

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

Amelia Storti	:	CIVIL ACTION
	:	
v.	:	
	:	
First Fidelity Bank	:	No. 97-5283

**MEMORANDUM**

Yohn, J.

July , 1998

The plaintiff, Amelia Storti ("Storti"), was an employee of First Fidelity Bank ("First Fidelity") for thirty years until she was terminated on January 11, 1995. First Fidelity eliminated Storti's position pursuant to a reduction in its workforce. At the time she was terminated, Storti was forty-eight years old. Storti claims that her termination was based solely on age discrimination.

First Fidelity claims that Storti was terminated based on a number of legitimate, nondiscriminatory factors. First, due to financial concerns, First Fidelity was conducting a reduction in force. Second, based on Storti's 1994 performance evaluation and her supervisors' impressions of her abilities, Anthony Marsella ("Marsella"), the supervisor of the Trust Accounting Services Section ("Trust Section"), ranked her as the lowest performer in the Trust Section for the 1993-1994 year. After being instructed to eliminate two positions within his department, Marsella consulted his ranking and chose to terminate Storti.

After discovery closed, First Fidelity filed the instant motion for summary judgment, asserting that it has articulated a legitimate, nondiscriminatory reason for

Storti's termination and that Storti cannot show that this reason is pretextual. By separate order the court has granted the defendant's motion.

### **BACKGROUND**

These are the undisputed facts or, if disputed, taken in the light most favorable to the plaintiff.

Storti began working for the defendant First Fidelity in September 1964. Def.'s Motion for Summ. J., Ex. A., Storti Dep. at 43 ("Storti Dep."). Throughout her tenure with First Fidelity, she held a variety of positions in different departments. Storti Dep. at 45-46. In 1991, First Fidelity placed Storti in the Funds Services Unit, where she held the position of Funds Accountant II. Id. at 56-59. The Funds Services Unit was one of four units within First Fidelity's Trust Section. The supervisor of the Funds Services Unit, for the relevant time periods, was Joanne Monteiro ("Monteiro"). Def.'s Motion for Summ. J., Ex. B, Monteiro Verif. ("Monteiro Verif."). The supervisor of the Trust Section for the same period was Anthony Marsella ("Marsella"). Def.'s Motion for Summ. J., Ex. C, Marsella Verif. ("Marsella Verif.").

Marsella created a "forced ranking" of employees in the Trust Section each fall. Id. ¶ 6. Marsella created the ranking to determine raises and to ascertain future training needs. Id. Marsella compiled the forced ranking by directing the supervisor of each unit to rank the employees under their supervision. Id. He would then discuss the rankings with the supervisors and rank all of the employees of the Trust Section as a group. Id.

In the fall of 1994, Marsella created his annual forced ranking. Id. Monteiro, Storti's direct supervisor, advised Marsella that she considered Storti to be the lowest performer in the Funds Services Unit. Id., Monteiro Verif. ¶ 6. Monteiro reached this conclusion based on Storti's July 1994 performance evaluation and Monteiro's belief that Storti had not improved since that evaluation. Def.'s Motion for Summ. J. Ex. D., Monteiro Dep. at 29-36 ("Monteiro Dep."). Monteiro believed that Storti had particular problems in several areas of her job. First, Monteiro believed that Storti, without substantial guidance from her supervisors, could not adequately resolve discrepancies in the investment company's records of mutual fund ownership amounts with First Fidelity's records. Monteiro Dep. at 49; Monteiro Verif. at ¶ 4. Second, Monteiro perceived Storti as having problems with calling in trades to First Fidelity's investment company. Monteiro Dep. at 36; Monteiro Verif. at ¶ 3. Third, Monteiro perceived Storti as experiencing problems using First Fidelity's computer system. Monteiro Dep. at 73-74. Based on this information, as well as his own experiences with Storti, Marsella placed Storti at the very bottom of the forced ranking of all the employees in the Trust Section. Marsella Verif. ¶ 6.

Several months later, Joe Ready, Marsella's supervisor, informed Marsella that First Fidelity would be conducting a reduction of force to reduce company expenses. Id. ¶ 7. He instructed Marsella to eliminate two positions in the Trust Section. Id. Because Marsella had not replaced an employee who had recently resigned, he only needed to terminate one employee. Id.

