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

GEORGE E. McCARTY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO. 04-707
	:	
GMAC HOME SERVICES,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, S.J. March 27, 2006

Presently before the Court is Defendant's Motion for Summary Judgment (Docket No. 19), Plaintiff's Reply (Docket No. 22), Defendant's Reply (Docket No. 22), and Plaintiff's Surreply (Docket No. 25). For the reasons set forth below, Defendant's Motion is granted in part and denied in part.

I. FACTUAL AND PROCEDURAL HISTORY[1]

In August 2000, Plaintiff George E. McCarty ("Plaintiff") was hired by Allan Anderson ("Anderson") as a Manager of Cash and Receivables for Defendant GMAC Home Services' ("Defendant") Global Relocation Services Division ("Relocation").[2] Although hired to work in the Horsham, Pennsylvania office, Plaintiff agreed to a temporary assignment in the Relocation Division's California office. While on temporary assignment, Plaintiff's position in

1. As the parties are familiar with the facts and proceedings we will only briefly visit them here.

2. **Plaintiff's position was created as a result of Defendant shifting its financing and accounting needs from a "shared-services" model to a model in which Defendant would provide the services for itself.** Under the "shared-services" model, Defendant's sister company, GMAC Mortgage Company ("GMACM"), provided services for several of Defendant's business units, including Relocation, because Defendant did not have employees who could perform such services and Defendant wanted to "capitalize on economies of scale." (Def. Mot. Summ. J. at 3.)

Horsham was eliminated because Defendant decided to revert its business work back to GMACM.

When Plaintiff returned to Horsham, Plaintiff began working in the GMACM Accounting Department for Noreen Pemper ("Pemper"). Pemper anticipated that certain cash management and collections work would be moved to Horsham thereby creating a position for Plaintiff. Defendant, however, decided that such work would not be moved to Horsham and once again, Plaintiff's position was eliminated. This time, however, instead of filling an alternate position, Plaintiff was terminated.

The parties do not dispute that Plaintiff filed a Charge of Discrimination alleging age discrimination with the Equal Employment Opportunity Commission ("EEOC") on October 7, 2002.[3] On February 19, 2004, Plaintiff filed the instant suit alleging age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA") and the Pennsylvania Human Relations Act ("PHRA") and intentional infliction of emotional distress.

II. DISCUSSION

A. Plaintiff's Claim of Discriminatory Discharge and Retaliation under the ADEA and the PHRA[4]

1. Age Discrimination

3. Plaintiff also alleges that he filed a Charge alleging retaliation in October 2003. **(Pl.'s Reply Ex. N.)** Defendant disputes Plaintiff's allegation, noting that Defendant "was never served or otherwise put on notice of this charge, and thus was deprived an opportunity to investigate or defend the allegations." (Def.'s Reply at 8.)

4. The Court analyzes Plaintiff's claims of age discrimination and retaliation in violation of the ADEA using the burden shifting analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973); See also Turner v. Schering-Plough Corp., 901 F.2d 335, 342 (3d Cir. 1990) (noting that the Third Circuit adopted the McDonnell Douglas test for ADEA cases).

Although the Court finds that Plaintiff produced sufficient evidence to convince a reasonable fact finder that he established the elements of his prima facie case for discriminatory discharge and that Defendant offered a legitimate, nondiscriminatory reason for Plaintiff's discharge, the Court concludes that Plaintiff has failed to establish that Defendant's reason for his discharge was a pretext. The standard for proving pretext "places a difficult burden on the plaintiff." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). In order to avoid summary judgment, a plaintiff must 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. The plaintiff's evidence "must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons . . . was either a post hoc fabrication or otherwise did not actually motivate the employment action." Id. at 764.

Defendant claims that its reorganization efforts are the legitimate reason for Plaintiff's discharge. Plaintiff attempts to demonstrate pretext by noting numerous inconsistencies in the record and Pemper's deposition testimony such as: the details of Plaintiff's return to Horsham from his temporary assignment, whether Plaintiff was actually hired for a position by Pemper prior to returning to Horsham from California, and the parameters of Plaintiff's new position. (Pl.'s Reply at 5-8.) Yet, Plaintiff fails to set forth any evidence that Defendant's reorganization effort was a post hoc fabrication or that it did not actually motivate his discharge. Further, although Plaintiff disputes the reason he was discharged was Defendant's reorganization (Pl.'s Surreply at 1), Plaintiff concedes that the reorganization was a solid business decision and that the reorganization was not based on his age. (Def.'s Mot. Summ. J.

Ex. B at 140-142). Accordingly, the Court grants Defendant's Motion on the claim of discriminatory discharge under the ADEA. The Court also grants Defendant's Motion on the claim of discriminatory discharge under the PHRA. Kelly v. Drexel Univ., 907 F. Supp. 864, 871 (E.D. Pa. 1995) (noting that PHRA age discrimination claims are properly evaluated under federal law interpreting ADEA).

2. Retaliation

The Court finds that genuine issues of material fact exist with respect to the causal connection prong of Plaintiff's prima facie case for retaliation. The record shows that Plaintiff engaged in a protected activity by sending a letter on February 8, 2002 to Defendant's Human Resources Department indicating his intention to file a complaint with the "Pennsylvania Human Relations Board."[5] (Pl.'s Reply Ex. M.) Plaintiff alleges that Defendant retaliated against him approximately two months later by failing to consider or respond to his application for employment on April 15, 2002.

