

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

JAMES MCCABE,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
VOEGELE MECHANICAL, INC.,	:	No. 02-7938
Defendant.	:	

MEMORANDUM AND ORDER

SCHILLER, J.

July 17, 2003

Plaintiff James McCabe commenced this action against his former employer, Defendant Voegele Mechanical, Inc. (“Voegele”), for violations of the Age Discrimination Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*, in connection with the termination of Plaintiff’s employment. Plaintiff, a sixty-five year old plumber, was working on the construction of the Dockside Apartments complex in Philadelphia when he was laid off on December 19, 2001. Presently before the Court is Defendant’s motion for summary judgment. Because Plaintiff has failed to put forth evidence sufficient to create a genuine issue of material fact such that a jury could conclude that Defendant terminated Plaintiff because of his age, as set forth below, I grant Defendant’s motion.

I. FACTUAL BACKGROUND

Plumbing work began at the Dockside Apartments in August, 2001. Michael Murtha, the foreman on the site, did the first plumbing work with an apprentice. (Murtha Dep. at 24-25.) Mr. Murtha was intimately familiar with the building, as he himself had been a major participant in the design process. (*Id.* at 19.) In approximately September, 2001, Mr. Murtha brought three or four plumbers from Plaintiff’s union, Plumbers’ Local 690 (McCabe Dep. at 6), to work on the site

(Murtha Dep. at 25). He did this by contacting John Walton, the Road Superintendent at Voegele who made the decisions regarding the assignment of plumbers to particular job sites. (*Id.* at 16-17, 25.) The plumbers worked on floors well below the builders for safety reasons and moved upward through the building as they completed each floor. (*Id.* at 29.) By the time Mr. McCabe became employed at the site, more than twenty plumbers were employed there. (*Id.* at 41, McCabe Dep. at 38.) Mr. Murtha estimated that the plumbers' ages ranged from 20 to 59. (Murtha Dep. at 62.)

Mr. Murtha and Mr. Walton coordinated a continual movement of workers on and off the Dockside site based on the needs at that and other sites. (*Id.* at 35, 42-43.) In some cases, Mr. Murtha reassigned workers who had completed their job to another job on the same site or on a different Voegele site. (*Id.*) In other cases, he laid them off completely. (*Id.*) Mr. Murtha identified five union plumbers other than Mr. McCabe who were laid off from the Dockside job site. (*Id.* at 35-37, 49, 74.) One plumber was laid off the same day as Mr. McCabe, December 19, 2001, and the others were not laid off until after the Christmas holiday. (*Id.* at 45, 49.)

Mr. McCabe, who has been a plumber for forty-five years (McCabe Dep. at 6), began work with Voegele in March, 2001, ultimately working in eight different locations for the company (*Id.* at 21). The company moved Mr. McCabe among various construction projects based on its needs at particular sites. (*Id.* at 29-31.) Mr. Walton was in charge of assigning jobs to Voegele employees and specifically assigned Mr. McCabe to the Dockside site in late November. (*Id.* at 22, 35.) Mr. McCabe falsely stated on the Voegele job application that his age was 58, when, in fact, it was 65. (*Id.* at 11.) Mr. Murtha never learned Mr. McCabe's age. (Murtha Dep. at 61.) Mr. Murtha and Mr. McCabe did not know each other prior to Mr. McCabe's work on the Dockside site. (McCabe Dep. at 36.)

Some three weeks after Mr. McCabe began work at the Dockside site, Mr. Murtha determined that fewer plumbers would be needed once work reached the ninth floor where the number of residential units per floor began to decrease due to the building's tapered design.¹ (Murtha Dep. at 16, 45-46.) Mr. Murtha testified that this fact, combined with his observation that the plumbers had "caught up" to the carpenters working on the eighth floor of the building, convinced him that it would be appropriate to cut back on the number of plumbers. (*Id.* at 51-52.) Kevin Campbell, the foreman below Mr. Murtha who worked directly with Mr. McCabe, had reported to Mr. Murtha that, after two weeks on the job, Mr. McCabe was the slowest plumber at the job site. (*Id.* at 55-57, 73.) Sometime during the week of December 10, 2001, Mr. Murtha called Mr. Walton and told him that he needed to cut back on the number of plumbers and that he wished to lay off Mr. McCabe and Ray Dashill, an apprentice plumber. (*Id.* at 63, 69.) Mr. Murtha testified that the fact that he had learned that Mr. McCabe was the "least productive" was the primary reason he selected Mr. McCabe to be laid off. (*Id.* at 75.) Mr. Walton made the final decision to lay off both Mr. McCabe and Mr. Dashill. (*Id.* at 55-57.) Prior to December 15, 2001, Mr. Murtha was aware that a final decision had been made to lay off Mr. McCabe. (*Id.* at 66-67.)

On Saturday, December 15, Mr. McCabe attended, along with his wife, daughter and grandchildren, a company party given by Mr. Voegele and attended by an estimated three hundred individuals. (McCabe Dep. at 66.) Mr. McCabe testified that at the party he was heckled by some of the younger plumbers about when he was going to retire. (*Id.*) Mr. McCabe also testified that Mr. Voegele was in the "area" of the crowd from which these remarks came. (*Id.* at 69.) Mr. McCabe

¹ The eighth floor had twenty-two units, the ninth and tenth floors had twenty units, the eleventh and twelfth floors had eighteen units, the thirteenth and fourteenth floors had sixteen units and the fifteenth and sixteenth floors had fourteen units. (Murtha Dep. at 24.)

observed Mr. Voegele talking to his daughter during the course of the party. (*Id.* at 67.) Mr. McCabe had never met Mr. Voegele prior to the party and did not have occasion to talk to him during the party.² (*Id.* at 67-68.) Mr. McCabe is not aware of any conversation during the party in which his age was directly mentioned. (*Id.* at 68.)

On Wednesday, December 19, 2001, Mr. Murtha told Mr. McCabe that he had been laid off at Mr. Walton's direction. (*Id.* at 43-44, Murtha Dep. at 69.) There is no indication in the record that Mr. McCabe was specifically replaced on the job site. Mr. Murtha's records indicated that the average number of plumbers on the site declined from the end of December, 2001 through January, 2002. (Murtha Dep. at 84.)

In February 2002, Joe Mulholland, the Business Agent for Local 690, attempted to contact Mr. McCabe by phone and left a message with Mr. McCabe's wife asking that he return the call. (McCabe Dep. at 78-79.) Mr. McCabe never returned the call. (*Id.*) Mr. Mulholland had served as Mr. McCabe's point of contact in the past when he sought work through the union. (*Id.* at 13, 20.) From 1995 through 2001, Mr. McCabe had worked on a number of jobs through the union, none of which lasted longer than nine months. (*Id.* at 15-16.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In reviewing the record, "a court

² Mr. McCabe's testimony stands at odds with the allegations in his complaint that (a) he met Mr. Voegele for the first time at the Christmas party, and that Mr. Voegele observed Plaintiff and noted Plaintiff's age. (Pl.'s Compl. ¶ 10, 11.)

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 moving party bears the burden of showing that the record reveals no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Anderson*, 477 U.S. at 247. Once the moving party has met its burden, the non-moving party must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. *See* FED. R. CIV. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. "Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Williams v. Borough of W. Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

III. DISCUSSION

The pertinent section of the ADEA, 29 U.S.C. § 623(a), provides:

It shall be unlawful for an employer . . . (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a) (2003). When evaluating ADEA discrimination claims based on indirect evidence, as here, the Third Circuit applies a "slightly modified version" of the three-step burden shifting analysis developed by the United States Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), for use in Title VII discrimination cases. *Keller v. Orix Credit Alliance, Inc.*,

130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). Thus, Plaintiff must first establish a prima facie case using indirect evidence by showing that he (1) was a member of a protected class, i.e., that he was over age forty, (2) was qualified for the position at issue, (3) suffered an adverse employment action, and (4) was ultimately replaced, or the position was filled by, a younger person. *See id.* The evidence must be “sufficient to convince a reasonable factfinder to find all of the elements of [the] prima facie case.” *Id.* Once Plaintiff has established his prima facie case, the burden of production then shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the action. *See id.* If Defendant meets this burden, Plaintiff may survive summary judgment 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.* (citing *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir.1994)).

A. Plaintiff’s Prima Facie Case of Age Discrimination

Plaintiff meets his production burden as to the first three elements of the prima facie case articulated in *Keller*. At the time of the alleged discrimination, Plaintiff was sixty-five and thus clearly a member of a protected class. He has shown that he was qualified for the position as he had worked as a plumber for decades and had performed several jobs for Voegele during the nine months prior to his termination. Mr. McCabe also suffered an adverse employment action when he was laid off by Voegele on December 19, 2001.

Defendant contends, however, that Plaintiff has not shown that he was ultimately replaced, or the position was filled by, a younger person. Plaintiff contends that, because he was the oldest employee, his work was “obviously . . . taken over by younger journeyman.” (Pl.’s Mem of Law at

4.) Plaintiff has, in fact, shown that he was the oldest employee, although Mr. Murtha testified that he never knew Plaintiff's age and Plaintiff's application suggested he was the same age as the oldest of the plumbers at the Dockside site. The evidence in the record also suggests that twenty-plus plumbers remained working on the site after Plaintiff was laid off, although that number continued to decline in January, 2001.

The Third Circuit has "repeatedly emphasized that the requirements of the prima facie case are flexible, and in particular that 'the fourth element must be relaxed in certain circumstances, as when there is a reduction in force.'" *Pivrotto v. Innovative Sys., Inc.* 191 F.3d 344, 357 (3d Cir.1999) (quoting *Torre v. Casio, Inc.*, 42 F.3d 825, 831 (3d Cir.1994)); see also *Marzano v. Computer Science Corp.*, 91 F.3d 497, 503 (3d Cir.1996) (noting that, in a reduction-in-force case, "it is sufficient to show that [plaintiff] was discharged, while the employer retained someone outside the protected class") (internal quotation and brackets omitted); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.1983) ("This prima facie case is easily made out: a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class and that he was [removed] from a job for which he was qualified while others not in the protected class were treated more favorably").

Applying a relaxed standard, I find that Plaintiff has put forth evidence sufficient to show that he was discharged in connection with a reduction in force and that other similarly-situated employees under forty were not discharged and were thus treated more favorably. I therefore conclude that Plaintiff has met his burden to set forth a prima facie case of age discrimination.

B. Defendant's Non-Discriminatory Reason

Defendant has articulated a legitimate, non-discriminatory reason for Plaintiff's termination.

Defendant has put forth evidence sufficient to explain its general decision to reduce the number of plumbers on the Dockside project. Mr. Murtha's determination that fewer plumbers would be needed once they reached the ninth floor and the number of units per floor began to decrease seems perfectly plausible. Mr. Murtha's observation that the plumbers had "caught up" to the carpenters working on the eighth floor of building, although contested by Plaintiff, is supported by facts in evidence; the builders had finished only half the units on the eighth floor when the Plumbers – who had formerly worked on floors below the builders – began work there. As to the specific decision to select Plaintiff from among his coworkers for termination, Mr. Murtha, who made the selection, offered the sound and legitimate reason that he regarded Plaintiff as his slowest plumber based on reports from a foreman who worked with Plaintiff. *See Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 330 (3d Cir.1995) (finding that defendant had articulated legitimate non-discriminatory reason for plaintiff's termination when it showed problems with plaintiff's job-performance).

Once the defendant has articulated a legitimate, non-discriminatory reason, the plaintiff "must point to some evidence, direct or circumstantial, from which a reasonable fact finder could reasonably either: (1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Brewer*, 72 F.3d at 331 (citing *Fuentes*, 32 F.3d at 763-64). To do so, the plaintiff must demonstrate such "weaknesses, implausibilities, inconsistencies, incoherences, or contradictions" in the employer's reasons that a reasonable factfinder could find them unworthy of belief. *Id.* (citations omitted).

Plaintiff challenges Defendant's articulated reason for general reductions in force. Plaintiff disputes that plumbing work on the Dockside project was "caught up" based on his observation that

eleven (of twenty-two) units on the eighth floor were ready for plumbing work on the morning of December 19, 2001. This observation, however, does not undermine Mr. Murtha's explanation. First, Mr. Murtha oversaw a team of more than twenty plumbers, each of whom worked alone on individual units in the building. The presence of eleven units ready for plumbing work, therefore, does not negate Mr. Murtha's conclusion that the plumbers had "caught up" to the builders. Second, Mr. Murtha testified that, for safety reasons, the plumbers worked on floors below the builders. Thus, the fact that the plumbers had reached a floor that the builders had only half-completed strongly substantiates Mr. Murtha's use of the phrase "caught up" to describe the situation. Moreover, Plaintiff does not contest Defendant's analysis of the declining need for plumbers on the floors above. The credibility of Defendant's explanation is further bolstered by the fact that Defendant laid off other plumbers after Mr. McCabe and continued to reduce its staff of plumbers at the Dockside site through January. Plaintiff does not address the issue of his performance compared to other plumbers. *Cf. Brewer*, 72 F. 3d at 331-333 (overturning summary judgment for defendant where plaintiff showed he had received performance bonus three months prior to his termination). Thus, Plaintiff has failed to put forth evidence sufficient to allow the factfinder to disbelieve Defendant's articulated reason for its actions.

Plaintiff also contends that his age was the motivating factor behind Defendant's actions. In his Memorandum of Law, Plaintiff contends that he was warned in advance of his employment with Voegele that the company "was known for their age discrimination and that once a plumber reached the age of retirement, he was removed from the rolls of the employed for the company." (Pl.'s Mem. of Law at 1.) However, the record is devoid of evidence to support this statement and Plaintiff has identified no witnesses whose testimony might substantiate it. The fact that Plaintiff

might offer his own testimony as to what others told him about Voegele does not impact this analysis.³ Plaintiff also relies on hearsay evidence in his description of the heckling that occurred at the Voegele Christmas party. Plaintiff has offered no additional witnesses to testify as to what they heard or said at the party.

Other evidence put forth by Plaintiff would require virtually implausible speculation on the part of the jury for it to conclude that Plaintiff's age motivated Defendant. Even if Plaintiff's testimony about what he heard from the crowd at the December 15, 2001 party was admissible, the jury would have to infer that (a) Mr. Voegele heard these statements and (b) these statements contributed to the decision to terminate Mr. McCabe despite the absence of any testimony that Mr. Voegele was even involved in that decision. Plaintiff has also indicated that, at trial, his daughter, who is thirty-nine, would testify that she had a conversation with Mr. Voegele during the December 15 Christmas party and that her two children, ages 11 and 7, were present during the conversation and that she and the children shared their identities with Mr. Voegele.⁴ Here again, the jury would have to infer that Mr. Voegele drew conclusions about Plaintiff's age from this conversation and

³ Such testimony would clearly be hearsay. Plaintiff contends that such testimony would be admissible under the state of mind exception to the hearsay rule, as it goes to Plaintiff's state of mind in falsifying his age on the Voegele application. Federal Rule of Evidence 803(3) does, in fact, create an exception to the hearsay rule for a statement of the declarant's then existing state of mind. However, because "statements that are considered under the exception to the hearsay rule found at [Federal Rule of Evidence] 803(3) . . . cannot be offered to prove the truth of the underlying facts asserted," *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1274 (3d Cir.1995), I decline to treat the possibility that Plaintiff could testify at trial as to what unidentified individuals said about Voegele's general reputation as evidence sufficient to alter my analysis of the instant motion.

⁴ Plaintiff explains in his Memorandum of Law that Mr. McCabe's daughter has "recently . . . disclosed" that she and Mr. Voegele discussed Mr. McCabe's age during their conversation. (Pl.'s Mem. of Law at 2.) The record before the Court, however, contains no affidavits, testimony or other evidence to substantiate this allegation.

then brought those conclusions to bear on the decision to terminate Mr. McCabe. I find that eventuality extraordinarily improbable and pure speculation.

Ultimately, two pieces of undisputed testimony in the record strike fatal blows to Plaintiff's case. First, Mr. Murtha, who selected Plaintiff from among the plumbers to be laid off, testified that he never knew Plaintiff's age. Even if he had he sought to determine Plaintiff's age, the job application would have indicated that Plaintiff was roughly the same age as the older plumbers on the job. Thus, it would be difficult to regard Defendant as treating Plaintiff differently based on his age, since some of the Plumbers remaining after he was laid off were – as far as Defendant knew – the same age as Plaintiff.

Second, Mr. Murtha has testified that the decision to terminate Plaintiff's employment occurred prior to the December 19, 2001 Christmas party at which the events crucial to Plaintiff's claim transpired. Again, there is nothing in the record to contravene Mr. Murtha's testimony on this point, and Mr. Murtha further explained that the reason he had waited until after the Christmas party to act on the decision was because he knew that Mr. McCabe intended to bring a large number of family members to the party.

Plaintiff's strongest argument arises from the fact that he had worked on several jobs for Voegele and had always been reassigned, as opposed to laid off, when he was no longer needed on the job. Yet, as set forth above, the record is devoid of evidence that Defendant acted with discriminatory motive when it decided to lay Plaintiff off, rather than reassign him. Accordingly, I grant Defendant's motion for summary judgment.

III. CONCLUSION

For the reasons set forth above, I grant Defendant's motion for summary judgment. An appropriate Order follows.

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

JAMES MCCABE,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
VOEGELE MECHANICAL, INC.,	:	No. 02-7938
Defendant.	:	

ORDER

AND NOW, this 17th day of **July, 2003**, upon consideration of Defendant Voegele Mechanical's Motion for Summary Judgment, and the response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's Motion for Summary Judgment (Document No. 10) is **GRANTED**.
2. Summary Judgment is granted in favor of Defendant and against Plaintiff.
3. The Clerk of Court is directed to close this case for statistical purposes.

BY THE COURT:

Berle M. Schiller, J.