Relying solely on the forced ranking that he had created in the fall, Marsella decided that Storti, the lowest ranked employee in the Section, was the most appropriate employee to dismiss. Id. ¶ 6. Moreover, although Marsella did not rely on this factor in reaching his decision, Storti was the highest paid nonsupervisor employee in her unit and the second highest paid nonsupervisor employee in the entire section. Pl.'s Mem. of Law Opposing Motion for Summ. J. at 3. Marsella terminated Storti as part of the reduction of force on January 11, 1995. Marsella Verif. ¶ 6.

At the time of the layoff, Storti was 48 years old. See Def.'s Mot. for Summ J., Ex. H. At that same time, there were a total of 27 nonofficer employees within Marsella's Section. Id. Thirteen of those employees were age 40 or older. Id. Four of the employees who were not chosen for layoff were considerably older than Storti. Id.<sup>1</sup>

### **SUMMARY JUDGMENT STANDARD**

Rule 56 of the Federal Rules of Civil Procedure states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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 reviewing the record, the court must presume that the non-moving party's version of any disputed fact is correct. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992). Additionally, the court must draw all reasonable inferences in favor of the non-moving party. Sempier v.

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<sup>1</sup> These employees are: Catherine E. Burke (age 54); Don Carr (age 58); Sobane Kamal (age 52) and Rose Marino (age 61). See Def.'s Ex. H

Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995) cert. denied, 115 S. Ct. 2611 (1995). Although the moving party carries the burden of demonstrating the absence of a genuine issue of material fact, the non-moving party cannot merely rely upon the allegations contained in the complaint, but must offer specific facts contradicting the movant's assertion that no genuine issue is in dispute. See Coolspring Stone Supply, Inc. v. Amer. States Life Ins. Co., 10 F.3d 144, 147 (3d Cir.1993). An issue is genuine only if there is sufficient evidence from which a reasonable jury could find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

## **DISCUSSION**

### **I. ADEA**

The Age Discrimination in Employment Act makes it unlawful to "discharge any individual [over the age of forty] or otherwise discriminate against any individual [over the age of forty] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Storti has alleged First Fidelity has violated the ADEA by terminating her as part of First Fidelity's expense reduction plan.

As with other employment discrimination claims, ADEA claims can be established in either, or both, of two ways: (1) by presentation of direct evidence First Fidelity harbored discriminatory animus under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), or (2) from evidence which creates an inference of discrimination under the burden-shifting framework of the McDonnell Douglas/Burdine/Hicks trilogy. See St.

Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Storti does not allege that she has presented direct evidence that First Fidelity harbored discriminatory animus. Therefore, the Court analyzes her claims under the burden-shifting framework of McDonnell Douglas/Burdine/Hicks.

The burden-shifting framework initially requires the plaintiff to establish by a preponderance of the evidence a prima facie case of disparate treatment. See Burdine, 450 U.S. at 252. Once plaintiff succeeds in presenting a prima facie case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the unfavorable treatment. McDonnell Douglas, 411 U.S. at 802; Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

After the defendant produces a legitimate, nondiscriminatory reason, the plaintiff can defeat summary judgment by pointing to some direct or circumstantial evidence from which a jury could reasonably either: "(1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer's action." Sheridan v. E.I. DuPont & Co., 100 F.3d 1061, 1067 (3d Cir. 1996) (quoting Fuentes, 32 F.3d at 764).

However, the plaintiff cannot "avoid summary judgment simply by arguing that the fact-finder need not believe the defendant's proffered legitimate explanations." Fuentes, 32 F.3d at 764. On the other hand, the plaintiff is not required to "adduce

evidence directly contradicting the defendant's proffered legitimate explanations" to survive a summary judgment motion. Id. (quoting Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 128 (3d Cir.1990)):

"The correct solution lies somewhere in between: to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact finder reasonably to infer that each of the employer's proffered non-discriminatory reasons, see Logue v. International Rehab. Assocs., Inc., 837 F.2d 150, 155 (3d Cir.1988) (holding that "the district court erred in failing to consider all of [the employer's] proffered evidence of legitimate business reasons for [the plaintiff's] termination" (emphasis supplied)), aff'd after remand, 866 F.2d 1411 (3d Cir.1989), was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext)."

Id. (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994)).

