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

EUGENE H. SYLVESTER	:	CIVIL ACTION
	:	
v.	:	
	:	
UNISYS CORPORATION	:	NO. 97-7488

MEMORANDUM AND ORDER

YOHN, J. March 25, 1999

Eugene H. Sylvester ("Sylvester") filed this action against his former employer, Unisys Corporation ("Unisys"), alleging that Unisys discriminated against him because of his age. Sylvester claims that Unisys' decision to lay him off and its refusal to rehire him constitute both discrimination and retaliation in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the New Jersey Law Against Discrimination ("NJLAD"), N.J. Stat. Ann. § 10:5-12 (a), (d) (West 1993 & Supp. 1998). Before this court is Unisys' motion for partial summary judgment which seeks dismissal of Sylvester's NJLAD claims, his ADEA retaliation claim, and his ADEA refusal to rehire claim. After considering the parties' submissions, I conclude that the Unisys' motion will be granted in part and denied in part.

FACTUAL BACKGROUND

Sylvester was notified, on August 15, 1994, that he was being laid off "for business reasons," effective September 12, 1994. See Memorandum in Support of Unisys' Motion for Partial Summary Judgment ("Unisys Mem."), Ex. A. At the time he was laid off, he was 59 years old. See id. In addition to income assistance benefits, which Sylvester received through

March 27, 1995, Unisys informed Sylvester that he would be considered for open positions in his department and area for a period of one year after he stopped working. See id., Plaintiff's Memorandum in Opposition to Unisys' Motion for Partial Summary Judgment ("Opposition"), Ex. 30. After he was informed that he would be laid off, Sylvester applied for 22 other positions within Unisys. See Sylvester's Counterstatement of Disputed Material Facts ("Counterstatement"), ¶¶ 3-19. Sylvester was not hired to fill any of these positions, and posits that the only possible explanation is age discrimination. See id.

Sylvester contends that he went to the New Jersey Division of Civil Rights ("DCR") on March 30, 1995, to file age discrimination claims, but that an employee of the DCR told him to file his claims with the Equal Employment Opportunity Commission ("EEOC") instead. See Counterstatement, ¶ 20. On the same day, Sylvester then went to the EEOC where he filed a charge of discrimination against Unisys, contending that Unisys discriminated against him because of his age, in violation of the NJLAD, when it laid him off and refused to rehire him. See Unisys Mem., Ex. C. An EEOC employee also prepared a separate DCR complaint, on DCR's form, alleging discrimination in violation of the ADEA, which Sylvester signed, and the EEOC forwarded to the DCR. See Unisys Mem., Ex. D.

On May 8, 1995, Sylvester returned to the Berkeley Heights Unisys facility to review the company's file of open jobs. See Counterstatement, ¶ 22. According to Sylvester, he was approached shortly after his arrival and was told that the Human Resources director, Howard Gribben, wished to speak to him. See Sylvester Dep., at 342-43. Sylvester alleges that Gribben questioned him about his reasons for visiting the Berkeley Heights facility and told him that he was no longer allowed to visit the facility because he had filed discrimination charges against the

company. See id. at 343-44. Sylvester further contends that he was ordered to leave immediately and that he feared arrest if he stayed to examine the job files or to speak with his former colleagues. See id. at 347.

Because of the May 8, 1995, confrontation, Sylvester filed a retaliation charge with the EEOC on July 17, 1995, which alleged that Unisys retaliated against him because he had filed an ADEA complaint. See Unisys Mem., Ex. E. As before, the EEOC prepared, and Sylvester signed, a separate DCR complaint, on DCR's form, alleging that Unisys had retaliated against him in violation of the NJLAD. See Unisys Mem., Ex. F. The DCR received this complaint on August 1, 1995. See id.

On June 18, 1997, the EEOC issued a Determination which concluded that Unisys had violated the ADEA when it decided to lay Sylvester off, when it refused to rehire him for a similar position, and when it asked him to leave the Berkeley Heights facility. See Opposition, Ex. 25, at 3. When conciliation efforts between Unisys and the EEOC failed, the EEOC issued a Notice of Right to Sue letter to Sylvester, which reported that it "found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge." Unisys Mem., Ex. G. Sylvester filed this suit on December 10, 1997, within ninety days of the EEOC's September 15, 1997, Notice of Right to Sue. See id. After this case was filed, the DCR informed Sylvester, on January 22, 1998, that it was closing its files on his complaints and was adopting the EEOC's conclusions. See Unisys Mem., Ex. H.

Sylvester's complaint alleges that Unisys violated the ADEA (Count I) and the NJLAD (Count III) when it laid him off and refused to rehire him. See Complaint, ¶¶ 27-31, ¶¶ 39-43. Sylvester also claims that Unisys retaliated against him in violation of the ADEA (Count II) and

the NJLAD (Count IV) when it expelled him from the Berkeley Heights facility on May 8, 1995.[1] See Complaint, ¶¶ 33-37, ¶¶ 45-49. In its motion for partial summary judgment, Unisys contends that Sylvester's NJLAD claims in Counts III and IV should be dismissed because they are time-barred by the NJLAD's two-year statute of limitations, or alternatively because they are barred by the NJLAD's election of remedies provision. See Unisys Mem., at 4-9. Unisys also argues that Sylvester's retaliation claims in Counts II and IV should be dismissed because Unisys' decision to bar him from the Berkeley Heights facility did not constitute an "adverse employment action." See id. at 10-14. Finally, Unisys argues that Sylvester's failure to rehire claims contained in Counts I and III should be dismissed because Sylvester has failed to advance a prima facie case that these decisions were discriminatory, and to rebut Unisys's legitimate non-discriminatory reasons for failing to offer him the positions for which he applied. See id. at 15-22. Unisys has not moved for summary judgment on Sylvester's discriminatory layoff claim under the ADEA, contained in Count I. See id. at 1 n. 1.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty

[1] Though Sylvester's complaint does not specify how Unisys is alleged to have violated the ADEA and the NJLAD, the parties have apparently agreed that his generalized allegations assert discriminatory layoff, failure to rehire and retaliation claims. I will, therefore, accept the parties' joint interpretation of the complaint's allegations.

Lobby, Inc., 477 U.S. 242, 247-48 (1986). If no factual issues exist and the only issues before the court are legal, then summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). If, after giving the nonmoving party the "benefit of all reasonable inferences," id. at 727, the record taken as a whole "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and the motion for summary judgment should be granted.

In ADEA cases, the court's decision to grant or deny summary judgment is closely linked to the substantive burden of proof that the plaintiff must meet. As with other employment discrimination claims, ADEA claims can be established in either, or both, of two ways: (1) by direct evidence that Unisys' decisions were motivated by age discrimination under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), or (2) by evidence which creates an inference of discrimination under the burden-shifting framework of the McDonnell Douglas/Burdine/Hicks trilogy. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Sylvester has not claimed to have direct evidence that Unisys harbored a discriminatory animus toward him. Therefore, his claims should be evaluated under the burden-shifting framework of McDonnell Douglas/Burdine/Hicks. See Simpson v. Kay Jewelers, Division of Sterling, Inc., 142 F.3d 639, 644 n.5 (3d Cir. 1998) (noting that plaintiff sought to prove that demotion was pretext for age discrimination).

The burden-shifting framework initially requires the plaintiff to establish a prima facie case of disparate treatment by a preponderance of the evidence. See Burdine, 450 U.S. at 252.

