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

WILHELMINA LYLES	:	CIVIL ACTION
	:	
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	NO. 04-1561

MEMORANDUM

Bartle, J. March 18, 2005

Before the court is the motion of defendant Philadelphia Gas Works ("PGW") for summary judgment. Pro se plaintiff Wilhelmina Lyles has alleged that her employer PGW discriminated against her on the basis of her age.[1]

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment should be granted "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." The moving party has the burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "A factual dispute is material if it bears on an essential element of the plaintiff's claim, and is

1. In a previous order dated September 3, 2004, this court dismissed plaintiff's claim for discrimination on the basis of color because it was not raised in her administrative complaint before the Pennsylvania Human Relations Commission and her claim for slander because she did not state a claim upon which relief could be granted.

genuine if a reasonable jury could find in favor of the nonmoving party." Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002) (citations omitted). "Summary judgment against a party who bears the burden of proof at trial ... is proper if after adequate time for discovery and upon motion, a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Anderson v. Consol. Rail Corp., 297 F.3d 242, 247 (3d Cir. 2002). For the present purpose of deciding this summary judgment motion, we view the facts in the light most favorable to plaintiff. Fakete, 308 F.3d at 337. However, plaintiff "may not defeat a motion for summary judgment by the mere assertion, not documented by record evidence, that the facts are sufficient to support his or her claims." Sherrod v. Phila. Gas Works, 209 F. Supp. 2d 443, 448 (E.D. Pa. 2002). Defendant may prevail on this motion for summary judgment if it can show that plaintiff's evidence is insufficient to carry her burden. Id.

Under the Age Discrimination in Employment Act ("ADEA"), it is "unlawful for an employer ... to discharge any individual or otherwise discriminate against 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)(1). "When a plaintiff alleges disparate treatment, 'liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.'" Reeves

v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

Such cases must be examined under a burden-shifting analysis. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Initially, the plaintiff must make out a prima facie case of discrimination. See Reeves, 530 U.S. at 142. Thus, plaintiff must show that: (1) at the time of the adverse employment action, she was a member of the class protected by the ADEA, that is, that she was at least 40 years of age; (2) she was otherwise qualified for the position in which she was employed; (3) she suffered an adverse employment decision; and (4) in the case of a demotion or discharge, she was replaced by a younger employee. Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644 n.5 (3d Cir. 1998). If plaintiff succeeds, the burden shifts to defendant, which must then produce evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. Id. "This burden is one of production, not persuasion; 'it can involve no credibility assessment.'" Reeves, 530 U.S. at 142 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)). Upon defendant's production, plaintiff must prove by a preponderance of the evidence that the nondiscriminatory explanation offered by the employer was not the employer's actual reason, but a pretext for discrimination. St Mary's Honor Ctr., 509 U.S. at 507-08.

As stated, we first must determine whether plaintiff has carried her burden of establishing a prima facie case of age

discrimination while viewing the facts in the light most favorable to the plaintiff. Reeves, 530 U.S. at 142; Fakete, 308 F.3d at 337. Defendant does not dispute that plaintiff is 52 years old or that she was qualified for her position. Defendant further concedes that plaintiff suffered two adverse employment actions: (1) a 10-day suspension in November, 2002; and (2) termination in August, 2003.[2] Although plaintiff ultimately was terminated, plaintiff stated at her deposition that the termination is not part of the present case.[3] Pl. Dep. at 115. Plaintiff has made out a prima facie case as to her suspension.

Next, we examine whether defendant has produced evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. Simpson, 142 F.3d at 644 n.5. Defendant maintains that plaintiff was suspended for insubordination after refusing to follow a repeated instruction to retrieve a document from a drawer. Plaintiff has conceded

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2. As this court has stated previously:

> An adverse action sufficient to support a prima facie case must be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits." ... This action must be an actual adverse action, "as opposed to conduct that the employee generally finds objectionable."
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> Sherrod, 209 F. Supp. 2d at 450.

3. Specifically, plaintiff stated, "I didn't say that they terminated me because of my race, age, or color. I didn't say that. I never said that. I never made that statement, that that's why they terminated me. I said that's why I have been harassed. The termination is a different discrimination case altogether." Pl. Dep. at 115.

this insubordination in her deposition testimony. Pl. Dep. at 79-82. Accordingly, defendant has borne its burden to produce a legitimate non-discriminatory reason for disciplining plaintiff.

Finally, we must examine whether plaintiff can demonstrate that defendant's proffered reason was a pretext for discrimination. In order to do so, plaintiff must set forth evidence to allow a fact finder reasonably to 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." Jones v. School Dist. of Philadelphia, 198 F.3d 403, 413 (3d Cir. 1999). "The nonmoving plaintiff must demonstrate 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." Id.

The record of alleged age-related harassment or discrimination proffered by plaintiff consists of: (1) plaintiff's complaint to the Pennsylvania Human Relations Commission ("PHRC"), which states "The other three clerks in the office are not being harassed or having their work constantly criticized. They are younger than 40 years of age;" (2) an email from Gwen MacMullen, plaintiff's supervisor, on September 10, 2002 asking plaintiff to sign in and out when she leaves the department even though according to plaintiff she only leaves "when going out to smoke as others do, or [to] another department

in reference to work, as others do;" (3) an email from Gwen MacMullen on January 13, 2003, asking plaintiff how plaintiff wished to handle an extra half-hour she took for lunch that day when according to plaintiff everyone takes 45 minutes to an hour for lunch and she was the only person to get this type of email; (4) a refusal by Gwen MacMullen to approve a two-hour unpaid leave for plaintiff to go to a doctor's appointment until plaintiff spoke with her union; and (5) documentation by plaintiff of an incident on November 5, 2002, when plaintiff went into Gwen MacMullen's office to tell her she was unfamiliar with "credits" after which Ms. MacMullen "started howling well I'll show you pointing her finger in my face. She grabbed the chair behind me and swung it around."

Clearly, there was animosity between plaintiff and her supervisor, Ms. MacMullen. However, that is all the evidence establishes. Plaintiff merely testified in her deposition: (1) "I don't – like I said, all I feel is though is [Gwen MacMullen] harassed me. I don't know if it – I'm saying color, I'm saying – hmm – hmm – her age, I don't know. All I know that she did what she did the things she did to me." Pl. Dep. at 67; and (2) when asked what evidence she could produce that she was "totally harassed or discriminated against by Anne Breyer or Gwen MacMullen, or anybody else here at PGW[] was because of [her] age," plaintiff replied: "From my knowledge – I'm not saying my knowledge. From the way I believe I – the age is – the age is because I know I'm older, I guess I'm older, I never even checked

in to find out." Pl. Dep. at 68-69 (emphasis added). Plaintiff has nothing more to prove age discrimination than what she believes or guesses.

Viewing the facts in the light most favorable to plaintiff, insufficient evidence exists to allow a fact finder either to: "(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." Jones, 198 F.3d at 413. There is no evidence that plaintiff's age "actually motivated the employer's decision." Reeves, 530 U.S. at 141 (citation omitted).

Accordingly, the motion of defendant for summary judgment will be granted.

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ORDER

AND NOW, on this 18th day of March, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Philadelphia Gas Works for summary judgment is GRANTED; and

(2) judgment is entered in favor of defendant Philadelphia Gas Works and against plaintiff Wilhelmina Lyles.

BY THE COURT:

/s/ Harvey Bartle III
J.