

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MICHAEL B. CUSTER,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-1490 GMS
)
 NEWROADS, INC., a Delaware)
 corporation, et al.,)
)
 Defendants.)

MEMORANDUM AND ORDER

I. INTRODUCTION

Michael Custer filed the above-captioned suit against NewRoads, Inc. (“NewRoads”) and Interactive Marketing Services, Inc. (“IMS” or collectively with NewRoads, “NewRoads”) on September 26, 2002, alleging age discrimination and breach of the implied covenant of good faith and fair dealing. Presently before the court is NewRoads’ motion for summary judgment (D.I 39). For the following reasons, the court will deny in part and grant in part this motion.

II. STANDARD OF REVIEW

NewRoads moves for summary judgment pursuant Federal Rule of Civil Procedure 56. Summary judgment is appropriate “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. PROC. 56; *see also Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). In other words, summary judgment is proper only if NewRoads shows that there are no genuine issues of material fact that would permit a reasonable jury to find for Custer. *See Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 247-48 (1986). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* In ruling on a summary judgment motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id.*; *see also Assaf v. Fields*, 178 F.3d 170, 173-74 (3d Cir. 1999).

III. BACKGROUND

Adopting Custer's version of events where they are disputed, the facts relevant to this motion are as follows.¹

A. Custer's Employment with NewRoads

The defendant NewRoads is a Delaware corporation in the business of servicing retail customers who sell goods by telephone, catalog, or through the internet. NewRoads acquired the defendant IMS, also a Delaware Corporation, on March 29, 2000.

¹ The court rejects NewRoads's contention that it must disregard Custer's affidavit in support of this motion because the document contradicts statements he made in his deposition testimony. As an initial matter, a review of the portions of Custer's deposition testimony cited by NewRoads reveals that Custer does not contradict himself to the extent NewRoads' implies, if at all. Furthermore, the case law NewRoads cites in support of its position permits the court to disregard an affidavit on summary judgment where "the affiant was carefully questioned on the issue, had access to the relevant information at that time, and provided no satisfactory explanation for the later contradiction." *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d Cir. 1988). Based on the limited excerpts NewRoads attached in the appendix to its reply brief, it is unclear whether Custer was questioned carefully on the issues in the affidavit during his deposition or if he even had access to the relevant information at the time. Even though Custer does not give an explanation for the later affidavit, the court can infer that there may be one from the surrounding circumstances. Indeed, the nine legitimate, non-discriminatory reasons NewRoads proffers in its opening brief to this motion did not appear in its responses to Custer's interrogatories. Thus, although Custer can likely cast sufficient doubt on NewRoads' proffered legitimate, non-discriminatory reasons even without the affidavit, the court will consider Custer's affidavit in deciding this motion.

In May of 1999, IMS hired Custer to work in its Local Area Network (LAN) department, located in Ridgely, Maryland. At that time, Michael Haxter was the LAN Administrator for IMS and the person responsible for hiring and directly supervising Custer. Eddie Harris, Director of Information Technology, was Custer's second level manager. Over Harris was Jeffrey Doster, Vice President of Information Technology. Custer was age forty-nine at the time of his hire.

For approximately the first six months of his employment with IMS, Custer performed hardware work such as board level work and work on terminals, monitors and printers. These duties were later performed by Steve Bollinger, an employee who was hired after Custer and nine years his junior in age. Also during the initial phase of his employment, Custer worked on the WMS system. Later, another IMS employee, Jessie Ford, was transferred to the LAN department and took over the WMS system responsibilities. Ford is twenty-five years younger than Custer.

As more employees were hired into the LAN department, Custer took on the role of assistant manager and managed the department whenever Haxter was out. During the last year of his employment, Custer took over the supervision of the LAN department several times a week. Eddie Harris and Jeff Doster were aware that Haxter was training Custer to manage the LAN department. In his deposition, Haxter recounted describing Custer as one of the LAN department's "foundation elements." Indeed, Custer's job performance was rated "good" to "excellent" on nearly all of the evaluations he received during his employment with NewRoads.

During the course of his employment in the LAN department, Doster referred to Custer's age on at least two occasions. In the first month of Custer's employment, Haxter told Custer that Doster had referred to the LAN department as the "geriatric ward." Later in his employment, Doster asked Custer how old he was. When Custer told him his age, Doster responded that Custer was in pretty

good shape for his age.

Custer resided in Dover, Delaware at all relevant times during his employment. While employed with the LAN department, Custer spent approximately 20% to 25% of his time servicing sites in Delaware. He spent the remainder of his time working in Maryland.