To establish a prima facie ADEA case, a plaintiff must demonstrate

> 1) that he belongs to the protected class, 2) that he applied for and was qualified for the job, 3) that despite his qualifications he was rejected, and 4) that the employer either ultimately filled the position with someone sufficiently younger to permit an inference of age discrimination or continued to seek applicants from among those having plaintiff's qualifications.

Barber v. CSX Distribution Serv., 68 F.3d 694, 698 (3d Cir. 1995) (citing Fowle v. C & C Cola, 868 F.2d 59, 61 (3d Cir. 1989)); see also Connors v. Chrysler Financial Corp., 160 F.3d 971, 973-74 (3d Cir. 1998). Once plaintiff succeeds in presenting a prima facie case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the unfavorable treatment. McDonnell Douglas, 411 U.S. at 802; Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997).

After the defendant produces a legitimate, nondiscriminatory reason, the plaintiff can defeat summary judgment by pointing to some direct or circumstantial evidence from which a jury could either reasonably: "(1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer's action." Simpson, 142 F.3d at 644 (quoting Fuentes, 32 F.3d at 764). The plaintiff cannot, however, "avoid summary judgment simply by arguing that the factfinder need not believe the defendant's proffered legitimate explanations." Fuentes, 32 F.3d at 764. On the other hand, the plaintiff is not required to "adduce evidence directly contradicting the defendant's proffered legitimate explanations" to survive a summary judgment motion. Id. (quoting Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 128 (3d Cir.1990)):

> The correct solution lies somewhere in between: to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered

> non-discriminatory reasons, . . . was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).

Id. (citations omitted).

The ultimate focus of this inquiry is on whether the plaintiff has met his burden of showing that the employer has discriminated against a member of a protected class. Burdine, 450 U.S. at 253. Accordingly, the ADEA does not command employers to be wise or efficient or even rational - it only restricts them from making employment decisions motivated by discriminatory animus. See Keller, 130 F.3d at 1108-09. To that end, a plaintiff must cast "substantial doubt" upon the proffered legitimate reason by demonstrating "such weaknesses or implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them 'unworthy of credence[.]' " Fuentes, 32 F.3d at 765 (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir.), cert. denied, 510 U.S. 826 (1993)); see also Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278-79 (3d Cir. 1998) (commenting that unexplained employment action is more likely to be motivated by impermissible concerns); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1071 (3d Cir. 1996) (endorsing Fuentes). While this standard places a difficult burden on plaintiffs, "[i]t arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs." Fuentes, 32 F.3d at 765 (quoting Ezold, 983 F.2d at 531).

If, however, a plaintiff cannot cast substantial doubt on the defendant's proffered reason, he can still avoid summary judgment by producing sufficient evidence that would allow a fact-finder reasonably to infer that the employer was motivated by discriminatory animus. Id. In

other words, the plaintiff must show, by a preponderance of the evidence, that "discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Keller, 130 F.3d at 1111.

DISCUSSION

A. Sylvester's NJLAD Claims Are Barred by the Statute of Limitations

In Montells v. Haynes, 627 A.2d 654, 655 (N.J. 1993), the New Jersey Supreme Court held that a two-year statute of limitations applies to all NJLAD claims arising after the date of that decision. The discriminatory conduct at the base of these claims occurred between August 15, 1994, when Sylvester was informed that he would be laid off, and May 8, 1995, when Sylvester was told to leave the Berkeley Heights facility. See Counterstatement, ¶¶ 1-22. Unisys' discriminatory conduct thus terminated, at the latest, on May 8, 1995, more than 31 months before this lawsuit was filed. The statute of limitations therefore bars Sylvester's NJLAD claims unless there is a reason why it should be tolled.

Unlike the ADEA, and some other state anti-discrimination laws, the NJLAD imposes no requirement that a plaintiff exhaust his administrative remedies before filing suit in court. Cf. Love v. Pullman Co., 404 U.S. 522, 523 (1972) (explaining Title VII administrative exhaustion requirement); Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 919 (Pa. 1989) (explaining PHRA administrative exhaustion requirement). To the contrary, the NJLAD allows plaintiffs to "initiate suit in the Superior Court under this act without first filing a complaint with the division [on civil rights] or any municipal office." N.J. Stat. Ann. § 10:5-13 (West 1993 & Supp. 1998). Instead, a person wishing to assert claims under the NJLAD must choose either to bring those claims in court or before the DCR. See N.J. Stat. Ann. § 10:5-27 (West 1993 &

Supp. 1998); Hernandez v. Region Nine Hous. Corp., 684 A.2d 1385, 1388-89 (N.J. 1996) (observing that claimant may choose to bring NJLAD claims either administratively or judicially, but that the choices are "mutually exclusive" while pending). Sylvester apparently chose to proceed with his NJLAD claims administratively, by filing his federal claims with the EEOC and signing a state complaint which the EEOC forwarded to the DCR.[2]

1. Sylvester's DCR Filing Did Not Toll the Statute of Limitations

Unisys contends that neither Sylvester's filing with the DCR, nor his filing with the EEOC, tolled the two-year statute of limitations on his NJLAD claims. Unisys argues that because Sylvester was not required to wait for the DCR's determination of his state claims as a prerequisite to filing suit, the DCR filing did not toll the statute of limitations. See Unisys Mem., at 4-5. In support of its contention, Unisys relies on a case interpreting similar provisions of the District of Columbia's Human Rights Act (the "Act"). See Weiss v. International Brotherhood of Elec. Workers, 729 F. Supp. 144, 146 (D.D.C. 1990). Like the NJLAD, the Act does not require a discrimination claimant to file with the local agency before suing in court; rather, the

[2] The parties seem to assume that the complaints filed with the DCR on both April 10, 1995, and August 1, 1995, assert NJLAD claims against Unisys. See Unisys Mem., Ex. D, F. Such a conclusion, however, is not apparent from the face of these complaints. In both complaints, Sylvester did not complete paragraph three, which asks the complainant to specify the section of the NJLAD which he alleges has been violated, and to specify the reason he alleges the NJLAD has been violated. See id. Instead, in his description of alleged discriminatory conduct, Sylvester explicitly states that "I was laid off and not hired because of my age . . . in violation of the Age Discrimination in Employment Act of 1967." Id. Though the court is not convinced that these complaints assert a violation of the NJLAD, Sylvester argues, and Unisys accepts, that they do. Because even a blank paragraph three could arguably be read as an allegation that the NJLAD has been violated, and because the court is obligated to construe the facts in the light most favorable to Sylvester, the court will assume that these two DCR complaints alleged that Unisys violated the NJLAD's prohibitions on age discrimination and retaliation.

Act permits the claimant to choose to proceed either before the agency or in court, and allows a claimant to withdraw from an administrative proceeding prior to its conclusion in order to file suit. See D.C. Code Ann. § 1-2556 (1998); Weiss, 729 F. Supp. at 146. Weiss held that when a claimant chooses to withdraw her administrative claim in order to file suit, the Act's statute of limitations is not tolled during the pendency of the administrative proceeding because a contrary result would allow a claimant to "'buy' more time" than the statute of limitations provides. Id. (citing Anderson v. United States Safe Deposit Co., 552 A.2d 859, 863 (D.C. 1989)).

