

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

JOHN J. PETROCI, III,

Plaintiff,

vs.

ATLANTIC ENVELOPE CO., LLC,

Defendant.

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CIVIL NO. 06-2792

RUFE, J.

July 3, 2007

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant’s Motion for Summary Judgment. Under the well-known rule, the Court should grant summary judgment to the moving party 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 judgment as a matter of law.”¹ In making this determination, the Court must “review all of the evidence in the record . . . and draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.”²

After reviewing the record in this ADEA retaliation case through this summary-judgment lens, a question of material fact remains: Why did Atlantic Envelope Company, LLC (“Atlantic”) place one of its sales managers, John Petroci, in a remedial Performance Improvement Program, and then shortly thereafter, put him on probation? Is it because Petroci had performance

¹ Fed. R. Civ. P. 56(c).

² Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

problems, as Atlantic claims? Or is it because Petroci had recently reported to Atlantic's senior management that several of his co-workers had given false testimony in connection with an age-discrimination suit that Atlantic was defending at the time? Only the factfinder, i.e. the jury, can decide this question; therefore summary judgment is inappropriate at this stage. The Court will now briefly describe the pertinent facts and law that led it to this conclusion.

I. BACKGROUND

From August 2003 until roughly August 2004, Petroci worked as a sales manager for Atlantic, a large national company based in Atlanta. Petroci managed a seven-person sales team out of the Exton, Pennsylvania office, where he reported directly to Jim Brown, the Exton office's General Manager. Although Petroci and Brown initially had a good working relationship, after about three months it became "negative" and "very turbulent."³

During Petroci's tenure at Atlantic, Atlantic was defending a federal age-discrimination lawsuit filed by a 59-year-old employee who had been terminated after 18 years on the job ("The Vandegrift case"). On July 21, 2004, Beverly Wichman, an Atlantic human-resources officer at Exton, conveyed to Petroci her belief that Jim Brown and several other Atlantic employees had testified falsely in depositions in the Vandegrift case. Petroci's understanding was that Brown had lied under oath, and had also influenced other witnesses to lie. Several days later, on August 10, 2004, Wichman told Petroci that Brown was planning to fire him. Petroci's reaction to this was "complete shock and disbelief."⁴ In response, Petroci did two things. First, Petroci, that same day,

³ Petroci Dep., at 185, 408.

⁴ Id. at 191.

arranged a meeting with Atlantic senior management in Atlanta, to discuss the conflicts between himself and Jim Brown. Second, on August 15, 2004, he contacted employment lawyer, Timothy Kolman to obtain legal advice.

On August 18, 2004, in Atlanta, Petroci met with Jim Farrell, Atlantic's Vice President of Sales, and Lisa Moore, Atlantic's Corporate Human-Resources Manager. At that meeting, Petroci explained to Farrell and Moore that Atlantic employees may have given false testimony in the Vandegrift case, and that Jim Brown may have been responsible. Farrell and Moore then directed Petroci to take administrative leave until the matter could be investigated and resolved.

On August 24, 2004, Moore interviewed some ten Atlantic employees in Exton about the alleged perjury in the Vandegrift case. Two weeks later, on September 7, 2004, Petroci again met with Farrell and Moore in Atlanta. According to Atlantic, Moore and Farrell then informed Petroci that the investigation resulted in a finding that no perjury had occurred.⁵ Petroci, on the other hand, denies that Atlantic mentioned the investigation's results, but merely told him that he "was in an unhealthy situation and that much improved communication amongst the leadership team was needed."⁶ Moore and Farrell also told Petroci that the investigation had revealed problems with his job performance. Moore and Farrell then provided Petroci with a 90-day Performance Improvement Plan ("PIP"), which was to go into effect when Petroci returned to work.

Petroci returned to work on September 28, 2004. On the morning of his return, Petroci was summoned to meet with Jim Brown, Beverly Wichman, and Pat O'Brien, Vice President of Business Development at the Exton facility. There, Petroci was handed a Memorandum authored

⁵ Id. at 74.

⁶ Id. at 75.

by Jim Brown and Jim Farrell, and addressed to Petroci. The Memorandum stated, among other things, that after investigating the matter, Atlantic had concluded that no perjury in the Vandegrift case had occurred. The Memorandum also stated that Petroci would be placed on probation. This nearly caused Petroci to “pass[] out from the shock, disbelief, stress, and anxiety.”⁷ Moments later, Petroci left the meeting and went home.

