

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

NEIL R. HERNE : CIVIL ACTION
 :
 :
 v. :
 :
 :
 SHERWIN WILLIAMS COMPANY :
 STORES GROUP, EASTERN DIVISION :
 OFFICE : NO. 97-5360

MEMORANDUM AND ORDER

FULLAM, Sr.J. August , 1998

Plaintiff alleges that he was fired by the defendant because of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623 et seq. On July 5, 1995, the defendant placed plaintiff on indefinite suspension after he was charged with five felony counts and one misdemeanor count of insurance fraud. (Plaintiff eventually pled guilty to the one misdemeanor count on January 24, 1996.) On October 23, 1995, the defendant terminated plaintiff's employment because it could no longer keep his job open while the criminal investigation continued; plaintiff, as Senior Project Engineer, had been the only employee in the region handling environmental and occupational safety complaints and overseeing renovations of stores for the defendant, and those tasks needed to be performed in his absence.

Plaintiff testified, at his deposition, that due to impaired eyesight caused by diabetes, he was disabled and unable to work as of June 1995 (before the date of his suspension).

Plaintiff further stated that had he not been suspended by the defendant, he would have been unable to continue working because of his disability; and he does not expect to be able to work again in the near future.

The defendant's pending motion for summary judgment will be granted. The plaintiff is unable to make out a prima facie case of age discrimination; he cannot establish that he is qualified for the position he previously held. Because plaintiff was disabled before the date of his suspension and termination (the Social Security Administration found that plaintiff was totally disabled as of June 30, 1995) and is still unable to perform his job, there is no genuine issue of fact as to whether he is qualified to perform the job he previously held.

Even if plaintiff could make out a prima facie case of age discrimination, his claim would fail because the defendant has presented legitimate, non-discriminatory reasons for its decision to suspend the plaintiff and then terminate his employment. Plaintiff has not established that the defendant's proffered reasons for the firing were pretext for age discrimination.

An Order follows.

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ORDER

AND NOW, this day of August, 1998, IT IS ORDERED:

1. Defendant's motion for summary judgment is GRANTED.
2. Judgment is entered in favor of defendant and against plaintiff.

John P. Fullam, Sr.J.