

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

STANLEY JOSEPH,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
FIRST JUDICIAL DISTRICT OF	:	
PENNSYLVANIA and CITY OF	:	
PHILADELPHIA	:	
Defendants.	:	NO. 97-6703

MEMORANDUM

Reed, J.

February 1, 1999

Plaintiff Stanley Joseph (“Joseph”) initiated this lawsuit, claiming violations of the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. Ann. § 951 et seq. Presently before the Court is the motion of defendant First Judicial District for summary judgment (Document No. 18), and the responses thereto. Because this suit is premised on a violation of the ADEA, this Court has original jurisdiction pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367. For the reasons set forth below, the motion will be granted.

I. Background

The following facts are based on the evidence of record viewed in the light most favorable to plaintiff Stanley Joseph, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997). Joseph alleges that he was discriminated against because of his age when he was forced to resign from his position as court reporter due to disciplinary actions taken against him

by his supervisors in connection with his usage of sick leave. At the time of his resignation, Joseph was fifty-five years old.

Joseph was a court reporter for the Municipal Court of Philadelphia for twenty-nine years. In 1994, Joseph informed his supervisors of a degenerative disc problem in his back. Over the next three years, Joseph used a total of 33 weeks of sick leave: 11 weeks in 1994 (from April 20th to June 17th), 10 weeks in 1995 (from April 8th until June 12th), and 12 weeks in 1996 (February 7th to April 9th and again from April 17th to May 14th). (Complaint at ¶¶ 14-16; Joseph Dep., Exh. 1.) During all three years, Joseph provided notes from his treating physician.

In January of 1996, the Municipal Court hired a new Court Administrator, Richard Simpson (“Simpson”).¹ Simpson put into effect “Draconian sick-leave enforcement practices.” (Plaintiff’s Response to Motion For Summary Judgment of Defendant First Judicial District of Pennsylvania (“Plt. Mem.”) at 2). The defendant claims that Simpson met collectively with all the court reporters to discuss attendance and vacation schedules for the summer of 1996 because special rules would be in effect. (Simpson Dep. at 43-44). The court reporters agreed that because of short staffing and existing vacation requests, only one standby reporter would be available during the summer. This decision had implications for sick leave because the standby shift allows a court reporter to transcribe his or her notes. Thus, when a court reporter on the standby shift has to fill in for someone out sick, the court reporter is pressed for time to transcribe his or her notes. As a result, Simpson put the reporters on notice that every sick day would be monitored. (Simpson Dep. at 83-84; Def. Exh. C). The court reporters voted unanimously for

¹Simpson became the Municipal Court Administrator due to the untimely death of his predecessor, Kevin Murray. Joseph Dep. at 90; Simpson Dep. at 12.

the plan. (Exh. C). Joseph does not recall this meeting. (Joseph Dep. at 87-88).

On or about May 3, 1996, Simpson met with Joseph and conveyed that he was concerned about Joseph's usage of sick leave and that a pattern had developed over the last few years. Simpson told Joseph that he would be monitoring Joseph's use of sick leave carefully in the future. Also at the meeting, Joseph requested five weeks of vacation, to be taken together, which Simpson denied citing present staffing problems. (Def. Exh. A).

Joseph was on a scheduled vacation for three weeks from June 3, 1996 through June 21, 1996. Soon after his return from vacation, on July 8, 1996, Joseph informed the court administration by letter that he intended to retire effective September 27, 1996. (Def. Exh. A). Joseph stated that after the meeting on May 3, 1996, with Simpson he "was able to see the writing on the wall" and knew that Simpson would be difficult to deal with regarding absences from work. (Joseph Dep. at 106).

In August, Joseph was absent from work on two occasions. The first instance was from August 8, 1996 to August 9, 1996, and the second was from the 27th of August through the 29th. After the second occurrence, Simpson suspended Joseph for four days.² Simpson cited Joseph's continued use of sick time and undependability as a court reporter, especially during the high vacation period, as reasons for the suspension. (Def. Exh. A, attachment 7). Simpson also told Joseph that "if you can't do the job, you should leave" and that another use of sick time would result in the loss of pension benefits. When Joseph returned from his suspension on September

²In his memorandum of law, Joseph inexplicably asserts that he "took off the days August 19 through September 1. . . . Immediately after his return--on August 30--Mr. Simpson summoned Mr. Joseph to a meeting and told him he was suspended" (Plt. Mem. at 3). Plaintiff's brief presents other chronological conundrums as well.

