic. Someone takes on a new job or promotion and by virtue that you're taking on this promotion, you know, it's understood that you're not, you know, super-skilled in that yet. Those are skills you'll have to develop. Generally, people suffer, you know. Ranking drops when they take on promotions.

Bauer Dep. at 27. In 2003, Angelico improved his ranking to 2, largely by addressing Bauer's concerns about his sales quota.

In the first half of 2004, Agilent failed to win the "Cell Processor" business, an opportunity to sell test equipment to IBM for use in the design and production of the Microsoft Xbox and Sony Playstation. This loss was a major blow to the ATG sales division. Angelico himself described it as "one of the biggest losses that I could imagine in my whole career."

Angelico Dep. at 69. Angelico and Bauer had discussions about whether one or both of them would lose their jobs as a result.

Neither Angelico nor Bauer lost their jobs in the immediate aftermath, but Bauer suggested to Angelico that he should reassign Alan Smith, the salesperson responsible for IBM.

Bauer suggested that a younger, female salesperson with more "fire in the belly" might be better able to develop relationships with the decision makers at IBM. Bauer told Angelico that he had replaced an older male salesperson with a younger female in the past and had gotten good results. Angelico declined to replace Smith because he did not believe that the loss had been the sales team's fault. Angelico felt that Agilent's loss was the result of the product's deficiencies. Angelico went so far in an e-mail to Bauer in August, 2004, as to refer to Bauer's manager, Pascal Ronde (who had determined that the sales team had failed), as "an egotistical fool" and an "imbecile." Angelico Dep., Exh. 2, at 1-2.

In August, 2004, Bauer was involuntarily transferred to another position. Before he left, however, he told Ronde that he believed Angelico should be returned to his former position as an AEDM. Bauer saw that Angelico was having difficulty leading and was not able to follow his ideas through to execution. Bauer had received complaints on both of these issues from salespeople Angelico managed.

Deborra Ahlgren replaced Bauer as Angelico's manager. Ahlgren quickly found that Angelico's performance did not meet her expectations. She felt that he "failed from a leadership perspective to provide the guidance and mentorship and the lead by example [sic] that Agilent demands of its managers." Ahlgren Dep. at 69. In particular, Ahlgren felt that Angelico's lack of faith in Agilent's senior management, as exemplified in his epithets for Ronde, made it difficult for him to be an effective

leader. She also felt that his unwillingness to accept responsibility for the sales team's role in the loss at IBM was not consistent with Agilent's corporate culture, which highly values taking responsibility for one's own mistakes.

Ahlgren attempted to mentor Angelico about his leadership skills, but was not satisfied with his progress. On October 12, 2004, she gave Angelico a written warning, the first step in the Agilent disciplinary process. The warning was due to "unacceptable performance in the area(s) of leadership, taking and giving direction, accepting criticism and making appropriate adjustments to performance." Angelico Dep., Exh. 3.

On January 13, 2005, still not satisfied with Angelico's progress, Ahlgren placed Angelico on probation, the second step in the Agilent disciplinary process. The notice of probation listed five specific incidents that had occurred since the written warning. These incidents contributed to Ahlgren's sense that Angelico had "persisted in using mitigating language and in transferring accountability beyond [his] scope of control." Angelico Dep., Exh. 6. The notice of probation clearly stated that "[u]nless immediate, significant, and sustained improvement is noted, termination of your employment can occur at any time within the probationary period." Id. On February 15, 2005, Ahlgren met with Angelico to discuss the fact that he had not met the performance goals laid out in the probation notice. On February 16, 2005, Ahlgren notified Angelico that she was firing him.

Following Angelico's termination, Ahlgren and Catherine Warzek temporarily performed his duties. On May 2, 2005, Agilent hired a permanent replacement for Angelico, Michael McCaffrey.

At the time of his termination, Angelico was 53 years old. On that date, Ahlgren was 49 and Ronde was 42. Warzek was 40 when she took over some of Angelico's duties, and McCaffrey was 46 when he was hired to assume those duties permanently.

Analysis

Angelico alleges both disparate treatment and disparate impact under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. (ADEA) and violation of the Pennsylvania Human Relations Act, 43 Pa. C.S. § 951, et seq. (PHRA). Because the same legal standard applies to both the federal and state claims, Kautz v. Met-Pro Corp., 412 F.3d 463, 466 n.1 (3d Cir. 2005), we will address them together.

A. Disparate Treatment

In order to succeed on his disparate treatment claim, Angelico must demonstrate that his age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Because it is very rare that there is conclusive direct evidence of actionable discrimination, plaintiffs most often must proceed under the familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Angelico must first establish a prima facie case of discrimination, which establishes a rebuttable presumption of it.

The burden then shifts to Agilent to advance a legitimate, non-discriminatory reason for terminating Angelico. If they are able to do so, Angelico may still succeed if he can "demonstrate by competent evidence that the presumptively valid reasons for his [termination] were in fact a coverup for a ... discriminatory decision." Id. at 805.

