

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

ALLEN M. ANDREWS,
Plaintiff,

v.

GLAXO SMITHKLINE, INC.
Defendant.

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CIVIL ACTION
NO. 03-5831

MEMORANDUM & ORDER

YOHN, J.

January ____, 2005

Plaintiff Allen Andrews brings this age discrimination and retaliation case under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (“ADEA”) and the Pennsylvania Human Relations Act, Pa. Stat. Ann., Tit. 43, § 951 et seq. (“PHRA”).¹ Andrews claims that his former employer, defendant Glaxo Smithkline, Inc. (“Glaxo”), discharged him because of his age and in retaliation for his complaints about age discrimination. Presently before the court is Glaxo’s motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). For the reasons set forth below, I will deny the motion.

I. FACTUAL BACKGROUND²

¹I will not address Andrews’ PHRA claims separately because courts “generally interpret the PHRA in accord with its federal counterparts.” *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996) (citation omitted).

²The following account contains undisputed facts and plaintiff’s factual allegations because on summary judgment courts must view all facts and inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986).

Plaintiff Andrews, a certified public accountant, began working at defendant Glaxo in 1996 as a temporary worker.³ (Tr. of Dep. of Allen Andrews (“Andrews Dep.”) at 28–29.) Andrews first supervisor at Glaxo was Tony Zuazo. In January 1999, Zuazo hired Andrews as a full-time financial analyst. (*Id.* at 29.) Andrews was fifty-one when he began working at Glaxo full-time. (*Id.*) Zuazo never completed any performance evaluations for Andrews, but he rated Andrews’ performance in a planning document. Zuazo gave Andrews mixed ratings, but reported that “Andrews ha[d] been extremely valuable in supporting the Telecom organization.” (Ex. 3 to Def.’s Mot. Summ. J.)

Early in his tenure, Andrews alleges that he encountered evidence of possible age bias at Glaxo. Before he was hired to work full-time, Zuazo told Andrews that Glaxo’s vice-president of finance, Don Zangara, preferred to hire “a young person out of public accounting.” (Andrews Dep. at 39.) Later, when Andrews told Zangara that he was taking a Retirement Planning course, Zangara replied that “the timing . . . was appropriate.” (*Id.* at 43.) Zangara left Glaxo in mid-2001, more than a year before Andrews’ termination. (*Id.* at 135.) Andrews concedes that no other employee at Glaxo ever made any remark suggesting age bias. (*Id.* at 99, 110–11, 177–78, 315.)

In June 1999, Andrews began reporting to Jim Toner. (Andrews Dep. at 45–46.) Under Toner, Andrews assumed increased duties. (*Id.* at 51–52.) In particular, Andrews became responsible for providing financial support and analysis to several Glaxo department managers.

³Initially, Andrews was assigned to SmithKline Beecham, a predecessor of defendant Glaxo SmithKline. (Def.’s Statement of Undisputed Material Facts at ¶ 1.)

(*Id.* at 53–54.)

In August 1999, Toner announced an opening for a senior financial analyst position. (*Id.* at 78.) When Andrews expressed interest in the position, Toner discouraged him from applying because he “did not feel that he was qualified.”⁴ (Tr. of Dep. of Jim Toner (“Toner Dep.”) at 30). Glaxo eventually filled the position with Corrine Kelly, a female candidate under age forty, with no previous experience at Glaxo. (*Id.* at 36.) In November 1999, Andrews requested a salary increase because he felt that he performed essentially the same job as Kelly, who received a higher salary. (Andrews Dep. at 85–89.) Toner denied Andrews’ request and explained that Kelly, “brought something new to the table.” (*Id.* at 87–88.)

Upon Toner’s suggestion, Andrews took his concerns to Jeff Tucker, a Human Resources Manager. (*Id.* at 89.) Tucker gave Andrews a 5% salary increase, but denied his request for a promotion after he received largely negative feedback from department managers who worked with Andrews.⁵ (*Id.* at 94–5; Ex. 9 to Def.’s Mot. Summ. J.) Andrews contends that Toner began treating him differently after he elevated his complaint to Human Resources. (Andrews Dep. at 111.) In Andrews’ 2000 performance review, Toner gave Andrews a “4” rating,⁶

⁴Ultimately, Andrews decided not to apply for the position. (Andrews Dep. 80–81.)

⁵In August 2000, Tucker solicited Glaxo managers who worked with Andrews, and compiled a report of their feedback. (Andrews Dep. at 94.) Although the report described some “strengths,” it contained mostly negative comments in connection with Andrews’ “understanding,” his “responsiveness,” and his ability to “proactively anticipate and address problems.” (Ex. 9 to Def.’s Mot. Summ. J.)

⁶Under Glaxo’s “Development Ratings,” a “1” signifies “outstanding competency/behavior.” A “2” indicates that “competency/behavior” is “clearly demonstrated.” A “3” indicates that “competency/behavior” is “evident to some degree, but not a predominant strength,” and a “4” means that “competency/behavior” is “not yet evident or underdeveloped.” (Ex. 3 to Def.’s Mot. Summ. J.)

meaning that his competencies were “underdeveloped” and that he was ineligible for a merit increase in salary. (Ex. 11 to Def.’s Mot. Summ. J.)

On April 21, 2001, Andrews filed a formal grievance under Glaxo’s internal grievance procedure. (Ex. 12 to Def.’s Mot. Summ. J.) He charged that he was denied a promotion because of his sex and that Toner’s performance review was “deliberately designed to discredit [him] and deny [him] an earned position.” (*Id.*) Two months later, in a letter from his attorney, Andrews complained about age discrimination. (Ex. 14 to Def.’s Mot. Summ. J.)

After reviewing Andrews’ claim, Glaxo’s Grievance Committee concluded that Andrews “should not be promoted,” but it determined that Andrews “did not receive adequate support, guidance and or counseling to ensure . . . success.” (Ex. 13 to Def.’s Mot. Summ. J.) The committee changed Andrews’ merit rating from “4” to “3” and provided that management would give Andrews the necessary support to help him work toward his career goals. (*Id.*)

In April 2001, around the time that Andrews filed his grievance, Andrews began reporting to Janice Maddren. (Tr. of Dep. of Janice Maddren (“Maddren Dep.”) at 12.) In Andrews’ 2001 performance review, Maddren gave Andrews a “P” rating, signifying that he “partially met expectations.” (Ex. 16 to Def.’s Mot. Summ. J.; Maddren Dep. at 23–25.) This was considered a substandard rating. (Maddren Dep. at 25.) In the review letter, Maddren explained that Andrews failed to share information with his supervisors, completed assignments late, and was reluctant to take on additional projects. (Ex. 16. to Def.’s Mot. Summ J.) However, she also highlighted several “strengths” and asserted that Andrews had improved “going into 2002.” (*Id.*)

In March 2002, Maddren met with Andrews to discuss his review. According to

Maddren, Andrews told her that she was “wrong,” and “brought up the word discrimination about 25 times.” (Ex. N to Pl.’s Opp. to Def.’s Mot. Summ. J.) Maddren advised Andrews to talk to Human Resources about his concerns.⁷ (Maddren Dep. at 48.) After the meeting, Maddren emailed her supervisor, Peter Hamilton. (Ex. N to Pl.’s Opp. to Def.’s Mot. Summ J.) She told Hamilton that “[her] pulse rate [was] still really high” and that the “most positive thing” about the meeting was “it’s over.” (*Id.*) In another email to Hamilton, Maddren complained that she just “had a mini-breakdown” and “dealing with” Andrews is “very difficult” because he claims that “[e]verything is [her] fault and he is being discriminated against.” (Ex. S. to Pl.’s Opp. to Def.’s Mot. Summ. J.) Maddren testified that she was concerned that Andrews would file a formal grievance because “it would take a significant amount of time” and it would require her to “justify[] everything that had been done when it was clearly a performance issue.” (Maddren Dep. at 66.) In an email dated April 9, 2002, Camilla Moe, a Human Resources Manager reported that Andrews “is going down the [g]rievance road and . . . we need to understand his specific issues in order to resolve it before it advances.” (Ex. Q to Pl.’s Opp. to Def.’s Mot. Summ J.)

In March and April 2002, Maddren, Moe, and Hamilton prepared Andrews’ 2002 Performance Development Plan (“PDP”). In an email dated March 15, 2002, Hamilton set forth his “Plan” for Andrews. He asked Maddren to “set up” and “document” monthly “review meetings,” which he planned to “follow up” with a meeting where he raised “the what do you want/ how do you feel about working here Alan ? question.” (Ex. R to Pl.’s Opp. to Def.’s Mot.

⁷Ultimately, the Human Resources Department refused to change Andrews’ rating. In a letter dated July 2, 2002, Camilla Moe, a Human Resources Manager, explained that “areas for improvement in [Andrews’] performance remain.” (Ex. 22 to Def.’s Mot. Summ. J.)

Summ. J.) In an email dated April 9, 2002, Moe explained that, “[t]he 2002 PDP is so we can manage [Andrews’] current performance against objectives and it will then enable us to take appropriate action *when* he fails to meet the documented objectives.” (Ex. Q to Pl.’s Opp. to Def.’s Mot. Summ J.) (emphasis added). Andrews received his PDP in late April 2002. (Maddren Dep. at 87.)

The PDP assigned Andrews to document the “TES system processes.” (Ex. P. to Pl.’s Opp. to Def.’s Mot. Summ J.) TES was a software system used primarily in Glaxo’s United Kingdom operations. (Maddren Dep. at 79–82.) Andrews was the only financial analyst in his department assigned to work with TES. (*Id.* at 83.) He received no formal training and his only resource was a contingent worker in Glaxo’s United Kingdom offices. (*Id.* at 86.) The PDP provided that Andrews complete his work with TES by May 31, 2002.⁸ (Ex. P. to Pl.’s Opp. to Def.’s Mot. Summ. J.) Andrews immediately complained that the deadline was unreasonable. (Andrews Dep. at 199.) Nonetheless, Hamilton told Andrews that his deadline would not be changed. (*Id.* at 200.)

Andrews failed to meet the TES deadline. On May 31, the original “completion date,” Andrews sent Maddren an email indicating that he could not complete the entire project by the deadline. (Ex. 24 to Def.’s Mot. Supp. J.) He explained that “[s]ince TES [was] totally new to [him] [he] didn’t know what [he] would find or how long it would take, [and he did] the best to fit the request . . . into [his] schedule.” (*Id.*) Following Andrews’ email, Hamilton sent Maddren

⁸The parties dispute whether Andrews’ TES assignment was “urgent.” (Pl.’s Response to Def.’s Statement of Undisputed Material Facts at ¶ 31.) Because I must accept the evidence in the light most favorable to the non-moving party, I will accept Andrews’ contention and assume that the TES assignment was not “urgent.” *See Anderson*, 477 U.S. at 255.

and Moe the following email: “looking at this data (*good job Janice*) can I now move to put [Andrews] on a verbal warning? His lack of performance is having an increasing impact on the team deliverable” (Ex. U to Pl.’s Opp. to Def.’s Mot. Summ. J.) (emphasis added).

In June 2002, Carolyn Wigmore took over Maddren’s duties. (Tr. of Dep. of Carolyn Wigmore (“Wigmore Dep.”) at 15.) On July 26, Wigmore met with Andrews. She reviewed his performance problems, including his failure to meet deadlines. (Ex. 26 to Def.’s Mot. Summ. J.) Wigmore also extended Andrews’ TES deadline to July 31. (*Id.* at 35–36.) Andrews’ claims that he did not agree to the new date. (Andrews Dep. at 229.) Wigmore testified that following the meeting she was “optimistic” and felt that Andrews was “moving in the right direction.” (*Id.* at 40–41.)

Nonetheless, Andrews failed to meet the new TES deadline, and on August 2, 2002, Wigmore gave Andrews a verbal warning. (Wigmore Dep. at 43.) She also put Andrews on a Performance Improvement Plan (“PIP”), which set forth six “activities” to accomplish before specific deadlines. One “activity” provided that Andrews complete his work with TES by August 31. (Ex. 28 to Def.’s Mot. Summ. J.)

Wigmore reviewed Andrews’ progress in September 2002. Andrews had completed four of the six activities, but again, he failed to complete his TES assignment. (Ex. 29 to Def.’s Mot. Summ. J.) In the comments section of the PIP, Andrews explained that, “the TES problem didn’t start with me but in fact, started long before I became involved with TES. I believe that the deadlines set to date have been arbitrary and unreasonable.” (Ex. 30 to Def.’s Mot. Summ. J.) Andrews also contended that, “the requirements surrounding these activities and the way they have been presented have been designed to discredit me, and ultimately, lead to my termination.”

(Id.)

Wigmore gave Andrews a written warning on September 12, 2002. (Ex. 31 to Def.’s Mot. Summ. J.) She also placed Andrews on a second PIP. The second PIP set forth several new activities, as well as the two tasks that Andrews had failed to complete, including his work with TES. Wigmore also offered Andrews a severance package if he left Glaxo voluntarily. (Andrews Dep. at 240–42.) Andrews declined the package. (*Id.* at 242.)

In October 2002, Wigmore reviewed Andrews’ progress under the second PIP and concluded that he failed to meet two of his six objectives, including the TES project. (Ex. 33 to Def.’s Mot. Summ. J.) Wigmore asserted that Andrews’ failure to complete these “activities,” had “a serious impact on the business.” (*Id.*) She also reported that the “accuracy and the way the activities were completed continues to be below performance expectations.” (*Id.*)

At this point, Hamilton solicited feedback from department managers who worked with Andrews. Christopher Mullen, Glaxo’s Director of Delivery and the manager directly impacted by Andrews’ work with TES, reported that “[his] managers [were] still waiting for [Andrews] to fix things that he said he would in previous months.” (Affidavit of Christopher Mullen (“Mullen Affidavit”) at ¶ 11; Def.’s Mot. Summ. J. at 11.)

On November 5, 2002, Glaxo discharged Andrews for “unsatisfactory performance,” citing his failure to meet “the expectations set forth in [his] Performance Improvement Plan.” (Ex. 34 to Def.’s Mot. Summ. J.) Wigmore and Moe made the ultimate decision, and it was approved by four higher-level managers, including Hamilton. (Wigmore Dep. at 88–89; Tr. Of Dep. of Camilla Moe (“Moe Dep.”) at 77–78.) At that time, Andrews was fifty-four.

That same month, Glaxo hired Noah Eisenmann to replace Andrews. (Madden Dep. at

111.) Eisenmann was under age forty when he was hired. Eisenmann was hired as a senior financial analyst and consequently earned a higher salary than Andrews. (*Id.* at 111–13.) Eisenmann and Wigmore assumed Andrews’ work with the TES software. (*Id.* at 115.) However, around August 2003, less than a year after Andrews’ discharge, Glaxo replaced TES with another software system. (*Id.*) Maddren testified that TES was not “getting support” and did not “have all the features that were needed.” (*Id.*)

II. STANDARD OF REVIEW

A court may only grant a motion for summary judgement, “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted).

When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, “[a]ll justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* “Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v.*

Allied Signal, Inc., 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Inuds. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

III. DISCUSSION

A. Andrews’ age discrimination claim

The ADEA “prohibits employers from discriminating against an individual in hiring, discharge, compensation, term[s], conditions, or privileges of employment on the basis of age.” *Connors v. Chrysler Fin. Corp.*, 160 F.3d 971, 972 (3d Cir. 1998) (citing 29 U.S.C. § 623(a)(1)). A plaintiff may establish a cause of action under the ADEA with either direct or circumstantial evidence that creates an inference of discrimination. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 527 (1993). The Supreme Court set forth the analytical framework for employment discrimination cases based on circumstantial evidence in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).⁹ Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination.¹⁰ *Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000) (citations omitted).

⁹Although *McDonnell Douglas* was a racial discrimination case brought under Title VII of the Civil Rights Act of 1964, “[w]here appropriate, the analysis used in describing the evidentiary burdens in Title VII cases [are] also used in ADEA cases.” *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 n.10 (3d Cir. 1994).

¹⁰A prima facie case for unlawful discharge under the ADEA requires proof of the following four elements: (1) the plaintiff was over 40 years old; (2) the plaintiff was discharged;

If the plaintiff successfully sets forth a prima facie case, the burden of production shifts to the defendant to “articulate some legitimate, nondiscriminatory reason” for the unfavorable treatment. *McDonnell Douglas*, 411 U.S. at 802.

Once the employer comes forward with a legitimate, nondiscriminatory reason, to survive summary judgment, the plaintiff must demonstrate by a preponderance of the evidence “that the employer’s articulated reason was not the actual reason, but rather a pretext for discrimination.” *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 n.5 (3d Cir. 1998). The plaintiff may show pretext by pointing to some direct or circumstantial 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.* at 644 (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). “If the plaintiff produces sufficient evidence of pretext, he need not produce additional evidence of discrimination beyond his prima facie case to proceed to trial.” *Sempier v. Johnson & Higgins*, 45 F.2d 724, 731 (3d Cir. 1995). “To discredit the employer’s proffered reason . . . the plaintiff cannot simply show that the employer’s decision was wrong or mistaken” *Fuentes*, 32 F.3d at 765. Instead, the plaintiff “must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons. . . that a reasonable factfinder could rationally find them unworthy of credence.” *Id.* (quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1993)).

(3) the plaintiff was qualified for the position; and (4) “the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination.” *Showalter v. Univ. of Pittsburgh Med. Ctr.*, 190 F.3d 231, 234 (3d Cir. 1999).

Both parties agree for purposes of this motion that Andrews established a prima facie case of age discrimination and Glaxo articulated a legitimate nondiscriminatory reason for his termination. (Def.'s Mot. Summ J. at 17; Pl.'s Opp. Def.'s Mot. Summ J. at 16.) Hence, Glaxo's motion turns on whether Andrews can establish that Glaxo's nondiscriminatory reason is a pretext for discrimination. Glaxo asserts that it fired Andrews because three successive supervisors¹¹ and key department managers complained that he performed below expectations. (Def.'s Mot. Summ J. at 17.)

Andrews argues that his PDP, and specifically his TES assignment, was designed to discredit him and provide Glaxo with a justification for his termination. (Pl.'s Opp. to Def.'s Mot. Summ. J. at 20.) In support of this theory, Andrews points to the following email correspondence between his supervisors. In an email dated March 15, 2002, Hamilton set forth his "Plan" for Andrews. He asked Maddren to "set up" and "document" monthly "review meetings," which he planned to "follow up" with a meeting where he raised "the what do you want/ how do you feel about working here Alan ? question." (Ex. R to Pl.'s Opp. to Def.'s Mot. Summ. J.) In another email dated April 9, 2003, Moe explained that Andrews' "PDP is so we can manage his current performance against objectives, and it will then enable us to take appropriate action *when* he fails to meet the documented objectives." (Ex. Q to Pl.'s Opp. to Def.'s Mot. Summ J.) (emphasis added). Finally, after Andrews failed to meet his first TES deadline, Hamilton sent the following email: "looking at this data (*good job Janice*) can I now put [Andrews] on a verbal warning?" (Ex. U to Pl.'s Op. to Def.'s Mot. Summ. J.) (emphasis

¹¹Glaxo alleges that Toner, Maddren, and Wigmore all complained about Andrews' performance.

added). These emails suggest that Andrews' supervisors planned his termination and gave him difficult objectives that they knew he could not meet. Glaxo argues that Moe used the word "when" in her April 9 email because she expected Andrews to fail based on his history of lackluster performance. While this is one possible explanation, these emails, coupled with the evidence below, are sufficient for a reasonable juror to infer that Andrews' supervisors intended him to fail

The following evidence suggests that Andrews' TES assignment was an unreasonable task, designed to cause his failure and ultimate discharge: (1) the TES software was not previously used by Glaxo in the United States; (2) Andrews was the only analyst in his department assigned to work with TES; (3) Andrews received little or no training or assistance with TES; (4) Maddren initially only gave Andrews 30 days to learn the system and complete his assignment; (5) Andrews immediately complained that the TES deadline was unreasonable; and (6) Glaxo used Andrews' problems with TES to justify his termination.¹² (Maddren Dep. at 79–86; Andrews' Dep. at 199; Ex. 34 to Def.'s Mot. Summ. J.) Finally, and most importantly, Glaxo stopped using TES soon after Andrews' termination, when a younger employee assumed his responsibilities. (Maddren Dep. at 115.) This suggests that Glaxo used a "double standard" and gave Andrews the TES assignment because it knew he would fail. (Maddren Dep. at 115.) *See Waldron v. SL Indus., Inc.*, 56 F.3d 491, 499–500 (3d Cir. 1995) (holding that when an older candidate was rejected based on some criterion and a younger candidate was ultimately hired

¹²Andrews' "Separation Notice" states that he was fired because he failed to meet "the expectations set forth in the Performance Improvement Plan," which included the TES assignment. (Ex. 34 to Def.'s Mot. Summ. J.)

notwithstanding his failure to satisfy the same criterion, this suggests “not just pretext, but in fact discriminatory bias.”)

Glaxo contends that Andrews’ discharge was not discriminatory because it relied on the negative feedback from department managers, who were not involved in the ultimate decision to terminate Andrews and who Andrews concedes had no age bias. (Def.’s Mot. Summ. J. at 19–20.) This argument fails to account for Andrews’ claim that his supervisors designed the TES assignment to discredit him. Glaxo focuses on the negative feedback that Andrews received from Mullen, the manager who was directly impacted by Andrews’ TES assignment. (Def.’s Mot. Summ. J. at 11.) However, if the TES assignment was specifically designed for Andrews to fail, comments like Mullen’s were contemplated by Andrews’ supervisors, and part of the ultimate plan to justify his termination. Thus, even if Glaxco relied on Mullen’s feedback to discharge Andrews, this fails to disprove Andrews’ theory that his TES assignment was designed to give Glaxo a reason to fire him.

Glaxo also claims that it had no age-based animus toward Andrews because it hired him when he was over age fifty. Glaxo cites the Fourth Circuit’s decision in *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991), which held that “where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.” The Third Circuit has expressly declined to adopt such a presumption. *See Waldron*, 56 F.3d at 496 n.6 (“[W]here, as in *Proud*, the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. . . . this is simply evidence like any

other and should not be accorded any presumptive value.”); *Fullard v. Argus Research Labs., Inc.*, No. 00-509, 2001 U.S. Dist. LEXIS 7426, at *10 n.4 (E.D. Pa. June 7, 2001) Moreover, unlike the plaintiff in *Proud*, who was hired and fired by the same individual, and fired less than six months after he was hired, Andrews was discharged more than three years after he was hired, when Zuazo, the employee who hired him, no longer worked at Glaxo. *See Proud*, 945 F.2d at 797; (Andrews Dep. at 46.)

In conclusion, when the evidence is read in the light most favorable to Andrews, a reasonable jury could find that there was an age-based animus at Glaxo and that the company designed Andrews’ TES assignment to provide a justification for his discharge.

B. Andrews’ retaliation claim

1. *Whether Andrews exhausted his administrative remedies?*

Glaxo contends that Andrews’ retaliation claims should be dismissed because he has failed to exhaust his administrative remedies. (Def.’s Mot. Summ. J. at 24.) Before a plaintiff may file suit under the ADEA, he must exhaust his administrative remedies by filing a complaint with the Equal Employment Opportunity Commission (“EEOC”). 29 U.S.C. § 626(d). In his initial EEOC charge, Andrews checked the box for age discrimination, but failed to check the box for “retaliation.” (Ex. X to Pl.’s Opp. to Def.’s Mot Summ. J.) Nonetheless, on June 8, 2003, more than a month before the EEOC issued Andrews’ right to sue letter,¹³ Andrews requested that his charge be amended to include a retaliation claim. (Ex. X to Pl.’s Opp. to

¹³The EEOC issued Andrews Dismissal and Notice of Rights on July 24, 2003. (Ex. B to Pl.’s Comp.)

Def.'s Mot. Summ. J.) Glaxo argues that Andrews' attempt to amend his charge is insufficient because there is no evidence that the EEOC investigated the additional claim. (Def.'s Reply in Supp. of Mot. Summ. J. at 7.) However, Andrews requested an amendment before the EEOC closed its investigation and, "although EEOC must be given the opportunity, it is not necessary that it actually investigate and conciliate a charge before a right to sue letter is issued."

Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 n.6 (3d Cir. 1976). Additionally, the EEOC's procedural regulations specifically provide that "[a] charge may be amended to cure technical defects or omissions," and that amendments alleging additional unlawful acts "will relate back to the date the charge was first received." 29 C.F.R. § 1601.12. Thus, Andrews' retaliation claim satisfies the ADEA's exhaustion requirement.

2. *Whether Andrews can make out a prima facie case of retaliation?*

Under the ADEA, an employer may not discriminate against an employee who "has opposed any practice made unlawful by this section." 29 U.S.C. § 623(d). Courts also use the *McDonnell Douglas* burden-shifting framework to assess retaliation claims. *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701 (3d Cir. 1995). To establish a prima facie case of retaliation, "a plaintiff must show that: (1) the employee engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000).

Andrews can easily satisfy the first two elements of the prima facie case. Andrews

“engaged in protected employee activity” in his formal grievance, when he complained about age¹⁴ and sex discrimination, and Glaxo “took an adverse employment action” when it fired Andrews. (Ex. 12 and Ex. 13 to Def.’s Mot. Summ. J.)

Glaxo argues that Andrews has failed to come forward with sufficient evidence for a reasonable jury to find a “causal link.” (Def.’s Mot. Summ. J. at 20.) I disagree. Andrews may be able to satisfy the “causal link” requirement because the evidence shows that Andrews’ complaints frustrated his supervisors, and these same supervisors gave Andrews poor reviews and difficult assignments, which eventually led to his discharge. In March 2002, after Andrews complained to Maddren about discrimination, she told Hamilton that “the most positive thing” about her meeting with Andrews was “it’s over.” (Ex. N to Pl.’s Opp. To Def.’s Mot. Summ. J.) In another email to Hamilton, Maddren complained that “dealing with” Andrews “is very difficult and caused her to have a “mini-breakdown.” (Ex. S. to Pl.’s Opp. to Def.’s Mot. Summ. J.) Maddren also testified that she was concerned that Andrews would file a formal grievance because “it would take a significant amount of time” and it would require her “to justify[] everything that had been done” (Maddren Dep. at 68.)

Andrews received poor evaluations from these same supervisors after he filed his grievance. In March 2002, nearly a year after Andrews filed his formal complaint, Maddren gave him a substandard rating on his 2001 performance review. (Ex. 16 to Def.’s Mot. Summ. J.; Maddren Dep. at 23–25.) Additionally, Hamilton approved the ultimate decision to terminate Andrews, and Wigmore testified that the decision was partially based on earlier documentation

¹⁴Andrews added an age discrimination allegation on June 11, 2001. (Ex. 14 to Def.’s Mot. Summ. J.)

“handed over” by Maddren . (Wigmore Dep. at 16, 43–44.)

The evidence also suggests that after Andrews filed his grievance, his supervisors assigned him difficult projects in the hope that he would fail and provide them with a justification for his termination. As I detailed above, around the time that Andrews filed his formal grievance, Maddren, Moe, and Hamilton developed a “Plan” to deal with Andrews, which contemplated “tak[ing] appropriate action *when* he fail[ed] to meet the documented objectives.” (Ex. Q and Ex. R to Pl.’s Opp. to Def.’s Mot. Summ. J.) (emphasis added). Andrews supervisors’ proceeded to assign him to work with a complicated new software system, with little training or assistance, and strict deadlines. (Ex. P to Pl.’s Opp. to Def.’s Mot. Summ. J; Maddren Dep. at 80–81.) Andrews was eventually fired largely because of his failure to meet deadlines in connection with the TES system. (Maddren Dep. at 115.)

Glaxo contends that Andrews has failed to produce sufficient evidence to show a “causal link” because there was too great a period of time between Andrews’ grievance and his termination. (Def.’s Mot. Summ. J. at 22.) While Andrews was fired over a year after he filed his grievance, his supervisors expressed frustration about his complaints and gave him the TES assignment in the same month that he filed the grievance. Moreover, timing is not the only method of showing a causal link. In *Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997), the Third Circuit recognized that “where there is a lack of temporal proximity, circumstantial evidence of a ‘pattern of antagonism’ following the protected conduct can also give rise to the inference [of causation].” (citation omitted). Here, Andrews’ supervisors’ concerns about his grievance, along with his difficult assignments and poor evaluations, could reflect a “pattern of antagonism” sufficient to establish a causal link between Andrews’ grievance

and his termination.

Glaxo also argues that Andrews' poor performance evaluations do not show a "causal link" between his termination and his "protected activity" because he received similar evaluations before he filed a grievance. (Def.'s Mot. Summ. J. at 23.) However, prior poor evaluations cannot preclude a plaintiff from using later poor evaluations as evidence of retaliation because a plaintiff might initially receive poor reviews because of illegal discrimination, and later receive poor reviews in retaliation for his complaints about discrimination. Here, Andrews' poor performance reviews, along with his supervisors' concerns about his grievance, suggest that his supervisors arguably retaliated against him for alleging age discrimination.

3. *Whether Andrews can show that Glaxo's legitimate nondiscriminatory reason for his discharge is a pretext for retaliation?*

As I explained above, Andrews has come forward with sufficient evidence for a reasonable jury to conclude that Glaxo's justification for Andrews' termination was a pretext for age discrimination or unlawful retaliation. *See supra* Part III.A. The emails between Andrews' supervisors that anticipate his termination and the difficulty of Andrews' TES assignments suggest that a reasonable juror could find that his supervisors' designed his assignments to discredit him and ultimately provide a justification for his discharge. It may well be that the evidence, on balance, favors Glaxo. However, that is a decision for the jury, not for the court on summary judgment.¹⁵

¹⁵Glaxo also alleges that during the course of discovery it learned that Andrews had lied on his employment application with Glaxo about his prior employment at Wyeth-Ayerst, Inc.

IV. CONCLUSION

For the reasons explained above, I will deny Glaxo's motion for summary judgment. An appropriate order follows.

(Def.'s Mot Summ J. at 4 n.2.) If proven, such evidence may terminate Andrew's damages claim as of the date that the information was acquired. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1994). However, this defense has not been raised at this stage of the litigation.

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

ALLEN M. ANDREWS,
Plaintiff,

v.

GLAXO SMITHKLINE, INC.,
Defendant.

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CIVIL ACTION

NO. 03-5831

ORDER

AND NOW, this _____ day of January, 2005, upon consideration of defendant Glaxo Smithkline Inc.'s motion for summary judgment and brief in support thereof (Doc. No. 10), defendant Allen M. Andrews brief in support of his opposition (Doc. No. 12), and defendant's reply in further support of its motion (Doc. No. 13), it is hereby ORDERED that defendant's motion for summary judgment is DENIED.

William H. Yohn, Jr., J.