On October 1, 2004, Petroci’s doctor placed him on medical leave due to anxiety.⁸

On October 15, 2004, Petroci “took a leave of absence . . . due to severe anxiety from which he was suffering as a result of the hostile and retaliatory work environment to which he was subjected.”⁹

On January 20, 2005, Petroci began a new employment position at Dumond Chemicals. Shortly thereafter, Petroci received a letter from Atlantic, dated January 31, 2005 and signed by Beverly Wichman, notifying him that his position at Atlantic was terminated.

Petroci has sued under the retaliation provision of the Age Discrimination in Employment Act (“ADEA”),¹⁰ and the similar retaliation provision of the Pennsylvania Human Relations Act (“PHRA”),¹¹ arguing that Atlantic unlawfully placed him in the PIP and on probation as an act of retaliation against him for interfering in the Vandegrift case. He seeks money damages and injunctive relief. It should be noted that Petroci has withdrawn his claim for relief under the Family and Medical Leave Act.

⁷ Pl.’s Responses to Def.’s First Set of Interrogs., at 22.

⁸ Compl. ¶ 26.

⁹ Id. ¶ 27.

¹⁰ 29 U.S.C. § 623(d).

¹¹ 43 Pa. C.S.A. § 955(d).

II. DISCUSSION

Because the Third Circuit has stated that the PHRA should be interpreted in an identical manner to federal employment-discrimination laws,¹² the Court will perform a single analysis under the law of retaliation under the ADEA. Petroci seeks to prove his case through circumstantial evidence; thus, the Court turns to the judicially created framework for analyzing such cases, established by the Supreme Court in McDonnell Douglas Corp. v. Green.¹³ Under the McDonnell Douglas framework, Petroci first must prove a relatively simple prima facie case for retaliation.¹⁴ Atlantic then must rebut this by articulating a legitimate non-retaliatory reason for the adverse action.¹⁵ Petroci must then ultimately prove, by a preponderance of the evidence, that Atlantic's proffered reasons are not legitimate, but rather a pretext to disguise a retaliatory practice.¹⁶ Petroci "may succeed in this either directly by persuading the [fact finder] that a discriminatory reason more likely motivated the employer[,] or indirectly by showing that the employer's proffered explanation is unworthy of credence."¹⁷

To prove a prima facie case of retaliation, Petroci must show: (1) that he engaged in a protected activity; (2) that Atlantic subsequently subjected him to an adverse employment action;

¹² Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567 (3d Cir. 2002).

¹³ 411 U.S. 792 (1973).

¹⁴ McKenna v. Pacific Rail Serv., 32 F.3d 820, 825 (3d Cir. 1994).

¹⁵ Id.

¹⁶ Barber, at 701.

¹⁷ Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998).

and (3) that a causal link exists between the protected activity and the adverse action.¹⁸ Turning to the first prong of the retaliation claim, Atlantic argues that notifying both Atlantic and Timothy Kolman about the alleged perjury was not an ADEA-protected activity, since Petroci did not participate as a witness or give sworn testimony. But under 29 U.S.C. § 623(d), employees are protected against retaliation based on participating “in any manner” in an ADEA proceeding. This intentionally broad language sweeps in many forms of conduct other than merely giving formal testimony.¹⁹ Thus, under this broad definition, the Court is satisfied that a jury could conclude that Petroci’s tangential participation in the Vandegrift case qualifies as ADEA-protected activity.

Addressing the second prong of the prima facie retaliation claim, Atlantic argues that putting Petroci in a PIP and then on probation is not an adverse employment action under federal discrimination law. The Court disagrees. In Burlington Northern & Santa Fe Railway Co. v. White,²⁰ the Supreme Court held that any action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination” constitutes an adverse employment action under the “opposition clause” of the federal retaliation statutes.²¹ Although this case is brought under the “participation clause” of the ADEA retaliation provision, both Petroci and Atlantic argue in their briefs that Burlington Northern governs the question of whether PIP and probation are adverse actions in this participation case. The Court will therefore read Burlington Northern to mean that

¹⁸ Barber v. CSX Distrib. Servs., 68 F.3d 694, 701 (3d Cir. 1995).

¹⁹ See, e.g., Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) (“The words ‘participate in any manner’ express Congress’ intent to confer ‘exceptionally broad protection’ upon employees.”); Deravin v. Kerik, 335 F.3d 195, 203 (2d Cir. 2003) (language of the participation clause “is expansive and seemingly contains no limitations”).