The ultimate focus of this inquiry is on whether the plaintiff has met her burden of showing that the employer has discriminated against a member of a protected class. Burdine, 450 U.S. at 253. Accordingly, the ADEA does not command employers to be wise or efficient or even rationale - it only restricts them from making employment decisions motivated by discriminatory animus. Fuentes, 32 F.3d at 764. To that end, a plaintiff must cast "substantial doubt" upon the proffered legitimate reason by demonstrating "such weaknesses or implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them 'unworthy of credence[.]'" Id. at 765 (quoting Ezold, 983 F.2d at 531). See also Sheridan, 100 F.3d at 1071 (endorsing Fuentes). While this standard places a difficult burden on plaintiffs, "[i]t arises from an

inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs." Fuentes, 32 F.3d at 765 (quoting Ezold, 983 F.2d at 531).

If, however, a plaintiff cannot cast substantial doubt on the defendant's proffered reason, she can still avoid summary judgment by producing sufficient evidence that would allow a fact-finder reasonably to infer that the employer was motivated by discriminatory animus. Id. In other words, the plaintiff must show, by a preponderance of the evidence, that "discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Keller v. Orix Credit Alliance, 130 F.3d 1101, 1111 (3d Cir. 1997).

Under either avenue, Storti has failed to raise a genuine issue of material fact.

## **II. Storti's Claim**

### **(A) Legitimate, Nondiscriminatory Reason**

For purposes of its summary judgment motion, the defendant conceded that Storti established a prima facie case of age discrimination. Instead, the defendant advances a legitimate, nondiscriminatory reason for Storti's dismissal; namely, that First Fidelity dismissed Storti because (1) of First Fidelity's need to eliminate one position in Storti's unit and (2) Storti scored the lowest of all employees in the Trust Section in the forced ranking. This reason is legitimate. See e.g., Rea v. Martin Marietta Corp., 29 F.3d 1450, 1456 (10th Cir. 1994) (finding that eliminating lowest ranking employee in department pursuant to a reduction in force legitimate); Conkwright v. Westinghouse

Elec. Corp., 933 F.2d 231, 235 (4th Cir.1991) (eliminating employee pursuant to reduction in force is legitimate).

**(B) Pretext**

Storti attempts to survive the defendant's motion for summary judgment by offering evidence that she claims creates an inference that the defendant's proffered justifications for selecting her for lay-off were a pretext for discrimination. Storti has a difficult hurdle to overcome because the defendant presents powerful evidence of its reasons for discharging Storti. As previously noted, the undisputed evidence shows that each fall, Marsella, the supervisor of the Trust Section, would create a forced ranking of all the employees in the Trust Section. Marsella Verif. ¶ 6. Marsella would use the ranking to determine such things as salary increases and training needs. Id. He created the list by consulting with the supervisors of each of the four units within the Trust Section regarding the performance of that unit's employees. Id. To that end, he asked the four supervisors to rank the employees within their respective units.<sup>2</sup> Id. at 2.

Citing Storti's frequent miscalculations of funds, which cost First Fidelity time and money, along with her inability to efficiently and independently solve problems,

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<sup>2</sup> The plaintiff claims that Marsella did not ask each of his supervisors to rank the employees under their supervision but asked them to conduct performance evaluations of them. Pl.'s Counterstatement of Material Facts Re: Summ. J. at 9 ¶15. He has not, however, introduced any evidence, outside of bald assertions, that Marsella did not ask the unit supervisors to rank their employees. Unsupported allegations do not create genuine issues of material fact for summary judgment purposes. See Coolspring Stone Supply, Inc. v. Amer. States Life Ins. Co., 10 F.3d 144, 147 (3d Cir.1993).

Monteiro ranked Storti as the lowest performer in her group.<sup>3</sup> Monteiro Verif. ¶ 6.

Next, based on the rankings and the performance evaluations, Marsella created the forced ranking, ranked Storti as the lowest performer in the Trust Section and ranked Swoope as the second lowest. Marsella Verif. at ¶ 6. Based on conversations with Storti's and Swoope's direct supervisors, Marsella concluded that Storti should be ranked as the lowest performer due to her supervisor's inability to confidently predict

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<sup>3</sup> Again, the plaintiff seemingly tries to dispute the fact that Monteiro ranked Storti as the lowest performer in her unit. To that end, the plaintiff states, "[a]t the time of the performance evaluation in July 1994, it was not [Monteiro's] intent that Ms. Storti be listed as the lowest performer in her group. [NT 57-58]." Pl.'s Counterstatement at 10 ¶ 16 & 17. Ms. Monteiro's actual testimony is as follows:

Q. When you gave her a performance evaluation in July 1994 did you intend that she be listed as the lowest performer in your group?

