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

SHEILA M. KOTAS	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
EASTMAN KODAK COMPANY	:	
Defendant.	:	NO. 95-CV-1634

M E M O R A N D U M

J.M. KELLY, J. **SEPTEMBER , 1997**

Presently before the Court are the following post-trial motions in the above-captioned case: Defendant's Motion for Judgment as a Matter of Law on Plaintiff's disability discrimination claim; Defendant's Alternative Motion for a New Trial on Plaintiff's disability discrimination claim; Plaintiff's Motion for a New Trial in Part and to Alter and Amend Judgment accordingly; Plaintiff's Motion for Reinstatement; and Plaintiff's Motion for Attorneys' Fees and Costs. Also before the Court are all Responses, Replies and Supplemental Briefings received in relation to these Motions. For the following reasons, Defendant's Motion for Judgment as a Matter of Law will be granted, in the alternative, Defendant's Motion for a New Trial on the disability discrimination claim is conditionally granted; Plaintiff's Motion for a New Trial on her age

discrimination claim is denied. Plaintiff's Motion to alter and amend the verdict; her Motion for Reinstatement; and her Motion for Attorney's Fees and Costs will be dismissed as moot.

I. Background

Sheila Kotas ("Plaintiff") was employed by Eastman Kodak ("Kodak" or "Defendant") for twenty-five years, starting in 1968, until her termination in 1993. For the last sixteen of those years, Plaintiff was employed as a customer support representative ("CSR") in the Atlantic Branch of Kodak's Office Imaging ("OI") Division. Her position entailed training purchasers of Kodak copier machines in the use of their equipment. Although most of her work was done at customers' facilities, Plaintiff worked out of Kodak's Horsham, Pennsylvania office. At the time of her discharge, Plaintiff was forty-six years old.

Plaintiff has suffered from chronic back pain since the early 1980s. In 1991, her back impairment was diagnosed as a herniated disk. Over time, Plaintiff's back condition worsened and she spent several weeks off work in 1991 after her physician prescribed bed rest. When Plaintiff returned to work, her back condition again worsened and her physician recommended that she undergo back surgery to correct the herniated disk. Plaintiff scheduled surgery for the Spring of 1991. Subsequently, Plaintiff decided to cancel her scheduled surgery and to pursue

other treatment techniques, such as physical therapy, for her symptoms. (N.T. Day 5, pp. 63-65).

In 1991, Kodak introduced two new, advanced copier models, the 1575 and the 2100. Each branch of the OI Division received a notice that all CSRs and sales representatives would be scheduled to travel to Rochester for a one week training course on the two machines. When Plaintiff received the notice regarding her scheduled training, she told Leonard Morris ("Morris"), then the District Sales Manager, that she would not be available on the proposed date due to her scheduled back surgery and requested that he attempt to reschedule her training for later in August, when Plaintiff would have returned from her surgery. Morris advised her that he would look into it. After Plaintiff decided to cancel her scheduled surgery, she told Morris that she would be able to attend her scheduled training session after all. At this time, he was informed that all of the training slots were filled and that Plaintiff would be unable to attend the training course. He said he investigate into other training opportunities, but Plaintiff received no training on the new machines at this time. (N.T. Day 5, pp. 64-66).

Plaintiff was concerned about her lack of training on the new models and repeatedly requested that she receive training on these models. By the Autumn of 1991, several of Plaintiff's accounts started receiving 1575 model copiers. Because she had not yet received formal training on the 1575 copier, Plaintiff requested that Meg Anker ("Anker"), the other CSR based in the

Philadelphia area, perform the training, while Plaintiff observed. After this session and after studying the manuals and practicing in the Demonstration Room, Plaintiff was able to conduct basic training on the 1575 copier for the City of Philadelphia. In October, another of Plaintiff's accounts, Wyeth-Ayerst Laboratories received a 1575 copier. The training at Wyeth was intended to be for "key operators," who need training in the more complex functions of the copier. Plaintiff attempted to provide this training; however, the client was angry when it became apparent that Plaintiff was not fully knowledgeable about the functions of the copier. Following this incident, Plaintiff received a voicemail from Jim Brannigan, the new district sales manager, stating that all further training on the 1575 copier would be conducted by Anker, until the end of the year. Plaintiff was to be responsible for conducting all other training in both her own territory and Anker's territory. Starting in January 1992, Plaintiff again began to receive calls requesting training on the 1575 copier. (N.T. Day 5, pp. 106-17).

In January 1992, Plaintiff's back condition had continued to worsen and she was forced to spend a week off work for bed rest. At this time, Plaintiff and her physician became convinced that surgery would be the only way to alleviate her condition, and surgery to correct her herniated disk was scheduled for April 1992. The surgery took place as scheduled and Plaintiff took several months off work to recuperate.

Plaintiff returned to work in July 1992. Initially, her neurosurgeon imposed a two week restriction to light duty. Plaintiff found that she was too busy to maintain the restricted schedule, and she began working full-time, before the end of two weeks. Her Doctor's recommendation of light duty was not renewed. (N.T. Day 6, pp. 11-16). Several months after her surgery, Plaintiff's surgeon wrote to her general practitioner, to advise him of Plaintiff's condition. He stated, "[s]he has definitely improved a great deal after surgery, but it has been a slow drawn out recovery process for her. I would expect her to continue to improve as the months pass." (N.T. Day 5, pp. 86-87). This letter was also forwarded to Defendant and placed in Plaintiff's medical file.

In the Summer of 1992, Kodak announced that a secretarial position would be eliminated in its Princeton Office, also located in the Atlantic Branch, due to the transfer of order entry functions to Rochester. That secretarial position was held by Melinda Ceralde ("Ceralde"), a twenty-five year old secretary. Fearing that she would be laid off, Ceralde contacted her supervisor, Jim Clifford, the Manager for the Atlantic Branch of OI Division about other opportunities with Kodak. Clifford advised Ceralde that he would look into making her a CSR. Clifford talked to Brannigan about the possibility of transferring Ceralde. Brannigan stated that he did have an opening for a CSR in the Philadelphia region because two of his CSRs had been on disability leave, recovering from surgery, for

much of the Summer.[1] In August of 1992, Ceralde was assigned to the Philadelphia Office as a CSR trainee. During her first two weeks as a CSR, Ceralde received training from Cyril Ffolkes on Kodak's most recently released copiers, the 1575 and 2100 models. Although there was no reason why she could not have participated, Plaintiff was not informed of this potential training opportunity. There was, however, some concern that the training would be repetitive or too basic for Plaintiff. (N.T. Day 2, pp. 92-93, Day 3, pp. 99-103). After completing this initial training, Ceralde became a "floater", a CSR with no particular assigned territory, filling in where needed. On occasion, she traveled with Plaintiff and with Anker, observing training sessions and also conducting training on both the 1575 model copier and other, older copier models. (N.T. Day 3, pp. 20-21).