B. NewRoads' Cutbacks

NewRoads reports that during the second and third quarters of 2001, the company was forced to make cutbacks due to loss of revenue. NewRoads lost two customers, Warner Brothers and MVP.com, in early 2001. Then, in late 2001, the company lost two additional customers, Microsoft and Abercrombie & Fitch.² In January of 2001, NewRoads laid off two employees in the LAN department, Michael Kuhn, age twenty, and Erric Walston, also age twenty.³ In June of 2001, however, at least one NewRoads employee, Mary Neal, age thirty-four, was promoted and received a pay increase that was made retroactive to January 1, 2001.

C. Custer's Termination

On September 21, 2001, Haxter and Eddie Harris had a meeting with Custer in which they informed him that NewRoads was terminating his employment. Although Haxter was at this meeting, he was not involved in the decision to terminate Custer. Custer was age fifty-two at the time of his discharge. After Custer's termination, the remaining employees in the LAN Department included Michael Haxter, age fifty-three, Steve Bollinger, age forty-three, Jessie Ford, age twenty-seven, Robert Kantner, age forty two, and Matthew Woomer, age nineteen.

² NewRoads lost these two customers after Custer's termination.

³ In March of 2001, another LAN department employee, David Berkey, age twenty-five, resigned from the company.

The letter from Harris to Custer outlining NewRoads' reasons for his termination stated: "Due to changing business needs, NewRoads, Inc.–Atlantic Division has found it necessary to restructure the organization. As a result of this restructuring effort, your position is being eliminated, and your employment is being terminated, effective today, September 21, 2001." In its response letter to EEOC, NewRoads stated that Custer's position had been eliminated, in part, because "many of the tasks Custer was responsible for were outsourced to a vendor."

NewRoads contends that in September of 2001, Doster and Harris were given the directive to lay off an employee in the LAN department due to a decline in revenue. Allegedly, after reviewing the functions of the positions in the LAN department, Harris concluded that Custer's position was the most redundant. In its opening brief in support of this motion, New Roads lists nine post hoc, non-discriminatory reasons explaining why Custer's position was selected for elimination.⁴ NewRoads also claims that Michael Kuhn, Erric Walston, and David Berkey were laid off as a result

⁴ Specifically, these nine reasons are as follows. (1) The migration of the accounting system (Custer's primary responsibility) was completed and operating in a stable environment. (2) The day-to-day operation of the accounting LAN was being handled by an employee in the accounting department, Mary Yeager. (3) Two supervisors (Haxter and Custer) were not required in the LAN department. (4) Custer was not needed to make assignments to other LAN technicians since by the end of 2000, most of the calls were handled by the Help Desk which was located in another department. The work orders were then recorded and tracked through an email system. (5) During 2001, the LAN department had gained the ability to remotely manage most of the servers at the remote locations enabling Haxter to stay at the Ridgely facility. He therefore would be able to fill Custer's other responsibilities. (6) Matt Woomer, who was hired before Custer in 1997, had very good skills, and was performing cabling work which Custer did not do. (7) Steve Bollinger was the bench tech hardware specialist. He did board level work, terminals, monitors, and printers. Custer was not doing this type of work. (8) Jessie Ford was the primary individual working on the Ascent system and WMS system. Custer did not work on either of these systems. (9) Robert Kantner supported the New Castle facility and did telecommunications work which Custer did not do.

of the company's cut-backs.

After Custer was terminated, Haxter and Jessie Ford took over Custer's responsibilities. However, Haxter was subsequently terminated in January of 2002. A continued downturn in business was given as the reason for Haxter's discharge as well. Haxter was age fifty-four at the time of his termination.

IV. DISCUSSION

A. The Age Discrimination Claim

NewRoads claims that Custer cannot establish a prima facie case of age discrimination. In the event that Custer can establish a prima facie case, however, NewRoads contends that summary judgment is still appropriate because Custer cannot point to any material facts disputing NewRoads' legitimate, non-discriminatory reasons for his discharge. The court disagrees.

Under the framework set forth in *McDonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973), a plaintiff may establish a prima facie case of discrimination using indirect, or circumstantial, evidence. In a reduction of force case, i.e., where a plaintiff's job is eliminated, a plaintiff establishes a prima facie case of discrimination if he can show that he (1) is a member of the protected class, (2) was qualified for the position at issue, (3) was laid off from a job while a similarly-situated, sufficiently younger employee was retained. See *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 249 (3d Cir. 2002).

