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

H. DAVID MADONNA,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 03-4289
	:	
	:	
v.	:	
	:	
CONMED CORPORATION	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, S.J. March 1, 2005

Plaintiff, H. David Madonna, brought a claim for damages against Defendant, ConMed Corporation, under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq* ("ADEA")(Count I) and the Pennsylvania Human Relations Act, 43 Pa.Cons.Stat. § 951, *et seq* ("PHRA")(Count II).[1]

Presently before this Court is Defendant's Motion for Summary Judgment, Plaintiff's Response, Defendant's Reply Brief and Plaintiff's Surreply. For the reasons set forth below, Defendant's Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

Plaintiff, H. David Madonna, is a United States citizen residing in Warminster, Pennsylvania. Defendant, Conmed Corporation, is a Utica, New York based medical technology company that manufacturers, markets and sells medical equipment and devices to hospitals and

1. On January 9, 2004, this Court issued an Order granting Defendant's Motion to Dismiss claims alleging Intentional Infliction of Emotional Distress (Count III) and Negligent Infliction of Emotional Distress (County IV).

medical facilities. In December 2000, Defendant hired Plaintiff as a Field Marketing Manager for its Endoscopy Division in the Philadelphia area. Plaintiff was forty-eight (48) years old at the time of his hire.

In 2000, Defendant began negotiations with Imagyn Medical Technologies, Inc. ("Imagyn") to acquire Imagyn's endoscopic product lines. The negotiations were successful resulting in Defendant's acquisition of Imagyn's entire endoscopic product line as well as the right to hire various Imagyn employees. At the time of this acquisition, Frank Williams was ConMed's Vice President of Endosurgery and Charles LeDoux was Imagyn's Vice President of Corporate Accounts. During the acquisition, ConMed hired Mr. LeDoux as its Director of Sales.

In June 2001, ConMed announced the acquisition of Imagyn to its Field Marketing Mangers and the Imagyn employees that ConMed intended to hire. A transition team, which included Plaintiff, was assembled to address the logistics of combining the sales forces. Ultimately, certain members of the transition team were selected to become Area Directors. Plaintiff was not selected for one of these positions.

A national sales meeting was held in July 2001 to introduce the members of the combined sales force to one another. While attending this meeting, and in the company of other Field Marketing Managers, Plaintiff expressed his dissatisfaction and shock with being demoted by means of not being selected as an Area Director.

As a result of the consolidation of ConMed and Imagyn's sales forces, a duplication in sales areas existed. Specific to the matter currently before this Court, the Philadelphia area had been serviced by Plaintiff for ConMed and Margaret Yezzi for Imagyn. At the conclusion of the July 2001 sales meeting, Plaintiff was informed by Mr. Williams and Mr.

LeDoux that his position was being eliminated. Ms. Yezzi was retained as the sales person for the Philadelphia area. Ms. Yezzi was under the age of forty (40) at this time.

II. STANDARD OF REVIEW

A motion for summary judgment will be granted where all of the evidence demonstrates "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) (West 1992 & Supp. 2004). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The ultimate question in determining whether a motion for summary judgment should be granted is "whether reasonable minds may differ as to the verdict." Schoonejongen v. Curtiss-Wright Corp., 143 F.2d 120, 129 (3d Cir. 1998). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248.

III. DISCUSSION

Plaintiff alleges violations of the ADEA and PHRA. This Court has original jurisdiction over the federal question presented in Plaintiff's ADEA claim, pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the PHRA claim, pursuant to 28 U.S.C. § 1367. Claims under the ADEA and the PHRA are governed by the same legal framework. Simpson v.

Kay Jewelers, Inc., 142 F.3d 639, 634, n.4 (3d Cir. 1998)(citing Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995)); Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996).

A. McDonnell Douglas

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set forth a special scheme for structuring the presentation of evidence in discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, *et.seq*. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). The Third Circuit applies a modified version of this scheme in ADEA cases. Keller, 130 F.3d at 1108 (citing Waldron v. SL Industries, Inc., 56 F.3d 491, 494-95 (3d Cir. 1995)).

The McDonnell Douglas scheme is a three step process. First, the plaintiff is required to set forth sufficient evidence to establish a *prime facie* case. In a cause of action claiming unlawful discharge based on age, the plaintiff is required to establish that "(i) the plaintiff was a member of the protected class, i.e., was 40 years of age or older, (ii) that the plaintiff was discharged, (iii) that the plaintiff was qualified for the job, and (iv) that the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination." Keller, 130 F.3d at 1108 (citing Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995)(internal citations omitted)).

