

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

CAROL D'AMICO : CIVIL ACTION  
 :  
 v. : No.: 08-1099  
 :  
 PULTE HOMES, INC. :

**MEMORANDUM AND ORDER**

**Juan R. Sánchez, J.**

**March 23, 2009**

Carol D'Amico claims her former employer, Pulte Services Corporation,<sup>1</sup> terminated her employment on the basis of age and sex, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (ADEA) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), respectively. Pulte asserts it selected D'Amico for a reduction-in-force (RIF) based upon a legitimate assessment of her performance using customer survey data. Because D'Amico has not shown there is a genuine issue of fact as to whether Pulte's proffered reason for her termination was a pretext for age discrimination, the Court will grant Pulte's motion for summary judgment in part.<sup>2</sup>

**FACTS**

Pulte is a new home builder. From October 2004 until June 7, 2007, D'Amico worked as a Customer Relations Manager at Pulte's Centennial Mills residential development. D'Amico's formal job description included, among other duties, managing daily work "to guarantee quality

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<sup>1</sup>Though D'Amico named Pulte Homes, Inc. as Defendant in this action, Defendant asserts its correct legal name is Pulte Services Corporation.

<sup>2</sup>The Court concludes D'Amico has proffered sufficient evidence to establish a genuine issue of material fact with respect to her Title VII claim and therefore will deny Pulte's motion for summary judgment in part. Because D'Amico's Title VII claim may proceed to trial, the Court limits its discussion to D'Amico's ADEA claim.

workmanship and ‘on time, every time’ accountability,” monitoring the progress of homes throughout the construction process, and ensuring “homes are ready before taking ownership and are 100% complete prior to the Pre-Close Orientation.” Def.’s Mot. for Summ. J., Ex. 5. During her employment, D’Amico was supervised by Joseph DiGiovanni, General Manager for Customer Relations, and also reported to the Vice President of Customer Relations, Brad Chorpenning. In late 2006, Rod Hart replaced Chorpenning.

Pulte asks customers to complete Customer Satisfaction Measurement Surveys (CSMSs). The CSMSs measure three components of a Pulte customer’s experience: short-term overall experience, long-term overall experience, and whether a house was completed to the customer’s satisfaction. The House Complete score is based upon CSMS responses and represents the percentage of customers who reported complete satisfaction with their houses at the time of closing for each development. An independent third-party survey company collects completed CSMSs from Pulte customers.

On January 22, 2007, Hart sent an e-mail to all customer relations personnel, stating the House Complete scores for the Delaware Valley region needed improvement. D’Amico was the Customer Relations Manager for Pulte’s Centennial Mills community in the Delaware Valley region. On February 17, 2007, Hart sent another e-mail to customer relations personnel, in which he established a goal of substantially increased House Complete scores for the Delaware Valley region. In May 2007, the House Complete scores for Centennial Mills ranked 30th out of the region’s 31 communities and ranked 29th in overall CSMS scores.

In June 2007, Pulte implemented a RIF, affecting employees throughout the United States. Hart was given the authority to select which of the employees he supervised would be chosen for

the RIF and what criteria would be used to select employees for termination. Hart testified he selected employees for the RIF by measuring their performance against stated goals and objectives for their performance which were communicated to them by Hart and their immediate supervisors at the beginning of each year. Hart testified he selected D'Amico for the RIF based upon Centennial Mills's poor House Complete and CSMS scores.

D'Amico was 52 years old at the time of her termination. D'Amico's supervisor, DiGiovanni, age 41, was also terminated as part of the June 2007 RIF. Hart conceded each of the employees he selected for the RIF was over the age of 40 in June 2007, though Hart also chose to retain a Customer Relations Manager approximately ten years older than D'Amico and an Assistant Customer Relations Manager approximately thirteen years older than D'Amico.

After the June 2007 RIF, D'Amico's former assistant, Christopher Lambert, age 36, assumed D'Amico's job responsibilities with a Senior Customer Relations Manager, Scott Wescoat, age 44, supervising Lambert. Pulte promoted Lambert to D'Amico's former position approximately eight months after D'Amico's termination.

## **DISCUSSION**

Summary judgment may be granted only "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 making this determination, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

The ADEA prohibits termination of an individual's employment because of her age. 29

U.S.C. § 623(a). A plaintiff who claims an ADEA violation may prove her case by direct or indirect evidence. *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 247 (3d Cir. 2002). In order to make out a prima facie case of age discrimination using indirect evidence, a plaintiff must show she:

- (1) was a member of a protected class (i.e. he or she was forty years of age or older);
- (2) was qualified for the position at issue;
- (3) suffered an adverse employment action; and
- (4) was replaced by a sufficiently younger person, raising an inference of age discrimination.

*Anderson*, 297 F.3d at 249. Where a plaintiff's employment was terminated in the context of a RIF, the plaintiff must also show "as part of the fourth element, that the employer retained someone similarly situated to him who was sufficiently younger." *Id.* at 250. If a plaintiff can establish a prima facie case of age discrimination, "the burden of production shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the action." *Connors v. Chrysler Fin. Corp.*, 160 F.3d 971, 974 n.2 (3d Cir. 1998).

If the employer can articulate a legitimate, nondiscriminatory reason for the adverse action, "the plaintiff can survive summary judgment only if he submits 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." *Id.* (citation and internal quotation marks omitted). "[P]roof of pretext does not have to include evidence of discrimination." *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 467 (3d Cir. 2005). If a plaintiff cannot provide evidence of discrimination, to avoid summary judgment she must "put forward such weaknesses, implausibilities, inconsistencies, incoherencies, or

contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." *Id.* (citation, emphasis, and internal quotation marks omitted).

