

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

MARY F. KESSLER,

Plaintiff,

v.

McKESSON DRUG CORPORATION,

Defendant.

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CIVIL ACTION NO. 98-4903

MEMORANDUM

R.F. KELLY, J.

SEPTEMBER 3, 1999

Before this Court is Defendant McKesson Drug Corporation's Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Mary Kessler filed this action alleging that Defendant's decision not to employ her in a remaining receptionist position, after the corporation decided to consolidate its customer service relation functions, was based on age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 (1988). For the following reasons, Defendant's Motion will be granted.

FACTUAL BACKGROUND

Plaintiff Mary Kessler began her employment with McKesson Corporation in 1986. Ms. Kessler served as a receptionist in the customer service department for McKesson in

Philadelphia, Pennsylvania and Delran, New Jersey.¹

In February, 1996, McKesson decided to consolidate its customer service relation functions to a central location in Westlake, Texas. As a result of the consolidation process, the positions at the Delran, New Jersey Distribution Center, where Plaintiff was employed, were to be eliminated, with the exception of three positions -- a receptionist, an ARCOS (narcotics) clerk, and a customer service representative. Plaintiff and the other customer service employees were permitted to apply for any or all of the three positions.

Plaintiff applied for the receptionist position only. After interviews were held, the receptionist position was given to a 20-year-old female named Denisha Petty. Plaintiff was 64 years old at the time.

According to McKesson Intra Company memoranda, Ms. Petty was recommended by McKesson's interviewers, Jay Lowy and Arnie Entis, to be the receptionist based on her excellent past performance evaluations, her ability to perform the new job functions and duties, and her past receptionist experience. See Pl.'s Ex. F to Offerman Aff. (Def.'s Ex. C). On the other hand, the reasons given by McKesson's interviewers for not recommending

¹ Prior to her employment with McKesson, Plaintiff was a receptionist at West Wholesale, a company that was taken over by McKesson. Kessler worked as a customer service representative for West and another drug company before working as a receptionist.

Plaintiff for the newly-created receptionist job was that, despite her excellent receptionist skills, Plaintiff did not show the ability to cover the other positions.² Id.

Subsequently, Plaintiff filed the instant ADEA action which challenges McKesson's decision not to give Plaintiff the receptionist position. In doing so, Plaintiff contends that McKesson deemed her unqualified for the position, despite her prior experience in customer service and narcotics ordering at employers other than McKesson and her performance evaluations given during her employment at McKesson.

STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty

² "Due to the decrease in staff from eight employees to three, [Kim Offerman, McKesson's Distribution Center Manager in Delran, New Jersey,] determined that it was critical to have each position be able to act as a "back up" for the other positions during break times, vacation times and also times of personal illness." Offerman Aff. at ¶ 13 (Ex. C to Def.'s S.J. Motion).

Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. "A dispute regarding a material fact is 'genuine' if the evidence is such that 'a reasonable jury could return a verdict for the non-moving party.'" Armbruster v. Erie Civic Center Auth., 937 F. Supp. 484, 488 (W.D. Pa. 1995), aff'd, 100 F.3d 946 (3d Cir. 1996).

In ADEA cases, the plaintiff first must establish a prima facie case by showing that (1) she is over 40, (2) she is qualified for the position in question, (3) she suffered an adverse employment decision, and (4) she was replaced by a sufficiently younger person to create an inference of age discrimination. Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). By doing so, the plaintiff creates a presumption of age discrimination that the defendant must rebut by stating a legitimate nondiscriminatory reason for the adverse employment decision. Id. The plaintiff then has the opportunity to demonstrate, through direct or

circumstantial evidence, that the employer's stated reasons were not its true reasons but were a pretext for discrimination. Id.

Thus, to survive a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie showing of discrimination must point to some evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence. Id. On the other hand, an ADEA defendant may prevail on a summary judgment motion by showing that the plaintiff can raise no genuine issue of fact as to one or more elements of plaintiff's prima facie case, or by introducing evidence of nondiscriminatory animus and showing that plaintiff can raise no genuine issue of fact as to whether the proffered reason for the employment action is a pretext for discrimination. Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988).