The second step in the McDonnell Douglas scheme shifts the burden of production to the defendant. Once the plaintiff has establish a *prime facie* claim for age discrimination, the defendant has the burden to produce evidence that is sufficient, if believed, to support a finding that it had a legitimate, nondiscriminatory reason for the discharge. Keller, 130 F.3d at 1108 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993)). Summary

judgment should be granted in favor of the plaintiff if the defendant is not able to satisfy his burden. Id.

Finally, McDonnell Douglas shifts the burden back upon the plaintiff. "The plaintiff may then survive summary judgment or judgment as a matter of law by submitting evidence from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Keller, 130 F.3d at 1109 (citing Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)). This third step is commonly referred to as the Fuentes test, which is broken down into two prongs. Id.

Under the first prong of the Fuentes test, a plaintiff may survive summary judgment by "offering evidence from which a fact finder could reasonably . . . disbelieve the employer's articulated legitimate reasons." Keller, 130 F.3d at 1108 (quoting Fuentes, 32 F.3d at 764). The Third Circuit has explained the plaintiff's burden as follows:

> To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent. Rather, the nonmoving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence.

Keller, 130 F.3d at 1108 - 09 (quoting Fuentes, 32 F.3d at 765). Thus, "the question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination." Id. at 1109 (citing Carson v. Bethlehem Steel Corp., 83 F.3d 157, 159 (7th Cir. 1996)).

Under the second prong of the Fuentes test, a plaintiff may survive a motion for summary judgment by identifying evidence in the record that "allows the fact finder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Id. at 1111 (quoting Fuentes, 32 F.2d at 762). In order to satisfy this prong, the plaintiff must identify evidence which "could reasonably be viewed as sufficient to prove by a preponderance of the evidence that age was a determinative cause of [the plaintiff's] subsequent termination." Id. at 1112.

B. Application of McDonnell Douglas

The issue currently before the Court is whether Plaintiff has satisfied his burden under the final phase of the McDonnell Douglas scheme. For the purposes of this motion for summary judgment, Defendant placed an assumption in the record that Plaintiff had made a *prime facie* showing of age discrimination. (Def. Br.[2] at n.1.) In response to Plaintiff's *prima facie* claim of age discrimination, Defendant set forth three legitimate, non-discriminatory reasons for Plaintiff's discharge. The reasons are as follows:

1. [Plaintiff] had expressed dissatisfaction with his new role as a Territory Manager and displayed an overall negative attitude regarding the prospect of having to make direct sales;

2. Margaret Yezzi's existing book of business, client contacts and familiarity with the Imagyn product line made her the superior candidate for the position; and

3. [Plaintiff] had but one client account of note.

(Def's Br. at 7.)

2. "Def.'s Br." refers to Brief in Support of Defendant Conmed Corporation's Motion for Summary Judgment which was filed in conjunction to Defendant Conmed Corporation's Motion for Summary Judgment (Docket No. 15).

Therefore, pursuant to McDonnell Douglas, the burden of presentation has shifted back on to Plaintiff to survive a motion for summary judgment by submitting evidence sufficient to satisfy either prong of the Fuentes test. It is the opinion of this Court that Plaintiff has failed to satisfy his burden and, therefore, he is unable to survive Defendant's motion for summary judgment.

1. Plaintiff failed to present evidence from which the fact finder could reasonably disbelieve Defendant's proffered legitimate business reasons.

Under the first prong of the Fuentes test, Plaintiff may survive summary judgment by presenting evidence from which the fact finder could reasonably disbelieve Defendant's above cited legitimate reasons. Keller, 130 F.3d at 1109. In order to succeed, Plaintiff must present evidence which points to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendant's proffered legitimate reasons [such] that a reasonable fact finder could rationally find them 'unworthy of credence' and hence infer that the proffered nondiscriminatory reason did not actually motivate Defendant's action." Simpson, 142 F.3d at 644 - 45.

Plaintiff argues that he should survive summary judgment because Defendant's proffered reasons for his termination are merely a pretext for discrimination. (Pl.'s Mem.[3] at 7.) Plaintiff points to five issues which he believes are weaknesses, implausibilities and/or inconsistencies which would make a reasonable fact finder disbelieve Defendant's proffered legitimate reasons.