9, 1996, Simpson threatened to suspend Joseph again with the intent to dismiss if Joseph missed another day of work due to illness. (Joseph Dep. at 102-04). Instead of jeopardizing the start of his retirement benefits as a result of being suspended on the effective date of his retirement, Joseph felt compelled to retire immediately, effective September 9, 1996. Joseph claims he was forced to retire because of his age.

Joseph was replaced by a woman in her late twenties. Joseph's replacement was hired from the "per diem" pool of court reporters that were employed on a daily basis to fill in when there was a shortage to cover assignments. (Simpson Dep. at 74-75). At the time Joseph retired, the pool consisted of four court reporters: Aida Wallach, age 70; Ron Brown, approximately age 55; Mary Swallow, age 39; and Geraldine Fitzgerald, age 28. All four were offered the position. Wallach and Brown did not want to work full time. (Simpson Dep. at 74-76, 87-88). Ms. Fitzgerald was hired to replace Joseph and Ms. Swallow was eventually hired to replace another court reporter. Simpson testified that the court hires for any full time position from the experienced per diem pool. (*Id.* at 74-75). Joseph acknowledged that the court hired from the pool "ninety percent of the time." (Joseph Dep. at 81).

II. Legal Standard

Defendants have moved pursuant to Federal Rule of Civil Procedure 56 for summary judgment. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the

nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. Discussion

Joseph's claims under the ADEA and PHRA are pretext claims which are analyzed under the burden shifting analysis originally set forth in McDonnell Douglas. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Simpson v. Kay Jewelers, Division of Sterling, Inc., 142 F.3d 639, 643-44 (3d Cir. 1998). Under the McDonnell Douglas line of cases, as applied to the ADEA and the analogous provision of the PHRA, there are three steps in the analysis of pretext discrimination cases.³ The burden falls first on the plaintiff to establish a prima facie case of discrimination. This is done if the plaintiff shows that: (1) he is over 40 years old, (2) he is qualified for the position in question, (3) he suffered from an adverse employment decision, and (4) his replacement was sufficiently younger to permit an inference of age discrimination. See Simpson, 142 F.3d at 644 n.5; Lawrence v. National Westminster Bank N.J., 98 F.3d 61, 65-66 (3d Cir. 1996) (citing Sempier, 45 F.3d at 728 (3d Cir. 1995)). Once the plaintiff establishes a

³The three step McDonnell Douglas analysis, as modified by Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1973) and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), has been applied by the Court of Appeals for the Third Circuit to ADEA pretext claims. See, e.g., Simpson, 142 F.3d at 643; Sempier v Johnson & Higgins, 45 F.3d 724, 728 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). It has similarly been applied to PHRA cases. Simpson, 142 F.3d at 643 n.4 (citing Bernard v. Bethenergy Mines, Inc., 837 F. Supp. 714, 715 (W.D. Pa. 1993), aff'd, 31 F.3d 1170 (3d Cir. 1994) and Fairfield Township Volunteer Fire Co. v. Commonwealth, 609 A.2d 804, 805 (Pa. 1992)).

prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. Sempier, 45 F.3d at 728. Should the defendant successfully carry its burden, the plaintiff then has the burden of proving, by a preponderance of the evidence, that “the employer's stated reasons were not its true reasons but were a pretext for discrimination.” Id. at 728. A plaintiff may defeat a motion for summary judgment based on the defendant's proffered nondiscriminatory reason by either showing evidence, directly or circumstantially, that (1) discredits the proffered reasons for termination, or (2) discrimination was more likely than not a motivating or determinative cause of the adverse action. Id. at 731. The plaintiff cannot simply show that the decision was wrong or mistaken, because the factual dispute at issue is not whether the defendant made a correct decision in terminating plaintiff but whether unlawful discrimination motivated that decision. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). A plaintiff need not present evidence beyond his or her prima facie but must at least be able to point to “weaknesses, implausibilities, inconsistencies, incoherences, or contradictions” that could support an inference that defendant did not act for its stated reasons. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993).