DISCUSSION

In this case the parties' dispute centers on whether Plaintiff has met her burden of showing that McKesson's proffered reasons for not hiring Plaintiff for the receptionist position were pretextual. Here, McKesson has articulated a non-discriminatory reason for not selecting Plaintiff for the receptionist position -- that Plaintiff, while qualified on the switchboard, did not possess any of the skills needed for the primary responsibility of backing up the customer service and

ARCOS clerk positions. Plaintiff argues that Defendant's stated reason for choosing Denisha Petty over her is belied by the fact that Ms. Petty left for another position after approximately one year and was replaced by Dorothy Erb, who had no experience in ARCOS, no experience in customer service, and no experience as a receptionist except as a back-up to Plaintiff. Furthermore, Plaintiff points out that Ms. Erb was never interviewed for the position to ensure that she could perform the job, nor was she asked how much she knew about ARCOS. Pl.'s Brief at 6.

In response, McKesson convincingly argues that "[t]here is no comparison between the procedures implemented during the 1996 consolidation of customer service and the filling of the receptionist position that occurred in 1997." McKesson's Reply at 3. Id. Indeed, at the time McKesson was consolidating its customer service function there was no issue of providing training for any customer service employee affected by the consolidation because fully trained qualified individuals, whose positions were also being eliminated, already existed for these positions. Id. at 4. Thus, McKesson correctly contends that different considerations prevailed in 1996 when a reduction in force was occurring and no training was necessary as contrasted by events in 1997 when a vacancy occurred which required the

training of someone -- in this case Ms. Erb.³

In Kapossy v. McGraw-Hill, Inc., 921 F. Supp. 234 (D.N.J. 1996), the plaintiff brought an action against his former employer alleging, among other claims, age discrimination in violation of the New Jersey Law Against Discrimination. The plaintiff in that case called into question two distinct job actions, the dismissal from his job and the defendant's failure to hire him for another position. As in the instant action, the plaintiff in Kapossy testified at his deposition that although he was not qualified for the job given to a coworker, this resulted from age discrimination practiced by McGraw-Hill. According to the plaintiff, McGraw-Hill provided preferential training for its younger employees, specifically training provided to the coworker who was placed in the newly-created position immediately prior to the decision to eliminate plaintiff's job. And like the allegations made in the instant action, Kapossy argued that had McGraw-Hill given him training, he would have been qualified for an available position. The court, however, found that Kapossy failed to make out a prima facie case, and granted summary judgment to McGraw-Hill on this claim. The court based its finding on Kapossy's own admissions in his deposition testimony, his counsel's concessions at oral argument that discovery had

³ Ms. Petty bid for and moved to an open position elsewhere in the Delran facility leaving a vacancy in the receptionist position which Plaintiff had applied for.

revealed no significant evidence of preferential training given to younger employees, and the uncontradicted testimony presented by McGraw-Hill documenting the training which was available to Kapossy. 921 F. Supp. at 242-43. As indicated below, the record in this case likewise does not support Plaintiff Kessler's allegations.

Here, Plaintiff contends that McKesson's determination at the interview stage that Plaintiff "does not show ability to learn other positions," despite the fact that Kessler had prior experience in customer service and narcotics, would allow a jury to infer that the evaluation was discriminatory.⁴ See Lowy evaluation of interviews (Ex. E to Pl.'s Resp. to Def.'s S.J. Motion). Plaintiff adds that such an evaluation "flies in the face of Kessler's prior evaluations which indicate a willingness to do anything asked of her" Pl.'s Brief at 7.

