IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALFRED E. SMITH, Plaintiff, v. NORAMCO OF DELAWARE, INC., a Delaware corporation; ORTHO-McNEIL PHARMACEUTICAL, INC., a Delaware Corporation; JOHNSON & JOHNSON, a New Jersey Corporation, and XYZ CORPORATIONS, Defendants.	)	Civil Action No. 02-1615-KAJ

MEMORANDUM OPINION

Alfred E. Smith, 4474 Country View Drive, Doylestown, Pennsylvania 18901, *pro se* plaintiff.

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Of counsel: Francis X. Dee, Esq. and David B. Beal, Esq., Carpenter, Bennett & Morrissey, Three Gateway Center, 100 Mulberry Street, Newark, New Jersey 19899.

Wilmington, Delaware
May 3, 2004

JORDAN, District Judge

I. INTRODUCTION

This is an employment discrimination case. Jurisdiction is proper under 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Plaintiff Alfred E. Smith ("Plaintiff") filed a complaint on November 6, 2002, alleging that defendants Noramco of Delaware, Inc. ("Noramco"), Ortho-McNeil Pharmaceutical, Inc. ("Ortho"), and Johnson & Johnson ("J&J") (collectively, "Defendants") unlawfully terminated his employment on the basis of his age and veteran's status, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311, *et seq.,* respectively. (*See* Docket Item ["D.I."] 1.) Plaintiff also alleges that Defendants unlawfully terminated his employment in retaliation for an earlier lawsuit he brought against Ortho in 1996, wherein he raised claims under the ADEA and the USERRA. (*Id.*) Presently before me is Defendants' Motion for Summary Judgment (the "Motion"). (D.I. 47.) For the reasons that follow, Defendants' Motion will be granted.

II. STANDARD OF REVIEW

A party is entitled to summary judgment only when the court concludes "that there is no genuine issue of material fact and that the 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 material issue of fact is in dispute. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 n.10 (1986). Once the moving party has carried its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)). "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. Federal Kemper Life Assur. Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he 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). The mere existence of some evidence in support of the party 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 factual issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This court, however, must "view all the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). 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. BACKGROUND[1]

In March 1986, Johnson & Johnson Products, a subsidiary of J&J, hired Plaintiff as an engineer. (D.I. 1 at ¶ 5.) At various times between March 1986 and July 2000, Plaintiff was employed by other subsidiaries of or entities related to J&J, including Noramco and Ortho. (*Id.*) On May 18, 1992, Plaintiff was hired by Ortho (which, at the time, was McNeil Pharmaceutical). (*Id.* at ¶ 13.) Plaintiff was laid off from Ortho on July 21, 1995, prompting him to file a lawsuit against Ortho, J&J, and other related entities on November 20, 1996, alleging discrimination based on age and veteran's status. (*Id.* at ¶ 17, 18, 20.)

In September 1998, Plaintiff, who was 57 years old at the time, was hired by Noramco and began working at its plant in Wilmington, Delaware. (*Id.* at ¶ 21; D.I. 48 at 4.) His supervisor was William Mullen. (D.I. at ¶ 26; D.I. 48 at 4.) Plaintiff's responsibilities included project assignments dealing with the purchase, installation, hook-up, start-up, and validation of various pieces of processing equipment. (D.I. 48 at 4.) In November 1998, Plaintiff received a performance evaluation from Mr. Mullen rating his job performance as "Effective" overall. Mr. Mullen's evaluation also noted that Plaintiff needed to improve his ability to manage multiple projects, an assessment with which Plaintiff agreed. (D.I. 48 at 4; D.I. 49 at A21-23, A58.)[2] After receiving this

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[1]These facts, taken from Plaintiff's complaint, deposition testimony, and documents contained in appendices submitted with the parties' summary judgment briefing, are accepted as true by Defendants for purposes their Motion. (D.I. 48 at 4 n.2.)

[2]D.I. 49 is an appendix filed in support of Defendants' Motion, containing Plaintiff's deposition transcript and the documentary evidence referred to in this Memorandum Opinion.

evaluation, Plaintiff voluntarily dismissed the 1996 suit against Ortho. (D.I. 1 at ¶ 22; D.I. 48 at 4.)

On July 1, 1999, Dennis Canavan, a former director of engineering at Ortho, visited the Noramco plant. (D.I. 1 at ¶ 25; D.I. 48 at 10; D.I. 49 at A10-15.) Plaintiff alleges that Mr. Canavan told Mr. Mullen about Plaintiff's lawsuit against Ortho in 1996. (*Id.* at ¶ 26.) However, Plaintiff had lunch with Mr. Canavan and Mr. Mullen that day and they never discussed the 1996 lawsuit, nor did Plaintiff overhear any conversations between Mr. Canavan and Mr. Mullen or any other Noramco employee. (D.I. 48 at 10; D.I. 49 at A15.)

In a July 1999 mid-year performance evaluation, Mr. Mullen rated Plaintiff "Below Average" overall, again stating that Plaintiff had problems with managing projects, and also noting two projects for which Plaintiff was responsible that were three to four weeks behind schedule. (D.I. 48 at 4-5; D.I. 49 at A23-29, A64.) Plaintiff agreed with the July 1999 evaluation. (*Id.* at 5; D.I. 49 at A24.) On Plaintiff's next evaluation, dated December 8, 1999, he received an overall rating of "Unsatisfactory" because he had not improved in many of the areas Mr. Mullen identified in the previous evaluations. (*Id.*; D.I. 1 at ¶ 27; D.I. 49 at A30, A67-72, A73-75.) Furthermore, many of Plaintiff's projects were months behind schedule and another was incomplete and over budget. (*Id.*) As a result, Mr. Mullen noted that he was putting Plaintiff on probation, establishing a development plan for him, and would not assign him any new priorities until Plaintiff's existing projects were completed. (*Id.*)

On December 16, 1999, Plaintiff received a final warning from Mr. Mullen placing him on probation and warning him that failure to improve his job performance would

result in termination of his employment. (D.I. 48 at 6; D.I. 49 at A31-36, A73-76.) Mr. Mullen also provided Plaintiff with a development plan mandating that he complete certain projects over a six month period, with the understanding that failure to complete those projects would also result in termination of Plaintiff's employment. (*Id.*; D.I. 49 at A35, A77-78.) Plaintiff disagreed with Mr. Mullen's December 1999 evaluation in certain respects, but admitted that he deserved criticism for his "lack of timeliness" and inability to comply with administrative requirements. (*Id.*)

By July 10, 2000, Plaintiff failed to meet a majority of objectives set forth in the development plan. (D.I. 48 at 7; D.I. 49 at A39, A83; D.I. at ¶¶ 29-41.) As a result, Mr. Mullen recommended that Plaintiff's employment be terminated, and Plaintiff was advised of his termination on July 19, 2000. (D.I. 48 at 8; D.I. A41-43, A95.) The termination letter that Plaintiff received said that his termination was performance related. (D.I. 1 at ¶ 46.) Plaintiff prepared a written response to his final evaluation, wherein he admitted that he failed to meet the objectives of the development plan. (D.I. 48 at 8; D.I. 49 at A93-94.) He also went through an internal appeal process to J&J's corporate headquarters but was not reinstated at Noramco. (D.I. 1 at ¶ 43.)

Mr. Mullen first learned that Plaintiff had previously filed a lawsuit against Ortho during the fall of 1999, but he did not know that the 1996 lawsuit pertained to discrimination based on Plaintiff's age or veteran's status until 2001. (D.I. 48 at 10; D.I. 49 at A101.) When Plaintiff met with Mr. Mullen and Claudia Cobble, Noramco's human resources manager, on July 19, 2000 regarding his termination, Plaintiff claims that he may have asked Ms. Cobble whether his termination had anything to do with his last termination, to which he thinks Ms. Cobble replied, "If we had known that, that would

have been unethical." (*Id.* at 9; D.I. 49 at A44-46.) Plaintiff also contends that an investigator from the Equal Employment Opportunity Commission ("EEOC") told him that Mr. Canavan told her that he told Mr. Mullen that Plaintiff previously sued Ortho. (*Id.*; D.I. 49 at A8-14, A16-17) Plaintiff does not know when this conversation took place or whether Mr. Canavan told Mr. Mullen that the lawsuit alleged discrimination based on age and veteran's status. (*Id.* at 9-10.)

IV. DISCUSSION

A. Plaintiff's Claims of Age and Veteran Status Discrimination

In Count II of his complaint, Plaintiff alleges that Noramco unlawfully terminated his employment on the basis of his age, in violation of the ADEA. (D.I. 1, ¶¶ 63-65.) Plaintiff also alleges, in Count IV of his complaint, that Noramco unlawfully terminated his employment due to his veteran status, specifically, membership in the U.S. Army Reserves and the National Guard, in violation of the USERRA. (*Id.*, ¶¶ 73-75.) However, at his deposition, Plaintiff stated that "[o]n the basis of what [he] know[s] now," the only claims he is asserting against Noramco are those for retaliation, set forth in Counts I and III of his complaint. (D.I. 49 at A54-A55.) Therefore, Counts II and IV of Plaintiff's complaint will be dismissed with prejudice.

B. Plaintiff's Retaliation Claims

Plaintiff's remaining claims against the Defendants are that he was discharged from Noramco in retaliation for filing a lawsuit against Ortho in 1996 alleging discrimination based on his age and veteran's status. (*See* D.I. 1, ¶¶ 58-62, 66-72.) Noramco argues that Plaintiff's retaliation claims fail as a matter of law because he

cannot offer any evidence that there was a causal link between his termination and the claims he made in the 1996 suit against Ortho. (D.I. 48 at 13.)

In order to establish a *prima facie* case of retaliation, a plaintiff must demonstrate by a preponderance of the evidence that (1) he engaged in activity protected under the ADEA[3] or USERRA[4]; (2) the employer took an adverse employment action against him; and (3) a causal link exists between the protected activity and the adverse employment action. *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 567 (3d Cir.), *cert. denied*, 123 S. Ct. 112 (2002); *see also Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1999). Once a plaintiff has established a *prima facie* case, the burden shifts to the defendant to clearly set forth, through the introduction of admissible evidence, reasons

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[3]The anti-retaliation provision of the ADEA provides:

> It shall be unlawful for an employer to discriminate against any of his employees...because such individual...has opposed any practice made unlawful by this section, or because such individual...has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d) (2004).

[4]The anti-retaliation provision of the USERRA provides:

> An employer may not...take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

38 U.S.C. § 4301(b) (2004).

for its actions that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the motivating force behind the adverse employment action. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). If the defendant successfully rebuts the plaintiff's *prima facie* showing, the presumption of discrimination drops from the case, and plaintiff must present sufficient evidence for a reasonable factfinder to conclude "that the proffered reason was not the true reason for the employment decision." *Id.* at 256; *see also Bray v. Marriott Hotels,* 110 F.3d 986, 990 (3d Cir. 1997) ("The plaintiff must produce evidence from which a reasonable factfinder could conclude either that the defendant's proffered justifications are not worthy of credence or that the true reason for the employer's act was discrimination.").

In this case, the court need not undertake this extensive burden shifting analysis because plaintiff has not come forth with competent evidence of a causal link between the protected activity and the adverse employment action, and therefore has failed to set forth a *prima facie* case of retaliation under the ADEA or the USERRA.[5] *See Kidd v. MBNA America Bank, N.A.*, 224 F. Supp. 2d 807, 812-13 (D. Del. 2002). Specifically, Plaintiff alleges that the causal connection between the protected activity (filing the 1996 employment discrimination lawsuit against Ortho) and the adverse employment action (termination from Noramco in 2000) is demonstrated by "(a) the temporal proximity between the time Mullen learned of [Plaintiff's] protected activity and the time [Plaintiff] was discharged, (b) circumstantial evidence of a pattern of antagonism following protected activity, Mullen was displeased with the protected activity of [Plaintiff] and it

[5]Because the anti-retaliation provisions of the ADEA and the USERRA are nearly identical, they may be analyzed together. *See Fogleman,* 283 F.3d at 567.

angered him, (c) personal knowledge and awareness of protected activity by Mullen, and (d) the evidence as a whole." (D.I. 1, ¶ 44.) Even though Mr. Mullen learned that Plaintiff filed a lawsuit against Ortho in the fall of 1999, Plaintiff has not come forward with any competent evidence to dispute the fact that Mr. Mullen did not know the subject of the 1996 lawsuit until 2001, well after Plaintiff's employment with Noramco was terminated. Plaintiff's assertion that an EEOC investigator told him that Mr. Canavan told Mr. Mullen about the 1996 lawsuit at some unknown date and time does not constitute sufficient evidence, even when viewed in the light most favorable to the Plaintiff, to enable a reasonable factfinder to find in favor of Plaintiff on the issue of causation, *see Anderson,* 477 U.S. at 249, nor does the evidence when taken as a whole. The undisputed documentary evidence, together with Plaintiff's own deposition testimony, indicates that Plaintiff was terminated for poor job performance, specifically, an inability to complete projects on time, which was even acknowledged by the Plaintiff himself. Because Plaintiff has failed to meet his burden of setting forth a *prima facie* case of retaliation by a preponderance of the evidence, Counts I and III of his complaint will be dismissed.

V. CONCLUSION

For these reasons, Defendants' Motion (D.I. 47) will be granted. An appropriate order will issue.

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ORDER

For the reasons set forth in the Memorandum Opinion issued today, it is hereby ORDERED that Defendants' Motion to Dismiss (D.I. 47) is GRANTED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
May 3, 2004