1. Prima Facie Case

"[A] plaintiff may establish a prima facie case of age discrimination under the ADEA by demonstrating that she: (1) was a member of a protected class, i.e., that she was over forty, (2) is qualified for the position, (3) suffered an adverse employment decision, (4) and was ultimately replaced by a person sufficiently younger to permit an inference of age discrimination." Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001). Here, there is no question that Angelico was over forty and suffered an adverse employment decision, but we will examine the other two elements closely.

Not surprisingly, the parties are at odds over how to characterize Angelico's employment history as regards his qualifications. On the one hand, Angelico points out that the same good job performance that got him promoted should be sufficient to determine that he was qualified for the new position. Agilent contends that his good reviews only demonstrate his qualifications for his AEDM job, not his more demanding sales management role.

Here, where we are concerned not with clearly objective qualifications but with "softer" job skills such as leadership and management, we must be concerned about the ease with which such "qualifications" could be used to mask otherwise discriminatory employment actions. As our Court of Appeals has observed, "while objective job qualifications should be considered in evaluating the plaintiff's prima facie case, the question of whether an employee possesses a subjective quality, such as leadership or management skill, is better left to the later stage of the McDonnell Douglas analysis." Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990). At this stage in the process, then, we must find that Angelico was qualified for his position.

More complex is the question of whether Angelico "was ultimately replaced by a person sufficiently younger to permit an inference of age discrimination." Duffy, 265 F.3d at 167. As a preliminary matter, although there is some discussion in the briefs about Catherine Warzek, who assumed some of Angelico's duties after he left, it is clear on the undisputed facts that Angelico was actually replaced by Michael McCaffery, who was seven years younger than Angelico. That determination, however, still leaves the difficult question of whether McCaffery is "sufficiently younger." Of course, "[t]here is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination." Barber v. CSX Distribution Servs., 68 F.3d 694, 699 (3d Cir. 1995). This is plainly true since the inference of

age discrimination would be very different in a case where a 40-year-old was replaced with a 33-year-old than in a case where a 70-year-old was replaced with a 63-year-old.

In the absence of a "magical formula," we must resort to case law. Id. In Narin v. Lower Merion Sch. Dist., 206 F.3d 323 (3d Cir. 2000), our Court of Appeals found that the difference in age between a 56-year-old employee and one who was 49 was not sufficient to allow an inference of discrimination. Id. at 333, n.9. Indeed, it appears that our Court of Appeals has never found a difference of less than seven years to be sufficient to infer age discrimination.⁴ See Steward v. Sears, Roebuck and Co., 2006 WL 1648979 (E.D. Pa. June 13, 2006), at *14 (citing cases and finding a difference of 6.75 years insufficient). Indeed, at least one court in our circuit has found, based on our Court of Appeals's jurisprudence, that there is a categorical requirement that the age difference be at least 8 years. See Stafford v. Noramco of Del., Inc., 2000 WL 1868179 (D. Del. Dec. 15., 2000), at *3 fn.14.

While we do not believe that this issue lends itself to such precise quantification, we cannot find a sufficient age gap here to permit an inference of age discrimination. There is, we think, no tenable distinction between this case and Narin, and so Angelico has not met the fourth requirement of Duffy. Angelico

⁴ Angelico cites Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101 (3d Cir. 1997) (en banc) as a counter-example where a five-year age gap was deemed sufficient, but fails to mention (or perhaps fails to notice) that this finding is taken from the dissent. Id. at 1117 (Lewis, J., dissenting).

has, therefore, not made a prima facie case of age discrimination.

2. Pretext Analysis

Even were we to find that a seven year difference in age was sufficient, we would still be obliged to grant summary judgment here. Angelico has failed to demonstrate that Agilent's proffered non-discriminatory explanation -- namely, that Angelico was not adequately performing his job -- is mere pretext. In order to demonstrate pretext, Angelico must "submit[] evidence 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." Keller, 130 F.3d at 1108 (quoting Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)). Because Angelico has not shown either, his claim must fail.

We begin by noting that Agilent's proffered explanation is clearly not a "post hoc fabrication." Fuentes, 32 F.3d at 765. Agilent has provided e-mails and documents covering almost the whole six months that Angelico reported to Ahlgren, and these confirm Ahlgren's dissatisfaction with Angelico's performance. Even Angelico's response brief notes that "[e]mails from Deb Ahlgren to Phil Angelico indicate that Ms. Ahlgren was unhappy from the beginning with plaintiff's 'management style'." D. Resp. at 19.

Angelico points to his long successful tenure with Agilent and Hewlett-Packard as clear proof that he was an exemplary employee. That evidence, however, is not probative of his performance at his new job. The Peter Principle and our everyday experience tell us that being good at one job is not a guarantee of success at another.⁵ No reasonable jury could conclude, without further evidence, that Angelico's success at managing engineers was proof of his ability to manage a sales team.

Perhaps even more important than Angelico's change of position, however, is his change of manager. Certainly, when Ahlgren took over responsibility for managing Angelico, federal law did not forbid her from having different priorities or a lower tolerance for certain failings than her predecessor. In any case, it is clear from the record that Ahlgren was not alone in her view that Angelico was ill-suited for his sales management possession. Indeed, when Ahlgren took over, Bauer had already recommended that Angelico be reassigned. But even if Bauer -- or for that matter the salespeople who reported to him -- believed Angelico's work was exemplary, if it did not meet Ahlgren's expectations, she was within her rights to fire him. See Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991), overruled in

⁵ Examples are, of course, too numerous, in too many walks of life, to list, and so we offer but one example of this familiar phenomenon. From The Naked and the Dead (1948) to The Executioner's Song (1979), Norman Mailer's literary stature was secure, but when he took the opportunity to direct the film version of a later novel, his career took a turn that his admirers wish it had never taken. See Tough Guys Don't Dance (Cannon Releasing, Zoetrope Films, 1987).

part on other grounds by St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) ("[W]hat matters is the perception of the decision maker. The fact that an employee disagrees with an employer's evaluation of him does not prove pretext.") (citations omitted). "Barring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." Id.

In a further attempt to show pretext, Angelico directs our attention to Weldon, which he claims is directly on point. In Weldon, however, our Court of Appeals found summary judgment inappropriate in what it described as a "close case," id. at 799, because a finder of fact might credit Weldon's testimony that other minority employees had experienced difficulty with the same manager. Here, by contrast, no evidence has been advanced of other older employees who had difficulties with Ahlgren.

Angelico claims that Bauer once told him that he should replace one of his salespeople, Alan Smith, with a younger employee. Since Bauer had nothing to do with Angelico's termination, however, his possible animus against older employees⁶ has no bearing on Angelico's claims. "[S]tray remarks by non-decision makers ... are inadequate to support an inference of discrimination by the employer." Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1085 (3d Cir. 1995).

⁶ We note in passing that Bauer himself is only two years younger than Angelico.

The only link Angelico has produced between Bauer's comments and the circumstances of his own dismissal is that Bauer had received pressure from Ronde to fire Smith.⁷ We do not believe that a reasonable jury could determine on that basis alone that Ronde sought to remove Smith, and, by extension, Angelico, from his position on the basis of his age.⁸

Angelico has failed to produce any evidence that would allow a reasonable jury to determine that he was not terminated because of poor job performance or that his age was a motivating factor in his termination. Summary judgment would thus be appropriate even if we found that he had made out a prima facie case.

B. Disparate Impact

If Angelico's disparate treatment claim is lacking in evidence, his disparate impact claim borders on the incoherent. Angelico⁹ seems to believe that the primary difference between a disparate treatment claim and a disparate impact claim is that, in a disparate impact claim, no showing of discriminatory intent is required. As we read his brief, Angelico claims that because he is a member of the protected class and was terminated,

⁷ We do not find this unusual or unreasonable since Smith was the salesperson responsible for IBM, the major client ATG had just failed to win.

⁸ At the time these events occurred, Smith was 57.

⁹ Here, the standard legal fiction of attributing counsel's arguments to the litigant himself seems downright unfair, but we will persist.

"Agilent's actions had a disparate impact on plaintiff." D. Resp. at 23.

That is, of course, not sufficient to make out a claim under Smith v. City of Jackson, 544 U.S. 228 (2005), which found that disparate impact claims were cognizable under the ADEA. "In a disparate impact claim, a plaintiff challenges an adverse employment action resulting from a facially neutral practice, alleging that the practice has a disproportionate impact on members of the protected class." Embrico v. U.S. Steel Corp., 404 F. Supp. 2d 802, 828 (E.D. Pa. 2005) (emphasis added). Here, looking at both his complaint and his response brief to this motion, Angelico identifies neither a facially neutral practice that resulted in his termination nor any disproportionate impact that any policy at Agilent has on older employees. On this alone, his disparate impact claim must fail.

Conclusion

In sum, we find that no reasonable jury could reach a decision in Angelico's favor regarding his ADEA claims. Thus, summary judgment in favor of Agilent is appropriate. Because the standard under the PHRA is the same, summary judgment is also appropriate on Angelico's claim under that state statute.

We therefore attach an Order granting Agilent's motion for summary judgment as well as a Judgment in favor of Agilent.

BY THE COURT:

/s/ Stewart Dalzell, J.

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ORDER

AND NOW, this 3rd day of October, 2006, upon consideration of Agilent's motion for summary judgment (docket entry # 18), Angelico's memorandum in opposition (docket entry # 21), and Agilent's motion for leave to file a reply brief (docket entry # 25) as well as the reply brief attached as an exhibit to the motion, and for the reasons stated in the accompanying Memorandum of Law, it is hereby ORDERED that:

1. Agilent's motion for leave to file a reply brief is GRANTED;
 2. Agilent's motion for summary judgment is GRANTED;
- and
3. The Clerk of Court shall CLOSE this matter statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.

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JUDGMENT

AND NOW, this 3rd day of October, 2006, the Court having today granted Agilent's motion for summary judgment, it is hereby ORDERED that JUDGMENT IS ENTERED in favor of defendant Agilent Technologies and against plaintiff Phil Angelico.

BY THE COURT:

/s/ Stewart Dalzell, J.