Viewing the facts in the light most favorable to D'Amico and drawing all inferences in her favor, D'Amico has made out a prima facie case of age discrimination. She has established membership in the protected age class because she was 52 years old when she was fired. D'Amico has provided some evidence, undisputed by Pulte, she was qualified for the Customer Relations Manager position. She has shown she suffered an adverse employment action when Pulte terminated her employment. D'Amico has also shown Pulte retained similarly situated, sufficiently younger employees. Lambert was similarly situated because he assumed D'Amico's job responsibilities upon her termination, and he was sufficiently younger than she at 16 years her junior.<sup>3</sup>

Pulte has also met its burden of articulating a legitimate, nondiscriminatory reason for

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<sup>3</sup>Pulte argues Lambert was not similarly situated because he held an inferior title to D'Amico – Assistant Customer Relations Manager – in June 2007. Pulte's argument is belied by Lambert's assumption of D'Amico's job duties upon her termination. Though Pulte argues D'Amico's responsibilities were split between Lambert and Wescoat, Wescoat's testimony makes clear Wescoat only provided supervision and mentorship to Lambert, and Lambert assumed all or virtually all of D'Amico's former responsibilities. *See* Wescoat Dep. at 13-14, 17-18. Even if Wescoat had taken over some of D'Amico's job duties, at ten years younger, Wescoat is also sufficiently younger than D'Amico for D'Amico to establish a prima facie case. *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 699 (3d Cir. 1995) ("It is clear that here, the eight year difference between [the plaintiff] and the successful candidate . . . could support a finding that [the successful candidate] was sufficiently younger than [the plaintiff] to permit an inference of age discrimination.") (citation and internal quotation marks omitted); *Sempier v. John & Higgins*, 45 F.3d 724, 729-30 (3d Cir. 1995) (concluding four- and 10-year age differences were sufficient to support a prima facie case of age discrimination); *Steward v. Sears Roebuck & Co.*, 231 Fed. Appx. 201, 209 (3d Cir. Aug. 14, 2007) ("We decline to adopt a brightline rule that a 6.75 year average age difference between a plaintiff and those who assume his job duties is, as a matter of law, insufficient to give rise to an inference of age discrimination.").

selecting D'Amico for the RIF, namely, poor performance as measured by House Complete and CSMS scores for Centennial Mills. Thus, to survive Pulte's motion for summary judgment, D'Amico must offer evidence either discrediting Pulte's proffered reason for her termination or showing her termination was motivated by discriminatory animus, such that a reasonable jury could find in favor of her age discrimination claim. She can do neither.

First, D'Amico argues House Complete scores were not a measure of her individual performance because they incorporated factors beyond her control, including the contributions of the construction team, local government, and Pulte management. Though D'Amico has offered evidence House Complete scores were not an ideal measure of her job performance, this evidence does not demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Pulte's proffered reason for her termination such that a reasonable jury could reject it as unbelievable. *Kautz*, 412 F.3d at 467 (citation and internal quotation marks omitted). "Evidence that the method of an evaluation an employer used was not the best method does not amount to evidence that the method was so implausible, inconsistent, incoherent or contradictory that it must be a pretext for something else." *Id.* at 471.

In addition, Pulte has offered evidence which demonstrates it held Customer Relations Managers responsible for CSMS and House Complete scores and communicated this expectation to them. D'Amico's job duties included ensuring "homes are ready before taking ownership and are 100% complete prior to the Pre-Close Orientation." Def.'s Mot. for Summ. J., Ex. 5. Hart repeatedly placed the onus of raising House Complete scores on customer relations personnel. Even if Pulte's expectations of D'Amico were unfair due to her limited ability to impact the scores, "[i]t is not the role of the courts to assess the fairness or unfairness of the employer's decision, but only

to determine whether that decision was motivated by an illegal consideration.” *Dodge v. Susquehanna Univ.*, 796 F. Supp. 829, 836 (M.D. Pa. 1992).

D’Amico also offers evidence of past performance reviews which show she was at or above average in several categories used to measure Customer Relations Manager performance, and by taking House Complete scores out of the equation, her overall customer satisfaction scores exceeded those of most other Customer Relations Managers. This evidence is also insufficient to cast doubt on Pulte’s proffered reason for her termination because “[p]retext is not established by virtue of the fact that an employee has received more favorable comments in some categories or has, in the past, received some good evaluations.” *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 528 (3d Cir. 1992).

Second, D’Amico argues Hart’s discriminatory animus against older employees is demonstrated by his exclusive selection of individuals over 40 years of age for the RIF. Hart also chose to retain two individuals substantially over the age of 40. Without more, Hart’s selection of individuals for the RIF is insufficient to create a question of fact regarding whether an “invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer’s action.” *Kautz*, 412 F.3d at 467 (citation and internal quotation marks omitted).

Because D’Amico has failed to show there is a genuine issue of material fact regarding whether Pulte’s proffered reason for her termination was a pretext for age discrimination, the Court will grant summary judgment in favor of Pulte on D’Amico’s ADEA claim. An appropriate order follows.

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**ORDER**

AND NOW, this 23rd day of March, 2009, Defendant Pulte Homes, Inc.'s Motion for Summary Judgment (Document 20) is GRANTED in part<sup>4</sup> and DENIED in part.<sup>5</sup>

BY THE COURT:

/s/ Juan R. Sánchez  
Juan R. Sánchez, J.

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<sup>4</sup>Pulte's motion is granted as to Plaintiff Carol D'Amico's claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*

<sup>5</sup>Pulte's motion is denied as to D'Amico's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*