New Jersey courts have not explicitly addressed the issue of whether filing an administrative NJLAD complaint with the DCR tolls the two-year statute of limitations for filing an NJLAD suit. In Hernandez, the New Jersey Supreme Court did not address the issue of whether administrative filings with the DCR and the EEOC tolled the statute of limitations on Hernandez's NJLAD claims, which were filed in state court approximately 31 months after the alleged acts of discrimination. See Hernandez, 684 A.2d at 1388 (holding that adverse EEOC determination on Title VII charges did not prevent plaintiff from filing NJLAD claim based on same facts); see also Aldrich v. Manpower Temporary Serv., 650 A.2d 4, 5 (N.J. Super. Ct. App. Div. 1994), certif. denied, 655 A.2d 445 (N.J. 1995) (reporting that DCR complaint was filed in July, 1991, and that Superior Court suit was filed on June 1, 1993, but omitting information concerning when the alleged discrimination occurred). The policies emphasized by the New Jersey Supreme Court when it adopted a two-year statute of limitations for all NJLAD claims, however, weigh in favor of a rule similar to that of Weiss. In Montells, that court emphasized that fairness and efficiency concerns support a short statute of limitations in discrimination cases, particularly because they are usually based on testimonial evidence implicating the witnesses'

credibility. See Montells, 627 A.2d at 659-60. A rule similar to Weiss' would also tend to prohibit forum-shopping by plaintiffs whose chosen DCR remedies were not progressing favorably. See Aldrich, 650 A.2d at 5 (noting trial judge's concern that "[t]heoretically, the plaintiff could file an administrative law complaint, withdraw it . . . file a complaint in [court], withdraw it, and go back to the Administrative Law, provided you could get all these changes done within the statute of limitations"). Because the court believes that the New Jersey courts, if faced with a situation similar to that in Weiss, would hold that filing a DCR complaint does not toll the statute of limitations for filing an NJLAD suit in court, Sylvester's filing with the DCR does not toll the statute of limitations on his NJLAD claims.

2. Sylvester's EEOC Filing Did Not Toll the Statute of Limitations

Unisys also argues that Sylvester's filing with the EEOC did not toll the statute of limitations for his NJLAD claims and points to several cases holding that EEOC filings do not toll the statute of limitations on related state law causes of action. See Unisys Mem., at 5 (citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465-66 (1975); Myers v. Chestnut Hill College, No. 95-6244, 1996 WL 67612, *14 n. 9 (E.D. Pa. Feb. 13, 1996) (state law misrepresentation claim) and Plemmons v. Pennsylvania Mfr. Ass'n Ins. Co., No. 90-2495, 1991 WL 61128, *2 (E.D. Pa. Apr. 13, 1991) (state law whistleblower claim)). Again, New Jersey courts have not addressed this issue. See United States v. Board of Educ. of the Town of Piscataway, 798 F. Supp. 1093, 1099 n. 4 (D.N.J. 1992) (declining to address whether NJLAD statute of limitations should be tolled by EEOC filing).

Sylvester counters that the related state causes of action in the cases cited by Unisys were not discrimination claims within the EEOC's investigatory authority and therefore that the cases

are inapplicable in the current situation, where the "state administrative agency waives its right to investigate a claim and charges the EEOC with that responsibility." Opposition, at 6. Contrary to Sylvester's assertion, one of these cases held that the EEOC's investigation of race-based discrimination claims did not toll the statute of limitations on the plaintiff's § 1981 race-based discrimination claim. See Johnson 421 U.S. at 465-66. In Johnson, the Court explained that "the remedies available under Title VII and § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." Id. at 461. This holding was based on the differences in the prerequisites to filing suit under the two statutes, the breadth of protection offered by the two statutes, the available remedies under the two statutes, and the fact that claims under the two statutes are not mutually exclusive. See id. at 458-61.

These same factors apply to compel the conclusion that the remedies available under the ADEA and the NJLAD are ordinarily "separate, distinct and independent." Id. at 461. As was the case in Johnson, the ADEA and the NJLAD differ in their prerequisites for filing suit, the scope of the protection they offer and the scope of the remedy they provide. See Hernandez, 684 A.2d at 1388 (describing the "marked differenced between the state and federal statutory schemes"). Unlike the ADEA, claimants seeking relief under the NJLAD are not required to file administrative claims as a prerequisite to filing suit, but if claimants choose to file administrative claims, the state agency has greater authority than the EEOC to provide them with a remedy. See id. at 1389-90 (describing multiple fora available to an NJLAD claimant as opposed to the "single track" for processing claims under Title VII). The DCR, unlike the EEOC, is authorized to award damages to NJLAD claimants, and its findings preclude later suits on the same claims. See id. at 1390. Moreover, the damages available under the NJLAD differ from those available

under the ADEA; though the punitive damages available for violations of the NJLAD are similar to the liquidated (double) damages available for willful violations of the ADEA, the standards for obtaining punitive damages under the NJLAD may be more rigorous, and successful NJLAD claimants may also be entitled to statutory damages. See N.J. Stat. Ann. § 10:5-14.1 (West 1993) (imposing additional penalties of "not more than $2,000.00 for the first offense and not more than $5,000.00 for the second and each subsequent offense"); Harter v. GAF Corp., 150 F.R.D. 502, 511-12 (D.N.J. 1993). Under Johnson, then, it is clear that filing ADEA claims with the EEOC would not normally toll the statute of limitations on age-based NJLAD claims, just as filing administrative Title VII claims does not toll the statute of limitations on related § 1981 claims. Moreover, there is no reason why the Weiss rule should yield a different result when the administrative claims are filed with a federal rather than a state agency. Had Sylvester wished to bring suit on his NJLAD claims, he should have withdrawn them from the DCR before the two-year statute of limitations expired. See Weiss, 729 F. Supp. at 146. Finally, as noted in Johnson, the state could have provided for tolling the statute of limitations while an EEOC investigation was pending, but it chose not to do so. See Johnson, 421 U.S. at 463 (noting that state law expressly provides some circumstances under which statute of limitations could be tolled).

Sylvester protests that his NJLAD claims are critically different from Johnson's § 1981 claims because the EEOC specifically undertook the responsibility for investigating them. See Opposition, at 6. Viewing the facts in the light most favorable to Sylvester, as the court must on summary judgment, it appears that the EEOC agreed, under the terms of its worksharing

agreement with the DCR,[3] to accept responsibility for investigating Sylvester's NJLAD claims as well as his ADEA claims.[4] See Opposition, Ex. 22, 23. In letters dated May 24, 199[5], and August 8, 1995, the DCR informed Sylvester that, pursuant to the agencies' worksharing agreement, "the processing of this complaint will be conducted by the [EEOC] not the [DCR]," and that the DCR would likely adopt the EEOC's determination of his complaint. Id. Additionally, the letters directed Sylvester to contact the EEOC if he had questions concerning his charges of discrimination, and failed to assign DCR docket numbers to his charges. See id. The EEOC's apparent agreement to investigate Sylvester's state law claims, however, is irrelevant to the tolling issue. Though the EEOC agreed to investigate Sylvester's claims on behalf of the DCR, Sylvester's state law claims were still administratively pending before the DCR until the DCR adopted the EEOC's finding on his claims. See Anjelino v. New York Times Co., No. 92-2582, 1993 WL 170209, * 15 n.10 (D.N.J. May 14, 1993) (dismissing NJLAD claim for retaliatory delistment because it was still administratively pending while it was under investigation by the EEOC pursuant to the EEOC's worksharing agreement with the DCR, and therefore could not be the subject of suit under the NJLAD's election of remedies provisions). Again, had Sylvester wished to bring his NJLAD claims in court, rather than resolve them through the administrative process, he was free to withdraw them from the DCR and file

---

[3] Though it would aid in the resolution of these issues, the worksharing agreement between the DCR and the EEOC is not part of the summary judgment record before the court.

