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

JAMES E. HIGGINS, JR.,	)	
	)	Civil Action
Plaintiff	)	
	)	
vs.	)	No. 04-CV-00074
	)	
HOSPITAL CENTRAL SERVICES, INC., and MILLER KEYSTONE BLOOD CENTER,	)	
	)	
Defendants	)	

* * *

APPEARANCES:
DONALD P. RUSSO, ESQUIRE
On behalf of Plaintiff

R. MICHAEL CARR, ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion of Defendants for Summary Judgment filed July 23, 2004.[1] Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment was filed August 12, 2004. For the reasons

[1] On August 20, 2004 defendants filed a reply brief. By Order of the undersigned dated February 10, 2004 there were to be "no reply briefs unless requested, or authorized, by the undersigned." Defendants did not seek leave of court prior to filing their reply brief nor did the undersigned request that defendants file a reply brief. Nevertheless, we find defendants' reply brief to be helpful to the court in deciding the underlying motion for summary judgment in this matter. Thus, we will consider defendants' reply brief.

expressed below, we grant defendants' motion for summary judgment.

Procedural History

On July 1, 2003 plaintiff James E. Higgins, Jr. initiated this matter by filing a Praecipe for Summons in the Court of Common Pleas of Lehigh County, Pennsylvania. On December 12, 2003 plaintiff filed a three-count Complaint. On January 8, 2004, defendants Hospital Central Services, Inc., ("HCSC") and Miller Keystone Blood Center ("Blood Center") filed a petition for removal to this court.

Count I of plaintiff's Complaint asserts a federal cause of action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA").[2] Count II asserts a pendent state law cause of action pursuant to the Pennsylvania Human Relations Act ("PHRA").[3] Count III asserts a federal cause of action pursuant to Title VII of the Civil Rights Act of 1964.[4]

Background

As noted below, the pertinent facts upon which the ruling on this summary judgment motion was based were derived from the record papers, affidavits, exhibits, depositions,

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[2] 29 U.S.C. §§ 621-634.

[3] Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

[4] 42 U.S.C. §§ 2000(e) to 2000(e)-17.

concessions of the parties in their briefs, and the Statement of Material Facts of Defendant filed August 20, 2004. By Rule 16 Status Conference Order of the undersigned dated February 10, 2004 and filed February 26, 2004, any party in this litigation filing a motion for summary judgment was required to file a brief, together with "a separate short concise statement, in numbered paragraphs, of the material facts about which the moving party contends there is no genuine dispute." The concise statement of facts was required to be supported by citations to the record and where practicable, relevant portions of the record were to be attached.

In addition, our Status Conference Order provided that any party opposing a motion for summary judgment was required to file a brief in opposition to the motion and

> a separate short concise statement, responding in numbered paragraphs to the moving party's statement of the material facts about which the opposing party contends there is a genuine dispute, with specific citations to the record, and, where practicable, attach copies of the relevant portions of the record.

Moreover, our Status Conference Order provided that if the moving party failed to provide a concise statement, the motion may be denied on that basis alone. With regard to the opposing party, our Order provided: "All factual assertions set forth in the moving party's statement shall be deemed admitted

unless specifically denied by the opposing party in the manner set forth [by the court]."

In this case, defendants filed a concise statement of facts in support of their motion. However, plaintiff did not file any concise statement in opposition to defendants' concise statement in the manner set forth in our February 10, 2004 Order. Accordingly, the factual assertions set forth by defendants in their statement filed August 20, 2004 are deemed admitted. See Kelvin Cryosystems, Inc. v. Lightnin, No. Civ.A. 03-881, 2004 U.S. Dist. LEXIS 23298 (E.D. Pa. November 15, 2004).

We consider our requirement for a concise statement and a responsive concise statement to be consistent with Federal Rule of Civil Procedure 56. In addition Rule 83(b) of the Federal Rules of Civil Procedure provides:

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Thus, even if our requirement for a separate concise statement is not consistent with Rule 56, we gave plaintiff actual notice of our requirement, and it was clearly not complied with. Kelvin Cryosystems, Inc., supra.

