

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

ANDREA GARY,
Plaintiff,

v.

CITY OF PHILADELPHIA,
DEPT. OF HUMAN SERVICES,
Defendant.

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CIVIL ACTION

NO. 04-1493

MEMORANDUM AND ORDER

Tucker, J.

November 21, 2006

Presently before this Court is Defendant, City of Philadelphia Department of Human Services' Motion for Summary Judgment (Doc. 17). For the reasons set forth below, upon consideration of Defendant's Motion and Plaintiff's Response (Doc. 23), this Court will grant Defendant's Motion for Summary Judgment.

BACKGROUND

From the evidence of record, taken in a light most favorable to the Plaintiff, the pertinent facts are as follows. *Pro se* Plaintiff, Andrea Gary worked as a social worker for Defendant City of Philadelphia's Department of Human Services ("DHS") since April 11, 1983. When hired, Plaintiff held a Bachelor's Degree in Business Administration. In 1991, Plaintiff attained a Master's of Business Administration, notified DHS of her receipt of the advanced degree, and expressed interest in promotional administrative positions. Plaintiff alleges that openings for administrative positions are never published or posted.

In February 2002, Juanita Dennis ("Dennis") became Plaintiff's immediate supervisor. At that time, Dennis was in her late twenties. Plaintiff, at age 55, was the oldest social worker in her unit at

DHS. Ms. Gary contends that she suffered harassment, physical abuse, verbal abuse, intimidation, and unjustifiable discipline by and at the behest of Dennis and other, younger workers at DHS.

On April 15, 2002, Plaintiff and Dennis engaged in a verbal altercation. Plaintiff claims that the altercation became physical when Dennis threw papers and grabbed her arm. Plaintiff informed Alice Moreno, DHS Social Work Administrator, about the incident, but Plaintiff alleges Moreno did nothing in response. On May 15, 2002, Dennis issued Plaintiff a verbal admonition. Plaintiff filed grievances regarding Dennis's behavior which were reviewed under DHS's grievance procedures and denied. The alleged abuse continued.

On June 24, 2002, Dennis restricted Plaintiff from conducting field visits. On July 9, 2002, Plaintiff alleges that she sustained injuries when Dennis intentionally slammed into her shoulder while walking down a hallway in the work unit. On July 26, 2002, Plaintiff learned that Dennis filed a complaint against Plaintiff stating Plaintiff was the one who started the attack. On September 13, 2002, Plaintiff attended a panel hearing, accompanied by a union representative, to address the July 9, 2002 incident. On October 2, 2002, Dennis informed Plaintiff that she was to serve a three-day suspension for the July 9, 2002 incident.

Eventually, the incidents between Plaintiff and Dennis affected Plaintiff's performance evaluations. On August 1, 2002, Dennis evaluated Plaintiff as "Needs Improvement." Plaintiff claims that previous supervisors evaluated her work as "Outstanding." Further, Plaintiff alleges that her workload was increased dramatically prompting her to submit a report of case activity highlighting the rate of case assignments. Thereafter cases were reassigned.

On October 3, 2002, Plaintiff filed a grievance resulting from Plaintiff's fear for her own safety, and based on an alleged threat from Dennis. After her grievances were deemed unfounded, Plaintiff was allegedly ordered to submit to a mental health evaluation. On April 14, 2003, Plaintiff

filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”). Plaintiff commenced this action on April 5, 2004.

