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

DENNIS HOUSER	:	CIVIL ACTION
	:	
v.	:	
	:	
CARPENTER TECHNOLOGY CORP.	:	NO. 04-0237

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: September 12, 2005

In this age discrimination case, brought under the ADEA, 29 U.S.C. § 621 and the Pennsylvania Human Relations Act, defendant Carpenter Technology Corp., ("Carpenter") has filed a motion for summary judgment. For the reasons set forth below, I will grant Carpenter's motion.

I. Factual and Procedural Background

Houser worked for Carpenter between March, 1987, and September 30, 2002, when he was terminated. Complaint at ¶ ¶ 3, 5, 7. Between 1987 and April, 1998, he worked in the Human Resources Department, ultimately as Manager of the Human Resources Management System. Id. When Carpenter re-organized in April, 1998, Houser was assigned to the Information Technology ("IT") Department. Id.

At the time Houser was terminated, he held the job title "Project Manager." Id. and Complaint at ¶ 4. His supervisor was Frank Bommentre, who, in turn, was supervised by Laura Scott. Memorandum of Law in Houser's Response, at 4. As a project manager, Houser was "responsible for the cost-scheduled performance of moving forward with a strategic objective that's been decided [upon] by the business people in the company," as he described it in his deposition. Houser Deposition Excerpt at 28, attached as Exhibit A to Houser's Response.

According to Laura Scott, who was Carpenter's Vice President and Chief Information Officer, a project manager would "meet with [a team of people working on a project], understand what the work is that they need to do, divide it up into a task list, assign resources to it and estimate the hours and so forth." Laura Scott Deposition Excerpt, attached as Exhibit B to Houser's Response.

Houser, however, represented himself as having a technical role as well as a management role. He testified at his deposition that the technical responsibilities required of a project manager varied. Houser Deposition Excerpt, supra, at 28. In some cases, programming was required, but in others "it was minimal." Id. at 29. Houser estimated that his responsibilities amounted to 50% business and 50% technical, i.e., programming. Id.

Between March and September, 2002, there was less traditional work for project managers, at least in part because of poor business conditions. Id. at 26-27 and 58-59. Carpenter underwent one or two rounds of reductions in force which did not affect Houser. Id. at 58. On September 30, 2002, however, as described above, Houser was terminated.

At that time, Houser was 53 years of age. Another project manager, Harold Hoak, who was 59 years of age was also terminated. Deposition Excerpt of Laura Scott, attached as Exhibit B to Houser's Response, at 24. A third project manager, Patrick Mulraney, who was approximately 50, had left of his own violation a short time earlier. Id. at 19. Project managers Doris Impink, who was 45 or 46, and Michele Page, who was 36 or 37, were retained. Id. at 21-22, 25. On the day of Houser's termination, Brett Aron, who was in his late thirties, and Barbara Emmett, a woman of 49, were transferred from elsewhere at Carpenter to the IT department. Complaint at ¶ 9, Scott Deposition Excerpt at 25-28.

Houser commenced this action in state court on November 12, 2003, after receiving his Right to Sue letter from the EEOC. Complaint at ¶ 24. Carpenter removed it to this Court on January 26, 2004. In his complaint, Houser asserted a claim under the ADEA and the PHRA for disparate treatment on the basis of his age. He stated that "his termination was misrepresented to be a reduction-in-force, when in fact it was not." Complaint at ¶ 16. Nevertheless, he has now conceded that there was a reduction in force at the time that he was terminated. Houser Deposition Transcript, attached to Carpenter's Motion for Summary Judgment as Exhibit A at 35. Approximately 130 employees were terminated. Id.

On June 3, 2005, I denied Houser's motion to amend his complaint to add a disparate impact theory, as permitted by Smith v. Jackson, – U.S. –, 125 S. Ct. 1536 (2005). The basis for my decision was that Houser, unlike Jackson, did not point to a specific test, requirement or practice by Carpenter which has (or had) a disparate impact upon older employees. Defendant filed this motion for summary judgment on July 14, 2005.

II. Legal Standards

A. Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, 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. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp.. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 "mandates the entry of summary judgment ... against a party who 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." Celotex Corp. v. Catrett, supra, at 323.