Facts

Based upon the record papers, affidavits, exhibits, depositions, and defendants' concise statement of facts, the pertinent facts are as follows:

In September 1988 plaintiff James E. Higgins, Jr. began working at HCSC as a marketing representative. HCSC is a Pennsylvania not-for-profit corporation which operates hospital laundries and provides blood banking and group purchasing services.

From April 16, 1990 until his resignation in February 1998, plaintiff was employed by HCSC Enterprises, Inc., an HCSC-affiliated entity which provides administrative support to HCSC, the Blood Center and other affiliated companies. During this time, plaintiff reported directly to HCSC's President and CEO, Dr. J. Michael Lee ("Dr. Lee").

In March 1993 plaintiff's title was changed from Manager of Public Relations and Communications to Director of Corporate Public Relations and Communications. In this capacity, plaintiff was responsible for the development, management, coordination, and implementation of all corporate marketing, communications, and public relations activities for HCSC, the Blood Center and other HCSC affiliates. This responsibility included the production of brochures, annual reports, and various other communications.

At HCSC, plaintiff received yearly performance evaluations. During his final two years as Director of Corporate Public Relations and Communications, plaintiff received performance evaluations by Dr. Lee which were critical of his attitude and lack of initiative.[5] Plaintiff acknowledged that he received these reviews and that he discussed these reviews with Dr. Lee.

On February 24, 1998 plaintiff resigned from HCSC in order to take a position with Mack Trucks, Inc.[6] After being terminated by Mack Trucks in November 1999, plaintiff worked for the Lehigh Valley Burn Prevention Foundation from June 2000 until he was laid off in June 2001.[7]

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[5] In plaintiff's performance review for 1995-1996, Dr. Lee wrote that "[plaintiff] appears to need an attitude adjustment, he needs to become more focused, structured, and dependable to his responsibilities. . . . it use [sic] to be that I would give [plaintiff] a job and not worry about the outcome, I can no longer say that. I feel that if I don't follow up with any project it won't get finished or it will be completed half/hearted. . . . [Plaintiff's] performance for the past year has been below average." (See Exhibit 13 of the Notes of Testimony of the deposition of James E. Higgins, Jr. conducted April 9, 2004.)

In the 1996-1997 review, Dr. Lee wrote that plaintiff needed to "develop a sense of urgency about his job and the organization. [Plaintiff] needs to be out and developing new opportunities for the company. [Plaintiff] needs to know that none of the management positions are a five day a week, 9 to 5 jobs. [Plaintiff] needs to work with the affiliates of HCSC to find out where his services could be useful and then follow up with ideas, programs etc." (See Exhibit 14 of the Notes of Testimony of the deposition of James E. Higgins, Jr. conducted April 9, 2004.)

[6] By letter dated February 24, 1998 plaintiff was offered the position of Manager of Trade Relations with Mack Trucks, Inc. (See Exhibit 18 of the Notes of Testimony of the deposition of James E. Higgins, Jr. conducted April 9, 2004.)

[7] By letter dated June 20, 2000 plaintiff was offered a position as the Corporate Affairs Director in the Burn Foundation Department of Lehigh

(Footnote 7 continued):

On November 2, 2001 plaintiff contacted Dr. Lee by electronic mail ("e-mail") requesting consideration for re-employment with HCSC stating that he "would be grateful for any opportunity, and thrilled to return to the fold." In response to plaintiff's e-mail, Dr. Lee suggested that he contact John Butler, the Director of Donor Resources at the Blood Center. Mr. Butler was recruiting candidates for an open position as a Donor Resource Representative, under Mr. Butler's supervision.

Plaintiff and John Butler had worked together on various projects when plaintiff was the Director of Corporate Public Relations and Communications for HCSC. Each of them had criticized the other's work performance.

More specifically, Mr. Butler stated that he was dissatisfied with plaintiff's performance as Director of Corporate Public Relations and Communications because plaintiff failed to achieve any substantial results with respect to the projects that Mr. Butler had assigned to him. Mr. Butler believed that based on the absence of results, plaintiff lacked a sense of urgency or initiative. With respect to Mr. Butler, Plaintiff stated that he had a "pushy New-York style of business" and that he did not like Mr. Butler's assertive demeanor.