Based on the aforementioned set of facts, a reasonable jury could conclude that Custer has established a prima facie case of age discrimination. There is sufficient evidence to conclude that this is a reduction in force case. Indeed, NewRoads states that Custer's job was being eliminated in the letter outlining the reasons for his discharge. As to the first prong of Custer's prima facie case,

there is no factual dispute that Custer was fifty-two, and therefore within the protected class, at the time of his lay-off. Custer can also adduce sufficient evidence to satisfy the second prong of his prima facie case. For example, his job evaluations were good to excellent. Additionally, Haxter's deposition testimony establishes that Haxter considered Custer to be the best man for the job upon hiring him. Thus, a jury could conclude that he was qualified for his position with the LAN department. Finally, Custer can also establish that other similarly-situated, but significantly younger, workers in the LAN department were retained after he was laid off, and thereby satisfy the third prong of his prima facie case. Both Jessie Ford, twenty-seven, and Matthew Woome, nineteen, retained their jobs. Moreover, Steve Bollinger and Robert Kantner, although both over the age of forty, were significantly younger than Custer and also retained their positions. The record also supports the conclusion that Custer was similarly situated to at least two of these employees, Ford and Bollinger. Ford took over many of Custer's job responsibilities after his termination. Furthermore, Bollinger's duties at the time of Custer's discharge were tasks that Custer had previously performed.

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant employer to demonstrate a legitimate, nondiscriminatory reason for the adverse employment action. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243, 252 (3d Cir. 2002). If the employer is able to articulate such a reason, in order to survive summary judgment, the plaintiff must then show that the reason is really a pretext for unlawful discrimination. *See Reeves*, 530 U.S. at 143. Specifically, Custer must show that a reasonable jury evaluating the entire record could (1) believe that discrimination on the basis of his age was more likely than not a motivating factor or determinative

cause for his discharge, or (2) disbelieve NewRoads' proffered reasons for firing him. *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 n.3 (3d Cir. 2002); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). To meet his burden, Custer may demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions" in the company's reasons such that a reasonable jury could find them "unworthy of credence." *Fuentes*, 32 F.3d at 765.

Custer points to inconsistencies and contradictions in NewRoads' explanation for his discharge, which, if believed, would enable a trier of fact to reasonably find that NewRoads' reasons are a pretext for discrimination. For example, NewRoads claims that Custer's discharge was part of the company's cut-back efforts in which at least three other employees, younger than Custer, were also laid off from the LAN department. Nonetheless, Michael Kuhn and Erric Walston were laid off in January of 2001, whereas the alleged cut-backs did not begin until April of 2001 at the earliest. Furthermore, one of the employees NewRoads claims was laid off as part of the cut-backs, David Berkey was not discharged at all, but in fact resigned. Custer also notes that NewRoads promoted and raised the salary of at least one employee during the course of the alleged cut-backs. In addition, NewRoads claimed in its position letter to the EEOC that it outsourced Custer's duties to a vendor. In contrast, however, are statements by NewRoads showing that his job functions were in fact taken over by Ford and Haxter. Finally, when construed in the light most favorable to Custer, there is evidence from which a reasonable jury could conclude that at least some of NewRoads' nine post hoc reasons for choosing to eliminate Custer's position are unworthy of credence.⁵ The

⁵ As to each of NewRoads' nine proffered non-discriminatory reasons, Custer makes the following contentions of fact. (1) Mary Yeager, who was responsible for configuring the application of the Kronos program and gathering necessary data, had no knowledge of the hardware required to run the system and thus no ability to repair breakdowns, a fact tending to contradict NewRoads' contention

combination of Doster's stray remarks about Custer's age along with the fact that NewRoads laid off the only other employee in the LAN department older than Custer just two months after Custer's discharge create a genuine issue as to whether or not NewRoads' explanations for its actions are mere pretext for age discrimination.

Based on the entire record before the court, NewRoads has not carried its burden to demonstrate that there are no genuine issues of material fact. "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. Construing the forgoing facts in the light most favorable to him, Custer could establish a prima facie case of discrimination under *McDonnell-Douglas* and cast sufficient doubt on NewRoads's proffered legitimate non-discriminatory reasons to create a genuine issue for a jury.

that the accounting system was operating in a more stable environment than it had been previously. (2) Contrary to NewRoads' contention, Mary Yeager was not handling the day-to-day operation of the accounting LAN at the time of Custer's departure. (3) The employees in the LAN department were relatively immature, which suggests that two supervisors were in fact needed in the LAN department. (4) The Help Desk personnel were qualified to handle only the most basic problems, not second, third and fourth level problems, a fact tending to contradict NewRoads' assertion that Custer was not needed to make assignments to other LAN technicians. (5) Contrary to NewRoads' assertion that the remote management of servers was a new capability gained by the LAN department in 2001, the function in fact had been in place since Custer's hire in 1999. (6) Custer was able to do the cabling work performed by Woomer, and NewRoads was aware of this fact despite its contention to the contrary. (7) Before Steve Bollinger, who is nine years younger than Custer, was hired, Custer performed all Bollinger's present tasks. (8) Before Jessie Ford, who is twenty-five years younger than Custer, was hired, Custer performed all of Ford's tasks, and after Ford's hire, Custer continued to perform those same tasks whenever Ford was absent. (9) Custer was qualified to perform most of the tasks performed by Robert Kantner, and could have performed the remainder without extensive training.

Summary judgment on Custer's age discrimination claim therefore is inappropriate.

B. The Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

New Roads also moves for summary judgment on Custer's Delaware implied covenant of good faith and fair dealing claim. The company argues that the court must apply Maryland law to this claim. Maryland law, NewRoads further asserts, does not recognize a claim for breach of the implied covenant of good faith and fair dealing under the facts alleged by Custer. The court agrees and will therefore grant NewRoads' motion with regard to Custer's breach of the implied covenant of good faith and fair dealing claim.

Custer does not dispute that his claim for breach of the implied covenant of good faith and fair dealing is based upon Delaware law. Consequently, Custer may go forward on this cause of action only if the court first decides that Delaware law applies to his claim.

A claim for breach of the implied covenant of good faith and fair dealing is contractual in nature. *See E.I. DuPont De Nemours & Co. v. Pressman*, 679 A.2d 436, 442-44 (Del. Ch. 1996); *Shearin v. E.F. Hutton Group, Inc*, 652 A.2d 578, 586 (Del. Ch. 1994). The court therefore must determine which state's law to apply to Custer's contract claim. In doing so, the court looks to Delaware's choice of law rules. *Peco Energy Co. v. Boden*, 64 F.3d 852, 855 (3d Cir. 1995) ("A federal court must apply the choice of law rules of the forum state when sitting in diversity."). Where the parties to a contract have not effected a choice of law provision, Delaware courts follow the Restatement (Second) of Conflict of Laws. *See, e.g., Old Republic Ins. Co. v. Rexene Corp.* 1990 WL 176791, at *5 (Del. Ch. 1990). The Restatement sets forth the following factors that should be considered when determining the applicable law: (a) the place of contracting, (b) the place of negotiation, (c) the place of performance, (d) the location of the subject matter of the contract,

and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2). These contacts should be evaluated according to their relative importance with respect to the particular issue. *Id.* Significantly, “if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied.” *Id.* at § 188(3).

Weighing the aforementioned factors in the appropriate light, the court determines that Maryland law applies to Custer’s claim for breach of the implied covenant of good faith and fair dealing. The parties agree that Maryland is the place of negotiation and the place of contracting with respect to Custer’s employment at NewRoads. As to the third and fourth factors in section 188, the place of performance and the location of the subject matter of the contract, respectively, it is undisputed that Custer spent 75% to 80% of his time servicing sites in Maryland. The court therefore finds that Maryland is also the place of performance and the location of the subject matter of the contract. Both NewRoads and IMS are Delaware Corporations, and Custer resides in Delaware as well. Thus, the remaining factor, domicile/place of incorporation, weighs in favor of Delaware.

Out of the five factors enumerated in section 188 of the Restatement, all but one weigh heavily in favor of the court applying Maryland law. Consequently, the court determines that it must apply Maryland law to Custer’s breach of contract claim. Having made this determination, the court need not inquire any further, as Custer’s claim relies exclusively on Delaware law.

V. CONCLUSION

With respect to Custer’s discrimination claim, the court finds that there are genuine issues of material fact which preclude the granting of summary judgment. Specifically, when construed

in the light most favorable to Custer, the record supports Custer's prima facie case and otherwise contains sufficient evidence to allow a reasonable jury to find that NewRoads' proffered legitimate, non-discriminatory reasons are really a pretext for unlawful discrimination.

On the other hand, the court agrees with NewRoads that Custer's claim for breach of the covenant of good faith and fair dealing is foreclosed as a matter of law because Maryland, rather than Delaware, law applies to that cause of action.

WHEREFORE IT IS HEREBY ORDERED that:

1. NewRoads' motion for summary judgment (D.I. 39) is GRANTED with respect to Count II of the Complaint (D.I. 1) and DENIED with respect to the remaining allegations in the Complaint.
2. Count II of the Complaint (D.I. 1) is dismissed with prejudice.

Dated: November 13, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE