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

CARL ROGER BENNETT,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PICCARI PRESS, INC., et al.,	:	
	:	
Defendants.	:	No. 04-112

MEMORANDUM AND ORDER

Carl Roger Bennett raises claims of age discrimination against Piccari Press, Inc. and Consolidated Graphics, Inc. Defendants have filed a motion for summary judgment against Bennett, arguing that Bennett's claims should be dismissed because he cannot prove age discrimination and that Consolidated Graphics is not a proper defendant. For the reasons discussed below, this court will grant defendants' motion in part and deny it in part.

I. BACKGROUND

Carl Roger Bennett filed this suit on January 12, 2004 against Piccari Press, Inc., Consolidated Graphics, Inc., and Consolidated Graphics Employee Retirement Plan, presenting claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S.A. § 951, et seq., and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.[1] In his complaint, Bennett states that he was employed by Piccari Press, Inc. and Consolidated Graphics, Inc. since 1994 as a production coordinator. Piccari Press is a wholly owned subsidiary of Consolidated

[1] In his complaint, Bennett notes that he timely filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission. Bennett states that on September 16, 2003, after an investigation, the EEOC issued a letter of determination in his favor, finding cause to believe that there were violations of age discrimination.

Graphics, which is a leader in the commercial printing industry.

According to Bennett, he turned sixty-five on December 16, 2001 and was the oldest employee in Piccari Press' production department. In December 2001, he met with Joseph Trefaller, President of Piccari Press, Carl Picarri, Jr., Vice President of Piccari Press, and Peggy Burg, Bennett's immediate supervisor. During the meeting, Bennett was asked to seriously consider retiring in January 2002, just after his sixty-fifth birthday. After Bennett stated that he could not afford to retire at that time and wanted to continue working, he was instructed to give it more thought and get back to Piccari in a few days. When Bennett met with Piccari, he reiterated his intent to continue working. Piccari told Bennett that he could stay on but would have to be very flexible and willing to work wherever he was needed.

Later that month, Bennett received his annual performance evaluation, in which Burg stated that Bennett was not as focused as he had been in the past. As a result of the evaluation, Bennett did not receive a salary increase. Bennett states that this was the first time that he did not receive a positive evaluation and a pay increase.

In July 2002, Burg was reprimanded for a "spoiled" printing job. According to Bennett, Burg, in turn, reprimanded him, and Piccari Press claimed that he caused $20,000.00 in losses for that job. Bennett, however, claims that the loss "was absorbed by the bindery company responsible for the problem" and that the loss was falsely attributed to him.

On November 1, 2002, Bennett was informed that he was going to be laid off. Trefaller reminded Bennett that he had been asked to retire the year before and claimed that the layoff was due to poor business and lack of work. According to Bennett, another employee over the age of fifty was also laid off. However, eight "less senior, and younger" people in the department were

retained.

Bennett contends that after his layoff, he learned that his former coworkers were "swamped with work." Bennett's former responsibilities were allegedly first assigned to a forty-year-old and then to a twenty-five-year-old "whose job duties [Bennett] had offered to perform in addition to his own . . . to save the company money. Instead, [Bennett's] job was eliminated and the younger worker was promoted to Production Coordinator."

According to Bennett, other workers who were laid off have since been called back to work, "performing duties within [his] experience and qualifications." However, Bennett does not know of anyone over the age of fifty-five who has been recalled from the layoff.

On September 16, 2004, Bennett withdrew his ERISA claim. Moreover, Bennett stated that Consolidated Graphics Employee Retirement Plan was incorrectly named a defendant in this case.

On November 22, 2004, defendants filed a motion for summary judgment against Bennett, arguing that Bennett cannot prove age discrimination. Defendants further argue that Bennett's age discrimination claims against Consolidated Graphics should be dismissed because Bennett was not an employee of Consolidated Graphics.