(Continuation of footnote 7):

Valley Hospital and Health Network. (See Exhibit 22 of the Notes of Testimony of the deposition of James E. Higgins, Jr. conducted April 9, 2004.) In June 2001, plaintiff's position was eliminated.

Nevertheless, on November 8, 2001 plaintiff, who was 52 years old at the time, interviewed with Mr. Butler for the entry-level position of Donor Resource Representative. The primary responsibility of a Donor Resource Representative was to persuade employers to sponsor blood drives and otherwise recruit blood donors.

Because Mr. Butler concluded that plaintiff lacked initiative, he decided not to hire plaintiff as a Donor Resource Representative. Instead, Mr. Butler awarded the position to Carol Damato, a woman nearly four years, nine months younger than plaintiff.[8]

Contentions of the Parties

Defendants contend that Donor Resource Representatives must be self-starters and must demonstrate initiative in planning and executing special events and projects to create enthusiasm for blood drives. Defendants further assert that the position required sales and marketing skills.

Defendants maintain that as a result of the interview[9] and prior experience with plaintiff, Mr. Butler determined that plaintiff lacked the initiative to be successful as a Donor

[8] Plaintiff's date of birth is August 10, 1949. Carol Damato's date of birth is May 30, 1954.

[9] During the interview, Mr. Butler asked plaintiff what his suggestions were for generating interest in blood drives. Defendants contend that plaintiff made no positive suggestions and, instead, indicated that he was doing this for Dr. Lee.

Resource Representative and was applying for the job simply as a means for returning to HCSC rather than because of his interest in the Blood Center. Defendants assert that Ms. Damato possessed the relevant sales and marketing experience which was required for the Donor Resource Representative position.

Plaintiff contends that although Mr. Butler indicated to him during the interview that he had all of the credentials necessary for the position,[10] the Blood Center hired a female in her twenties for the position of Donor Resource Representative. As a result, Plaintiff asserts that he was discriminated against because of his age and gender.[11]

Standard of Review

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may

[10] Defendant contends that Mr. Butler did not tell plaintiff that he was the prime candidate for the position.

[11] Plaintiff does not claim that he was discriminated against based on age or sex by HCSC prior to his resignation in February 1998.

affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

Discussion

As noted, plaintiff premises this suit on Title VII, the ADEA, and the PHRA in that he claims that his gender and age were the real reasons for defendants' refusal to hire him for the Donor Resource Representative position. Specifically, Title VII provides in pertinent part:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The pertinent portion of the ADEA similarly provides:

> **(a) Employer practices**
>
> It shall be unlawful for an employer–-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age....

29 U.S.C. § 623(a).

The PHRA provides the following, in relevant part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification,....:
>
> (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability...to refuse to hire or employ...such individual..., or to otherwise discriminate against such individual...with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.
>
> ....

43 P.S. § 955(a). Under 29 U.S.C. § 631 and 43 P.S. § 954(h)[12], the foregoing prohibitions apply only if an individual is age 40 or older.

While Pennsylvania courts are not bound in their interpretations of Pennsylvania law by federal interpretations of parallel provisions in Title VII or the ADEA, those courts nevertheless generally interpret the PHRA in accord with their federal counterparts; and it is therefore not uncommon to address such claims collectively. See, e.g., Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996); Bailey v. Storlazzi, 729 A.2d 1206 (Pa. Super. 1999); Zekavat v. Philadelphia College of Osteopathic Medicine, No. Civ.A. 95-3684, 1997 U.S. Dist. LEXIS 3802 (E.D. Pa. March 21, 1997). Where summary judgment is

[12] Act of October 27, 1955, P.L. 744, § 4, as amended, 43 P.S. § 954(h).

appropriate as to a Title VII or an ADEA claim, the PHRA claim will be dismissed as well. See, e.g., Sweet v. Bell Atlantic-Pennsylvania, 1998 U.S. Dist. LEXIS 5415 (E.D. Pa. April 20, 1998).

Cases such as this (including those brought pursuant to Title VII, the ADEA and the PHRA), alleging, but having no direct evidence of, disparate treatment are traditionally analyzed under the three-step analysis set forth under the line of cases decided by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-1825, 36 L.Ed.2d 668, 677-679 (1973).

