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

JOSEPH J. WATSON	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
PREMIER PORK, LLC	:	NO. 04-4997

MEMORANDUM

Padova, J. **August 2, 2005**

Pro se Plaintiff Joseph J. Watson brought this suit against Defendant Premier Pork, LLC for violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Plaintiff, who is now sixty years old, asserts that, on August 22, 2003, Defendant terminated his employment after he returned from having heart surgery and replaced him with a nineteen year old employee. Presently before the Court is Defendant's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.[1] For the reasons that follow, the Motion is granted.

[1] Although the deadline for responding to the instant Motion passed approximately two weeks ago, Plaintiff has not yet filed a response or sought an extension of time to file a response. The Court is not permitted, however, to grant the instant Motion merely because Plaintiff has failed to file a response. See Local R. Civ. P. 7.1(c). Instead, the Court "is required to conduct its own examination of whether granting summary judgment is appropriate." Fedake v. Lincoln Univ., 167 F. Supp. 2d 731, 738 (E.D. Pa. 2001) (citing Fed. R. Civ. P. 56(e)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show 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(e).

Plaintiff asserts that Defendant's termination of his employment violated the ADEA.[2] ADEA claims are analyzed under "a slightly modified version" of the three-step burden shifting analysis developed by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). To establish an ADEA claim, the plaintiff must first make a *prima facie* showing that he: "(1) was a member if the protected class, i.e., was over 40; (2) was qualified for the position; (3) suffered an adverse employment decision; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination." Monaco v. Am. Gen. Assur. Co., 359 F.3d 296, 300 (3d Cir. 2004) (citation omitted). If the plaintiff establishes a *prima facie*

[2] Defendant initially contends that Plaintiff's ADEA claim is barred by the statute of limitations. "A civil action may be brought under [the ADEA] against the person named in the charge [filed with the Equal Employment Opportunity Commission ("EEOC")] within ninety days after the date of receipt" of a notice of dismissal from the EEOC. 29 U.S.C. § 626(e). Defendant argues that Plaintiff was required to file his Complaint by October 28, 2004, ninety days after he received the EEOC's notice of dismissal. Plaintiff's Complaint, however, was not filed until November 23, 2004. The docket reveals that Plaintiff filed a motion to proceed *in forma pauperis* ("IFP"), with a copy of his Complaint attached thereto, on October 25, 2004. (See Doc. No. 1.) By Order dated November 23, 2004, the Court granted Plaintiff's IFP motion and ordered the Clerk of Court to file his Complaint. (See Doc. No. 2.) It is well-established that "where, as here, a plaintiff is proceeding *pro se*, . . . simultaneous delivery of both a request to proceed IFP and a complaint with court tolls the 90-day statute of limitations in discrimination cases." Ocasio v. Fashion Inst. of Tech., 86 F. Supp. 2d 371, 375 (S.D.N.Y. 2000) (citations omitted). The Court concludes, therefore, that Plaintiff's ADEA claim is not time-barred.

case of age discrimination, the burden of production shifts to the defendant to articulate "a legitimate, non-discriminatory reason for the discharge." Keller, 130 F.3d at 1108 (citation omitted). If the defendant meets its burden, the plaintiff may only survive summary judgment by submitting 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. (quoting Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)).

For the sake of argument, the Court assumes that Plaintiff could establish a *prima facie* case of age discrimination. The Court also summarily concludes that Defendant's articulated reason for terminating Plaintiff (viz., Plaintiff's failure to advise Defendant of his medical status or when he would be able to return to work) satisfies the second step of the burden-shifting analysis. Thus, the only question that remains is whether the summary judgment record contains any 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.

Although Plaintiff himself has not produced any evidence of discrimination, Defendant has submitted excerpts of Plaintiff's

deposition testimony in which he discusses his reasons for believing that his termination was motivated by age discrimination. Plaintiff testified that Defendant's Chief Executive Officer, Herman Klayman, who was responsible for the decision to terminate Plaintiff, made jokes about Plaintiff's age during the course of his employment. (05/31/05 Watson Dep. at 123-24; 06/15/05 Watson Dep. at 35.) Plaintiff admitted that he and Klayman were approximately the same age, and that he "took [Klayman's remarks] as a joke." (06/15/05 Watson Dep. at 35-36.) Plaintiff also testified that, at some point prior to his heart surgery, Dave Rios, a co-worker who had no direct authority to terminate Plaintiff, told Klayman that he should "get rid of [Plaintiff and] and get somebody else" because he "can't keep up" on certain job assignments. (05/31/05 Watson Dep. at 109, 122-23.) Plaintiff admitted that, prior to his heart surgery, he was having trouble "keep[ing] up" with certain assignments, (id. at 107), but he never requested any job accommodations. (06/15/05 Watson Dep. at 118-19.) At some point prior to his heart surgery, Plaintiff also heard some of "Dave Rios's guys saying bye, bye Watson, no mas, no mas." (05/31/05 Watson Dep. at 125.)

Although age-related comments may be considered as circumstantial evidence of discrimination, courts have rarely given much weight to remarks understood by the plaintiff to be joking banter. See, e.g., James v. N.Y. Racing Ass'n, 76 F. Supp. 2d 250,

257 (N.D.N.Y. 1999) (holding that age-related jokes did not evince discrimination where plaintiff admitted that the speakers were "[j]ust kidding around"), aff'd, 233 F.3d 149 (2d Cir. 2000); Agugliaro v. Brooks Brothers, Inc., 927 F. Supp. 741, 747 (S.D.N.Y. 1996) (discounting age-related comment that plaintiff "admittedly took as a joke"); Mullen v. N.J. Steel Corp., 733 F. Supp. 1534, 1551 (D.N.J. 1990) (same). Furthermore, Rios's comments to Klayman about Plaintiff's job performance, which by Plaintiff's own admission was deficient in some respects, fail to advance his age discrimination claim. Accordingly, Defendant's Motion is granted with respect to Plaintiff's ADEA claim.

Plaintiff also asserts that Defendant's termination of his employment violated the FMLA. The McDonnell Douglas burden shifting analysis also applies to Plaintiff's FMLA claim. Bultuskonis v. US Airways, Inc., 60 F. Supp. 2d 445, 448 (E.D. Pa. 1999). To establish a *prima facie* case of discrimination under the FMLA, a plaintiff must show that: "(1) he took an FMLA leave; (2) he suffered an adverse employment decision; and (3) the adverse decision was causally related to his leave." Conoshenti v. Pub. Serv. Elec. & Gas Co., 346 F.3d 135, 146 (3d Cir. 2004). At his deposition, Plaintiff admitted that he never even requested any leave pursuant to the FMLA. (06/15/05 Watson Dep. at 120-21.) As Plaintiff has failed to establish a *prima facie* case of discrimination under the FMLA, Defendant's Motion is granted with

respect to Plaintiff's FMLA claim.[3]

For the foregoing reasons, Defendant's Motion is granted in its entirety. An appropriate Order follows.

[3] The Court finally notes that, although Plaintiff has not expressly asserted a claim pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, Plaintiff suggested at his deposition that Defendant discriminated against him on the basis of his medical conditions. (See 06/15/05 Watson Dep. at 7-8.) The record evidence fails, however, to support an ADA claim.

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O R D E R

AND NOW, this 2nd day of August, 2005, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 19), **IT IS HEREBY ORDERED** as follows:

1. Defendant's Motion is **GRANTED** in its entirety.
2. Judgment is entered in favor of Defendant and against Plaintiff.
3. The Clerk of Court shall **CLOSE** this case for statistical purposes.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.