[4] Again, the court assumes, for purposes of the summary judgment motion, that Sylvester actually asserted NJLAD claims against Unisys. See *supra*, note 2. None of the correspondence between Sylvester, the DCR and the EEOC mentions his NJLAD claims. In fact, the DCR letters informing Sylvester that the EEOC would handle his claims refer only to the requirements of Title VII. See Opposition, Ex. 22, 23.

suit, as long as he did so within the two-year statute of limitations.

3. Equitable Tolling Does Not Save Sylvester's NJLAD Claims

Finally, Sylvester asserts that the DCR's abdication of its investigative responsibilities and its adoption of the EEOC's probable cause determination justify equitable tolling of the NJLAD's statute of limitations. See Opposition, at 3. He contends that the NJLAD's statute of limitations should not have begun to run until the EEOC issued his Right to Sue letter. See id. at 9. Sylvester's argument is without merit.

> Equitable tolling of a statute of limitations is appropriate:
>
> (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)). Sylvester contends that "the second and third scenarios are applicable to his filing with the EEOC under federal and state law." Opposition, at 7. Sylvester continues by arguing that the DCR "expressly directed [him] to file state claims through the EEOC and the representatives of the EEOC and the [DCR] indicated that both his federal and state claims would be investigated and remedied by some affirmative action by the EEOC." Id. Though the court accepts that Sylvester was directed to file both his state and federal claims "through the EEOC" and that the EEOC agreed to conduct an investigation of both his state and federal claims, there is absolutely nothing in the record to suggest that Sylvester's state law remedy would result from "affirmative action by the EEOC." The DCR's letters to Sylvester indicated that they would not conduct a separate investigation and would probably

adopt the EEOC's investigatory findings, but provide no basis for Sylvester's assumption that his state law remedy would be provided by the EEOC. See Opposition, Ex. 22, Ex. 23. As promised in these letters, the DCR adopted the EEOC's findings, as summarized in the Right to Sue letter, that "[t]he EEOC found reasonable cause to believe that violations of the statute[s] occurred with respect to the some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you." Unisys Mem., Ex. G, Ex. H.

Sylvester's unartful assertion that he has been extraordinarily prevented from asserting his state law rights can thus only be based on an assertion that the DCR's failure to continue its administrative procedures after it adopted the EEOC's findings of probable cause and failure of conciliation prevented him from obtaining relief on his state law claims. Under the administrative remedial procedure established by the NJLAD, the DCR's finding of probable cause is only a preliminary step in the DCR's administrative proceedings and is not a determination on the merits of Sylvester's claims. See Frank v. Ivy Club, 548 A.2d 1142, 1150 (N.J. Super. Ct. App. Div. 1988), rev'd on other grounds, 576 A.2d 241 (N.J. 1990) (holding that "a proceeding to determine the existence of probable cause . . . is an initial threshold procedure to determine whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits"); Muench v. Township of Haddon, 605 A.2d 242, 251 (N.J. Super. Ct. App. Div. 1992) (same). Once the DCR determined that Sylvester's claims were supported by probable cause and that conciliation efforts with Unisys had failed, the director of the DCR should have ordered Unisys to appear at a hearing on the merits of Sylvester's claims, and should have reached a final determination on the merits of his claims. See N.J. Stat. Ann. § 10:5-15 (describing DCR's duty to order a hearing on the merits of claims where conciliation

fails); § 10:5-16 (describing conduct of hearing on the merits); § 10:5-17 (describing DCR Director's duty to make findings of fact and conclusions of law on the merits of discrimination claims after the hearing). Instead of following these steps, the DCR informed Sylvester that it was closing its files on his case. See Unisys Mem., Ex. H.

Even though the Director of the DCR should have taken further steps to reach a final determination on the merits of Sylvester's claims, Sylvester cannot argue that the Director's failure to do so is a basis for equitably tolling the statute of limitations on his NJLAD claims. The DCR's error occurred on January 22, 1998, when it decided to close its files rather than to continue with the statutory procedures. Until that time, the DCR's conduct was in line with the statutory provisions for processing administrative complaints of discrimination. Because the statute of limitations expired, at the latest, eight months before the DCR's error, Sylvester cannot use that error as a reason to revive long-barred claims. See *supra*, pt. A.1 (finding that DCR filing did not toll the statute of limitations). Similarly, the third scenario under which courts apply equitable tolling principles is inapplicable to Sylvester's claims. See Robinson, 107 F.3d at 1022 (permitting equitable tolling "where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum"). Sylvester timely filed his NJLAD claims with the DCR, which was a proper forum to adjudicate his claims. See Unisys Mem., Ex. D, Ex. F. There is thus no reason to toll the statute of limitations on Sylvester's NJLAD claims because he filed them in a proper forum.

Sylvester's NJLAD claims are barred by the two-year statute of limitations applicable to those claims and there is no reason why the statute of limitations should be tolled under the facts of his case. Sylvester's NJLAD claims will, therefore, be dismissed.

B. Sylvester's NJLAD Claims Are Barred by the Election of Remedies Doctrine

As an alternative ground for dismissing Sylvester's NJLAD claims, Unisys argues that he may not now litigate claims which were previously submitted to, and on which a final determination was reached by, the DCR. See Unisys Mem., at 6-9. The NJLAD contains an election of remedies provision which provides that administrative proceedings before the DCR "shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned." N.J. Stat. Ann. § 10:5-27 (West 1993). Once Sylvester chose to proceed administratively, he was thus bound to pursue his claims in the administrative forum until the agency reached a final determination of his claims, or until he formally withdrew his claims from the administrative forum before the agency reached a final determination. See Aldrich, 650 A.2d at 6 (holding that plaintiff may withdraw her NJLAD complaint from the DCR before it scheduled hearings and then may sue in state court); see also Hernandez, 684 A.2d at 1391 (approving of Aldrich).

Sylvester filed this suit in federal court on December 10, 1997, before formally withdrawing his NJLAD claims from the DCR. The NJLAD's election of remedies provision thus prevented him from bringing his NJLAD claims in court. Whether they were still administratively pending when Sylvester filed suit, as I have posited, or by the passage of time, they may now be considered finally determined, as Unisys argues, the election of remedies clause prohibits this suit.[5] See N.J. Stat. Ann. § 10:5-27; Pittman v. LaFontaine, 756 F. Supp. 834, 843-

[5] Because Sylvester never received a final determination on his NJLAD claims from the DCR, and because there is no explicit time limit on the DCR's duty to schedule a hearing on the merits of discrimination claims, Sylvester may still be able to obtain a hearing on the merits of his NJLAD claims before the DCR. See N.J. Stat. Ann. § 10:5-15.

44 (D.N.J. 1991) (DCR finding of "no probable cause" precluded later Title VII suit on same charges); Hermann v. Fairleigh Dickinson Univ., 444 A.2d 614, 616 (N.J. Super Ct. App. Div.), certif, denied, 453 A.2d 884 (N.J. 1982) (holding that DCR determination of no probable cause precluded suit on same grounds).