Under McDonnell Douglas and its progeny, a plaintiff must initially establish a prima facie case of discrimination. Upon a prima facie showing, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the adverse employment action. After defendant has met its burden of production, the burden shifts back to plaintiff to demonstrate that defendant's articulated reason was not the actual reason, but rather a pretext for discrimination. Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998), Waldron v. SL Industries, Inc., 56 F.3d 491, 494 (3d Cir. 1995).

To establish a prima facie case in a discrimination action such as this, a plaintiff must show that he: (1) is a member of the protected class (i.e. he is at least 40 years of

age); (2) is qualified for the position; and (3) suffered an adverse employment decision; (4) under circumstances that give rise to an inference of unlawful discrimination. Waldron, supra.

Plaintiff claims in the alternative, that he may maintain a claim of discrimination where he demonstrates, by a preponderance of the evidence, that age or gender was considered and acted upon in an employer's decision-making. This type of claim requires a "mixed-motives analysis". Traditionally, a plaintiff could only proceed under a mixed-motives analysis if it provided direct evidence of discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268, 288 (1989)(O'Connor, J., concurring).

On June 9, 2003, by unanimous decision in Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), the United States Supreme Court eliminated the requirement of direct evidence of discrimination in order for a plaintiff to proceed on a mixed-motives theory. Prior to Desert Palace, a plaintiff could only proceed under a mixed-motives analysis if he provided direct evidence of discrimination. See Price Waterhouse, supra.

In Lloyd v. City of Bethlehem, No. Civ.A. 02-830, 2004 U.S. Dist LEXIS 3639 (E.D. Pa. March 1, 2004), we thoroughly analyzed the impact of Desert Palace on the existing framework of McDonnell Douglas. In so doing, we concluded that McDonnell

Douglas is still valid precedent. Moreover, we found persuasive the comprehensive analysis and reasoning of the district court in Dunbar v. Pepsi-Cola General Bottlers of Iowa, 285 F. Supp. 2d 1180 (N.D. Iowa 2003) and adopted the modified McDonnell Douglas test enunciated in Dunbar.

In Dunbar, Chief United States District Court Judge Mark W. Bennett advocated implementation of a modified McDonnell Douglas test that splits the third element of the test into two separate questions. Specifically, by utilizing the traditional McDonnell Douglas burden-shifting framework, step three is split, requiring plaintiff to prove by a preponderance of the evidence either (1) (the pretext method) that defendant's articulated reason is not true but is instead a pretext for discrimination, or (2) (the mixed-motives method) that defendant's reason, while true, is only one of the reasons for its conduct and another motivating factor is plaintiff's protected characteristic. Dunbar, 285 F. Supp. 2d at 1198.

If plaintiff prevails under the second option, but defendant is able to prove that it would have taken the same action in the absence of the impermissible discriminatory motivating factor, then defendant can limit the remedies available to plaintiff to only injunctive relief, attorneys' fees and costs. Otherwise, plaintiff will be able to receive monetary damages as well. Id. For the reasons expressed in Lloyd, we

apply the modified McDonnell Douglas test enunciated in Dunbar to the facts of the within matter.

Analysis

As noted above, plaintiff must first establish a prima facie case of discrimination. Accordingly, plaintiff must show that he: (1) is a member of the protected class (i.e. he is at least 40 years of age); (2) is qualified for the position; and (3) suffered an adverse employment decision; (4) under circumstances that give rise to an inference of unlawful discrimination. Waldron, supra. An ADEA plaintiff's replacement with a younger employee allows for an inference of discrimination. See Barber v. CSX Distribution Services, 68 F.3d 694 (3d Cir. 1995).

Plaintiff was a 52-year-old male at the time of his application for employment as a Donor Resource Representative. Thus, he satisfies the first element. Moreover, defendants do not dispute plaintiff's qualifications. Hence, he satisfies the second element. Next, plaintiff suffered an adverse employment action because he was not awarded the Donor Resource Representative position. Therefore, plaintiff satisfies the third element.