A. No.

Q. Where did you think you were placing her?

A. I wasn't placing her anywhere. I was doing a review of her prior year's performance.

Q. Do you agree that she was the lowest performer in your group?

A. In my specific unit at that time?

Q. Yes.

A. Yes, at that time, yes. At that time, I want to make that clear.

Q. Well, when was she not? Why are you saying at that time?

A. At that time that I did the performance review, yes.

Q. Okay, how about four months later?

A. I don't know.

Q. Did she get better?

A. No.

Monteiro testified that when doing her performance review she did not intend Monteiro to be ranked the lowest performer because ranking was not the purpose of the performance review. On the other hand, she unequivocally testified multiple times that she considered Storti to be the lowest performer in the group. In light of her full testimony, the court cannot see how Monteiro's intent regarding the performance evaluation is relevant to the issues in this case.

that Storti would improve. Id. Several months later, Marsella's supervisor informed him that Marsella would need to lay off an individual in the Trust Section. Id. at ¶ 8. Marsella consulted the forced ranking, concluded that Storti was ranked the lowest performer, and terminated her. Id.

**(1) Storti Has Not Presented Evidence That Her Performance Was So Clearly Adequate That A Reasonable Fact-Finder Could Find That A Claim Of Inadequate Performance Must Have Been A Pretext For Discrimination**

Storti attempts to undermine the defendant's reasoning with a variety of arguments. The theoretical underpinning of her first argument is that it was so plain that Storti could not have performed better that her alleged inadequate performance could not have been the real reason for her termination. Specifically, Storti attempts to introduce evidence (1) that her performance was adequate, and (2) that the process used to rank her as the lowest performer in her department was flawed.

It is critical to keep in mind that "to discredit the employer's proffered reason, . . . , the plaintiff cannot simply show that the employer's decision was wrong or mistaken . . . ." Fuentes, 32 F.3d at 765. Rather, "the factual dispute at issue is whether discriminatory animus motivated the employer[,]" not whether the employer is wise, shrewd, prudent or competent. Id. The plaintiff's aim is not to show that the reason was erroneous but that it is plagued by "such weaknesses, implausibilities, inconsistencies, incoherences or contradictions in the employer's proffered reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence' . . . ." Id. "In simpler terms, the plaintiff must show, not merely that the employer's

proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." Keller, 130 F.3d at 1111.

Storti's first argument that the defendant's proffered reason is a pretext is that her performance was actually adequate. When an employee combats an employer's reasoning on grounds of performance, "the relevant question is whether the evidence shows that it was so clear that [the employee] could not have done better that [the employer] could not have believed otherwise." Id. at 1109. To that end, the evidence should call into question the decisionmaker's actual beliefs regarding her performance. See id. Mere evidence that her performance was adequate amounts to "little more than the school ground retort 'Not so,' an approach which, . . . , does not create a genuine issue of material fact." Fuentes, 32 F.3d at 766.<sup>4</sup>

None of Storti's evidence calls into question her supervisor's beliefs. In fact, much of her evidence tends to support the defendant's position, rather than diminish it. Storti claims that she "never had an annual performance evaluation that was in any way unsatisfactory." Pl.'s Mem. Of Law Opposing Summ. J. at 2. See Pl.'s Mem. of Law Opposing Motion for Summ. J., Torres Aff. To support this assertion, Storti submits the affidavit of Sally Torres, who testified that she "was required on several occasions to conduct a performance evaluation of [Storti]. In all of [Torres'] evaluations [Storti] never had any serious problem. She always had high standards for her work."

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<sup>4</sup> More persuasive evidence of pretext would be evidence such as, expert testimony regarding the frequency of mistakes expected in a position of this sort or evidence that other similarly situated employees committed similar mistakes without repercussion. See e.g., Keller, 130 F.3d at 1109.

The fact that the relevant decisionmakers, however, disagree about the plaintiff's qualifications does not evidence discrimination. See Fuentes, 32 F.3d at 767 (citing Ezold, 983 F.2d at 533). Moreover, Torres did not make the decision to terminate Storti. Thus, Torres' affidavit opining as to the quality of Storti's past performance does not undermine the defendant's reasons for terminating Storti.