Although a period of two months between the protected activity and the adverse employment action is not unusually suggestive of a retaliatory motive, Pritchett v. Imperial Metal & Chem. Co., No. 96-0342, 1997 U.S. Dist. LEXIS 13841, at *12 (E.D. Pa. Sept. 8, 1997), the "mere passage of time is not legally conclusive proof against retaliation." Robinson v. SEPTA, 982 F.2d 892, 894 (3d Cir. 1993). See also Woodson v. Scott Paper Co., 109 F.3d 913, 921 n.3 (noting that in the absence of evidence establishing a pattern of antagonistic behavior

5. Defendant argues that the Court should not consider Plaintiff's letter because it "stands outside the pleadings in this case." (Def.'s Reply at 8.) Plaintiff does not have to set out in detail the facts upon which his retaliation claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim. See Fed. R. Civ. P. 8. The Court finds that Plaintiff's claim of retaliation, as set forth in his Complaint, is sufficient to put Defendant on notice.

between the protected activity and the adverse employment decision, "other types of evidence might also support a causal link finding in the absence of temporal proximity").

Here, Anderson stated in his deposition that the Plaintiff's background "would be a pretty good fit" for the position he applied for in April 2002. (Pl.'s Reply Ex. C at 113.) The Court also notes that Defendant offered Plaintiff "an additional $12,000" after his termination "in exchange for [Plaintiff's] execution" of a Release of Claims but that Plaintiff rejected the offer in his letter of February 8, 2002 to the Human Resources Department. (Pl.'s Surreply, Ex. C.)

Defendant responds only by stating that Plaintiff's retaliation claim should fail because "Plaintiff has no evidence that Monica Estes, the hiring manager for the Treasury position who declined to interview Plaintiff, was in any way aware of any protected activity by Plaintiff." (Def.'s Reply at 8.) To establish a causal connection, however, the Court would not expect Plaintiff to be able to present evidence "from the [D]efendant acknowledging that its refusal to even consider the [P]laintiff's employment inquiry was because he had initially complained about age discrimination, and was about to sue the [D]efendant." (Pl.'s Surreply at 8.)

Defendant also argues that Plaintiff's claim for retaliation fails because the Plaintiff did not exhaust his administrative remedies by filing a Charge with the EEOC alleging retaliation. (Def.'s Reply at 8 n. 4.) The record, however, contains evidence that Plaintiff mailed and faxed a Charge to the EEOC alleging retaliation on October 3, 2003. (Pl. Reply at 17, Ex. N.) Accordingly, the Court denies Defendant's Motion on the claim of retaliation as genuine issues of material fact exist. As noted above, the same analytical framework is used to analyze

cases brought under the ADEA and the PHRA. Therefore, the Court also denies Defendant's Motion on the claim of retaliation under the PHRA.

B. Plaintiff's Claim of Intentional Infliction of Emotional Distress

The Pennsylvania Workers' Compensation Act ("PWCA") is the exclusive remedy for injuries sustained during the course of employment and that are related to the employment, including injuries resulting from intentional infliction of emotional distress ("IIED"). Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (upholding dismissal of IIED claim because it was barred by the PWCA) (citation omitted).

An exception to the exclusivity provision of the PWCA exists if the injury in question was "caused by the act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment." 77 Pa. Stat. Ann §411(1) (2005). To set forth a valid cause of action triggering this exception, "an employee must assert that his injuries are not work-related because he was injured by a co-worker for purely personal reasons." Wilkins v. ABF Freight Sys., 2005 LEXIS 20310, at * 28 (E.D. Pa. Sept. 15, 2005) (quoting Kohler v. McCrory Stores, 615 A.2d 27 (Pa. 1992)).

The record is devoid of any evidence that Plaintiff's IIED claim occurred outside his employment relationship with Defendant. Accordingly, the Court grants Defendant's Motion on the claim of intentional infliction of emotional distress.

II. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted in part and denied in part. An appropriate order follows.

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Plaintiff,	:	
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v.	:	CIVIL ACTION NO. 04-707
	:	
GMAC HOME SERVICES,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 27th day of March, 2006, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 19), Plaintiff's Reply (Docket No. 22), Defendant's Reply (Docket No. 22), and Plaintiff's Surreply (Docket No. 25), it is hereby **ORDERED** that Defendant's Motion is **GRANTED in part** and **DENIED in part**.

With respect to Plaintiff's claim of discriminatory discharge in violation of the Age Discrimination in Employment Act ("ADEA") (Count I), Defendant's Motion is **GRANTED**.

With respect to Plaintiff's claim of retaliation in violation of the ADEA (Count II), Defendant's Motion is **DENIED** as general issues of material fact exist.

With respect to Plaintiff's claims of discriminatory discharge and retaliation in violation of the Pennsylvania Human Relations Act ("PHRA") (Count III), Defendant's Motion is **GRANTED in part** and **DENIED in part**. Defendant's Motion is **GRANTED** with respect to Plaintiff's discriminatory discharge claim under the PHRA but **DENIED** with respect to Plaintiff's retaliation claim under the PHRA.

With respect to Plaintiff's claim of Intentional Infliction of Emotional Distress (Count IV), Defendant's Motion is **GRANTED**.

TRIAL is scheduled for Monday, September 18, 2006 at 9:30 a.m. in Courtroom 14A.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.