Following Plaintiff's return from her back surgery, she discovered that a number of 2100 copiers were scheduled to be shipped to her clients. She testified that she became increasingly concerned about her lack of training on this machine and requested that Anker perform the first training session while she observed. When Plaintiff contacted Brannigan to request training on this machine, he suggested that she contact Steven Corey ("Corey"), a former CSR working out of Defendant's Princeton Office. Plaintiff met with Corey in the demonstration room of the Princeton Office twice and once again in the

[1]Anker also took an extended absence during the Spring and Summer of 1992 in order to recover from a hysterectomy. Upon her return to work, she, too, fully resumed her normal duties. (N.T. Day 8, p.87).

Philadelphia Office and received one-on-one instruction regarding the operation of the 2100 copier. When a large number of 2100 model copiers were delivered to SEPTA, Plaintiff and Ceralde shared the training. After watching Ceralde perform the initial training session, Plaintiff observed that Ceralde seemed to have had more training on the 2100 copier because she knew more of the features and functions of the machine. Plaintiff did try to increase her skills by practicing in the demonstration room. She also asked Anker to work with her on the 2100 copier, but they were unable to find a time to meet. (N.T. Day 6, pp. 17-28). On January 7, 1993, Brannigan called a meeting with Ceralde and Plaintiff and told them to divide Plaintiff's former territory, so that Ceralde would have a fixed territory. As a result, Plaintiff no longer provided customer support for many of her former accounts in Chester and Montgomery Counties. (N.T. Day 6, pp. 30-34).

In 1992, Defendant continued to incur substantial financial losses, performing well below its operating plan (N.T. Day 7, p. 51). The company was forced to make significant cuts in costs and overheads. Initially, efforts were made to cut costs in the areas of travel and entertainment and by a freeze on the purchase of new equipment. The marketing staff at Defendant's headquarters in Rochester was also reduced by approximately one third. (N.T. Day 7, p. 53). By the end of 1992, Kodak officials determined that a nationwide reduction in force in the field staff of the OI division would also be

necessary to cut costs in that division. Prior to undertaking this reduction in force, Defendant restructured the OI Division from ten branches nationwide to seven branches. The Atlantic Branch was consolidated with the Eastern Branch, effective January 1, 1993, under the leadership of David Rohrback ("Rohrback"), the Branch Manager for the former Eastern Branch. (N.T. Day 7, p. 62). Clifford, the Branch Manager for the former Atlantic Branch of the OI division, lost his position with the company during this restructuring. (N.T. Day 2, pp. 61-62).

Kodak officials determined that a twenty percent reduction in its field staff would be necessary to achieve the required cost savings. (N.T. Day 7, p. 56) In the OI Division, employees performing administrative, secretarial, CSR and logistical functions were targeted for lay-off. (N.T. Day 7, p. 57). These positions were selected because they did not generate revenue directly. Initially, supplemental employees in these positions were laid off. (N.T. Day 7, p. 133) In late December 1992 and January 1993, Kodak developed a Performance Appraisal Ranking ("PAR") Process to identify which permanent employees would be laid off. The PAR process was designed to provide a ranking of all employees within job classifications and wage bands based upon a weighted average of their last three

performance reviews.[2] (N.T. Day 7, pp. 57-58). Employees were classified into wage bands based upon their salary level.

Human Resources officials worked with the Branch Managers to develop a Workforce Reduction Plan ("WRP"), identifying as excess those positions that could be eliminated. Those employees with the lowest PAR rankings within those positions identified as excess were the ones initially targeted for layoff. Accordingly, when the initial WRP was produced for each Branch, only the positions targeted for reduction would be identified and not the individual employee who would be laid off. (N.T. Day 7, pp. 70-71). The WRP was then sent to Rochester for matching of the identified positions with actual employees. (N.T. Day 7, p. 73). If a decision maker knew the results of the most recent performance appraisals, however, it would be possible for him or her to determine, with relative accuracy, which employees would be targeted for discharge. It was Plaintiff's contention throughout the trial that the objective PAR process was a sham that enabled decision makers to target undesirable employees while protecting younger, favored employees from discharge. (N.T. Day 7, pp. 120-25).

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[2]The PAR process used an algorithm in which the most recent Performance Appraisal ("PA") multiplied by 25, the previous PA multiplied by 5, and earliest PA, were added together and then 92 was subtracted from the total in order to calculate the PAR figure. Although an employee's PAR ranking would be largely determined by their most recent PA, other factors such as bumping rights and transfers meant there was no automatic correlation between a higher score on the most recent PA and a higher PAR ranking. (N.T. Day 7, pp. 116-20).

Barbara Mather, Human Resources Manager for Office Imaging, sales and marketing, based in Rochester, was assigned to work with the Branch Managers for the OI Division in developing a WRP for each branch. For the Eastern and former Atlantic Branch, she prepared the WRP with Rohrback.[3] (N.T. Day 7, pp. 137-143). Following the preparation of the PAR rankings, Rohrback identified the following positions for lay off:

> 1. A CSR from Philadelphia in the K4 to K6 range;
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> 2. An administrative secretary from Morristown in the J7 to K2 range;
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> 3. An administrative secretary from Philadelphia in the J7 to K2 range; and
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> 4. An administrative secretary from Roseland in the J7 to K2 range.

(7/144- 146). Rohrback testified that these particular wage bands were selected through the PAR process because they were the ones which most accurately reflected the salaries earned by employees in the targeted positions. (N.T. Day 4, p. 92) He also stated in an affidavit, that he selected a CSR from the higher wage band for lay off because a reduction from that band would afford a greater cost saving. (N.T. Day 4, p. 96).

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[3]There was some evidence at trial that Clifford, the former Branch Manager for the Atlantic Branch was present at some of the meetings regarding the preparation of the WRP. While Mather did not recollect his presence at any of the meetings, both Mather and Rohrback testified that they were the individuals responsible for developing the WRP for the Eastern Branch. (N.T. Day 4, pp. 70-71, Day 7, p. 143, Day 8, pp. 52-58).

The PAR ranking process clearly identified Plaintiff as the lowest-ranked CSR in the Philadelphia area in the K4 to K6 range. Indeed, Plaintiff was the lowest-ranked CSR in the combined Eastern and Atlantic Branches, in either the higher or the lower wage band. Furthermore, Plaintiff received the second lowest PAR ranking among the administrative personnel of the combined branches.[4] (N.T. Day 5, pp. 33-34, Day 7, pp. 73-77). Following the PAR process, the remaining CSRs in Philadelphia were Anker and the newly-trained Ceralde. Both Anker and Ceralde had higher PAR rankings than Plaintiff. Although she had been recently promoted to the position of CSR, Ceralde remained in a lower wage band than either Plaintiff or Anker. Because she was not in the K4 to K6 wage band, Ceralde was not considered for lay-off in the 1993 downsizing.[5] Apart from limited use as a tie breaker or in relation to bumping rights, seniority had no impact upon the PAR process for identifying employees for discharge. (N.T. Day 4, p. 97). Accordingly, under PAR, Plaintiff did not have a greater right to be retained as a CSR than the less experienced Ceralde.