B. ADEA

Disparate treatment claims brought under the ADEA which rely on circumstantial evidence are analyzed using the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 792 (1973). Under this analysis, the plaintiff must first make a prima facie showing of discrimination by establishing that (1) he belongs to a protected class; (2) he was qualified for the job in question; (3) he suffered an adverse employment action and (4) circumstances existed which gave rise to an inference of unlawful discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 356 (3d Cir. 1999); Habib v. Urban Outfitters, Inc., Civ. A. No. 03-1561, 2004 WL 765119 at *4 (E.D. Pa. Apr. 1, 2004).

In a reduction in force case, the plaintiff must show that the employer retained a sufficiently younger similarly situated employee. Anderson v. Consolidated Rail Corp., 297 F.3d 242, 249-50 (3d Cir. 2002).

Once the plaintiff has established a prima facie case of discrimination the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the adverse employment

action. McDonnell Douglas, supra at 411 U.S. 802. The burden then shifts back to the plaintiff who must show that the nondiscriminatory reason articulated by the defendant is in fact a pretext for discrimination. Id. at 804.

At the summary judgment stage, this means that the plaintiff must produce evidence which: (1) casts sufficient doubt upon each proffered reason so that a fact finder could reasonably conclude that each reason was fabrication, or (2) allows a fact finder to infer that discrimination was more likely than not a motivating or determinative cause of action. Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994).

There is no support for Houser's argument that Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), has changed the standard by which ADEA summary judgment motions are decided. For one thing, Desert Palace has not been applied in the Third Circuit in an ADEA case. See Helfrich v. Lehigh Valley Hospital, Civ. A. No. 03-5793, 2005 WL 1715689 (E.D. Pa., Jul. 21, 2005), and cases cited therein. Even more importantly, the Desert Palace holding -- that a plaintiff is entitled to a mixed-motive jury instruction even when the evidence he has put forth is entirely circumstantial -- is not relevant here. This is not an issue of jury instruction, but of whether Houser has put forth enough evidence, whether direct or circumstantial, to permit a reasonable juror to decide in his favor.

III. Discussion

I agree with Houser that he has shown a prima facie case of age discrimination. Houser was certainly at an age at which he was entitled to the protection of the ADEA. 29 U.S.C. § 631(a). Carpenter has not disputed that Houser was qualified for the project manager position he held at the time he was discharged (Carpenter's arguments as to its plans for the future of the

project manager position are more accurately dealt with as a purported legitimate basis for Houser's discharge). Obviously, Houser was also subjected to an adverse employment action.

Moreover, the facts of Houser's dismissal legitimately give rise to an inference of discrimination on the basis of age. Three project managers over the age of fifty departed, and two younger project managers remained. Two younger individuals were brought into the IT department at the same time Houser and Hoak were asked to leave. I conclude, therefore, that Houser showed the existence of a prima facie case.

Nevertheless, Houser has not successfully refuted Carpenter's asserted legitimate, non-discriminatory reason for his dismissal. Carpenter maintains that the reduction in force was implemented by each department head retaining the people likely to add the most value to the company in the future. Bommentre and Scott felt there would be less project management in the future, and decided to retain only project managers who also had broad technical abilities. Houser was perceived as having a weaker technical skill set than Impink, Page or Aron. Emmett, who was responsible for Carpenter's web design, brought her own work with her; in any event, her position was eliminated the next year.

Carpenter has supported this position with the deposition testimony of Bommentre and Scott. Laura Scott explained:

> [W]e discussed everyone's skill set that we were terminating. That was part of the criteria in deciding who we would keep and who we would let go, because we had to have people who – the discretionary work was drying up. So, we no longer had a lot of new projects coming in that would require management skills. So, we had to look at – fundamentally we had to keep the systems up and running. If we had no other work, that's the only thing we would get done.
>
> So, everyone who was selected to stay had to be able to partake in that. And Dennis could not. Dennis had a human resources background as far as work and industrial engineering background. Harold Hoak did programming. He had a very narrow skill set in programming and that work was going away. Pat

> Mulraney, I honestly can't recall what he had. ... [But] he didn't have the technical skills that we would use within Carpenter.

Scott Deposition, supra, at 23-24.

She testified:

> I had come into the company in April. So, I did not have a lot of knowledge about these people. So, I relied on my managers, Neil and Frank [Bommentre], to evaluate who were the strongest performers and who had the most flexibility around their skill sets. And the criteria I gave them was, this is what the work is going to look like. So, this is what we've got and we need to have people who can fill these roles. Who are these people?

Scott Deposition, supra, at 32.

When she was asked what made Doris Impink "retainable" where Houser, Hoak and Mulraney were not, Scott replied: "Dorie had technical skills. So, we knew if her project management work went away that we could use her in other areas. She was very – she had a very flexible skill set. We could use her in any number of different types of jobs within information technology. And she also had very strong leadership skills." Id. at 22.

Bommentre testified almost identically:

> You know, through discussions with Laura Scott, you know, the reality of the cuts was that we would be doing less project work, what we typically called discretionary work, and spending more of our time maintaining and supporting our systems. So the reality is that there would be less of a need for project managers given a reduction in the level of project work. So I know we have had those discussions and that led to one of those criteria.
>
> [T]he other [criterion] was the skill sets and the qualifications that the folks that would be retained would have relative to the type of work that would be left. And again, that would be work of a technical nature, work in maintaining and supporting our systems and the folks that could provide the most flexibility in what we viewed as the work of the future as I just described.

Bommentre Deposition at 30-31; see also at 67-68.

Bommentre commented on Brett Aron's technical skills: "They were pretty broad actually. You know, he programmed for a number of years on the mainframe, COBOL programmer, he did a lot of system design and analysis, he built a number of the systems that Carpenter actually runs in production." Id. at 60. He added: "He also has a pretty good technical background as far as the technologies that we used, client server technologies, E-business technologies." Id. at 60-61.

Bommentre also explained Barbara Emmett's discharge: "[H]er position was eliminated by virtue of reexamining the work that she did and determining whether or not we could absorb that work. ... That was the analysis that I did, and so that position was ultimately eliminated." Id. at 65.

As to Houser, Bommentre testified:

> He was not – in my opinion he was not as technically capable or as versatile as the other folks that were doing the same things as him. So to answer your question, was he incapable, no; but I had other folks that I believed were more capable.

Id. at 83.

Houser has not come forward with any evidence that this was not the true reason for his discharge. Indeed, it is not clear that he is challenging the truth of this; his response to Carpenter's motion for summary judgment is primarily devoted to arguing that Scott and Bommentre simply used the wrong criteria and made the wrong decision:

> Bommentre needed to come up with criteria to follow to eliminate positions. His testimony reveals that he essentially wrote these criteria on his own from whole cloth. ... Bommentre had no knowledge of Houser's proficiency in using SQL Plus, Crystal Reports, Report Smith, COGNOS, ORACLE and ORACLE-based tools. ... Bommentre based his decision on Houser's proficiency and technical skills simply by what he saw being done during the time he was supervising Houser.

Memorandum in support of Houser's Response, at 5 (internal citations omitted).

Further, Houser states:

> Scott made the decision not to retain Houser based on the idea that he did not have the technical skills necessary to fit into any of the available technical positions. However, Scott did not really know Houser and she had never worked with him. Nevertheless, relying upon the advice of Frank Bommentre and Neil Berkley, she decided that Houser, Harold Hoak and Pat Mulraney did not have the necessary technical background to fit into the IT department's future. These employees were not judged on their proficiency of their jobs, nor were they subjected to any performance tests or self evaluations, where they would be able to state what their skills were. Scott relied on her managers, Frank Bommentre and Neil Berkley, to evaluate who would be retained.

Id. at 5-6.

This questioning of the methodology employed by Bommentre and Scott goes nowhere toward proving that Houser was discharged because of his age: "to discredit the employer's proffered reason ... the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Fuentes v. Perskie, supra, at 32 F.3d 765, citing Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 at 531, 533 (3d Cir. 1992) and Villanueva v. Wellesley College, 980 F.2d 124, 131 (1st Cir.) cert. denied 502 U.S. 861 (1991).

Instead, to discredit Carpenter's reason, Houser would have to "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." Id., citing Ezold, supra.

Houser has not done this. He has not provided detailed information on his own technical background, or those of Hauk or Mulraney. More importantly, has not provided any information

regarding the technical abilities of Impink, Page or Aron, other than his own casual impressions, such as that Impink "did not do much programing in her later years as a project manager" and that he didn't think Page "did much with programing." Houser Deposition Excerpt at 30-31. He conceded that he was "not as familiar with what [Page's] skills were." Id.

Neither has Houser:

> come forward with sufficient evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative cause of the adverse employment decision (e.g., by showing that the employer in the past had subjected him to unlawful discriminatory treatment, that the employer treated other, similarly situated persons not of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons).

Fuentes, supra at 764.