II. STANDARD OF REVIEW

Summary judgment is appropriate "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 a judgment as a matter of law." F.R.C.P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. Highlands Ins. Co. v. Hobbs Group LLC, 373 F.3d 347,

350-51 (3d Cir. 2004). Once the moving party has carried its burden, the nonmoving party must come forward with specific facts to show that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A fact is "material" if its resolution will affect the outcome under the applicable law, and an issue about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in favor of the nonmoving party. Highlands Ins. Co., 373 F.3d at 351.

III. DISCUSSION

A. Whether Consolidated Graphics Is a Proper Defendant

There is a presumption that a corporate parent is not the "employer" of its subsidiary's employees. Marzano v. Computer Science Corp. Inc., 91 F.3d 497, 513-14 (3d Cir. 1996); Ziegler v. Delaware County Daily Times, 128 F.Supp.2d 790, 796 (E.D.Pa. 2001). However, the presumption could be overcome in one of two ways:

> First, the parent could control the employment practices and decisions of the subsidiary. If the parent company hired and fired the subsidiary employees, routinely shifted them between the two companies, and supervised their daily operations, it would be hard to find that the parent was not their employer. Second, the parent might so dominate the subsidiary's operations that the parent and the subsidiary are one entity and thus one employer. For example, the subsidiary may be highly integrated with the parent's business operations, as evidenced by the commingling of funds and assets, the use of the same work force and business offices for both corporations, and the severe undercapitalization of the subsidiary. The parent might also fail to observe such basic corporate formalities as keeping separate books and holding separate shareholder and board meetings.

Marzano, 91 F.3d at 513; Ziegler, 128 F.Supp.2d at 796.

In this case, Bennett has provided evidence through the deposition testimony of Joseph

Trefaller that Consolidated Graphics oversees Piccari Press' finances and encourages Piccari Press to "meet certain performance standards related to head count."[2] Trefaller also testified that Consolidated Graphics sets certain targets for Piccari Press, including "sales growth targets," "profitability targets," "labor as a percentage of value added targets," and "headcount targets."[3] However, Bennett has not provided any evidence that Consolidated Graphics hired and fired Piccari Press' employees, shifted employees between Consolidated Graphics and Piccari Press, or supervised their daily operations. Moreover, Bennett has not provided any evidence of commingling of funds and assets, the use of the same work force and business offices, or the severe undercapitalization of Piccari Press. Furthermore, Bennett has not shown that Consolidated Graphics fails to keep separate books or hold separate shareholder and board meetings. Accordingly, because Bennett cannot overcome the presumption that Consolidated Graphics is not the employer of Piccari Press' employees, Bennett's claims against Consolidated Graphics are dismissed.

B. Whether Bennett's Age Discrimination Claims Against Piccari Press Must Be Dismissed

Disparate treatment claims brought under the ADEA and the PHRA are analyzed in accordance with the framework first set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Narin v. Lower Merion School Dist., 206 F.3d 323, 331 (3d Cir. 2000) (applying the McDonnell Douglas framework to an ADEA claim); see also Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996) (indicating that claims for discrimination under the

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[2] Trefaller Dep., at 28-29.

[3] Id. at 31-32.

PHRA are subject to the standards for claims for discrimination under the ADEA). This framework requires that the plaintiff first establish a prima facie case of age discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000). A plaintiff can establish a prima facie case by demonstrating that: (1) he is at least forty years old; (2) he was qualified for the position from which he was discharged; (3) he was dismissed despite being qualified; and (4) his "employer retained someone similarly situated to him who was sufficiently younger." Monaco v. American General Assurance Co., 359 F.3d 296, 305 (3d Cir. 2004); see also Siegel v. Alpha Wire Corp., 894 F.2d 50, 53 (3d Cir. 1990).

After the plaintiff has established a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate nondiscriminatory reason for the adverse decision. McDonnell Douglas Corp., 411 U.S. at 802. If the defendant satisfies this burden, the plaintiff must show that the nondiscriminatory reason articulated by the defendant is actually a pretext for discrimination. Id. at 804. The plaintiff can prove pretext by presenting evidence that: (1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a finder of fact could reasonably conclude that each reason was a fabrication; or (2) allows a finder of fact to infer that discrimination was more likely than not a motivating or determinative cause of the employment action. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994).

Under the first prong of the test, the plaintiff cannot discredit the defendant's proffered reasons by merely showing that the employment decision was wrong or mistaken. Id. at 765. Instead, the plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence." Keller v. Orix Credit

Alliance, Inc., 130 F.3d 1101, 1108-09 (3d Cir. 1997). "In simpler terms, [the plaintiff] must show, not merely that the employer's proffered reason was wrong, but that it was so plainly wrong that it cannot have been the employer's real reason." Id. at 1109. "The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination]." Id. Under the second prong of the test, the plaintiff must "point to evidence that proves age discrimination in the same way that critical facts are generally proved--based solely on the natural probative force of the evidence." Id. at 1111.

In this case, Piccari Press does not argue that Bennett cannot make out a prima facie case of discrimination. Instead, Piccari Press argues that it is entitled to summary judgment on Bennett's discrimination claims because Bennett's layoff was based on a legitimate nondiscriminatory reason. Specifically, Piccari Press presents evidence that it was forced to lay off its "poorest performers" because business was declining.[4] Because Bennett was the "poorest performer" in his department, he was selected for layoff.[5]

This court finds that Piccari Press has satisfied its burden of demonstrating a legitimate nondiscriminatory reason for laying Bennett off. Accordingly, this court must next determine whether Bennett can show that Piccari Press' reason for selecting Bennett for layoff is actually a pretext for age discrimination.

In establishing pretext, Bennett provides evidence that while Peggy Burg stated in an

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[4] See, e.g., Trefaller Aff. ¶ 6 ("In 2000, Piccari Press "began to experience a slowdown in its sales."); id. ¶ 10 ("The business climate for Piccari Press continued to worsen as 2002 progressed. Orders from existing clients declined and anticipated new business did not materialize."); id. ¶ 6 ("Carl Piccari, Jr. and [Trefaller] decided to review all of the departments and to consult the department heads to determine the performance levels of the employees. [Piccari and Trefaller] felt that it was vital for the company to retain its best performers. Therefore, [Piccari and Trefaller] decided that in making layoff determinations, the poorest performers should be laid off.").

[5] See, e.g., Burg Dep., at 57 (indicating that Bennett was the "biggest problem" in his department).

evaluation that he was "not focused enough, lacking attention to details,"[6] Frank Jablonski, Jr., a production planner in Bennett and Burg's department, received a performance review in 2000 which stated that: "Frank is often the last one in the department and the first one to leave"; "Frank needs to improve his written communications"; "when he is frustrated he can be very vocal and negative"; "sometimes the work he produces is less accurate and less thorough than he is capable of producing"; "Frank needs to tone down his voice"; and "[h]e needs to check his paperwork more thoroughly."[7] Furthermore, Bennett has provided evidence that in 2001, Jablonski received a performance review which stated that: "Frank carries too much information in his head which makes it hard to pick up from him when he is out"; "Frank can be too outspoken sometimes which creates conflict"; "Frank's record keeping is often weak"; "[s]ometimes . . . jobs will sit on his desk instead of getting into the works because he has not asked for help"; and "[h]e must . . . be more tolerant when his work is questioned."[8] Based on this evidence, Bennett contends that Jablonski was a bigger problem than him and that he was not the poorest performer in the department.

Viewing the evidence in the light most favorable to Bennett, the nonmoving party, this court finds that Bennett has adequately demonstrated that there is a genuine issue of material fact regarding whether he was, in fact, the poorest performer in his department and, therefore, properly chosen for layoff when Piccari Press' business declined. Bennett has cast sufficient doubt upon Piccari Press' reason for laying him off so that a finder of fact could reasonably

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6 Bennett Aff. ¶ 7.

7 Jablonski Dep., Ex. 1.

8 Id., Ex. 2.

conclude that the reason was a fabrication.[9] Accordingly, defendants' motion for summary judgment is denied as it relates to the age discrimination claims against Piccari Press.[10]

IV. CONCLUSION

Because Bennett has not established that he was an employee of Consolidated Graphics, his claims against Consolidated Graphics must be dismissed. However, viewing the record in the light most favorable to Bennett, this court finds that Bennett has provided sufficient evidence that the reason articulated by Piccari Press for laying him off is a pretext for age discrimination. Accordingly, Bennett's discrimination claims against Piccari Press remain. An appropriate order

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[9] Relying on Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), Piccari Press indicates that Bennett has not cast sufficient doubt upon its reason for laying him off because he does not dispute its specific reasons for laying him off, i.e., because his work is "less accurate and less thorough than his position requires." In Ezold, the Third Circuit Court of Appeals held that a district court erroneously found that the employer's explanation for denying a promotion to the employee was pretextual. The employer claimed that it had denied partnership to the employee because of her deficiencies in the specific area of legal analysis. The district court questioned the wisdom of the employer's partnership standards, and the Court of Appeals held that "[i]t was not for the district court to determine that [the employee's] skills in areas other than legal analysis made her sufficiently qualified for admission to the partnership." Id. at 528.

This case is distinguishable on its facts. In Ezold, the employee suffered deficiencies in one area deemed critical by the employer. Here, in contrast, the employee's alleged deficiencies were not in one area deemed critical by the employer. According to Piccari Press, it laid Bennett off because he was, in general, the "poorest performer" in the department. Accordingly, this court finds that Piccari Press' reliance on Ezold is misplaced.

[10] Relying on Grady v. Affiliated Cent., Inc., 130 F.3d 553 (2d Cir. 1997), and Rand v. CF Industries, Inc., 42 F.3d 1139 (7th Cir. 1994), Piccari Press indicates that it is entitled to an inference that it did not discriminate against Bennett and, therefore, entitled to summary judgment because "the same individuals who hired [Bennett] to work at Piccari Press in 1997 (Carl Piccari and Trefaller) just months before his 61st birthday made the decision to lay him off only a few years later in 2002 when he was 65." In Grady, the Second Circuit Court of Appeals affirmed a district court's decision to grant an employer's motion for summary judgment because, among other things, the manager who caused the employee to be fired "was the very person who had hired her just eight days earlier." Grady, 130 F.3d at 561. Moreover, in Rand, the Seventh Circuit Court of Appeals affirmed a district court's decision to grant summary judgment in favor of an employer because, among other things, the employee "was age 47 when [the company president] hired him and age 49 when [the president] fired him. [The president] made each decision in the space of only two years. Thus [the employee] was hired while in the protected class, and fired by the same person who hired him after a relatively short period of time." Rand, 42 F.3d at 1147. According to the court, "It seems rather suspect to claim that the company that hired him at age 47 had suddenly developed an aversion to older people two years later." Id.

This case can be distinguished from Grady and Rand. In this case, the employee was not fired only shortly after being hired. Piccari and Trefaller laid Bennett off five years after they hired him. Thus, because Bennett was laid off several years after he was hired, this court finds that Piccari Press' reliance on Grady and Rand is misplaced.

follows.

AND NOW, this 9th day of February, 2005, upon consideration of defendants' motion for summary judgment (Doc. # 13), and replies thereto, it is hereby ORDERED that said motion is GRANTED IN PART and DENIED IN PART as follows:

(1) All claims against Consolidated Graphics are dismissed.

(2) Bennett's discrimination claims against Piccari Press remain.

/s/
LAWRENCE F. STENGEL, J.