Defendant does not dispute that Plaintiff was a qualified receptionist. Def.'s Reply at 1. However, Defendant contends that Plaintiff did not possess any qualifications for either the customer service position or the ARCOS clerk position. Def.'s Reply at 1-2 (citing Kessler Dep., dated 4/30/99 (Ex. A to

⁴ Plaintiff's allegations that she had prior experience in customer service and narcotics are belied by her own deposition testimony which indicates that while she had some experience in these areas, her knowledge was not current with respect to what the newly-created receptionist responsibilities would require. Kessler Dep., dated 4/30/99, at 114-15.

Def.'s Motion), at 26-30, 105-08, 114-15). In contrast, the employee selected for the new receptionist position, Ms. Petty, already had experience working in customer service and handling ARCOS when she was a customer service representative before the consolidation. In this regard, Denisha Petty testified as follows:

Q. It sounds to me like when you were in it, the customer service and the ARCOS were sort of combined, is that correct?

A. In '95 when I first got the position in the customer service department, the customer service and narcotics were all in one. It was one job. Six of us did it. When they broke it up, they separated the two positions.

MS. HARTMAN: When was that?

THE WITNESS: When they centralized and they broke it down into three positions, customer service, narcotics, and receptionist.

BY MR. WILEY:

Q. When you would fill in for the ARCOS, what would you do? Would it be the function you had done when you were handling ARCOS before when you were the customer service rep?

A. Right. It was the same function, except now, instead of six people doing it, it was just one person doing it.

Q. So what they did is separated it so one person is doing the non-ARCOS and one person is doing the ARCOS; is that right?

A. By "non-ARCOS," if you mean customer service --

Q. Customer service function without ARCOS.

A. Right.

Q. And then the ARCOS person would be doing only ARCOS?

A. That is correct.

Q. And the function, correct me if I'm wrong, is essentially a function that you did when you were at customer service handling the ARCOS aspect of the customer service?

A. That is correct.

Petty Dep., dated 5/28/99 (Pl.'s Ex. F), at 39-40.

Moreover, the deposition testimony of Plaintiff confirms that she can point to no evidence indicative of age discrimination in McKesson's decision. Rather, Plaintiff acknowledges that Ms. Petty had the skills required for the receptionist job:

Q. I noticed that he complemented you on your handling of incoming calls and the sorting of mail. Is that correct?

A. Yes.

Q. Then he says that the job required current knowledge of customer service in Arcos. Is that right?

A. Yes.

Q. To your knowledge, was that true? Is that what the new job required?

A. Yes, it did.

Q. I believe that was also on the job posting. Wasn't it?

A. Yes.

Q. I believe your testimony was that, while you didn't have the current knowledge, it was something that you could have learned?

A. That's right.

Q. Is that correct?

A. Because I had past knowledge of it.

Q. To your knowledge, did Ms. Petty have current knowledge of the customer service and Arcos functions?

A. Yes, because that's where she was, customer service.

Q. What about the Arcos function?

A. I guess she did that --

Kessler Dep., dated 4/30/99, at 114-15.

In a very similar case, Tozzi v. Union Railroad Co., 722 F. Supp. 1236 (W.D. Pa. 1989), a railroad employee brought an action against the railroad company alleging that the railroad's proffered reason for its decision to retain a coworker rather than the plaintiff in a job created by the consolidation of the plaintiff's and the coworker's positions was a pretext for age discrimination against the plaintiff. First, the court in Tozzi determined that the plaintiff had established a prima facie case of age discrimination under the ADEA. The court based its determination on the plaintiff's allegation that a coworker was offered the consolidated position that the plaintiff was qualified for, that the coworker was six years younger than

employee, and that the plaintiff was eligible for a 70/80 retirement plan whereas coworker was not. However, after the defendant established that the coworker possessed certain job skills which made him more qualified than the plaintiff, the court found that the plaintiff was unable to present any substantial evidence which would raise a genuine issue that age played a role in his treatment. 722 F. Supp. at 1242. In this regard, the court stated: "Although he has attempted to impugn defendant's business reasoning, at most he has raised only an issue of whether his supervisors were mistaken in their appraisal of his skills." Id. The same can be said for the case at hand.