To further bolster her claim of adequate performance, Storti has produced copies of only two of her prior performance evaluations - from the years 1992 and 1993. These evaluations review her first two years in the Trust Section. The 1992 performance review, which surveyed the plaintiff's performance for the period from July, 1991 through July, 1992 gives her an "M" rating - meaning she "Meets Standards" - in eight out of ten categories. See Pl.'s Counterstatement of Material Facts in Issue with Additional Exs., Ex. 1, 1992 Performance Eval. She received an "E" - meaning she "Exceeds Standards" - for the remaining two categories. Id. Under the comments section of the category termed "Technical Knowledge," the evaluator noted that Storti "needs to become more familiar with how to deal with problems and exceptions." Id. This is one of the exact problems Monteiro cited as troubling Storti's performance in 1994 - the year just prior to Storti's layoff. See Monteiro Verif. ¶¶ 3-4.

In the following year's evaluation, from 1993, Storti again received an "M" in eight of the categories and an "E" in the remaining two. Id. Ex. 2. Under the "Technical Knowledge" category Storti received an "M" rating and the evaluator noted that she "has gained a better understanding of how to handle problems." Id. Ex. 2 at 2.

This evidence shows that, in the two years immediately prior to the 1994 evaluation, Storti's supervisors recognized that problem-solving was an area in which Storti needed improvement. Thus, the plaintiff's evidence of past performance actually lends more credence to the defendant's position that, due to her inability to solve problems, Storti's performance in the 1993-1994 year was unsatisfactory.

Storti's second line of attack is that the ranking process was so flawed that a reasonable fact-finder could find that the relevant decisionmakers could not have relied upon it. This rationale fails for largely the same reasons as Storti's first assault.

Here, Storti challenges the adequacy of the defendant's evaluation process in a number of ways. First, she claims that Marsella was remiss to rely upon the evaluations of other supervisors in determining her placement. Again, however, the issue "is not whether the staff members' criticisms . . . were substantiated or valid," but whether the decisionmaker "believed those criticisms to be accurate and accurately relied upon them . . . ." Fuentes, 32 F.3d at 766. For example, the plaintiff in Fuentes attempted to undermine his supervisor's claim that he received complaints from different employees regarding the plaintiff's performance by pointing out that (1) the supervisor could not remember the names of these individuals, and (2) that two of the complainants were biased against the plaintiff. Id. The Third Circuit rejected the plaintiff's evidence, holding that a fact-finder could not reasonably find that this evidence impeached the plaintiff's supervisor's evaluation of the plaintiff to the point of rendering it weak, implausible, or incredible. Id.

Storti has not presented any evidence that Marsella lacked confidence in Monteiro. Indeed, the evidence presented suggests the opposite - that Monteiro was an experienced supervisor who was more involved in the day-to-day activities of Storti than Marsella. Without more from the plaintiff, this court cannot conclude that Marsella's claimed reliance on Monteiro's evaluations rendered Marsella's statements weak, implausible, or incredible.<sup>5</sup>

The plaintiff also attempts to raise an issue of fact by challenging Marsella's method of grouping the employees for ranking purposes. She argues that she should not have been compared with the entire Trust Section for purposes of determining whom to terminate, but only with those employees in her specific unit. In the same vein, the plaintiff attempts to demonstrate that the reason was a pretext by showing that the performance evaluations that Marsella used to create the ranking were not created with the purpose of ranking in mind. Thus, argues the plaintiff, the ranking itself must be illegitimate.

These arguments amount to nothing more than imploring the court to substitute its business judgment for that of the employer, an invitation the court must reject. "[F]ederal courts are not arbitral boards ruling on the strength of 'cause' for discharge" Keller, 130 F.3d at 1109 (3d Cir. 1997) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (8th Cir. 1996)), and "this court does not sit as a super human resources

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<sup>5</sup> Storti also challenges Monteiro's reliance on information provided by two nonofficer employees, "Beth" and "Stacey," regarding Storti's performance. For the reasons mentioned above, this challenge likewise fails to meet plaintiff's burden.

office, judging whether plaintiff indeed possessed better leadership, communications or analytical skills than others on the same matrix.” Martin v. General Electric Co., 1997 U.S. Dist. LEXIS 9452 (E.D. Pa. 1997).

While the plaintiff vehemently argues that this process is flawed she does not provide any evidence, such as expert testimony or comparisons of the standard evaluation processes within First Fidelity, that would lead the court to that conclusion. Instead, Storti attempts to undermine the process by stating in her brief that the Human Resources Department did not review or approve of this layoff procedure or performance evaluation. The plaintiff does not, however, provide evidence that First Fidelity’s Human Resources Department’s failure to place its imprimatur upon Marsella’s termination procedures was in some way suspect, such as, evidence that the other departments within the Bank sought this Department’s approval or a company-wide policy instructing supervisors to do so. Without more, this court cannot find that the evaluation process was so flawed as to be weak, implausible or incredible.