C. Sylvester's Retaliation Claims Should Be Dismissed

Turning to the merits of Sylvester's claims, Unisys asserts that his ADEA and NJLAD retaliation claims[6] should be dismissed because the alleged act of retaliation, the May 8, 1995, incident during which he was barred from returning to the Berkeley Heights facility, is not an adverse employment action. See Unisys Mem., at 10-14. Sylvester contends that the prohibition on his return to the Berkeley Heights facility constitutes an adverse employment action because it prevented him from reviewing Unisys' internal job postings, and thus, from applying for at least 28 jobs he may have otherwise obtained.[7] See Opposition, at 15-18.

To state a prima facie retaliation claim under either the ADEA or the NJLAD,[8] Sylvester

---

[6] The ADEA prohibits discrimination against any person "because such individual has opposed any practice made unlawful by this section, or because such individual . . . has made a charge . . . under this chapter." 29 U.S.C. § 623 (d) (1999). The NJLAD makes it unlawful "[f]or any person to take reprisals against any person because he has opposed any practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act." N.J. Stat. Ann. § 10:5-12 (d) (West 1993 & Supp. 1998).

[7] Sylvester provides no evidence that he would have been qualified to fill any of the 28 positions in Unisys' Eastern Group which it filled between May 8, and September 12, 1995.

[8] There are no differences in the legal standards for evaluating retaliation claims under the ADEA and the NJLAD, and New Jersey courts generally look to federal discrimination laws when interpreting the NJLAD. See Keller, 130 F.3d at 1114 n.5; Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 452 (N.J. 1993). The court, therefore, need not distinguish between Sylvester's ADEA and NJLAD claims. See Hurley v. Atlantic City Police Dep't, No. 96-4928. 1998 WL 351781, at * 11 (D.N.J. May 28, 1998) (analyzing Title VII and NJLAD claims together).

must allege that (1) he engaged in a protected activity, (2) his employer took adverse action against him "either after or contemporaneous with [his] protected activity," and (3) "a causal connection [exists] between [his] protected activity and [Unisys'] adverse action." Krouse v. American Fertilizer Co., 126 F.3d 494, 500, 506 (3d Cir. 1997) (explaining elements of prima facie retaliation case under the Americans with Disabilities Act and applying those elements to ADEA claim); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997) (describing elements of Title VII retaliation claim); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 273 (7th Cir. 1996) (describing elements of ADEA retaliation claim). Unisys concedes, for summary judgment purposes, that Sylvester engaged in a protected act when he filed ADEA and NJLAD claims on March 30, 1995, and April 10, 1995, and that the May 8, 1995, confrontation was causally connected to those complaints. See Unisys' Statement of Undisputed Material Facts ("Undisputed Facts"), ¶ 22, n.2 (accepting Sylvester's version of May 8, 1995, events for summary judgment purposes only). Unisys contends that barring Sylvester from the Berkeley Heights facility and instructing its employees not to speak to him is not an adverse employment action. See Unisys Mem., at 10.

For a former employee, like Sylvester, to prove that he suffered an adverse employment action, he must demonstrate that his former employer's action harmed his future employment opportunities. See Robinson, 120 F.3d at 1301 n. 15, Nelson v. Upsala College, 51 F.3d 383, 388 (3d Cir. 1995) (finding that retaliation must "relate to an employment relationship"); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir.), cert. denied, 513 U.S. 1022 (1994) (holding that ex-employee may bring retaliation claim if the retaliatory act "arises out of or is related to the employment relationship"). The court in Robinson commented that "a plaintiff

who claims that the alleged retaliation prejudiced his or her ability to obtain or keep future employment would meet the standard we announce today by showing that the retaliatory conduct was related to his or her future employment prospects or conditions." Id. Not every unkind action by a former employer which makes a former employee unhappy rises to the level of an adverse employment action. See id. at 1300.

Accepting Sylvester's version of the May 8, 1995, incident, the court cannot conclude that he suffered an adverse employment action because Unisys' actions did not harm his chances of obtaining future employment. According to Sylvester, two Unisys employees told him to leave the building immediately, and one of those employees directed another Unisys employee, Eric Feulmer, not to speak with Sylvester because he had filed a charge against the company. See Counterstatement, ¶ 22; Sylvester Aff., ¶ 34. In the absence of evidence that Feulmer would have assisted Sylvester in finding future employment, telling him not to speak with Sylvester is not an adverse employment action. See Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 243 (4th Cir. 1997), cert. denied, 118 S. Ct. 105 (1998) (holding that employer's direction to ignore and spy on current employee is not an adverse employment action); Nelson, 51 F.3d at 388-89 (alleged retaliation must impact employment relationship) . Because Sylvester has not alleged that his contact with Feulmer was related to his future employment prospects, Sylvester has failed to state a prima facie case of retaliation based on Unisys' instructions to Feulmer.

Similarly, banning Sylvester from the Berkeley Heights facility is not an adverse employment action because Sylvester has not demonstrated that it had an impact on his future employment prospects. Sylvester argues that he was prohibited from reviewing Unisys' internal job postings because he was banned from the Berkeley Heights facility. See Opposition, at 17-

18. Unisys contends however, that Sylvester was able to view the job listings at any number of other Unisys facilities, and that Sylvester actually visited at least one of these facilities during the time when he was eligible for consideration for other Unisys positions.[9] See Unisys Mem., at 13-14 (citing Sylvester Dep., at 472-73). Even accepting Sylvester's assertions that he did not look at job postings on his trips to other Unisys facilities, or that his visits to other Unisys facilities did not take place within the relevant time frame, Sylvester has not argued that he was unable to review job postings at other Unisys sites during the relevant time. See Opposition, at 17-18; Sylvester Dep. at 474-75 (testifying that to the best of his recollection, he visited Unisys' Atlanta facility after May 8, 1995). Unisys' action in barring Sylvester from one facility does not rise to the level of an adverse employment action as there is no evidence, but only Sylvester's unsubstantiated claims, that this action terminated Sylvester's access to its internal job listings. Moreover, there is no evidence that Unisys' action affected Sylvester's ability to obtain a job with another employer. See Sylvester Dep., at 8-9 (describing his current position with Uberi International). Therefore, this action had no impact, much less a materially adverse impact, on Sylvester's future employment prospects and cannot form the basis for a prima facie case of retaliation. See Robinson, 120 F.3d at 1300; Nelson, 51 F.3d at 389 (former employer's refusal to allow former employee onto campus without pre-approval is not adverse employment action); see also Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997) (former employer's refusal to allow former employee to use former office to conduct job search is not

[9] Sylvester contends that Unisys' retaliatory action only harmed him between May 8, and September 12, 1995, because his consideration for reemployment letter allowed him to consult internal job listings and apply for Unisys jobs for one year after his layoff. See Sylvester Dep., at 356-57.

adverse employment action). Sylvester's ADEA and NJLAD retaliation claims are dismissed because he has not asserted a prima facie case of retaliation.

D. Most of Sylvester's Failure to Rehire Claims Should Be Dismissed

Unisys argues that Sylvester's failure to rehire claims in Counts I and III should be dismissed because he has failed to set forth a prima facie case, or to rebut Unisys' legitimate non-discriminatory reasons why he was not hired for any of the twenty-two jobs for which he applied between August, 1994, and February, 1995. See Unisys Mem., at 15. Sylvester claims that Unisys' legitimate reasons are a pretext for age discrimination and that he has produced sufficient evidence to discredit those reasons, thereby allowing him to present his claims to a jury. See Opposition, at 19. As explained above, the burden-shifting framework in age discrimination cases requires Sylvester to demonstrate that he is a member of a protected class, *i.e.* over age 40, that he applied for jobs he was qualified to fill, that he was not hired, and that a younger person was hired. See *supra*, p. 5; Barber, 68 F.3d at 694.