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[4] The administrative employee receiving the lowest PAR ranking was Connie Johnson, an administrative secretary in Roseland, who was also identified for lay off during the PAR process. (N.T. Day 3, pp. 41-42, 163).

[5] According to Defendant, Ceralde received a three percent salary increase upon her promotion to the CSR position. Despite her promotion, she remained in the lower wage band during the PAR process. See Defendant's Opposition to Plaintiff' Motion and Supplement to her Motion for a New Trial in Part and to Alter and Amend Judgment Accordingly, p. 5 n.5.

The WRP was completed by Rohrback and Mather in January 1993. On January 23, 1993 packages containing the discharge information and identifying the individuals to be discharged were sent to the district sales managers. Plaintiff received a voice mail instructing her to meet with Brannigan in Defendant's Horsham office. Brannigan advised Plaintiff that she was being laid off in response to a need to cut costs in the division. Her discharge would become effective in sixty days, on March 23, 1993. Plaintiff was advised that she should stop working, immediately. She would, however, continue to receive her full salary and benefits for sixty (60) days. Plaintiff was also eligible for a severance package of benefits which included two weeks of pay for every year with the company, outplacement counseling and a retraining allowance. (N.T. Day 3, pp. 140-42, 146-50).

Plaintiff received a copy of the form termination letter advising her of the benefits that she would receive in the lay off. The letter also included information regarding an employee's right, during the sixty days preceding formal termination, to seek other positions with the company. The letter states, "[i]f you wish to be considered for any future job openings in the company for which you may be qualified, you must submit a written request form to the Kodak employment office at the time of termination or at some later date." Defendant's Exhibit D-3. According, to company policy, Brannigan should also have discussed the option to seek other positions with the

company during his interview with Plaintiff. Plaintiff asserts, however, that he never discussed such an option with her. (N.T. Day 6, pp. 55-56, 131, 137, Day 7, pp. 10-13, 86-87). Plaintiff asked Kathy Riley, in the human resources department, about the availability of positions with Defendant's pharmaceutical division. She was advised that she would have to place a formal application with that division, and she did not pursue such a position, further. (N.T. Day 6, pp. 41-42).

Other employees, also targeted for lay off, were able to use this opportunity to locate other positions with the company. Jean Kutz, age twenty-six, and Joan Guarino, age sixty-three, were both able to fill open administrative secretary positions. Defendant's Exhibit, D-24. Carolyn Lundy, a thirty-year-old CSR targeted for lay off, was offered a position as an administrative CSR, because she had critical computer networking skills. Lundy declined this position. Because it was not known whether Plaintiff possessed the necessary computer skills, she was not offered this opportunity to remain with the company. (N.T. Day 4, pp. 153-54).

Plaintiff was deeply distressed by her discharge. Although she had suffered previous episodes of depression, Plaintiff experienced severe depression following her discharge. She found herself crying uncontrollably and had difficulty sleeping. She began taking anti-depressant medication and seeing a therapist. This depression appears to have been quite debilitating for a number of months.

Following her discharge Plaintiff made some initial efforts to look for work. Plaintiff made some efforts to contact companies for whom she had provided customer support while at Kodak. She also sent out some resumes in response to newspaper advertisements listing customer support positions in suburban Philadelphia. After 48 weeks, Plaintiff's severance pay ended and she applied for unemployment benefits. On her application for benefits, Plaintiff stated that she was ready and available to work and was neither disabled nor perceived to be disabled. While on unemployment, Plaintiff continued to seek a customer service position in suburban Philadelphia. After her unemployment benefits had run out, Plaintiff located a part-time position, without benefits, as a telephone service representative for a company marketing a line of pharmaceutical products. At the time of trial she was still employed by the company, and her salary remained substantially below what she earned while employed by Defendant. (N.T. Day 6, 45-50, 136-40).

In July 1993, Plaintiff filed charges of age and disability discrimination and also interference with Plaintiff's rights under an employee welfare benefit plan, and an employee pension benefit plan with the Pennsylvania Human Rights Commission (PHRC), requesting that her charges also be filed with the Equal Employment Opportunity Commission (EEOC). (N.T. Day 6, pp. 6-7). The EEOC issued a right-to-sue letter in March 1995. On March 21, 1995 Plaintiff filed suit in this Court, alleging age and disability discrimination and also interference with

employee rights under employee welfare and pension benefit plans. Plaintiff's allegations interference with her right to benefits were later voluntarily withdrawn. I denied Defendant's Motion for Summary Judgment as to the remaining claims of age and disability discrimination under the ADA, ADEA, and the PHRA.

A ten day jury trial was held in December 1995. At the end of Plaintiff's case, Defendant moved for Judgment as a Matter of Law on both Plaintiff's age and disability claims. At trial, I denied this motion. After hearing all of the testimony, the Jury returned a verdict in favor of the Defendant on the age discrimination count. On the disability discrimination count, the Jury found that Defendant had discriminated against Plaintiff because it regarded her as disabled. The Jury elected to award no compensatory damages; however, it awarded Plaintiff $100,000 in punitive damages. Following the trial, Defendant renewed its Motion for Judgment as a Matter of Law on Plaintiff's disability claim. In the alternative, Defendant filed a Motion for a New Trial on the disability claim. Plaintiff also filed a Motion for a New Trial in Part and to Alter and Amend the Judgment Accordingly, seeking a new trial on her age discrimination claim and the compensatory damages portion of her disability discrimination claim. Plaintiff also filed Motions for Reinstatement and requesting Attorneys' Fees and Costs. In June 1996, all of these motions were placed in suspense pending the Third Circuit Court of Appeals' Decision in Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), cert.

denied, --- U.S. ---, 117 S.Ct. 2532 (1997). Following the publication of the decision in Sheridan, these motions were removed from suspense in November 1996. Both Plaintiff and Defendant submitted additional briefing on these motions and oral argument was held on July 2, 1997.

II. Standard of Review[6]

In evaluating a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, this court must determine whether the evidence and all reasonable inferences, viewed in a light most favorable to the prevailing party, is sufficient, as a matter of law, to support the claim. Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258, 259 (3d Cir. 1987). This Court is not allowed to weigh the evidence, pass on the credibility of the witnesses or substitute its judgment for that of the jury. Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110, 113 (3d Cir. 1987). "The question is not whether there is literally no evidence supporting the party against whom the verdict is directed, but whether there is evidence upon which the jury could properly find a verdict for that party." Lightening Lube v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993)(quoting Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir. 1978)). A motion for judgment as a matter of law is properly granted when there can be but one

[6]Because the questions presently before the Court arise in the form of post-trial motions, all reasonable and logical inferences will be drawn in favor of the nonmoving party. See Lightening Lube v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993).

reasonable conclusion as the proper judgment. National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491 (3d Cir. 1987).