Similarly, in Armbruster, a former managing director of a city civic center authority brought an action against the authority alleging that his termination violated the ADEA. In that case, the issue before the court was whether the plaintiff produced sufficient evidence to rebut the defendant's proffered nondiscriminatory reasons for the plaintiff's discharge such that a reasonable jury could find them pretextual. 937 F. Supp. at 490. After considering the plaintiff's challenge to the defendant's three proffered reasons for terminating the plaintiff, the court granted the defendant's motion for summary judgment, concluding that the plaintiff did not meet his burden under Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994), of submitting evidence which:

(1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Armbruster, 937 F. Supp. at 495 (citing Fuentes, 32 F.3d at 762).

Like in Tozzi and Armbruster, Plaintiff has not sufficiently challenged the proffered reasons for McKesson's employment decision. When asked at her deposition to explain why she thought age played a role in McKesson's decision to hire Ms. Petty for the new receptionist position, Plaintiff admitted that she was guessing that age was the reason for Defendant's decision:

Q. Now in Deposition Exhibit 18, your third paragraph, you make a reference to your age. "I believe it was not given to me because of my age." Do you see that there on Deposition Exhibit 18?

A. Yes.

Q. But you did not include that on Deposition Exhibit 13.

A. I don't know why not, but maybe I felt that because of all this, maybe it was my age that they were saying about because I was 65 or almost.

Q. You were guessing at that?

A. Yes.

Q. Is that what led you to believe that it was because of your age, you were just guessing, well, maybe it's because of my

age?

A. Yes.

Q. Nothing else led you to that conclusion?

A. They didn't give me a chance to learn. Maybe they thought I was too old.

Q. Did anybody ever tell you that?

A. No, but they didn't tell me I wasn't. They didn't say, would you like to learn the computer? Would you like to try and do some of this work? They didn't say that.

Kessler Dep. at 107-08.

Thus, a review of the summary judgment record in this case shows that Plaintiff's is merely advocating age as the reason for McKesson's decision to choose Ms. Petty rather than herself for the receptionist position. Indeed, in addition to Plaintiff admitting in her deposition that she was merely guessing that McKesson's employment decision was based on age, Plaintiff testified that she was not aware of any age-based comments, policies, or programs at McKesson. Kessler Dep. at 13-20.

Finally, Plaintiff contends that, at the very least, Plaintiff has presented a mixed motive case which shifts the burden to Defendant to prove that the same employment decision would have been made even if age were not a factor. In doing so, Plaintiff presupposes that she has met her initial burden of

showing that age discrimination played a motivating part in McKesson's employment decision. However, this Court finds that Plaintiff has simply failed to produce any direct evidence of such discrimination.⁵ See Kapossy, 921 F. Supp. at 240 ("Although Kapossy begins his brief in opposition to defendant's motion by arguing that his is a 'mixed motive' case and that he should benefit from the Price Waterhouse allocation of burdens, he has simply produced no 'direct evidence' of discrimination.").

Based on the above, this Court will enter an order granting Defendant's Motion for Summary Judgment.

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

_____	:	
MARY F. KESSLER,	:	
	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO. 98-4903
	:	
McKESSON DRUG CORPORATION,	:	
	:	
Defendant.	:	
_____	:	

ORDER

AND NOW, this 3rd day of September, 1999, upon

⁵ It is worth noting that two of the three employees selected to fill the positions that remained at McKesson were in the same protected classification as the Plaintiff. See Def.'s S.J. Brief at 16. More specifically, Ms. Helene Chermak (age 57) was chosen for the ARCOS clerk opening and Ms. Deborah Niebolowicz (age 40) was selected for the customer service representative position. See Def.'s Reply at 3.

consideration of Defendant McKesson Corporation's Motion for Summary Judgment, and all responses thereto, it is hereby ORDERED that Defendant's Motion is GRANTED.

BY THE COURT:

ROBERT F. KELLY, J.