Defendants concede that Joseph is over forty years of age, was a qualified court reporter and that Joseph was replaced by a younger employee. (Defendant First Judicial District’s Memorandum of Law In Support of Motion for Summary Judgment (“Def. Mem.”) at 7). Defendant's argue, however, that Joseph has failed to make a prima facie showing because he did not suffer an adverse employment decision. Defendant's argue that Joseph was not fired but rather that he retired of his own volition on a date of his own choosing. Joseph argues, however, that he constructively discharged because he was forced to retire and, therefore, he has met his

burden of establishing a prima facie case of age discrimination.

The Court need not reach this issue because even assuming that Joseph has made out a prima facie case of age discrimination, summary judgment is appropriate because he has failed to carry his ultimate burden. Simply stated, Joseph has failed to point to "weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered reasons [such] that a reasonable factfinder could rationally find them 'unworthy of credence'" and hence, infer that the proffered nondiscriminatory reason "did not actually motivate" the employer's action. Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995) (quoting Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992)).

Assuming Joseph has established a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employer's action. The burden upon the defendant is minimal. Wilsbach v. Filenes Basement, Inc., 1997 WL 805164 at *6 (E.D. Pa. Dec. 31, 1997) (citing Fuentes, 32 F.3d at 763). Here, the defendant maintains that Joseph was disciplined because of sick leave abuse. I conclude that defendant has adequately satisfied its relatively light burden of articulating a legitimate, nondiscriminatory reason for its employment decision. The burden thus returns to Joseph to show that the defendant's proffered reason is pretextual.

To defeat a motion for summary judgment, Joseph must "point to some evidence, direct or circumstantial, 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 motivating or determinative cause of the employer's action." Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc) (quoting Fuentes, 32

F.3d at 764), cert. denied, 117 S. Ct. 2532 (1997). In evaluating the proffered reasons of defendant for terminating plaintiff, it is not the role of court to determine whether the employer was "wise, shrewd, prudent, or competent." Fuentes, 32 F.3d at 765. Rather, plaintiff must point the court to "such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, . . . and hence infer that the employer did not act for the asserted non-discriminatory reasons." Id. (quotations and internal citations omitted).

Joseph has failed to "cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible." Sheridan 100 F.3d at 1072. It is an essential job requirement for court reporters to be present in court. Joseph had a remarkably poor attendance record. The record also shows that Simpson believed Joseph to be a sick leave abuser. (Simpson Dep. at 65). Indeed, when Joseph was absent in August, Simpson sent an investigator to his home to confirm his whereabouts. (Id. at 19, 63). The record shows that Simpson was dissatisfied with Joseph's sick leave usage and that Simpson did not believe that Joseph's back problems caused him to miss as much time from work as he did. (Id. at 65-70). Given the short staffing and special provisions that had been agreed to during the summer of 1996, Simpson testified that he felt that Joseph's use of an additional five days of sick days in August warranted suspension. Even if Simpson's actions were harsh, there is no evidence that they were not based upon a perceived abuse of sick leave.

"To show that discrimination was more likely than not a cause for the employer's action, the plaintiff must point to evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that age was a motivating or determinative factor in

the employment decision.” Simpson, 142 F.3d at 644-45 (citing Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1111 (3d Cir. 1997)). Joseph has presented no evidence either direct or from which a reasonable fact finder could infer circumstantially that age was a factor in Simpson's employment actions. Joseph was first admonished and then disciplined because of his sick leave usage. At no time did Simpson make any remarks regarding Joseph's age. (Joseph Dep. at 73-74). Nor does the record show that Simpson’s “Draconian sick leave enforcement practices” were implemented in an agist manner.⁴ A review of other Municipal Court employees’ performance evaluations demonstrates that the concerns of Simpson over sick leave abuse were not limited to Joseph and were not limited to older employees.⁵ Not only were other employees

⁴As evidence of age hostility, plaintiff points to the fate of another older court reporter, age 52, who was demoted from court reporter to clerical assistant and eventually dismissed. That assertion alone, however, does not establish the existence of discrimination base upon age. Neither does the bare assertion that the court reporter had filed an internal appeal with the Human Resources Division. In a letter dated April 24, 1996, the court reporter, after consulting with an attorney, withdrew his appeal. In so doing, the employee stated he understood that his “termination as a Court Reporter was justified based upon my insufficient production of notes of testimony. . . . and I understand that I will be taking a voluntary reduction in pay to the position of Clerical Assistant I also understand that I will have to perform my duties as a Clerical Assistant or be subject to termination based upon non performance of my duties as a Clerical Assistant only” He was later discharged for incompetence. Nothing in the record gives any hint that age was ever a factor in the court reporter's demotion or eventual dismissal.