Unisys does not contest Sylvester's membership in a protected age group. See 29 U.S.C. § 631 (a) (ADEA protects those above age 40). Unisys nonetheless maintains that Sylvester cannot establish a prima facie case with respect to some of the jobs because no one was hired to fill them. Additionally, Unisys argues that Sylvester has failed to demonstrate that he was qualified to fill several of the positions for which he applied. Even assuming arguendo that Sylvester was able to state a prima facie case with respect to these positions, Unisys finally contends, he has failed to demonstrate that its legitimate reasons for not hiring him are a pretext for age discrimination. Because the resolution of these issues requires a fact-specific inquiry, the court will address the viability of Sylvester's claims with respect to each of the twenty-two jobs

for which he applied. For ease of analysis, the jobs will be discussed in categories according to Unisys' reason for not hiring Sylvester to fill them. Unisys' internal job openings were announced by requisitions, which assigned a requisition number to the job opening, listed the job's skill requirements and its responsibilities, and identified the contact person for applications. See, e.g., Unisys Mem., Ex. L, Tabs 1-6.

1. The Closed Positions

Unisys has produced evidence demonstrating that the requisitions for five of the positions for which Sylvester applied were closed and that no one was hired to fill these openings. These five requisitions sought to hire a Value Added Marketing ("VAM") Solution Manager (#1917), a Staff Business Development Manager (#9293), two Senior Project Managers (#1943, #1944), and a Senior Project Manager/Professional Services (#9251). See Undisputed Facts, ¶¶ 3, 9, 12, 13; Counterstatement, ¶¶ 3, 9, 12, 13. The Unisys decisionmaker responsible for hiring a candidate to fill each of these positions and a Unisys Human Resources Consultant testified that the requisitions were closed and that no one was hired to fill these positions.[10]

With respect to the VAM Solution Manager Position, Sylvester asserts that the reorganization which Unisys claims postponed the filling of this position occurred more than one year after he was rejected, was not mentioned during his hour-long interview for the position, and

[10] Ralph Zuccarini testified that "[b]ecause the entire VAM organization was restructured, this requisition [#1917] was never filled, and no one was ever hired for this position." Unisys Mem., Ex. I. Deborah Nechay-Hoer, a Human Resources Senior Consultant, testified that requisition #9293 "was closed and no one was interviewed or hired for this position," and that requisitions #1943 and #1944 were similarly "closed and no one was interviewed or hired for these positions." Unisys Mem., Ex. L, ¶¶ 4, 6. Nechay-Hoer also testified that "[t]he hiring of a permanent employee to fill [] requisition [#9251] was put on hold because it became unclear whether the facility where this position was located would remain open. Therefore, no one was hired for this position." Id. ¶ 7.

thus, could not have been the reason for his rejection. See Sylvester Aff., ¶ 2. There is no evidence in the record concerning when the decision to reorganize the VAM department was made, and whether the timing of this decision correlates with the decision not to hire Sylvester. Without this information, it is impossible to evaluate Sylvester's contention that a pending reorganization could not possibly have been the reason he was not hired. See Sylvester Aff., ¶ 2 (c) ("The reorganization was not the reason for refusing to hire me."). Sylvester has thus failed to produce evidence that Unisys' proffered reason for his rejection "was so plainly wrong that it cannot have been [Unisys'] real reason." Keller, 130 F.3d at 1109. Even if the reorganization was irrelevant to Unisys' decision not to hire Sylvester, Sylvester has failed to establish a prima facie case with respect to this position because he has failed to produce evidence that anyone, much less a younger person, was hired to fill it.[11]

With respect to the remaining closed positions, Sylvester argues that "Unisys [sic] repeated arguments that jobs were either 'closed' or 'filled' before Plaintiff applied for them is not worthy of credence and certainly there exists a genuine issue of material fact since the Jobs Availability Policy also states . . . that 'filled' or 'closed' jobs . . . must be removed [from the posting system] 'without delay.'" Opposition, at 20. Sylvester's argument amounts to a contention that Unisys' failure to remove jobs from the posting system in a timely fashion

---

[11] In his concurrence in Simpson, Judge Pollak questioned whether an ADEA plaintiff should be required to show that she was replaced by a younger person as an element of her prima facie case. See Simpson, 142 F.3d at 549. Though declining to resolve that issue on the facts of Simpson, Judge Pollak noted that McDonnell Douglas, a refusal to hire case, "required the more limited showing that 'the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.'" Id. at 650 (quoting McDonnell Douglas, 411 U.S. at 802). Similarly, the debate over the fourth element of an ADEA prima facie case need not be resolved on these facts because Sylvester has offered no evidence suggesting either that a younger person was hired or that Unisys continued to seek candidates to fill this position.

discredits Unisys' evidence that the jobs were never filled. Though the court accepts, for summary judgment purposes, that Unisys was slow to remove closed requisitions from its job posting system, this slowness cannot be interpreted as a pretext for a discriminatory motive for failing to hire Sylvester. See Fuentes, 32 F.3d at 765 (employer need not be "wise, shrewd, prudent, or competent"). Moreover, Unisys' slowness is irrelevant as Sylvester has failed to establish a prima facie case based on the remaining closed positions, as he has failed to produce a scintilla of evidence that anyone was hired to fill these positions or that they remained open after Sylvester was rejected. Because Sylvester has failed to establish a prima facie case that Unisys' refusal to hire him for any of the five closed positions was a pretext for age discrimination, these claims will be dismissed.

2. The Positions that were Filled Before Sylvester Applied

Unisys has also produced evidence that three requisitions were filled before Sylvester applied. These three requisitions sought to hire a Manager of Systems Engineering (#2111), a Senior Project Manager (#9237), and a Manager of Product Marketing (#2042). See Undisputed Facts, ¶¶ 6, 8, 11; Counterstatement, ¶¶ 6, 8, 11. The Unisys decisionmaker responsible for hiring a candidate to fill each of these positions and a Unisys Human Resources Consultant testified that another candidate was selected to fill each of these positions before Sylvester applied.[12]

[12] Nechay-Hoer testified that requisition #2111 was filled in August, 1994, and that Sylvester did not apply until September, 1994. See Unisys Mem., Ex. L, ¶ 2. Unisys has attached documents suggesting that another candidate, who was hired on August 15, 1994, performed the duties of the position but was not officially promoted into the position until the end of his ninety-day probationary period. See id., Tab 1. Sylvester argues that Unisys could not have considered the position filled until this candidate was actually promoted, but offers no evidence to support his assertion.

Sylvester protests that because these jobs were listed as open on Unisys' internal job list, and because he was not promptly informed that he was not selected for these positions, in accordance with Unisys' Jobs Availability Policy, that Unisys' asserted reason why he was not selected is unworthy of credence. See Opposition, at 19-20. As explained above, Sylvester's assertions that Unisys acted slowly in fulfilling its obligations under the Jobs Availability Policy is not sufficient evidence to overcome summary judgment on the closed positions. See Fuentes, 32 F.3d at 765. Sylvester accuses Unisys of, at best, incompetence in following its established policies. This accusation does not suggest that Unisys' reason for rejecting Sylvester for these three positions, that they were already filled, is so "weak, implausible, or incredible" that a reasonable factfinder could reject it. Fuentes, 32 F.3d at 766. Moreover, Unisys argues that Sylvester was not even an intended beneficiary of the Jobs Availability Policy because it applied only to current Unisys employees. See Unisys Reply, at 7; Opposition, Ex. 11. Though Sylvester's entitlement to rely on the procedures outlined in the Jobs Availability Policy is disputed, this dispute is not material to the question of whether Sylvester has discredited Unisys' reason for not hiring him into the closed positions, and therefore, does not prevent summary judgment on these claims.