LEGAL STANDARD

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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.” FED. R. CIV. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual 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, 477 U.S. at 322. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against opponent, even if the quality of the movant’s evidence far outweighs that of its opponent.” Big Apple BMW, Inc.

v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

DISCUSSION

Plaintiff brings the following claims pursuant to the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621. Defendant claims an entitlement to summary judgment on Plaintiff’s complaint. Specifically, Defendant contends that Plaintiff cannot succeed on her claims for discrimination because Defendant had a legitimate, non-discriminatory reason for giving lowered performance evaluations, issuing a verbal admonition, and placing Plaintiff on suspension. To establish a prima facie case of age discrimination under the ADEA, Plaintiff must show that: (1) she is a member of the protected class, that is, that she was over forty years of age; (2) she is qualified for the employment position; (3) she suffered an adverse employment decision; and (4) similarly situated non-protected persons were treated more favorably than Plaintiff under circumstances giving rise to an inference of discrimination. 29 U.S.C. §631(a)(2); Fallon v. Meissner, 2003 U.S. App. LEXIS 8277, at *7 (3d Cir. Apr. 30, 2003); Fuentes v. Perskie, 32 F.3d 759, 764-65 (3d Cir. 1994). Defendant may rebut the claim by providing a legitimate, non-discriminatory reason for Plaintiff’s termination. Fuentes, 32 F.3d at 764. At that point, it is the Plaintiff’s burden to produce sufficient evidence—whether direct or circumstantial—such that a fact-finder reasonably may infer that the proffered non-discriminatory reasons were “either a post-hoc fabrication or otherwise did not actually motivate the employment action” and thus “unworthy of credence.” Id. at 764-65 (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1993)).

Plaintiff has established the first three elements of a prima facie case for discrimination, but has not satisfied the fourth element. She is a member of the protected class, she was qualified for

her position, and she suffered adverse employment action, namely a lowered employment evaluation, a verbal admonition, and suspension without pay. Under the fourth element of the analysis, however, Plaintiff must show that persons, not part of the protected class, were treated more favorably than Plaintiff under similar circumstances. Plaintiff has made no such showing.

Plaintiff alleges that her age was a factor in her lowered employment evaluation, suspension, and verbal admonition but fails to identify any person who had not been admonished under similar circumstances or suspended after a physical altercation with a superior. Moreover, it is improbable that Plaintiff could make such a showing since, in all likelihood, a failure to comply with departmental procedures and a physical altercation with a superior would result in disciplinary actions.

While Plaintiff has failed to state a prima facie case, this Court will nevertheless engage in the ADEA burden shifting analysis for purposes of clarity and efficacy. As already noted where a plaintiff established a prima facie case, the burden is shifted to the defendant to state a legitimate, non-discriminatory reason for its action. In the instant matter, Defendant has presented evidence that Plaintiff was negatively evaluated because of her consistently poor interaction with her co-workers. Furthermore, Plaintiff was verbally admonished because she neglected to follow departmental procedures for arranging coverage when assigned to E-days.¹ Additionally, Defendant proffers Plaintiff's physical altercation with her supervisor as the reason for Plaintiff's suspension. Thus, this Court finds that Defendant has met its burden.

Finally, Plaintiff has presented no credible evidence from which fact-finder may disbelieve Defendant's articulated legitimate reasons or believe that an invidious discriminatory reason was

¹ On "E-days" employees are responsible for responding to emergencies or immediate case management tasks regarding another employee's caseload not otherwise covered. Def. Mot. Summ. J. Ex. 5.

more likely than not a motivating or determinative cause of Defendant's action. Plaintiff contends that her supervisor was "in her 20s" and Plaintiff was eligible for pension. Pl.'s Resp. Def. Mot. Summ. J. 3. However, Plaintiff presents no credible evidence that age was more likely the reason for her verbal admonition, negative performance evaluations, and suspension. The Court's finding in this regard is underscored by credible evidence demonstrating that Plaintiff was negatively evaluated by a prior supervisor who was a member of the ADEA protected class for negative interactions with her peers—the very same reason for her more recent negative evaluations. Def. Mot. Summ. J. Ex. 6. Moreover, Defendant's actions do not effect Plaintiff's right to a pension or its amount and therefore provides no basis for determining a motivating cause of Defendant's actions.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted. Judgment is entered in favor of the Defendant and against the Plaintiff for summary judgment on her claim for age discrimination. An appropriate order follows.