⁵Simpson points to the treatment of a Anthony Giordano, a court reporter born in 1966, as evidence that he was really being discriminated against because of his age. Giordano had 18 days of sick leave and his discipline consisted of a "unsatisfactory" notation on his performance report. However, Simpson testified that any disparity was due to difference in the perceived sick leave abuse. Giordano's history of sick leave was sporadic, and had since been corrected. Simpson testified that he viewed this differently than a court reporter who took eight of nine weeks in a row for three years, and who continued to lose time. (Simpson Dep. at 44-49). Simpson also stated that the notes from Joseph's physician were too infrequent and not satisfactory in that they did not contain enough information as to treatment and prognosis. (Simpson Dep. at 66-77, Exh. 7).

More importantly, however, is that Joseph's comparison to Giordano is misplaced. A plaintiff's burden is to demonstrate that similarly situated persons were treated differently. Simpson v. Kay Jewelers, 142 F.3d 639, 645 (3d Cir. 1998) (plaintiff is prohibited from choosing a comparator). “[T]he mere favorable treatment of one younger [person] may not be sufficient to infer age discrimination.” Id.

The record shows that sick leave usage was an issue in the performance evaluations of a number of other Municipal Court employees. (Def. Mem., Exhs. D & E). The job descriptions on the evaluations submitted by the defendant ranged from court administrative officer to typist and trainee. The evaluations appear to have been completed by each employee’s supervisor. Of eleven performance evaluations, all but one had additional hand written notes from Simpson regarding sick leave usage. (Id.). The employees ranged in age, the oldest being born on 3/25 and the youngest being born on 12/72. (Id.; Def. Mem. at 14). For instance, in one evaluation, a court administrator was praised for all her hard work but nevertheless received an unsatisfactory rating with respect to her

similarly situated to Joseph warned about sick leave abuse, but five others were suspended and one, born in 1972, was suspended with the intent to dismiss. (Def. Exh. E).

Joseph claims that Simpson's comment to him, "if you can't do the job, you should leave," is evidence that Simpson was trying to remove older employees and hire younger employees. Joseph testified that he understood the comment to mean "you're getting old--get lost." (Joseph Dep. at 73-74). Although it appears from the record that the comment was directed at Joseph's ability to cope with his physical limitations and the demands of the job, even if Simpson's comment could be construed to express an age animus, one such ambiguous remark is not sufficient to meet Joseph's burden of proving pretext. Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 683-84 (D.N.J. 1996); see also Gagne v. Northwestern Nat'l Ins., Co., 881 F.2d 309-16 (6th Cir. 1989) (finding that a "single, isolated discriminatory comment" by a supervisor who said he "needed younger blood" was insufficient to withstand summary judgment).

Moreover, the fact that a younger person was hired to replace Joseph, while helpful in establishing a prima facie case of age discrimination, is not dispositive of whether an employer

sick time because she was "over the acceptable average of the court mandated nine (9) days." (Id., evaluation dated February 25, 1998). Simpson even added a note of warning to another court administrator's use of sick leave, even though she only used nine days. (Id., evaluation dated August 1, 1997). In another instance, where a court administrator trainee had only taken five sick days, Simpson added a warning about sick leave usage because the sick days were attached to weekends. (Id.). In yet another instance, where a tipstaff employee took 14 days of sick leave, all medically documented, Simpson added the following note: "This employee is averaging 10 days a year of sick leave. Two attached to holidays and all but two attached to weekends. Frank . . . should monitor for abuse pattern." (Id., evaluation dated August 29, 1996). On the evaluation of another tipstaff employee who received an excellent evaluation but had 10 sick days, Simpson commented: "Sick time is still over the average." (Id., evaluation dated August 28, 1997). On the evaluation of an assistant clerk, who had an excellent evaluation but had taken 16 sick days, Simpson added: "All but two of the sicknesses are attached to weekends. This can be a pattern associated with abuse. . . . Let this be a warning to you." (Id., evaluation dated June 30, 1996). In a final example, a clerk typist had the following comment in capitals: "you MUST MAKE IMPROVEMENT IN YOUR SICK TIME USAGE. In 1996 you used a total of twelve sick days, you are suspect of abuse of sick time. . . . You have to [sic] many Dr.'s appointments on court time. You may be charged vacation time . . ." (Id., evaluation dated February 12, 1997). Simpson added in a hand written note: "You are in danger of losing your job if this continues." (Id.).

discriminated based upon age. Here, job offers were made to all the court reporters in the “per diem” pool regardless of age. Indeed, the job was offered to court reporters who were older than Joseph. Furthermore, Joseph’s argument that being replace by someone younger is indicative of age discrimination because a younger person would earn a much lower salary and benefits package is without merit in the factual context of this case. The difference in pay from the most senior to the most junior court reporter is minimal. A court reporter's compensation consists of two parts, salary and transcription fees. The base salary among court reporters ranges from approximately \$42,300 to \$48,500 annually. The transcription fees could comprise nearly as much or more than the base salary. The difference in base salary is the only distinction in compensation among all the court reporters. After they are employed by the court for four years, all court reporters make the maximum base salary.⁶ The transcription work is evenly distributed among the court reporters regardless of seniority and can constitute the larger portion of their earnings. The benefit package is the same for all court reporters. This structure offers little savings when a more senior court reporter is replaced by a newer employee.

In sum, the circumstantial evidence presented by Joseph can be summarized as follows: (1) he was the oldest court reporter; (2) he had a back condition of which his employer was aware; (3) his back condition required him to take blocks of time which were, before Simpson, not questioned; (4) once Simpson became Court Administrator he told Joseph that further use of sick time would result in discipline and could result in the loss of pension rights and benefits; (5) Joseph felt compelled to retire so that he would not put his pension benefits in jeopardy should

⁶The differences in the salaries listed for the court reporters are accounted for by percentage cost of living adjustments over the years. (See, Plt. Mem., appendix).

he have to take sick time and as a result be suspended at the time his retirement became effective; (6) he was told by Simpson that if he could not do the job, he should leave; and (7) a younger court reporter was hired in his place. (Plt. Mem. at 7). Joseph admits that for the most part "such evidence is ordinarily not conclusive" but that Simpson's comment and the fact that a younger employee was hired in Joseph's place demonstrates that Simpson's true motive was to fire older employees and hire younger employees. (Id.)

Even with the benefit of all reasonable inferences, the evidence presented by Joseph is insufficient for a reasonable jury to return a verdict in his favor. Joseph has not presented or pointed to any evidence sufficient to infer that defendants' proffered explanations were a pretext for age discrimination. While the response of Simpson to Joseph's use of sick leave may seem severe, there is no evidence that Simpson's actions were motivated by age.

IV. Conclusion

Based upon the foregoing analysis, the motion will be granted.⁷ An appropriate Order follows.

⁷Although the City of Philadelphia did not join in the motion for summary judgment, the Court finds no reason why the City of Philadelphia should not be included in the judgment. Both the City of Philadelphia and the First Judicial District are being "sued on the basis of acts committed by its agents, servants and employees." (Complaint at ¶¶ 3, 4). Thus, the liability of both defendants is premised upon whether Simpson discriminated against Joseph because of his age. Insofar as Joseph has not presented or pointed to any evidence from which a reasonable jury could find that Simpson's proffered reasons were a pretext for age discrimination, summary judgment is appropriate for the claims against the City of Philadelphia as well.

**IN THE UNITED STATES DISTRICT COURT
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STANLEY JOSEPH,	:	CIVIL ACTION
Plaintiff,	:	
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v.	:	
	:	
FIRST JUDICIAL DISTRICT OF	:	
PENNSYLVANIA and CITY OF	:	
PHILADELPHIA	:	
Defendants.	:	NO. 97-6703

ORDER

AND NOW this 1st day of February, 1999, upon consideration of the motion of defendant First Judicial District for summary judgment (Document No. 18), and the responses thereto, as well as the supporting memoranda, pleadings, exhibits and affidavits submitted by the parties, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion is **GRANTED** and summary judgment is hereby entered in favor of the defendants First Judicial District and the City of Philadelphia.

This is a final order.

LOWELL A. REED, JR., J.