

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

DELORES WEAVER : CIVIL ACTION  
 :  
 v. :  
 :  
 U.S. FILTER CORPORATION : 96-CV-7057

M E M O R A N D U M

WALDMAN, J.

December 2, 1997

I. BACKGROUND

Plaintiff asserts a claim for age discrimination pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. Plaintiff contends that defendant terminated her employment and denied her a comparable position at a new location because of her age when the branch office at which she was the administrator was closed following a merger.

Presently before the court is defendant's motion for summary judgment. Oral argument was held on December 1, 1997.

II. LEGAL STANDARD

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Arnold-Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only

facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248.

All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating an absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which she bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

### **III. FACTS**

The evidence of record, when viewed and construed most favorably to plaintiff, shows the following.

Plaintiff was born on January 14, 1936. She was hired by Polymetrics, the predecessor to defendant U.S. Filter, as an assistant at its Bristol, Pennsylvania branch office on June 16, 1989. Plaintiff was subsequently promoted to the position of branch administrator. On October 1, 1995, Polymetrics was acquired by U.S. Filter. Plaintiff was then 59 years old. At the time, the other administrative employee in the office was Amy Polizzotti. She was 23 years old.

In the course of her employment with Polymetrics, plaintiff performed many functions. By 1993 or 1994, plaintiff was responsible for recording and preparing receivables, billing work, monthly reports and monthly closes. Plaintiff operated computerized billing systems, performed data entry work on the

computer system (which included typing for the sales personnel), handled miscellaneous requests and answered telephones, which often required beeping repair personnel and listening to customer complaints. Plaintiff also posted checks to customers' accounts.

After a few years, another employee was hired to do office work for Polymetrics. Subsequent to this, plaintiff primarily did the month end close, the posting of receivables and billing work, while the other office worker primarily handled the telephone work and the filing, although plaintiff continued to do those tasks as well.

Her 1989 performance evaluation indicated that plaintiff experienced some difficulty adjusting to the "Lan" computer system, noted that plaintiff "must improve her general attitude" and faulted her for "shortness" with co-workers and customers. It was recommended that plaintiff undergo customer service training, but nevertheless rated her as "good" at "Customer Relations." Plaintiff's performance evaluation also notes that plaintiff enrolled for two computer courses to upgrade her skills. Plaintiff's overall performance rating for 1989 was good/satisfactory. Plaintiff submitted a commentary disagreeing that she was ever discourteous to co-workers or customers and took issue with her rating of satisfactory, as opposed to outstanding, good or excellent, in the areas of cooperation with co-workers, communication with co-workers and judgment.

Plaintiff's overall performance ratings for 1990, 1991 and 1992 were good. In 1990 it was noted that plaintiff's

communications skills with her supervisor and co-workers had improved. In 1991 it was noted that plaintiff was by then "comfortable" using her computer. In 1992 it was noted that plaintiff played an important role in the company's branch and regional office. For 1993, 1994 and 1995, a different evaluation form was used but it notes that plaintiff "meets expectations." In 1993 it was noted that plaintiff was a hard working and responsible employee. The 1994 evaluation states that plaintiff "has done a great job." Plaintiff received annual salary increases for each year she worked at Polymetrics.

In plaintiff's 1995 employee evaluation, Cynthia Calhoun, the reviewing supervisor, noted that plaintiff "is an excellent employee" and gave her an overall evaluation of "meets expectations." Ms. Calhoun also suggested, however, that plaintiff take a class on "How to Deal with People" and gave her a "below expectations" evaluation for cooperation and communication with co-workers. Plaintiff disputed this rating.

After the acquisition, U.S. Filter decided to close the Bristol branch office and to consolidate its operations with the Bensalem, Pennsylvania office. Karen Dence, defendant's regional financial manager, had responsibility for restructuring the workforce of the consolidated office. Ms. Dence states she concluded that the consolidated office would not require a person to perform billing and collections related functions which were going to be handled at the defendant's Lowell, Massachusetts regional office. She states that she concluded the

responsibilities of the post-consolidation office personnel would essentially entail computer work including heavy data entry and key punching, some spreadsheet work, heavy telephone work and customer service work.

Ms. Dence visited the Bristol facility six times between the acquisition and plaintiff's termination. During one of those visits she observed plaintiff at work for several hours and noted no problems or deficiencies. Ms. Dence gathered information on the employees at Polymetrics. She was told by Cynthia Calhoun, plaintiff's supervisor, that plaintiff was an "old timer and a pro at what she does." When asked by Ms. Dence to elaborate, Ms. Calhoun stated that plaintiff "was a constant in that office, that she knew what she was doing and she knew how to handle it, and was very good at being the branch administrator." Ms. Dence was informed by several Polymetrics employees that plaintiff could be gruff and abrupt, particularly on the telephone.

Plaintiff told Ms. Dence that Ms. Polizzotti did a lot of the telephone work. Plaintiff told Ms. Dence that she preferred working with actual documents and did not particularly like the computer work but that she could do it.

Ms. Polizzotti was insecure about her future position after the acquisition. She decided sometime in November 1995 to accept another job offer and advised Ms. Calhoun that she would be submitting a letter of resignation. Ms. Dence and Tim Crawley, an upper level manager, told her that U.S. Filter was a

growing company and that she should rethink her decision to leave. Ms. Polizzotti did not leave U.S. Filter.

On December 7, 1995, plaintiff was summoned by Ms. Dence to Mr. Crawley's office where they told her that she was terminated. Ms. Polizzotti continued to work for defendant and for at least several months handled billing and collection work that had been done by plaintiff. At least through September of 1997, Ms. Polizzotti on a weekly basis processed requests from the Lowell regional office for copies of old Polymetrics orders or invoices.

In mid-January 1996, plaintiff received a telephone call from Ms. Dence who inquired about plaintiff's interest in a possible part time job involving, inter alia, processing purchase order and contract renewals and "checking" customers. Plaintiff responded that she was seeking a full time position with benefits. Ms. Dence telephoned plaintiff at the end of January 1996 again to discuss a potential future part time position. No concrete offer was made to plaintiff who again informed Ms. Dence that plaintiff needed a job with benefits.

#### **IV. DISCUSSION**

In the absence of direct evidence of discrimination by a decisionmaker, a Title VII or ADEA plaintiff may still proceed under the McDonnell-Douglas/Burdine framework. Direct evidence is overt or explicit evidence which directly reflects a discriminatory bias by a person who participated in making the adverse employment decision. Armbruster v. Unisys Corp., 32 F.3d

768, 778, 782 (3d Cir. 1994) (analogizing direct evidence to proverbial "smoking gun"). Evidence is not direct where the trier of fact must still infer discrimination from it. Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994).

Plaintiff argues that Ms. Calhoun's characterization of her as an "old timer" constitutes such direct evidence. This argument borders on the disingenuous. Ms. Calhoun was not a decisionmaker. More importantly, it is clear from Ms. Calhoun's complete statement that this term was used in a positive sense and was a comment not about plaintiff's age but about her acquired knowledge and experience. Indeed, plaintiff also cited Ms. Calhoun's statement in context at oral argument as evidence of plaintiff's superior qualifications. Plaintiff has not presented direct evidence of discrimination. This is clearly not a Price Waterhouse case.<sup>1</sup>

To establish a prima facie case of discrimination under the burden shifting approach where a plaintiff's job has been eliminated as part of a reduction in force, she must show that she was in a protected class, that she was qualified, that she was laid off and that other unprotected employees were retained. Torre, 42 F.3d at 830-831; Armbruster, 32 F.3d at 777.<sup>2</sup>

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<sup>1</sup> Plaintiff acknowledged in her deposition that no one overtly said or implied anything about her age in connection with the adverse employment action.

<sup>2</sup> The precise phraseology or elements of a prima facie case must necessarily be flexible and somewhat dependent on the particular circumstances of the case at issue if the concept is to be fairly and rationally applied. See, e.g., Torre, 42 F.3d

Similarly, to establish a prima facie case of discrimination in failing to select a plaintiff for a new or open position, she must show that she belonged to a protected class, that she was qualified for the position she sought, that she was nevertheless rejected and that the position was filled by someone sufficiently younger to permit an inference of discrimination. Barber v. CSX Distribution Services, 68 F.3d 694, 698 (3d Cir. 1995).<sup>3</sup>

Once a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). A plaintiff then may discredit the employer's proffered reason and show that it was pretextual, from which a fact finder may infer that the real reason was discrimination. Hicks, 509 U.S. at 508; Lawrence v. National West Minster Bank of New Jersey, 98 F.3d 61, 66 (3d Cir. 1996). A plaintiff may thus avert summary judgment

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at 830-31; Armbruster, 32 F.3d at 771 & n.11. Thus, if a plaintiff's job functions are essentially given to another to perform, regardless of any change in title, it makes sense to ask if plaintiff was qualified to perform the job from which she was terminated. If a plaintiff's position and duties were eliminated and no one else was retained, sought or hired to fill such a position or perform such duties thereafter, it makes sense to ask only if plaintiff was qualified for the job she was denied in favor of another during a merger or RIF.

<sup>3</sup> While a plaintiff may sustain her claim by proving she was replaced by or rejected in favor of someone appreciably younger which clearly helps to raise an inference of discrimination, a plaintiff's claim is not foreclosed absent such proof if other evidence adequately supports such an inference. See O'Connor v. Consolidated Coin Caterers Corp, 116 S. Ct. 1307, 1310 (1996).

in a pretext case with evidence discrediting the employer's proffered reasons or showing that discrimination was more likely than not a determinative factor in the adverse employment decision. Id.; Sempier v. Johnson & Higgins, 45 F.3d 724, 730-31 & n.5 (3d Cir. 1995).

A plaintiff does not discredit the employer's proffered reason merely by showing that the adverse employment decision was mistaken, wrong, imprudent, unfair or even incompetent. Rather, a plaintiff must show such weaknesses, implausibilities, inconsistencies, incoherence or contradictions in the reasons articulated by the employer that a jury reasonably could find them unworthy of belief. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

Plaintiff was a member of the protected class for purposes of ADEA. Plaintiff was terminated. Ms. Polizzotti was retained. She was significantly younger than plaintiff. There is evidence, including plaintiff's periodic evaluations and Ms. Calhoun's assessment to Ms. Dence, to show that plaintiff was qualified for the job from which she was separated. Whether plaintiff was qualified for the new position she was denied in favor of Ms. Polizzotti is entwined with the question of pretext. If plaintiff can show she was qualified, she has not only established a prima facie case but has effectively cast doubt on defendant's proffered legitimate reason which is that plaintiff was unqualified for the work to be performed at the consolidated Bensalem office.

Defendant's proffered reason is that the Bristol branch office was closed and thus obviously no longer required an office administrator, that plaintiff's primary functions involved billing and collection and these would now be performed at the regional office in Massachusetts, and that plaintiff was not qualified for the administrative position at the consolidated Bensalem branch office because it involved substantial computer and customer telephone work for which she was unsuited. Defendant acknowledges that it considered only plaintiff and Ms. Polizzotti for the position at the Bensalem office.

Plaintiff does not suggest there was anything discriminatory or nefarious about the decision to merge the two Bucks County offices. She does not dispute that the decision to maintain only one administrative position at the consolidated office was legitimate. She does, however, dispute that her primary functions were billing and collection and that she could not ably work on a computer or with customers by telephone. She contends that Ms. Polizzotti was retained to perform essentially the same functions plaintiff had been competently performing.

While far short of overwhelming, there is evidence from which one rationally could find that plaintiff was qualified for the position she was denied, that there was a continuing need for someone to perform functions she was competently performing at the time and that defendant's contentions to the contrary are sufficiently weak or implausible in view of all the circumstances to be unworthy of credence. Plaintiff denies that her duties

were primarily limited to billing and collection. She avers that she could and did work with a computer. She avers that she got along with those with whom she worked and denies being short or confrontational with customers. She received satisfactory or good evaluations over a number of years including those given for customer relations. Within 39 days of being terminated, plaintiff was contacted by the decisionmaker about the prospect of part-time reemployment in a job involving interaction with customers.

#### **V. CONCLUSION**

There is significant evidence to show that Ms. Dence made the decision to terminate plaintiff's employment and retain Ms. Polizzotti for the administrative position in the consolidated office for the reasons she stated. Viewed in a light most favorable to plaintiff, however, there is evidence, albeit not abundant, from which one could conclude that her age was more likely than not a determinative factor in the decision to separate her from the merged company and deny her the administrative position in the consolidated office for which she was qualified.

Accordingly, defendant's motion must be denied. An appropriate order will be entered.