Houser has pointed to Hoak's discharge, and Mulraney's decision to leave. Although these circumstance were sufficiently suggestive to support a prima facie case, further evidence would be needed to show that they were instances of discrimination. This evidence is absent. No affidavits from Hoak or Mulraney support Houser's response in this motion, and it does not appear that either of them was deposed. As quoted above, Scott testified that Hoak and Mulraney did not have strong technical backgrounds, and Houser has not come forward with any evidence to contest this, or – more to the point – to contest the fact that Scott believed this.

Moreover, Houser has not shown that, in the reduction in force as a whole, older employees were affected more than younger employees. Further, he conceded in his deposition that he knew of no instance of age discrimination directed against him, other than his discharge. Houser Deposition Excerpt at 37.

Even construing Houser's case in the most positive light, as I am required to do in a summary judgment motion, I cannot conclude that Houser has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Carpenter's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence. Under Fuentes v. Perskie, therefore, Houser cannot show that Carpenter's proffered explanation is pretextual. Thus, Houser has not met the third McDonnell Douglas requirement.

Houser argues that "if an employer claims that a position was eliminated because it was no longer necessary, as Carpenter does here, yet effectively preserves it by assigning the plaintiff's former duties to the remaining younger employees, an inference of discrimination is raised." He points to Janiuk v. TCG/Trump Company, 157 F.3d 504 at 507-508 (7th Cir. 1998). There, the Court of Appeals for the Seventh Circuit reversed a lower court's grant of summary judgment, and remanded a case because, although the defendant had argued that Janiuk's position was eliminated in a reduction in force, the defendant's own organizational charts showed an individual in that very position after Janiuk was discharged.

Houser also cites Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997), where the Court of Appeals for the Seventh Circuit warned that an employer could not "get around" the McDonnell Douglas formula by "fractionating an employee's job." Indeed, Bommentre admitted that Aron, who was transferred into the IT department on the day of Houser's discharge, "assumed the responsibilities of project manager," as well as doing "some other things." Bommentre Deposition at 65.

However, unlike in Janiuk and Wallace, Carpenter has not argued that it eliminated Houser's position. It has argued, instead, that in the future there would be "less project-based work, so fewer project managers." Id. at 67. As above, Bommentre and Scott testified that project managers remaining at Carpenter had to possess broad technical skill sets. Bommentre testified that he believed Aron had this. Id. at 60.

Cases cited by Houser with respect to the significance of a claimant's work history (E.g. Chisholm v. National Corporation for Housing Partnerships, Civ. A. No. 99-3602, 2001 WL 115406 at *3 (E.D. Pa. Jan. 31, 2001) and Gunby v. Pennsylvania Electric Company, 840 F.2d 1117 (3d Cir. 1988)) are also inapposite, because Carpenter has not disputed the fact that Houser was a good worker.

In summary, although Houser put forth a prima facie case of age discrimination, he has not come forward with evidence sufficient to create a genuine issue of fact as to whether Carpenter's asserted reason for his discharge was pretextual.[1] This problem is highlighted by Houser's own statement in his response that "Carpenter's purported justification for terminating Houser ... *may* in fact be nothing more than 'latter-day inspiration triggered by the exigencies of fending off litigation'". Memorandum of Law at 20, (emphasis supplied). It "may", but at this late point, after the close of fact discovery, Houser has not carried his burden of showing evidence in support of this theory.

[1]Interestingly, a case cited by Houser, Branson v. Price River Coal Company, 853 F.2d 768, 771 (10th Cir. 1988), is similar: there, the Court of Appeals for the Tenth Circuit found that a claimant had set forth a prima facie case of age discrimination in a reduction in force context. It was for this reason that Houser cited the case. However, Houser failed to note that the Court of Appeals then affirmed the lower court's grant of summary judgment in favor of the defendant, because Branson had not gone to the required next step of producing "'*specific*' facts" showing a genuine issue for trial as to whether the defendant's asserted reason for terminating her was pretextual. Id. at 771-771 (emphasis in original).

In accordance with the above Opinion, I now enter the following:

O R D E R

AND NOW, this 12th day of September, 2005, upon consideration of Defendant's Motion for Summary Judgment, filed in this case as Document No. 14, and of Plaintiff's Response thereto, it is hereby ORDERED that Plaintiff's Motion is GRANTED.

Judgment is ENTERED in this case in favor of Defendant, Carpenter Technology Corporation. The Clerk of Court is hereby directed to close this case for statistical purposes.

BY THE COURT:

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JACOB P. HART
UNITED STATES MAGISTRATE JUDGE