Finally, Storti’s evidence of her adequate performance loses significant probative value because, in a reduction of force case somebody must be terminated, even satisfactory employees. See Rea, 29 F.3d at 1456; Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 235 (4th Cir.1991). Moreover, those employees retained, consistent with Marsella’s yearly ranking procedures, received higher departmental rankings than Storti. See id.; See Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 848 (7th Cir.1992) (proof that plaintiffs were satisfactory employees does not

suggest discrimination in reduction in force case where performance of retained employees was superior).

**(2) The defendant's evidence that this was a legitimate, nondiscriminatory reason is not unduly suspicious**

As further evidence of pretext, the plaintiff points out that the defendants have not produced her original 1994 performance evaluation, the evaluation which Storti contends was altered to incorrectly reflect that she received a "low" rating for the 1993-1994 year. Furthermore, the plaintiff makes an issue out of the fact that Storti never saw some of Monteiro's notes regarding Storti's problematic performance. These arguments fail to raise a genuine issue of material fact.

In light of the other undisputed evidence, the abovementioned disputes are actually immaterial to the instant motion. As already mentioned, Storti does not dispute the fact that Monteiro, her direct supervisor, perceived her to be the lowest performer in her unit. She also does not dispute the fact that Marsella, the Trust Section supervisor, perceived her to be the lowest performer in the Trust Section. Furthermore, she does not dispute the fact that, consistent with his expectations, Marsella ranked her as the lowest performer in the forced ranking, the list he used to evaluate the proper candidate for termination.<sup>6</sup>

As shown, Storti must undermine her supervisor's stated beliefs about her actual

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<sup>6</sup> Plaintiff's counterstatement of material facts claims that Storti does dispute these facts. A close reading of these paragraphs, however, reveals that Storti actually disputes the fact that her performance was adequate, not that Monteiro or Marsella actually believed that she was the lowest performer in her unit. See Pl.'s Counterstatement of Material Facts Re: Summ. J. at 3 ¶ 6 and ¶ 21.

performance. Moreover, that she was not informed of the ranking does not render the ranking somehow suspect, especially in light of the fact that Storti does not claim that she was unfairly placed last in the departmental rankings on the basis of age. See Rea, 29 F.3d at 1456. In light of the undisputed evidence in this case, however, the assertions that the 1994 performance evaluation was not the original and that Storti never saw certain notes Monteiro had made regarding her performance do not meet plaintiff's burden. As such, Storti has not proved that the defendant's assertion that Storti was terminated due to a reduction of force amounts to a pretext for discrimination.

**(D) Direct Evidence of Age Discrimination**

Even though Storti has failed to demonstrate a triable issue of fact surrounding the pretext issue, Storti may still overcome summary judgment if she can identify evidence that "allows the fact-finder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Keller, 130 F.3d at 1111 (quoting Fuentes, 32 F.3d at 762). This type of evidence of discrimination must "prove age discrimination in the same way that critical facts are generally proved - based solely on the natural probative force of the evidence." Id. (considering the evidentiary impact of the employer's comments made to the plaintiff regarding his age).

**(1) Storti Has No Claim For Salary Discrimination**

The plaintiff's best, and only, evidence under this prong is her assertion that the real reason First Fidelity terminated her was because she was the highest paid

employee in her unit and the second highest paid employee in her department. The plaintiff claims that this decision amounted to age discrimination.

Salary discrimination is not actionable under the ADEA. Hazen v. Biggins, 507 U.S. 604, 610 (1993). The ADEA merely "requires employers to ignore an employee's age; it does not specify further characteristics that an employer must also ignore." Id.

To that end, Hazen held that:

a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be \_\_\_") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee - that he indeed is "close to vesting."

Id. at 611.

Likewise, terminating Storti because she was the highest paid employee in her unit would not be the result of inaccurate and denigrating stereotypes regarding age, but would represent an actual fact about the employee - that she is the highest paid. Indeed, Storti was terminated pursuant to a reduction in force precipitated by financial concerns, which is even more probative that age was not a factor in her employer's decision. Id. at 613 ("inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present").

**(2) The Chronological Make-Up of the Retained Employees Further Undermines Storti's Claim**

Storti's already heavy burden is made even more difficult in light of the fact that of the 27 non-officer employees in the Trust Section, thirteen were age 40 or older and four of the employees who were not chosen for layoff were considerably older than Storti, ranging in ages from 54 through 61. While evidence that significant numbers of employees within the protected age group were retained is not dispositive of the absence of age discrimination, it can be viewed as persuasive evidence of such. EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1461 (D.N.J. 1993).

Storti claims that the second to last employee in the ranking, Karen Swoope, was younger than Storti and was not terminated during the lay-off. This, however, also fails to prove any discrimination.

The Third Circuit recently held that "a plaintiff does not create an issue of fact merely by selectively choosing a single comparator who was allegedly treated more favorably, while ignoring a significant group of comparators who were treated equally to her." Simpson v. Kay Jewelers, Inc., 142 F.3d 639 (3d. Cir. 1998). A decision adversely affecting an older employee that, at the same time, bolsters a younger employee, does not automatically lead to an inference of age discrimination. Id. at 645. Again, the ultimate inquiry is whether there is any evidence that the decision was made based on an employee's age. Id.

Once again, Storti has not introduced any evidence that the decision to chose Swoope over Storti was age-based. Storti does not dispute the fact that Swoope was ranked above her in the forced ranking. Nor does she assert that Marsella did not rely

on the forced ranking to determine the appropriate termination. Rather, Storti claims that, in light of her experience compared to Swoope's, choosing Swoope over Storti must lead to an inference of discrimination. This evidence will not surmount plaintiff's burden.

**(E) Conclusion**

Looking at all of the evidence in a light most favorable to the plaintiff, and drawing all reasonable inferences in her favor, she has not surmounted her evidentiary burden. The primary problem with the plaintiff's evidence is that it challenges First Fidelity's employment decision per se, rather than making any real attempt to show that the defendant's proffered reason was some type of post hoc fabrication or pretext for age discrimination.

A discrimination analysis must not evaluate individual incidents in a vacuum but should "concentrate . . . on the overall scenario." Bray, 110 F.3d at 991 (quoting Andrews v. City of Phila., 895 F.2d 1469, 1484 (3d Cir. 1990)). In light of the complete scenario presented to this court, including the defendant's proffered reason and the powerful, undisputed evidence supporting it, this court cannot find that a reasonable fact-finder could be persuaded that the defendant's proffered reason was a pretext for discrimination. Nor has plaintiff demonstrated evidence from which a reasonable fact-finder could infer that age was "more likely than not a motivating or determinative cause" of the defendant's decision. Fuentes, 130 F.3d at 764. As such, the defendant's

motion was granted.<sup>7</sup>

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William H. Yohn, Jr., J.

- (1) the September, 1994 performance evaluations of each employee in the Trust Accounting Services Section, the documents used to create the forced ranking

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<sup>7</sup> Due to the impending trial date, First Fidelity's Motion for Summary Judgment was granted on July 10, 1998, as soon as the court decided the issue but prior to the finalization of this memorandum.

list upon which the lay-offs were based, were done at different times for different employees over the course of the year; were done by four different supervisors who were not apprised that the evaluations would be used to create a forced ranking;

- (2) Storti's supervisor, Marsella, created the forced ranking list without the approval of the Human Resources Department and without any training from First Fidelity;<sup>8</sup>
- (3) When he created the forced ranking list, prior to First Fidelity's announcement of the impending layoff, Marsella intended to use it to determine the appropriate distribution for raises, not which employees would be laid-off;

Pl.'s Mem. of Law Opposing Motion for Summ. J. at 6-7. Additionally, the plaintiff claims that:

- (4) Storti was not grouped with the proper set of employees for purposes of the forced ranking list, thereby making the forced ranking list illegitimate.
- (5) Ms. Monteiro, the supervisor who conducted Storti's 1994 performance evaluation, did not intend for Storti to be ranked the lowest on the forced ranking list created by Marsella; that Monteiro did not play any role in the forced ranking and Ms. Monteiro did not recommend that Storti be fired;
- (6) Ms. Monteiro inappropriately relied on feedback from "Beth and "Stacey," employees who were more involved with Storti on a day-to-day basis, when conducting the performance evaluation.

PCounter statement at \_\_\_\_\_.

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<sup>8</sup> The plaintiff alternatively refers to this department as the Human Relations Department and the Human resources Department.