Where a motion for judgment as a matter of law is accompanied by a motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure, the court shall also rule on the motion for a new trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253 (1940). When evaluating a motion for a new trial pursuant to Rule 59, the court shall grant such motion when the jury's verdict is against the great weight of the evidence, such that a miscarriage of justice will result if the verdict is allowed to stand. Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991); Whitted v. City of Philadelphia, 744 F. Supp. 649, 653 (E.D. Pa. 1990). It is not a proper basis to grant a new trial merely because the court would have reached a different verdict, but rather a new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the court's] conscience." Williamson, 926 F.2d at 1353.

III. Defendant’s Motion for Judgment as a Matter of Law

Defendant seeks judgment as a matter of law on Plaintiff's claim that she was discharged in violation of the ADA and the PHRA. The Jury found that a determinative factor in Plaintiff’s discharge was Defendant's perception of her back

condition as disabling. Defendant contends that this finding cannot be sustained as a matter of law because Plaintiff failed to present any evidence that Defendant regarded Plaintiff's back condition as a disability that substantially impaired her ability to work.

Defendant initially made its Motion for Judgment as a Matter of Law at the close of Plaintiff's evidence. At that time, in the midst of trial, I denied Defendant's Motion. Defendant then renewed its Motion for Judgment as a Matter of Law pursuant to Rule 50(b).[7] Now, after having heard all of the

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[7]The Advisory Committee explicitly envisioned this situation:

> Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.
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> In ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it. The court may then decide such issues as a matter of law and enter judgment if all other material issues have been decided by the jury on the basis of legally sufficient evidence, or by the court as a matter of law.

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testimony presented by both parties at trial, reviewing the parties' submissions on this matter, and hearing oral argument on Defendant's renewed Motion for Judgment as a Matter of Law, I agree that Plaintiff failed to make the required preliminary showing that she is a disabled person under either the ADA or the PHRA. Accordingly, I will grant Judgment as a Matter of Law in favor of Defendant on Plaintiff's charge of disability discrimination.

The ADA prohibits discrimination in employment against qualified individuals with disabilities because of their disabilities. 42 U.S.C. § 12112(a).[8] The PHRA prohibits an employer, inter alia, from refusing to hire, discharging, or otherwise discriminating against an employee on the basis of a non-job related handicap or disability. 43 Pa. Cons. Stat. Ann. § 955(a).[9] Although the Pennsylvania courts are not bound by the

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Fed. R. Civ. P. 50(b) advisory committee's note.

[8]The ADA provides in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

[9]The PHRA reads in relevant part:

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interpretation of parallel provisions in federal employment discrimination statutes in their construction of the PHRA, Harrisburg Sch. Dist. v. Pennsylvania Human Relations Comm'n, 466 A.2d 760, 763 (Pa. Cmwlth 1983), Pennsylvania courts have typically interpreted the Pennsylvania statute in accord with the interpretation of the corresponding federal statute. Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996); Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1083-84 (3d Cir. 1995), cert. denied, --- U.S. ---, 116 S. Ct. 2524 (1996). Furthermore, the PHRA's definition of "handicap or disability" is substantially the same as the definition of "disability" under the ADA. See Fehr v. McLean Packaging Corp., 860 F. Supp. 198, 200 (E.D. Pa. 1994). The Parties have not disputed that Plaintiff's substantive claims under the ADA and the PHRA are coextensive.

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> It shall be an unlawful discriminatory practice, . . . (a)For any employer because of race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

43 Pa. Cons. Stat. Ann. § 955(a).

To make out a prima facie case of discrimination under the ADA, a plaintiff must establish:

> (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability.

Milton v. Scrivener, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995); see also Aucuff v. Six Flags Over Mid-America, Inc., 869 F. Supp. 736, 743 (E.D. Mo. 1994)(cited in Newman v. GHS, 60 F.3d 153, 157 (3d Cir. 1995)). At trial, a plaintiff bears the burden of proof as to each of these elements. Only once an employee makes out her prima facie case, need an employer present evidence of a legitimate, nondiscriminatory reason for the adverse employment decision.

As a preliminary matter, to make out a claim of disability discrimination, a plaintiff must demonstrate that she has a disability. Under the ADA, a disability is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). To be considered a disability, an impairment must substantially limit one or more major life activities. 42 U.S.C. § 12102(2)(A). A substantial limitation exists if a plaintiff is "unable to perform a major life activity that the average population can perform . . . or . . . [is]

significantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity as compared to" the average person. 29 C.F.R. § 1630.2(j)(1). Whether an impairment substantially limits a major life activity is determined in light of:

> (i) The nature and severity of the impairment;
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> (ii) The duration or expected duration of the impairment; and
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> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

At no point during these proceedings has Plaintiff contended that she is actually disabled. Rather, her claim relies solely upon the argument that Defendant regarded her as being substantially impaired in a major life activity. Under this prong of the ADA, an employee is entitled to protection against discrimination even if she does not have a substantially limiting impairment, provided she can show that her employer regarded her as having such an impairment. See 29 C.F.R. § 1630.2(l). An employee is regarded as substantially impaired if she:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

Id.

Major life activities are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).[10] Plaintiff's ADA claim was based upon the contention that Defendant regarded her back condition as substantially impairing her in the major life activity of working. As it relates to the major life activity of working,

> [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. 1630.2(j)(3)(i) (emphasis in the original). To demonstrate a substantial limitation on her ability to work, an employee must demonstrate that her condition, as perceived, substantially limits her ability to work in a class or broad range of jobs.[11] 29 C.F.R. § 1630.2(j)(3)(i); Wooten v. Farmland

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[10]This list was designed only to be illustrative, however, and was not intended to be exclusive. See Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1320 (E.D. Pa. 1994)(interpreting 29 C.F.R. § 1630.2(i)).

[11]In determining whether an individual is substantially impaired in the major life activity of working, a court can also consider:

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Foods, 58 F.3d 382, 385-86 (8th Cir. 1995). The inability to perform the essential functions of a single job or a narrow category of jobs is not, however, a substantial limitation on the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i); Heilwell v. Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994), cert. denied, --- U.S. ---, 115 S. Ct. 1095 (1995). The Third Circuit has held that "if an individual is perceived to be but is not actually disabled, he or she cannot be considered a `qualified individual with a disability' unless he or she can, without accommodation, perform all the essential as well as the marginal functions of the position held or sought." Deane v. Pocono Medical Center, --- F.3d ---, 1997 WL 500144 (3d Cir. Aug. 25, 1997).

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> (A) the geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C).

Under these standards, Plaintiff's claim of disability discrimination in violation of the ADA and the PHRA fails as a matter of law. Plaintiff failed to introduce any evidence that Defendant regarded her back condition as substantially impairing her ability to work. Plaintiff can point to no direct evidence of disability discrimination by Defendant. Her supervisors and coworkers, while aware of her back condition, made no comments regarding her ability or inability to work as a result of her back condition.

It has long been recognized that it is often difficult for the victims of discrimination in the workplace to produce direct evidence of the discriminatory attitudes of their employer. See e.g., Sheridan, 100 F.3d at 1071; Jackson v. University of Pittsburgh, 826 F.2d 230, 236 (3d Cir. 1987). This recognition led to the development of a burden-shifting framework that enables plaintiffs to prove employment discrimination through the use of circumstantial evidence and inferences. See Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989)("[T]he entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); see also Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081-82 (3d Cir. 1996)(recognizing that cases charging employment discrimination are uniquely difficult to prove and often must rely upon circumstantial evidence).

In this case, however, Plaintiff has failed to produce any evidence, either direct or circumstantial, from which it is possible to infer that Defendant regarded Plaintiff as a disabled person, within the definition of the ADA. Indeed, the testimony at trial, much of it presented by the Plaintiff, clearly demonstrates that Plaintiff was treated fairly and without discrimination by both her immediate supervisors and the company as an entity. Upon her return from each of her back-related absences, Plaintiff acknowledged that she received fair and nondiscriminatory treatment, and was expected to resume all of her regular duties as a CSR. Thus, Plaintiff failed to satisfy her initial burden of proving that she is a qualified person with a disability.

At trial, Plaintiff presented evidence that she had suffered from a serious, chronic back impairment since 1980. Both Plaintiff and Defendant concur that Plaintiff's back impairment was not, in itself, disabling. Furthermore, both Plaintiff and Defendant concur that Plaintiff's immediate superiors were aware not only of the existence of Plaintiff's back condition[12], but also that its treatment had necessitated

[12]At trial there was conflicting testimony regarding who had access to information regarding Plaintiff's back condition. While Plaintiff asserted that Dave Rohrback had access to all of Plaintiff's employment and health records, he denied any knowledge of her condition. Even drawing the reasonable inference that there would be some information relating, either directly or indirectly, to Plaintiff's back condition in her personnel file, this information, by itself, is insufficient to demonstrate that Rohrback perceived Plaintiff as (continued...)

several absences from work, including an extended four month recovery from surgery to repair a herniated disk. It is significant to note, however, that when a plaintiff is proceeding on the basis of the perceived disability prong of the ADA, she cannot satisfy her burden of proving that she has a disability merely by demonstrating that her employer was aware of her impairment. See Kelly, 94 F.3d at 109. It is essential that she demonstrate, not only that her employer perceived her as having an impairment, but also that the employer regarded that impairment as imposing a substantial limitation on a major life activity. See Kelly, 94 F.3d at 109 (visible and apparent limp insufficient to demonstrate that employee was substantially limited in the major life activity of walking); Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)(employee known to suffer from acrophobia was unsuited for one position, but not regarded as substantially limited in the major life activity of working); Howell v. Sam's Club # 8160/Wal-Mart, 959 F. Supp. 260, 268 (E.D. Pa. 1997)(known back impairment found not to impair employee in the major life activity of working although he was classified as twenty percent disabled by the Veterans' Administration).

Plaintiff failed to produce any evidence from which it might be possible to infer that Defendant regarded her back condition as a substantial impairment. At trial, there was only limited testimony relating Defendant's perception of Plaintiff's

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(...continued)
substantially impaired.

back condition. None of this evidence advances Plaintiff's argument that she was regarded as disabled.

Plaintiff missed three weeks of work to treat back pain in January and February of 1991. In March 1991, only a few weeks after her return from this absence, Plaintiff received a performance appraisal that rated her overall performance in 1990 as a "4", which reflects the satisfactory completion of all aspects of her position.[13] This is the same rating that she had received for the previous year, 1989. Plaintiff's performance in 1991 was also rated as a "4" overall. At trial, Plaintiff readily conceded that each of these performance appraisals was fair and non-discriminatory. (N.T. Day 7, p.6). Indeed, Defendant, by its own initiative, actually increased several of the individual ratings on her 1990 review to "5's", which reflected performance beyond the requirements of her position.

In the following year, 1992, Plaintiff missed approximately four months of work to recover from surgery to correct a herniated disk. Plaintiff returned to work in late July 1992, five months before she was laid off. Initially, Plaintiff returned to work with a limited, two-week restriction from her physician to light duty. Plaintiff testified that she

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[13]The performance appraisals rate employees on a scale of "1" to "7", with "7" as the highest score. A rating of "4" "is appropriate for individuals who regularly perform all assigned responsibilities with independence and initiative, and achieve expected results on a continual basis." Copy Products Nonexempt Performance Appraisal, Exhibit 8-H in Support of Defendant's Renewed Motion for Judgment as a Matter of Law.

was unable to keep to the restriction because she had too much work, and the restriction was never renewed. Defendant received a copy of a letter from Plaintiff's neurosurgeon to her general practitioner. This letter, which was placed in Plaintiff's medical file, stated that Plaintiff's surgery had been a success and that Plaintiff's condition had improved greatly since her surgery and that continued improvement was expected. While the surgeon acknowledged that Plaintiff's recovery had been slow, he anticipated continued improvement and released her from his care. In the remainder of her employment with Defendant, Plaintiff required no further absences to treat her back condition.

Following Plaintiff's return from surgery, there is no evidence that Defendant regarded her ability to perform the job requirements of a CSR as impaired. Plaintiff was provided with training on both the 2100 model copier and a newly released color copier. Plaintiff failed to make the necessary connection between her allegations that her training was less comprehensive than that received by Ceralde, and Defendant's perception of her back condition, to create the inference that her lack of training stemmed from Defendant's perception of her back condition as a substantial impairment. Upon her return to work, Plaintiff was also expected to continue providing customer support throughout her assigned territory.

Plaintiff was discharged in January 1993, as part of a nationwide reduction in force in the OI Division. At the time that she was discharged, Plaintiff received a letter detailing

the rights and benefits that she would receive as a result of the lay-off. In addition, the letter advised her that she could submit a written request to the Kodak employment office if she wished to be considered for other positions with the company. This was the same opportunity that was provided to all employees who were to be laid off. Letter from Jim Brannigan to Sheila Kotas of January 21, 1993, Defendant's Exhibit, D-5. Even if this opportunity was not explicitly described to her by Brannigan, his omission neither negates the content of the letter nor, by itself, creates an inference of disability discrimination. Although Plaintiff made some initial inquiries regarding employment with Defendant's pharmaceutical division, she never filed the required formal application for continued employment, and her employment with the company was formally terminated on March 21, 1993. The fact that Plaintiff was offered the opportunity to pursue other positions with Defendant belies the argument that Defendant regarded her as substantially impaired in the major life activity of working.

Plaintiff was able to produce no evidence that Defendant perceived Plaintiff's back condition as permanently impairing her ability to work. The only testimony regarding Defendant's perception of Plaintiff's back condition, that suggests that Defendant perceived Plaintiff's condition as an impairment is unavailing because it is evidence of a temporary impairment, only. At most, Plaintiff was perceived as temporarily disabled during her back-related absences. As a

matter of law, a short-term impairment does not constitute a disability under the ADA. See 29 C.F.R. § 1630.2(j)(2). In McDonald v. Commonwealth of Pennsylvania, the Third Circuit Court of Appeals held that a temporary inability to work after surgery does not constitute a disability under the parameters of the ADA. 62 F.3d 92, 96 (3d Cir. 1995). See also Rakestraw v. Carpenter, 898 F. Supp. 386, 390 (E.D. Miss. 1995)(holding that a back injury, perceived to be of limited duration, was not a disability under the ADA); Paegle v. Department of Interior, 813 F. Supp. 61 (D.D.C. 1993)(holding under the Rehabilitation Act, that employee recovering from temporary back injury was not handicapped).

Plaintiff was, at most, disabled, or perceived as disabled, only during those periods in which she was out of work to treat her back condition. Her last back-related absence was five months prior to her discharge. Although, on occasion, it is possible to infer that an employer has perceived a temporary condition as a permanent disability, there is no evidence that that occurred in this case. Unlike the plaintiff in Zambelli v. Historic Landmarks Inc., 1995 WL 116669 (E.D. Pa. Mar. 20, 1995), who was discharged within two hours of informing her employer that she required a leave of absence to undergo surgery, in this case there is no temporal proximity between Plaintiff's temporarily disabling condition and Defendant's adverse employment decision. Rather, Plaintiff was discharged a full five months after her return to full-time work.

Because it is apparent that Defendant understood the temporary nature of Plaintiff's impairment, and Plaintiff has been unable to show that Defendant perceived her as substantially impaired during those times that she was actually working, Plaintiff failed to prove that she is a disabled person, as defined by the ADA or the PHRA. Thus, Plaintiff failed to establish the initial element of her prima facie case, and is not entitled to claim the protections of either the ADA or the PHRA. Accordingly, it is held that Defendant is entitled to Judgment as a Matter of Law on Plaintiff's claims under the ADA and the PHRA. The Judgment entered on December 18, 1995 will be vacated and Judgment entered in favor of the Defendant. Plaintiff's Motion for a New Trial in Part and to Alter and Amend the Judgment Accordingly will be dismissed as moot with regard to her disability claim. In addition, because Plaintiff has not prevailed in her claim under the ADA, her Motions for Reinstatement, and Attorneys' Fees and Costs will also be dismissed as moot. See 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(g)(1)(reinstatement is an appropriate remedy when an employer has been intentionally engaging in an unlawful employment practice); 42 U.S.C. § 2000(e)-5(k)(prevailing party entitled to receive attorneys' fees and costs).

IV. Defendant's Motion for New Trial

As required by Fed. R. Civ. P. 50(c)(1)[14], I will also consider Defendant's alternative Motion for a New Trial pursuant to Fed. R. Civ. P. 59. Should my Judgment for the Defendant on Plaintiff's claims under the ADA and the PHRA be vacated or reversed, Defendant's Motion for a New Trial will be granted. The Jury's verdict finding Plaintiff's perceived disability to be a determinative factor in Defendant's decision to discharge her, was against the great weight of the evidence presented at trial. In instances where judgment as a matter of law is inappropriate, a trial court may still grant a new trial if the "verdict is against the great weight of the evidence." Roebuck v. Drexel Univ., 852 F.2d 715 (3d Cir. 1988).

A new trial is warranted in this case because there is insufficient evidence to support the Jury's finding that Plaintiff was discharged in violation of the ADA and the PHRA. As I discussed in relation to the Motion for Judgment as a Matter of Law, see supra, there was no evidence, either direct or circumstantial, from which a reasonable jury could infer that Defendant perceived Plaintiff to be substantially impaired in the

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[14]Rule 50(c)(1) provides in pertinent part:

> If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for new trial.

major life activity of working. Furthermore, Defendant produced substantial evidence that Plaintiff was laid off because she was the lowest ranked CSR, under the PAR process, in either the Eastern or Atlantic Branches of the OI Division. Plaintiff, herself, conceded that the performance appraisals upon which her ranking was based were fair and non-discriminatory. Plaintiff could offer little testimony to rebut Defendant's contention that her discharge resulted solely from her PAR ranking and not from the perception of Plaintiff as disabled. There was insufficient evidence of pretext for the Jury to conclude that Defendant's proffered reason for Plaintiff's discharge was not its true reason, and that illicit discrimination was its real motivation.

The nature of the Jury's verdict suggests that they departed from my instructions on the law. Although the Jury found that Defendant had discriminated against Plaintiff on the basis of a perceived disability, it awarded no compensatory damages for economic loss or emotional distress. It did, however award punitive damages in the amount of $100,000. The Jury's decision not to award compensatory damages is contrary to its finding of disability discrimination. There was substantial testimony regarding the economic losses Plaintiff had already incurred and also her anticipated future loss of income. (N.T. Day 6, pp. 94-130). Plaintiff also produced substantial evidence relating to the emotional distress and depression she suffered after her lay off. Given its finding of disability discrimination, the Jury's decision not to award compensatory

damages is puzzling. Furthermore, a review of the trial record fails to produce any evidence of outrageous conduct by the Defendant upon which the Jury could base a finding of punitive damages. See, e.g., Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987)(punitive damages require evidence of outrageous conduct beyond that which is required to demonstrate liability).

I am forced to conclude that the Jury allowed its understandable sympathy for the Plaintiff to overcome my instructions on the law. Plaintiff was long-term employee of the Defendant, who had worked for the company for almost twenty-five years, and it was clearly apparent that her discharge had been a difficult and distressing event, from which she still may not have fully recovered. Jurors may not, however, allow their sympathies to sway their verdict. They are charged to follow and uphold the law. See Rush v. Scott Specialty Gases, Inc., 930 F. Supp. 194, 197 (E.D. Pa. 1996)("A court may also grant a new trial if the verdict was . . . influenced by extraneous matter such as passion, prejudice, sympathy or speculation.")(citations omitted), reversed on other grounds, 113 F.3d 476 (3d Cir. 1997). Because the finding that Defendant's perception of Plaintiff as disabled was a determinative factor in the decision to discharge her, is against the great weight of the evidence, should my decision to award Defendant Judgment as a Matter of Law on Plaintiff's ADA and PHRA claims be vacated or reversed, I will conditionally grant Defendant's alternative Motion for a New Trial on Plaintiff's disability discrimination claim.