With respect to the fourth element, plaintiff alleges that the Blood Center passed him over for employment and, instead, hired a female in her twenties. Plaintiff further

contends, however, that he discovered that this younger female was Carol Damato. Defendants confirm that Carol Damato was in fact hired for the position of Donor Resource Representative. Ms. Damato's date of birth is May 30, 1954. As such, she is approximately four years and nine months younger than plaintiff.[13]

The case law in this Circuit frequently holds that an age gap of less than five years is, as a matter of law, insufficient to establish fourth element of the prima facie test. Lloyd, supra. Reap v. Continental Casualty Company, No. Civ.A. 99-1239, 2002 U.S. Dist LEXIS 13845 (D. N.J. June 28, 2002); Martin v. Healthcare Business Resources, No. Civ.A. 00-3244, 2002 U.S. Dist. LEXIS 5117 (E.D. Pa. Mar.26, 2002); Gutkrecht v. SmithKline Beecham Clinical Labs, 950 F. Supp. 667, 672 (E.D. Pa. 1996); Bernard v. Beth Energy Mines, Inc., 837 F. Supp. 714 (W.D. Pa. 1993).

Based upon the foregoing precedent which we find persuasive, we conclude under the circumstances of this case that four years and nine months is not a sufficient age difference for plaintiff to satisfy his burden of demonstrating that he was replaced by a sufficiently younger person to create an inference of age discrimination. However, because plaintiff also asserts gender as a factor and because defendants have conceded that

[13] Plaintiff's date of birth is August 10, 1949. Moreover, we note that Ms. Damato is also a member of the protected class (at least age 40).

plaintiff can establish a prima facie case, we will accept defendants' concession and continue our review of the evidence in the light most favorable to the plaintiff with respect to the remaining McDonnell Douglas factors as modified by Dunbar.

Defendants contend that their legitimate, non-discriminatory reasons for not hiring plaintiff for the Donor Resource Representative position are his prior unfavorable performance as HCSC's Director of Corporate Public Relations and Communications, including his failure to perform for the Blood Center, and his job interview in which plaintiff failed to dispel Mr. Butler's concerns about plaintiff's lack of initiative and suspicion that plaintiff was applying solely as a means to return to HCSC rather than because of his interest in the Blood Center.

Because defendants have met their burden of production, the burden shifts back to plaintiff to demonstrate by a preponderance of the evidence that defendants' articulated reason was not the actual reason, but rather a pretext for discrimination or that defendants' reason, while true, is only one of the reasons for their conduct and that another motivating factor is plaintiff's protected characteristic. Dunbar, 285 F. Supp. 2d at 1198.

To defeat a summary judgment motion based on a defendant's proffer of a non-discriminatory reason, the non-moving plaintiff must demonstrate such weaknesses,

implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-1109 (3d Cir. 1997); Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

Plaintiff contends that defendants' proffered reason (that its hiring decision was based on plaintiff's unfavorable performance at HCSC) is inconsistent with plaintiff's prior performance record. In support of this contention, plaintiff emphasizes that he received four salary increases and three bonuses during his tenure at HCSC. Defendants contend that plaintiff's poor performance and lack of initiative as Director of Corporate Public Relations and Communications was well-documented. Based on our review of the record, we agree with defendants and find that their proffered reason is not inconsistent with plaintiff's prior performance.

Plaintiff does not dispute that in the two years prior to his resignation, he received evaluations from Dr. Lee which were critical of his attitude and lack of initiative. More specifically, plaintiff was advised that he needed an attitude adjustment, needed to become more focused, structured and dependable, and needed to develop a sense of urgency about his job and the organization. Mr. Butler's prior experience with

plaintiff was consistent with the criticisms expressed by Dr. Lee in plaintiff's performance evaluations. Moreover, Mr. Butler's evaluation of plaintiff is also consistent with plaintiff's characterization of Mr. Butler's demeanor as overly assertive. It is not difficult to imagine why Mr. Butler would not wish to hire plaintiff, who made no secret of his opinion that Mr. Butler's assertive management style was not appropriate for the Blood Center.