3. The Positions Filled by a Stronger Candidate

Unisys has produced evidence supporting its assertions that five of the positions for which Sylvester applied were filled by a stronger candidate. Unisys hired other candidates to fill

---

Nechay-Hoer also testified that requisition #9237 was filled by an internal promotion on August 3, 1994, before Sylvester's September, 1994, application. See id., ¶ 3, Tab 2. Finally, Nechay-Hoer testified that requisition #2042 was filled on July 25, 1994, before Sylvester applied in September, 1994. See id., ¶ 5, Tab 4. At his deposition, Sylvester also agreed that requisition #2042 was filled before he applied. See Sylvester Dep., at 433-34.

the following open requisitions: Business Development Manager (#9291), Multi-Vendor Services ("MVS") Implementation Manager (#2469), District Information Services Manager (#50394), Senior Project Manager (#7417), and Manager of Program Implementation (#50150). The Unisys decisionmakers who were responsible for filling these positions testified that Sylvester was not as qualified for these positions as the candidates whom they ultimately selected.[13] Sylvester argues that he was equally qualified to fill all of these positions, and that he was refused these positions because of his age. See Opposition, at 20-23.

Unisys asserts that the successful candidate for the Business Development Manager opening was recruited from an external source because the Program Director was "already familiar with her qualifications and skills, including her extensive experience with similar federal contracts." Unisys Mem., Ex. N, at ¶ 4. Sylvester argues that this reason is not worthy of credence because the requisition does not list federal contracts experience as one of the skills or

[13] C. Ray Davis, the person responsible for filling requisition #9291, testified that he recruited only one person to fill this opening, and because he "made the decision at the outset that Ms. Lohn was the best person for this position, I did not consider any other candidates." Unisys Mem., Ex. N. Eileen Long, a Vice President, Service Design Operations who was responsible for hiring a candidate to fill requisition # 2469, testified that she filled the position with a candidate who had better "customer service MVS product management and customer service field operation experience" than Sylvester. Unisys Mem., Ex. O. Similarly, David Henderson, who was responsible for hiring a "District Manager of the Technology Group for New England" to fill requisition #50394, testified that the candidate he selected was better qualified that Sylvester. Unisys Mem., Ex. P. Richard Jarmusik, a Unisys Sales Director who was responsible for filling requisition #7417, testified that he did not consider Sylvester to fill this position because he lacked strong experience with "client server and end user computing," and that the candidate he did hire was currently "responsible for delivering the type of end user and client server computing services that Unisys required for requisition number 7417." Unisys Mem., Ex. M. Finally, Michael Sliwinski, who was responsible for filling requisition #50150, testified that he had concerns about Sylvester's "initiative and ability to manage large projects" and his lack of experience with Microsoft Project and that the successful candidate "was better qualified for this position." Unisys Mem., Ex. Q.

experiences required for the job. See Sylvester Aff., ¶ 9 (b); Unisys Mem., Ex. N, Tab 1 (copy of requisition #9291). The requisition does, however, describe the position as one which requires ongoing contact with government agencies and a "defense enterprise." Unisys Mem., Ex. N, Tab 1. Though Sylvester believes that he was qualified to fill the position, his belief in his qualifications is coupled with his assertion that federal contracts experience is not essential to the position. See Sylvester Aff., ¶ 9; Counterstatement, ¶ 10. It is unclear, therefore, that Sylvester has the federal contracts experience to qualify him for this opening. Because Sylvester has not produced evidence that Unisys did not rely on its asserted selection criterion, experience with similar federal contacts, or that he satisfied that criterion, he cannot survive summary judgment on this claim. See Simpson, 142 F.3d at 647 ("the plaintiff must point to evidence from which a factfinder could reasonably infer that the plaintiff satisfied the criterion identified by the employer or that the employer did not actually rely upon the stated criterion").

Similarly, Sylvester's arguments with respect to the MVS Implementation Manager, District Information Services Manager, Senior Project Manager, and Manager Program Implementation positions are focused on his contention that he was qualified to fill each of these positions. For the most part, Unisys has not claimed that he was not qualified to fill these openings, but rather that a more qualified candidate was selected.[14] See Unisys Mem., Ex. M, ¶ 5, Ex. O, ¶ 6, Ex. P, ¶ 4, Ex. Q, ¶ 3. Assuming arguendo that Sylvester was qualified to fill these

[14] Unisys does assert that Sylvester was not qualified to fill the Senior Project Manager position announced in requisition #7417. See Unisys Mem., Ex. M, ¶ 4 ("I did not consider Mr. Sylvester for this position because his work experience did not indicate an especially strong background in client server and end user computing."). It also asserts however, that the candidate who was hired for the position was much more qualified for the position than Sylvester, as he was then the service manager responsible for the Environmental Protection Agency's account. See id. ¶ 5.

four positions, he has failed to produce evidence which demonstrates that Unisys' asserted reason for not hiring him to fill these positions, that a more qualified candidate was hired, is pretext for age discrimination.

To survive summary judgment, Sylvester must demonstrate that Unisys' reason is unworthy of belief by demonstrating its "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions." Fuentes, 32 F.3d at 765. Sylvester cannot avoid summary judgment by arguing that Unisys' decision not to hire him for these positions was wrong, for "[t]he question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination]." Keller, 130 F.3d at 1109 (citing Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996)); Storti v. First Fidelity Bank, No. 97-5283, 1998 WL 404814, at * 6 (E.D. Pa. July 16, 1998). Here, at best, Sylvester has argued that Unisys' evaluation of his qualifications for these positions was wrong. See Sylvester Aff., ¶¶ 6 (a) ("I was qualified for the position of Senior Project Manager."); 13 (a) ("I have excellent qualifications for the MVS Implementation Manager Position"); 14 (a) ("My qualifications for the District IS Manager position . . . were superior to the other candidates"); 15 (b)-(c) ("My previous positions show experience in all of the requirements for this position. . . . I believe the selected candidate did not have knowledge and experience related specifically to this position."). He argues that he was the more qualified candidate, and if the court were to believe him, he would have succeeded in demonstrating that Unisys made unwise personnel decisions. Sylvester has not demonstrated however, that Unisys's statements that more qualified candidates were selected is implausible, is self-contradictory, or is inconsistent with the evidence contained in the summary judgment record. See Unisys Mem., Ex. O, Tab 2 (comparing Sylvester's

qualifications with those of successful MVS Implementation Manager candidate); Ex. P, Tab 2 (comparing Sylvester's qualifications with those of successful District Information Services Manager candidate). This court does not sit as an appellate personnel office in judgment on the wisdom of Unisys' hiring decisions. See Simpson, 142 F.2d at 647. Because Sylvester has failed to produce evidence showing that Unisys' statement that it hired more qualified candidates is unworthy of credence, he cannot survive summary judgment on these claims.[15]

4. The Positions for which Sylvester Was Not Qualified

Unisys has produced evidence that Sylvester was not hired to fill seven positions because he was not qualified. Unisys determined that Sylvester was not qualified to fill requisitions seeking four Information Services ("IS") Manager I (#2375, #2376, #2378, #2379), a Manager PM (#9283), a Manager Skills Center (no #), and a Program Marketing Manager (#50359). The Unisys decisionmakers who were responsible for filling these positions testified that Sylvester

[15] Sylvester also arguably attempts to meet the second prong of Fuentes by pointing to evidence from which a jury could believe that "an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes, 32 F.3d at 764. Sylvester makes much of Unisys' refusal to hire him to fill the District Information Services Manager position announced in requisition #50394. He claims that this was the same position from which he was laid off, and that Unisys failed to comply with its "Consideration for Reemployment" letter when it failed to notify him of the opening. See Opposition, at 20-21. The Consideration for Employment letter promises that for one year, Sylvester would be "considered for job openings in the same job classification, salary level and geographic location from which [he] was laid off." Opposition, Ex. 30. Unisys contends that, because requisition #50394 was for an opening in Massachusetts, it was not in his "geographic area" and therefore that it was not obligated to consider him automatically. See Unisys Reply, at 6. As Massachusetts is clearly a different "geographic location" from New Jersey, it appears that Sylvester was not entitled to automatic consideration for requisition #50394 and that Unisys' actions were not likely motivated by discrimination. Moreover, Sylvester was able to apply for the opening and was one of the candidates interviewed, so he is unable to demonstrate that he was harmed by Unisys' refusal to comply with his interpretation of the letter's terms.

was not qualified for these positions.[16]

In response to Unisys' contentions, Sylvester has pointed to experiences listed on his resume which demonstrate that he may have been qualified to fill some of these positions. See Sylvester Aff., ¶ 3 (b)-(k), ¶ 4 (b)-(f), ¶ 16 (a), ¶ 17 (b)-(e). Sylvester also argues that his interview for the four IS Manager positions was very informal, but that eight months after his interview, the decisionmaker wrote a detailed evaluation memo describing why Sylvester was not hired for a position with a different title, Application Development Manager. See Sylvester Aff., ¶ 3 (m)-(p). He also contends that the reasons given in the evaluation letter are inconsistent with Unisys' explanation to the EEOC of why he was not hired to fill this position. See id. ¶ 3 (s). Contrary to Sylvester's claims, the evaluation memo is not inconsistent with Unisys' explanation to the EEOC; both report, in varying levels of detail, that Sylvester lacked the technical skills required for the job. See Opposition, Ex. 5, Ex. 6. Sylvester's ability to survive summary judgment on these claims thus depends on whether his assertions that he was actually qualified to fill these positions "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Unisys' statement that he was not qualified that a jury "could

[16] Eric Consolazio, who was responsible for filling the four IS Manager Positions, determined that Sylvester was not qualified for these positions because he had no experience developing client/server systems and because Sylvester's experience was in contract management rather than application design. See Unisys Mem., Ex. J. Gary Mott, who interviewed Sylvester for the Manager PM position, determined that he was not qualified because he lacked "current project management and client interface skills" and his weaknesses included "client relationship skills, lack of help desk experience, not too familiar w/PC's and PC software." Unisys Mem., Ex. K, Tab 2. Joseph Sacchi, who interviewed Sylvester for the Manager Skills Center position testified that Sylvester was not qualified to fill that position. See Unisys Mem., Ex. R, at 232, l. 10-16. Finally, Summer Dawson, who screened resumes for the Program Marketing Manager position, testified that "Sylvester did not have a sufficient background in UNIX or market analysis" and that they did not typically consider candidates from outside of Utah, as their relocation budget was very limited. Unisys Mem., Ex. S.

rationally find" Unisys' statement unworthy of belief. Keller, 130 F.3d at 1109 (citing Fuentes, 32 F.3d at 765).

With respect to the four IS Manager positions, Sylvester has produced evidence which casts sufficient doubt on Unisys' legitimate explanation that he survives summary judgment. Sylvester has identified a detailed memorandum, written eight months after an allegedly informal interview, which explains that his lack of technical experience in applications development rendered him unqualified for the position. See Opposition, Ex. 5. The date of this memorandum, May 1, 1995, indicates that it was written shortly after Unisys became aware of Sylvester's discrimination complaints, and a reasonable jury may assume that it was written as a post-hoc rationalization of Unisys' decision. Additionally because the memorandum emphasizes Sylvester's lack of technical applications development experience, which would be relevant to an Applications Development Manager post, but not necessarily to an IS Manager position, the jury could believe that the memorandum evaluated Sylvester for a job other than the ones for which he applied. Sylvester is thus entitled to present his failure to rehire claim based on these four IS Manager positions to the jury. With respect to the remaining positions in this category, Sylvester has failed to meet his burden to avoid summary judgment. As with his claims based on positions where a stronger candidate was selected, which were disposed of above, Sylvester has, at best, claimed that Unisys' made an incorrect evaluation of his qualifications. See *supra*, pt. D.3. Summary judgment on those claims is, therefore, appropriate.

5. The Positions Advertised in the Newspaper

Sylvester's final failure to hire claims are based on his rejection for two positions which were advertised in the Wall Street Journal and the New York Times in January, 1995. Sylvester

testified that he called Bart Erwin, a Unisys human resources representative, to apply for these positions and that "Erwin stated that he had my resume, so it was not necessary to submit any other personnel record information to him." Sylvester Aff., ¶ 18 (c). Unisys appears to argue that Sylvester did not actually apply for these positions, and thus, was not considered. See Undisputed Facts, ¶ 19. Unisys offers no other explanation for its failure to consider, or hire Sylvester for these positions. Because Sylvester has testified that he did apply for these positions, and on summary judgment, the court must view the facts in the light most favorable to him, it is impossible for the court to determine, at this stage, whether Sylvester applied for these jobs. As there is insufficient evidence in the record concerning these two jobs, Unisys' motion for summary judgment on these two failure to rehire claims is denied.

CONCLUSION

Sylvester's NJLAD claims, contained in Counts III and IV, will be dismissed because they are time-barred and are precluded by the NJLAD's election of remedies provision. Summary judgment will be granted on Sylvester's retaliation claims under the ADEA and the NJLAD because he has failed to produce evidence that he suffered an adverse employment action. Summary judgment will also be granted on Sylvester's failure to rehire claims under the ADEA and the NJLAD with respect to all but the four Information Services Manager positions (requisition numbers 2375, 2376, 2378, 2379) and the two positions advertised in the newspaper. In all other respects, Unisys' motion for summary judgment is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EUGENE H. SYLVESTER	:	CIVIL ACTION
	:	
v.	:	
	:	
UNISYS CORPORATION	:	NO. 97-7488

ORDER

AND NOW, this _____ day of March, 1999, after consideration of the defendant's Motion for Partial Summary Judgment, the plaintiff's opposition, and defendant's response thereto, IT IS ORDERED that:

(1) Defendant's Motion for Partial Summary Judgment is GRANTED with respect to Counts III and IV of the Complaint because they are barred by the statute of limitations and the election of remedies provision of the statute;

(2) Defendant's Motion for Partial Summary Judgment is GRANTED with respect to Counts II and IV of the Complaint on the basis of lack of evidence of an adverse employment action;

(3) Defendant's Motion for Partial Summary Judgment is GRANTED with respect to

the failure to rehire claims in Counts I and III, except for the failure to rehire claims based on the four IS Manager positions and the positions advertised in the newspaper; and

(4) Defendant's Motion for Partial Summary Judgment is DENIED in all other respects.

_____

William H. Yohn, Jr., J.