V. Plaintiff's Motion for a New Trial

Plaintiff has also filed a Motion for a New Trial under Fed. R. Civ. P. 59(a) on her claim of age discrimination in violation of the ADEA and the PHRA.[15] In rendering its verdict, the Jury found that Plaintiff's age was not a determinative factor in Defendant's decision to discharge her. Plaintiff asserts that this verdict is against the weight of the evidence and that it would be a miscarriage of justice to allow the verdict to stand. Although Plaintiff has advanced a number of rationales for vacating the Jury's verdict, I can find no reasonable basis for granting a new trial on this claim.

A. Motion in Limine

Prior to the start of trial, I granted Defendant's Motion in Limine, preventing Plaintiff from introducing information relating to the salaries earned by employees other than Plaintiff. Plaintiff argues that my Order granting the Motion in Limine prevented her from introducing evidence relating to the salary of Ceralde and was prejudicial error. Plaintiff asserts that this Order prevented her from demonstrating the pretextual nature of Defendant's proffered cost savings justification for the adverse employment decision suffered by Plaintiff.

[15]As discussed in relation to Plaintiff's ADA claim, see supra, there is no dispute that Plaintiff's substantive claims under the ADEA and the PHRA are coextensive.

Following the Supreme Court's decision in Hazen Paper v. Biggins, plaintiffs are barred from using a disparate impact analysis to demonstrate employer liability for age discrimination. 507 U.S. 604 (1993). Plaintiffs may not, for example, equate the decision to discharge more highly paid, more senior, and typically, older workers with age discrimination. While such actions may violate other federal discrimination statutes, including ERISA, such conduct, alone, does not constitute age discrimination. Id. at 610-13. I precluded the admission of testimony regarding Ceralde's and others' salaries, in order to avert any possible conflict with the strictures of Hazen Paper.

At trial, Plaintiff argued that she sought to introduce evidence regarding Ceralde's salary, not to demonstrate age discrimination, itself, but rather to rebut Defendant's proffered reason for her discharge. Because Defendant discharged Plaintiff as part of a reduction in force designed to cut costs in the OI division, Plaintiff anticipated that Defendant would argue that the decision to discharge a CSR from the higher wage band, rather than the lower wage band, was made as a cost saving measure. Thus, she wished to introduce information regarding Ceralde's salary. She hoped to suggest to the Jury that because the salary differential between herself and Ceralde was minimal, Defendant's cost-savings argument was pretextual. Plaintiff is correct that the use of this information to rebut a proffered legitimate reason for Plaintiff's discharge would not violate the rule

announced by Hazen Paper. I advised the Plaintiff that if Defendant argued that Plaintiff was selected for discharge to save money, I would permit the introduction of evidence regarding Ceralde's salary, but until Defendant made a cost savings argument, evidence of Ceralde's salary was irrelevant. (N.T. Day 3, p. 44).

At trial, there was substantial evidence introduced that the higher wage band was selected because CSRs are typically grouped in this band. Plaintiff introduced into evidence Rohrback's affidavit in which he stated that he selected the higher wage band, in part, because more CSRs were located in this band. He also stated, however, that the higher wage band was selected because it would afford a greater cost-savings at a time when the company needed to cut costs. (N.T. Day 4 p. 96). In the midst of trial, I determined that given the dictates of Hazen Paper, any information regarding Ceralde's lower salary was likely to be misconstrued by the Jury and used as evidence of age discrimination, itself, rather than merely as a rebuttal of a cost savings argument. Fed. R. Evid. 403 (permitting the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury"). I declined to alter my initial ruling on the Motion in Limine. It is significant to note that other than this transitory reference to Rohrback's affidavit, Defendant never argued that the higher wage band was selected because it would afford more substantial cost savings.

Accordingly, Plaintiff did not need to introduce this information in order to rebut a detailed cost savings argument.

Furthermore, Plaintiff failed to establish any foundation for this testimony. She introduced no evidence from which a reasonable jury could infer that Rohrback, the ultimate decision maker, had any knowledge of the ages and identities of any of the Atlantic Branch CSRs in either the higher or lower wage band. Accordingly, there was no foundation for the argument that the cost savings explanation was used as a pretext for age discrimination against Plaintiff.

Finally, the cost savings argument made by the Defendant was not spurious, as contended by the Plaintiff. At the time of her discharge, Plaintiff's base salary was approximately $29,500. In contrast, Ceralde was earning $21,000 at the end of 1992. Plaintiff contends that Ceralde's salary was subsequently raised to $26,000 shortly after Plaintiff's lay off. (N.T. Day 3, pp. 43-44).[16] Although Defendant denies that Ceralde received an increase this large, a savings of $3,500, in excess of ten percent of Plaintiff's salary, is not the insubstantial savings alleged by Plaintiff. The finder of fact in an employment discrimination case is not permitted to

[16]Defendant contests the timing of Ceralde's raise. It claims that she received a raise following her promotion, but prior to the 1993 lay off. Defendant also contends that there remained a 13% salary differential between Plaintiff and Ceralde. Defendant's Opposition to Plaintiff's Motion and Supplement to her Motion for a New Trial in Part and to Alter and Amend Judgment Accordingly, p. 5 n.5.

substitute its subjective judgment for that of the employer in determining whether or not the proffered explanation for the managerial decision is reasonable. Rather, the finder of fact is limited to determining the question of whether the proffered reason is a pretext for the employer's true, discriminatory motives. See Ezold v. Wolf, Block, and Solis-Cohen, 983 F.2d 509, 512 (3d Cir. 1992). Accordingly, Plaintiff suffered little or no prejudice as a result of my refusal to permit the introduction of evidence relating to Ceralde's salary.

B. Jury Instruction

Plaintiff asserts that she is entitled to a New Trial on her allegations of age discrimination, because I declined to instruct the Jury that a preponderance of the evidence is established by a weight of evidence that just tips the scales in favor of one party. (N.T. Day 9, p. 38). I did, however, fully instruct the Jury regarding the meaning of the term "a preponderance of the evidence."[17] My failure to instruct them

[17]The instruction I gave was as follows:

> To establish by the preponderance of the evidence, is to prove something is more likely so than not so. In other words, a preponderance of the evidence when compared and considered with that evidence opposed to it, has a more convincing force and produces in your mind a belief that that which is sought to be proven, is more likely true than not true.
>
> So you have this debate between these parties and the test is as to each of the elements -- and I will get into them -- is it more likely so that this element is proven or

(continued...)

using the analogy of scales, does not make this instruction inadequate or prejudicial. See Link v. Mercedes Benz, 788 F.2d 918, 922 (3d Cir. 1986)(holding that a judge's ruling on jury instructions should be reversed only if it does not fairly and adequately submit to the jury and, thereby, confuse or mislead the jury). At oral argument on this motion, Plaintiff's counsel, herself, conceded that my failure to use this analogy was neither an error nor a miscarriage of justice sufficient to warrant a new trial.

C. Plaintiff's Request for Additional Discovery

Plaintiff contends that the Court erred in refusing to reopen discovery so that she could take additional depositions during the trial. Plaintiff asserts that Defendant's late production of certain documents and also the existence of inconsistencies between employee declarations and earlier produced corporate documents necessitated this reopening of discovery. Plaintiff's request to reopen discovery was initially attached to a request to file a surreply to Defendant's Motion for Summary Judgment. Prior to ruling on this motion, I denied Defendant's Motion for Summary Judgment. During the trial, however, I granted Plaintiff's Motion to take additional depositions. I permitted her to depose or redepose any witnesses

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[17](...continued)
not proven.

(N.T. Day 9, p.14).

that Defendant intended to call at trial on the subject of the late produced documents, only. Accordingly, Plaintiff was permitted to take the depositions of Joan Guarino and Jean Ficetola Furfero during a break in trial. She was also permitted to redepose Barbara Mather. Her request to depose Jean Kutz and Carolyn Lundy was denied because these persons were not called at trial.

Plaintiff asserts that she was unduly prejudiced by this restriction upon the reopening of discovery. She claims that due to this restriction, she was unable to gather the information necessary to show that younger workers received preferential treatment in the downsizing, because they were advised of the sixty period in which they could seek alternative positions within Kodak. In contrast, Plaintiff states she was never told, either by Brannigan or Riley that she had sixty days to search within the company. Thus, unlike younger employees, such as Jean Kutz and Carolyn Lundy, who were offered other positions with the Defendant, Plaintiff was discharged.

The decision on whether or not to permit the reopening of discovery is committed to the sound discretion of the District Court. See Habecker v. Clark Equipment Co., 942 F.2d 210, 218 (3d Cir. 1991). In addition, Rule 26(b)(2)(ii) of the Federal Rules of Civil Procedure permits a court to limit discovery if "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." Because the corporate documents were, in fact, produced late, I

granted the Plaintiff the opportunity to take depositions, of those witnesses who would be called at trial, limited to the area of these newly-produced corporate documents. I determined that this limited discovery was warranted because the documents in question appeared to be inconsistent with earlier-produced documents. I wanted, however, to avoid the situation of reopening discovery entirely in the midst of trial. Accordingly, I limited discovery to the narrow range of issues presented by the documents.

Ficetola Furfero and Guarino had no knowledge of the documents, and Plaintiff was unable to obtain any further information within the parameters of my extension of discovery. To the extent that Plaintiff had hoped to demonstrate a disparity between the treatment of older and younger workers in the 1993 reduction in force, this discovery should have taken place during the normal period for discovery. Guarino, Kutz and Lundy were each listed on the WRP prepared by Rohrback and Mather as employees targeted for discharge. Plaintiff also had access to information that all three remained with the company after March 1993. Similarly, Ficetola-Furfero's transfer to the Princeton office was clearly indicated on the WRP. Furthermore, information regarding these employees was produced in the deposition testimony of several witness, including Barbara Mather. Despite access to this information, Plaintiff chose not to pursue this angle of her case, during the normal discovery period. She cannot, therefore, decide in the midst of a jury

trial that she has made a strategical error by ignoring this facet of her claim and hope to reopen discovery. The limited Order reopening discovery provided the appropriate balance between Plaintiff's right to gather information about newly-received documents and the need to proceed with the trial. Accordingly, Plaintiff was not unduly prejudiced by this restriction on discovery.

D. The Weight of the Evidence

There is no question that Plaintiff made out a prima facie case of age discrimination in violation of the ADEA and the PHRA. Plaintiff demonstrated that she was a qualified person, over age forty, who suffered an adverse employment consequence, and was, to all intents and purposes, replaced by a very much younger employee. See Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3d Cir. 1995). Finding that Plaintiff had satisfied her initial burden of proof, during the trial I denied Defendant's Motion for Judgment as a Matter of Law. (N.T. Day 8, p. 16). Making out a prima face case is not, however, sufficient to make out a claim of employment discrimination. The employer also has the opportunity to present a legitimate, non-discriminatory rationale for the employment decision. The burden remains upon the Plaintiff, at all times, to prove that the employer's proffered reason was pretextual and that the true motivation behind her discharge was illicit discrimination. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

The Jury's finding of no age discrimination, was made with full knowledge of the most compelling evidence against the Defendant. Plaintiff was discharged at age 46, after twenty-five years with the company. She was replaced by a much younger and less experienced employee. As Ceralde was called to testify during Plaintiff's case, the Jury had a full opportunity to observe the marked difference in the age and experience of the two women. Despite this telling juxtaposition, the Jury held that age discrimination was not a factor in Plaintiff's discharge.

Plaintiff failed to provide any substantial evidence to rebut the Defendant's primary, legitimate explanation for her discharge. Defendant consistently argued that Plaintiff was selected for lay off as part of a neutral PAR ranking process. Plaintiff along with all of the other support staff in the OI division received a PAR ranking based upon a weighted average of her last three performance appraisals. Plaintiff, herself, readily acknowledges that each of these performance reviews was a fair and non-discriminatory appraisal of her performance. On the basis of her PAR ranking, Plaintiff was the lowest-ranked CSR in the combined Atlantic and Eastern Branches. She was also the lowest-ranked CSR in both the higher and lower wage bands. On the basis of this ranking, Plaintiff was targeted for discharge.

Plaintiff's argument that the PAR process was a sham is unavailing. Plaintiff attempted to argue that, despite its superficial appearance of neutrality and anonymity, under the PAR

process, decision makers were aware of which employees were targeted for lay off from the beginning. Accordingly, the decision makers could choose which positions and wage grades to select in order to protect favored employees. The Jury's verdict demonstrates, however, that it did not accept the Plaintiff's view that the PAR process was a sham. Ultimately, Plaintiff failed to overcome the reality that even if her identity was apparent throughout the PAR process, she was lowest-ranked CSR in the branch. Thus, Plaintiff is unable to demonstrate that Jury's finding was against the great weight of the evidence.

VI. Conclusion

Because the Plaintiff failed to produce any evidence that she was a disabled, as defined by the ADA and the PHRA, the Defendant's Motion for Judgment as a Matter of Law will be granted. In the alternative, because the Jury's finding of disability discrimination is against the great weight of the evidence, I will conditionally grant the Defendant's Motion for a New Trial. Accordingly, Plaintiff's Motion for a New Trial in Part and to Alter and Amend the Judgment Accordingly, as it relates to her claim of disability discrimination, will be dismissed as moot. Plaintiff's Motions for Reinstatement and for Attorneys' Fees will also be dismissed as moot. Plaintiff's Motion for a New Trial in Part and to Alter and Amend the Verdict Accordingly will be denied because the Jury's verdict was not against the great weight of the evidence, nor was Plaintiff

prejudiced by my rulings on Defendant’s Motion in Limine, Plaintiff’s Proposed Jury Instructions, or the reopening of discovery.

An appropriate Order follows.