Plaintiff also contends that his qualifications were superior to those of Ms. Damato and, therefore, he has established an inference of pretext. In so doing, plaintiff relies on Newhouse v. McCormick & Co., Inc., 110 F.3d 635 (8th Cir.), a case which we find to be both procedurally and factually distinguishable. In Newhouse, the United States District Court for the Eight Circuit held that a jury verdict for plaintiff was reasonable because the non-discriminatory reasons proffered by defendant for not hiring the plaintiff were merely pretext because defendant routinely changed its reasons. The Eighth Circuit Court found that the record demonstrated that defendant "consistently hired younger applicants instead of older ones, even when the older applicants were much better qualified". Based upon that record, the Court determined that it was reasonable to conclude that defendant engaged in age discrimination. 110 F.3d at 640.

In the case before this court, defendants concede that plaintiff was qualified for the Donor Resource Representative position. In fact, defendants contend that plaintiff was overqualified for the position. Despite plaintiff's assertions that this is evidence of inferred discrimination, this contention actually lends credence to another one of defendants' proffered reasons for not hiring plaintiff.

More specifically, defendants contend that in addition to plaintiff's prior performance, Mr. Butler did not want to hire plaintiff because of his suspicion that plaintiff was applying simply as a means of returning to HCSC as opposed to having any interest in the Blood Center. As evidenced by plaintiff's e-mail to Dr. Lee, plaintiff did not hide the fact that he "would be grateful for any opportunity, and thrilled to return to the fold." Plaintiff's assertion regarding his superior qualifications, therefore, is not inconsistent with defendants' proffered reasons for refusing to hire plaintiff.

Moreover, plaintiff fails to set forth sufficient evidence that defendants harbored any prohibited motive in their decision to hire someone else for the Donor Resource Representative position. We find that the only evidence to support the final McDonnell Douglas factor comes from the testimony of plaintiff himself. Specifically, plaintiff testified that a number of people Mr. Butler hired for this

position were young females. Plaintiff acknowledged, however, that he does not have information as to the comparative number of males and females hired by Mr. Butler for the Donor Resource Representative position.

Plaintiff also does not offer any evidence with respect to the ages of the individuals hired for the position. Further, plaintiff acknowledged that he does not have any specific information from anyone to demonstrate that Mr. Butler preferred younger female workers. Finally, plaintiff admits in his testimony that no one from HCSC said anything to him which caused him to believe that he was discriminated against based on his age or gender.

None of plaintiff's beliefs or assertions are supported by the testimony of his co-workers or by any of the documentary evidence provided. A plaintiff's own assertion of discriminatory animus does not give rise to an inference of unlawful discrimination. Williams-Mccoy v. Starz Encore Group, No. Civ.A. 02-5125, 2004 U.S. Dist. LEXIS 2600 at *26 (E.D. Pa. Feb. 5, 2004), citing, Sarullo v. U.S. Postal Service, 352 F.3d 789, (3d Cir. 2003) and Bullock v. Children's Hospital of Philadelphia, 71 F. Supp.2d 482 (E.D. Pa. 1999).

A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury

could reasonably find in his favor. Ridgewood, supra. Plaintiff produces no evidence that would allow a reasonable jury either to disbelieve defendants' articulated reason or to believe that invidious discrimination was more likely than not a motivating or determinative cause of defendants' decision to hire someone other than plaintiff for the Donor Resource Representative position.

Conclusion

Accordingly, because we conclude that plaintiff fails to establish the third element of the test under McDonnell Douglas, as modified under Dunbar, we conclude that plaintiff's claims under the ADEA (Count I), the PHRA (Count II), and Title VII of the Civil Rights Act of 1964 (Count III) all fail. Therefore, we grant defendants' motion for summary judgment and dismiss the Complaint.

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

JAMES E. HIGGINS, JR.,	)	
	)	Civil Action
Plaintiff	)	
	)	
vs.	)	No. 04-CV-00074
	)	
HOSPITAL CENTRAL SERVICES, INC., and MILLER KEYSTONE BLOOD CENTER,	)	
	)	
Defendants	)	

O R D E R

NOW, this 9th day of December, 2004, upon consideration of the Motion of Defendants for Summary Judgment filed July 23, 2004; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment filed August 12, 2004; upon consideration of the briefs of the parties; upon consideration of the pleadings, exhibits, depositions and record papers; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge