

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ELLIS BENJAMIN )  
 )  
 Plaintiff, )  
 )  
 v. ) C.A. No. 01-303-SLR  
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 E.I. DUPONT DE NEMOURS & CO., INC., )  
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 Defendant. )  
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**MEMORANDUM OPINION**

Dated: November 6, 2002  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Plaintiff, Ellis Benjamin ("Benjamin"), began working for defendant, E.I. DuPont de Nemours & Co. ("DuPont"), in April 1988. (D.I. 57 at 4, 61 at 3) Plaintiff began his career as a lab technician and eventually advanced to the position of Senior Assistant Chemist in 1994, the position he held until his termination. (Id.) On July 1, 1999, defendant made a general announcement that the department in which plaintiff worked was being restructured and was scheduled to be downsized. (Id.)

Within several weeks of the announcement, defendant established a criteria and selected a committee to determine which members of plaintiff's department would continue to be employed by defendant and which members would be discharged. (D.I 61 at 9) The selection committee consisted of four DuPont employees: Dr. Morgan, Dr. Pappenhagen, Dr. Maa, and Ms. Wilcox. (Id.) Once the selection committee was established, they evaluated forty-three employees, including plaintiff, for the position of Analytical Associate, the new position under the restructuring for which the candidates were competing. (D.I. 57 at 8)

In order to evaluate the candidates, the selection committee prepared a "Candidate Assessment Form" listing eight evaluation criteria. (D.I 58 at A125) For each criterion, a candidate was given a score of 1-5, one indicating that the candidate

frequently fell short of expectations and five indicating that the candidate consistently exceeded expectations. (Id.) The selection committee assigned a score for each criterion to each candidate and then summed up each candidate's scores to come up with a total aggregate score. (Id.) Next, the selection committee set an initial cut-off score. Candidates whose aggregate score fell below the cut-off were automatically selected for discharge. (D.I. 57 at 10)

However, after the initial cut-off, the selection committee realized that a further reduction of two more candidates was required given the number of available positions. (Id.) Therefore, the selection committee looked at candidates whose aggregate scores were just above the cut-off score. (Id.) Four candidates, including plaintiff, fell into this category, each having identical scores of 22. (D.I. 58 at A125) In order to select which two of these four candidates would be discharged, the selection committee discussed the qualifications and abilities of each candidate. (D.I. 57 at 10) Ultimately, plaintiff was selected as one of the two candidates for discharge.

On August 31, 1999, plaintiff was notified of defendant's decision to discharge him from his current position. (Id.) Upon receiving this news, plaintiff chose not to appeal the decision within the company but, rather, filed a charge of discrimination

against defendant with the Equal Employment Opportunity Commission ("EEOC"). (Id. at 11) In his EEOC action, plaintiff alleged discrimination based on age and disability. Following the issuance of a Notice of Right to Sue from the EEOC, plaintiff filed a suit in Delaware Superior Court on March 30, 2001. (D.I. 57 at 1) In his complaint, plaintiff alleged he was discharged by defendant in violation of the American With Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). (Id.)

On May 8, 2001, defendant removed the case to this court. (D.I. 1) During the course of litigation, the parties stipulated to the dismissal of the ADA claim. Thus, the sole remaining issue is plaintiff's claim of discrimination under the ADEA. Presently before the court are defendant's motions for summary judgment (D.I. 55, 56) and defendant's motion for a protective order (D.I. 44). This court has jurisdiction pursuant to 28 U.S.C. § 1331.

## **II. STANDARD OF REVIEW**

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). The moving party bears the burden of proving that no

genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v.

Catrett, 477 U.S. 317, 322 (1986).

With respect to summary judgment in discrimination cases, the court's role is "to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

### **III. DISCUSSION**

#### **A. Standards in Age Discrimination Cases**

The ADEA prohibits an employer from "discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]" 29 U.S.C. § 623(a)(1). To prevail on an ADEA termination claim, a plaintiff must show that his or her age "actually motivated" and "had a determinative influence on" the employer's decision to fire him or her. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000). An ADEA plaintiff can meet this burden by either presenting direct evidence of discrimination, or by presenting indirect evidence of discrimination that satisfies the familiar three-step framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Fakete

v. Aetna, Inc., 2002 U.S. App. LEXIS 22156 (3d Cir. Oct. 24, 2002).

The McDonnell Douglas analysis has three steps. First, the plaintiff must produce evidence that is sufficient to convince a reasonable fact-finder to find all of the elements of a prima facie case. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). When the plaintiff alleges unlawful discharge based on age, the prima facie case requires proof that:

(1) the plaintiff was a member of the protected class, i.e., was 40 years of age or older;

(2) the plaintiff was discharged;

(3) the plaintiff was qualified for the job; and

(4) the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination.

Keller v. Orix Credit Alliance, 130 F.3d 1101, 1108 (3d Cir. 1997).

If the plaintiff can establish a prima facie case, the second step of the analysis requires that the burden of production shifts to the defendant, who must then offer evidence to support a finding that it had a legitimate, non-discriminatory reason for the discharge. Id. If the defendant cannot satisfy this burden, judgment must be entered for the plaintiff. Id. However, if the defendant does satisfy this burden, step three is reached.

The plaintiff may then survive summary judgment by submitting evidence from which a fact-finder 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.

In this case, plaintiff concedes that there is little direct evidence of discrimination by defendant. (D.I. 61 at 21) Therefore, the court will analyze plaintiff's claim under the "slightly modified" McDonnell Douglas framework embraced by the Third Circuit. See, e.g., Keller v. Orix Credit Alliance, 130 F.3d 1101, 1108 (3d Cir. 1997); Waldron v. SL Industries Inc., 56 F.3d 491, 494-95 (3d Cir. 1995); Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995).

**B. Step 1: Prima Facie Case**

The first step of the McDonnell Douglas analysis requires that plaintiff produce evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a prima facie case are satisfied. The parties do not dispute that plaintiff satisfies the first two elements of the four-element test. Plaintiff was discharged from his employment, and he was over forty years old at the time of his discharge. The parties, however, do dispute the remaining two elements. For the reasons that follow, the court concludes that plaintiff is able to

establish a prima facie case.

**1. Plaintiff's qualifications for the job**

In support of his prima facie case, plaintiff asserts that he was well qualified for the job for which he was being considered. In making this claim, plaintiff relies on a number of favorable performance reviews and job feedback forms received throughout his tenure at DuPont. (D.I. 61 at 8-9)

Defendant argues that these performance reviews were merely self-assessments entitled to little weight. (D.I. 57 at 19-20) Furthermore, defendant asserts that plaintiff was not as qualified as other candidates applying for the position. (Id.) In support of this argument, defendant points to the candidate assessment form ranking the candidates on the basis of their aggregate scores. (D.I. 58 at A125) Defendant contends that plaintiff cannot point to any evidence that the selection committee's scoring of plaintiff is "unworthy of credence."

In response, plaintiff attacks his score on the candidate assessment form arguing he was improperly given a score of "2" in a category he should have received a "3" in. (D.I. 61 at 11) Plaintiff asserts that had he been given a "3" in this category, he would have had an aggregate score of 23, putting him above the remaining three candidates tied at 22, allowing him to keep his job.

The parties agree that the category on the candidate

assessment sheet entitled "knowledge of analytical chemistry" was used to determine a candidate's actual knowledge in the field. The parties also agree that the standard required for the job was "knowledge equivalent to a B.S. degree in chemistry." Plaintiff, however, contends that although he possessed knowledge equivalent to a B.S. degree in chemistry, since he did not actually have a B.S. degree in chemistry, he was precluded from receiving a score higher than a 2 in this category. Defendant argues that no bright line standard was used and plaintiff, or any other candidate, was not limited to a score of 2 simply because they did not have an actual B.S. degree in chemistry.

The record does not support defendant's argument. Dr. Morgan's (one of the selection committee members) deposition testimony is illustrative.

Q: Could somebody get a three there without having a B.S.?

A: I do not believe so, but I don't remember of (sic) any cases like that.

Q: You rated [plaintiff's] analytical knowledge without knowing the amount of training he had?

A: Mr. Benjamin did not have a Bachelor's in chemistry. So we rated him on not having the Bachelor's in chemistry.

(D.I. 62 at B-126)

In addition to this testimony, defendant's argument misses the mark for another reason. Defendant primarily argues that plaintiff was not as well qualified as other candidates in the pool. However, the third prong of the prima facie case only

requires that plaintiff was qualified for the job. Not that plaintiff was more qualified than others for the job. Given the fact that plaintiff's initial score of 22, which could have possibly been a 23, was not below the automatic cut-off, others with the same score kept their jobs, and construing the facts in a light most favorable to plaintiff, the court concludes that plaintiff has established he was at least qualified for the job.

**2. Plaintiff's replacement with a significantly younger person**

On this element, plaintiff argues that he was replaced by significantly younger candidates. In support of his position, plaintiff argues that all the "senior assistant chemist" candidates selected to remain at DuPont were between 6-25 years younger than plaintiff. Defendant argues that plaintiff cannot show that younger employees were treated more favorably in the selection process. Again, defendant's argument misses the mark. In order to satisfy the fourth element of the prima facie case, plaintiff does not need to show he was treated any differently than younger candidates, only that he was replaced with a significantly younger person. In this case, nearly all of the candidates retained by defendant were significantly younger than plaintiff, and both candidates retained that had the same score as plaintiff were significantly (7 and 28 years) younger.

**C. Step 2: Legitimate, Non-Discriminatory Reason for Discharge**

Upon concluding that plaintiff has satisfied the first step of the McDonnell Douglas analysis, the burden of production shifts to defendant, who must offer evidence to support a finding that it had a legitimate, non-discriminatory reason for the discharge. Keller, 130 F.3d at 1108. Defendant points out that its legitimate, non-discriminatory reason for discharging plaintiff, as well as 17 other employees, was the need to downsize the department in which plaintiff formerly worked. (D.I. 57 at 23) Plaintiff does not dispute the fact that defendant was, in fact, downsizing or that 18 employees, in fact, were discharged as part of the restructuring scheme.

More specifically, defendant contends that its legitimate, non-discriminatory reason for discharging plaintiff was that the selection committee determined that he was less qualified for the position than other individuals in the applicant pool. In support of this claim, defendant points to the candidate evaluation form and the testimony of the members of the committee. Given these undisputed facts, the court concludes that defendant has carried its burden of establishing a legitimate, non-discriminatory reason for discharging plaintiff.

**D. Step 3: Plaintiff's Rebuttal of Defendant's Legitimate Discharge**

Having carried its burden in step 2, the burden of production then shifts back to plaintiff. In order to survive summary judgment, plaintiff must submit evidence from which a

fact-finder 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. Keller, 130 F.3d at 1108. That is, the employee must prove by a preponderance of the evidence that the articulated reasons are merely a pretext for discrimination. Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001). The quantum of evidence required for plaintiff to meet this burden "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 (that is, the proffered reason is a pretext)." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)

In support of his argument that defendant's actions were merely a pretext for age discrimination, plaintiff first "cuts-and-pastes" snippets from various performance reviews and points to supposed contradictions between his evaluations at different points in time. (See D.I. 61 at 21-22) This argument is unavailing, however, since these performance reviews were often written by plaintiff himself and attested to by his superiors later. In fact, in plaintiff's last self-drafted assessment prior to being discharged, he stated that his future goals were to "relate more to peers and by networking," "relate with others

in a more productive fashion," and to "network with others."  
(D.I. 64, Ex. 4) These are some of the reasons the selection committee cited in their reasoning to discharge plaintiff. Thus, it is disingenuous for plaintiff to now argue that these reasons, cited by the committee, were merely a pretext for discrimination.

Next, plaintiff argues that the use of subjective criteria may have been a "subterfuge for discriminatory animus." (D.I. 61 at 25) In support of this argument, plaintiff makes conclusory allegations that defendant's subjective methodology could result in a finding of a pretext for discrimination and that a jury should decide the issue. However, plaintiff provides virtually no evidence to the court that this argument has any merit. In the absence of any evidence supporting this allegation, plaintiff's argument does not meet the burden of the McDonnell Douglas analysis.

Plaintiff then makes the argument that defendant's use of "code words" evidences a pretext for discrimination. In support of this argument plaintiff misquotes the record and, while corrected at oral argument, still relies on a statement made after his termination by a party who had nothing to do with the evaluation of plaintiff or the selection committee. As such, plaintiff has failed to provide any credible evidence that defendant used code words as a pretext for discrimination.

Finally, plaintiff relies on a one page expert report from a

statistician to show that the selection process was a pretext for age discrimination. (D.I. 61 at B-76) Setting aside the fact that the report lacks any discussion of the methodology used or any meaningful explanation of the results, plaintiff's expert found that only one of the eight selection criteria had a significant correlation with age. (Id.) Plaintiff fails to explain how this one correlation translates into a pretext for age discrimination against him.

In looking at the candidate assessment form, the court notes that of the 17 other employees discharged, 14 were younger than plaintiff. Additionally, three of the five candidates older than plaintiff had higher aggregate scores than plaintiff. Furthermore, as defendant points out, prior to downsizing, 74% of the employees fell within the protected class. After downsizing, 72% of the retained employees were members of the protected class. The average age of the pool prior to downsizing was 43, and after downsizing, 41. While these numbers may not be statistically significant, they cast doubt on plaintiff's unsupported argument that the statistics evidence a pretext for discrimination.

For the reasons stated, the court concludes that plaintiff has failed to satisfy step 3 of the McDonnell Douglas analysis and defendant, therefore, is entitled to the entry of a summary judgment.

#### **IV. CONCLUSION**

For the reasons stated, defendant's motions for summary judgment (D.I. 55, 56) are granted, and defendant's motion for a protective order (D.I. 44) is denied as moot. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ELLIS BENJAMIN )  
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 Plaintiff, )  
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 v. ) C.A. No. 01-303-SLR  
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 E.I. DUPONT DE NEMOURS & CO., INC., )  
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 Defendant. )  
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**O R D E R**

At Wilmington this 6<sup>th</sup> day of November, 2002, having heard oral argument and having reviewed papers submitted in connection therewith, for the reasons stated;

IT IS ORDERED that:

1. Defendant's motions for summary judgment (D.I. 55, 56) are granted.
2. Defendant's motion for a protective order (D.I. 44) is denied as moot.
3. The Clerk of Court is directed to enter judgment in favor of defendant against plaintiff.

Sue L. Robinson  
United States District Judge