²⁰ 126 S. Ct. 2405 (2006).

²¹ Id. at 2415 (internal quotation omitted).

any action that might dissuade a reasonable worker from *participating in a discrimination lawsuit* constitutes adverse action for the purposes of retaliation law. This is not an extension of the law, but merely a logical application of Burlington Northern to this case—an application that the parties themselves have suggested. Applying this rule, the Court believes that a reasonable jury could conclude that placing a managerial employee in a remedial program, as well as placing him on probation, could dissuade him from participating in a lawsuit. Thus, the Court is satisfied that Petroci has met the second prong of his prima facie case.

Turning to the third element of the retaliation claim, Atlantic next argues that there is insufficient evidence to suggest a causal link between Petroci’s allegations of perjury and his subsequent placement in the PIP and on probation. Again the Court disagrees. Atlantic put Petroci in the PIP about 20 days after the August 18 meeting, and put him on probation about 20 days after that. The Court believes that a reasonable jury could infer that the proximity in time between the August 18 meeting and the two adverse employment actions suggests that there is a causal link. The Third Circuit has held that “temporal proximity between the protected activity and the [adverse action] is sufficient to establish a causal link.”²² The Court does not consider the lapse of time here to be so large as to prevent the issue from going to the jury. Thus, the Court concludes that Petroci has shouldered his burden of establishing a prima facie case of retaliation under the ADEA.

Next, under the second prong of McDonnell Douglas, Atlantic must articulate a legitimate non-retaliatory reason for taking the adverse action against Petroci. To that end, Atlantic argues that some of Petroci’s working relationships were poor, and that one of his subordinates lodged a formal complaint against him. Atlantic also points out that Petroci himself was concerned

²² Shellenberger v. Summit Bancorp, 318 F.3d 183, 189 (3d Cir. 2003) (internal quotation omitted).

with his performance; he admitted in his deposition that he had been worried about low sales.²³ Indeed, this is consistent with the conclusion that Atlantic drew after investigating Petroci's allegations of perjury—that Petroci was underperforming and needed remedial help. Thus, Atlantic has articulated a legitimate business reason for penalizing Petroci, and thus the burden of production shifts back to him.

Finally, under the third prong of McDonnell Douglas, Petroci must point to sufficient evidence that these proffered non-retaliatory reasons are a mere pretext for retaliation. The Court concludes that the record contains enough evidentiary holes that will allow Petroci to prove pretext to the jury. In its brief, Atlantic points to nothing in Petroci's employment file documenting that he was underperforming before the August 18 meeting. Although Atlantic has included a copy of a formal complaint lodged against Petroci by a member of his sales team, Atlantic has not revealed to the Court the outcome of that complaint, e.g. whether Atlantic made a formal determination that Petroci should be disciplined. In its brief, Atlantic justifies the adverse action taken against Petroci in large part based on strained working relationships, but these are what Petroci himself described in his deposition²⁴—there is no documentation of these strained relationships. Therefore, the Court concludes that a reasonable jury could conclude that Atlantic's proffered non-retaliatory justifications are merely pretext.

Atlantic offers an alternative argument that even if Petroci can prove retaliation, he cannot recover damages, both for lack of evidentiary support, and as a matter of law. The Court notes, however, that Atlantic impliedly concedes that Petroci can recover, at the very least, non-

²³ See Def.'s Reply Br. [Doc. # 72], at 15.

²⁴ Id. (citing numerous parts of Petroci's deposition).

economic damages for pain and suffering that he experienced until January 13, 2005, shortly before beginning his new job.²⁵ Therefore, because the Court concludes that Petroci has a provable case on both liability and damages, the Court will deny Atlantic's Motion for Summary Judgment, and set the case for trial.

An appropriate Order follows.

²⁵ See Def.'s Reply in Support of Mot. for Summ. J., at 22.

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CIVIL NO. 06-2792

ORDER

AND NOW, this 3rd day of July 2007, upon consideration of Defendant's Motion for Summary Judgment [Doc. # 63], Plaintiff's Opposition thereto [Doc. # 66], Defendant's Reply Brief [Doc. # 72], Plaintiff's Sur-reply Brief [Doc. # 75], and the entire record in this case, it is hereby

ORDERED, that the Motion for Summary Judgment [Doc. # 63] is **DENIED**; and it is further

ORDERED, that this matter is set for trial on a **DATE CERTAIN** of **MONDAY, JULY 16, at 10:00 A.M.** All other pretrial deadlines remain in place.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.