3. "Pl.'s Mem." refers to Plaintiff's Memorandum of Law in Support of His Response to Defendant's Motion for Summary Judgment (Docket No. 16).

First, Plaintiff contends that the legitimate business reasons offered by Defendant are contradictory to Defendant's stated employment policy for termination, layoff, and reduction of force. (Pl.'s Mem. at 8.) In support of this argument, Plaintiff cites that Defendant's Employee Handbook contains provisions for reduction in the workforce and termination of an employee. (Id. at 8 - 9.) Since the forms completed by the Human Resources department at the time of Plaintiff's termination state that he was "laid off," Plaintiff argues that Defendant should have applied its Reduction in Force and Recall policy in determining which employee, Plaintiff or Ms. Yezzi, would be eliminated. (Id. at 9.) Defendant's Reduction in Force and Recall policy states:

> Business conditions sometime change to a point where there is not enough work to keep all employees on the payroll. In the unlikely event such a situation should occur, the work force may be reduced by laying off the number of employees over and above the number to perform the work available. Layoffs will be determined by past performance and the current standing of affected employees. Where relative ability is equal, length of service will be the determining factor in the layoff decision.

(Pl.'s Mem., at 9.) Specifically, Plaintiff argues that had the above policy been applied in this matter, Ms. Yezzi would have been laid off due to her shorter length of service and Defendant would have been "bound" to retain Plaintiff. (Id. at 10 - 11.)

Defendant refutes Plaintiff's application and interpretation of its Employee Handbook with regard to its employment obligations. (Def.'s Rep. Br.[4] at 2 - 4.) Defendant argues that Plaintiff's conclusion that he would prevail under the Reduction of Force and Recall policy is flawed. (Id. at 3.) In order for Plaintiff to prevail due to his seniority, it is necessary to assume that he and Ms. Yezzi were equal with regard to all other qualifications. (Id.) Defendant

4. "Def.'s Rep. Br." refers to Defendant Conmed Corporation's Reply Brief in Support of Summary Judgment (Docket No. 17).

rejects this assumption and, specifically, states that Plaintiff had a poor attitude and his superiors doubted his commitment to making direct sales. (Id.) Therefore, Plaintiff's conclusion that he would prevail due to his seniority is flawed because he failed to acknowledge that Defendant did not view him and Ms. Yezzi equally.

Furthermore, Defendant refutes Plaintiff's assertion that it was "bound" to retain Plaintiff. The Employee Handbook defines the employment relationship as "at-will" and states that the policies contained therein do not create an employment contract nor do they create a guarantee of employment. The Handbook clearly states that "individual employment may be discontinued whenever CONMED deems it to be in its best interest." (Id. at 4.) Therefore, Plaintiff's assertion that application of the Reduction in Force and Recall policy would have "bound" Defendant to retain him is incorrect. The Court agrees with Defendant's arguments and finds that Plaintiff's evidence is not sufficient to persuade a fact finder to reasonably disbelieve Defendant's proffered legitimate business reasons.

Second, Plaintiff asserts that contradictions exists between the deposition testimony of Mr. LeDoux and Mr. Williams regarding who terminated Plaintiff's employment. (Pl.'s Mem., at 11.) During his deposition, Mr. LeDoux testified that Mr. Williams terminated Plaintiff, but later testified that it was a joint decision between Mr. Williams and himself to terminate Plaintiff. (Id. at 11.) Plaintiff contends that the deposition of Mr. Williams contradicts Mr. LeDoux in that Mr. Williams testified that Mr. LeDoux was responsible for both the decision to terminate Plaintiff and the actual termination. (Id. at 11 -12.)

Defendant refutes this assertion by claiming that no inconsistencies exist. (Id. at 4.) Defendant explains the apparent discrepancies by alleging that Mr. LeDoux made the

recommendation to terminate Plaintiff and Mr. Williams accepted that recommendation. Defendant further highlights that both Mr. LeDoux and Mr. Williams were present at the time Plaintiff was terminated and that the termination was agreed to by both Mr. LeDoux and Mr. Williams. (Id. at 5.)

The Court believes Plaintiff's argument is one of semantics, not inconsistencies. Slight differences in how the joint decision-makers answered deposition questions clearly falls short of the evidentiary requirements under the Fuentes test. This Court finds that the above exercise in semantics is not sufficient evidence upon which a reasonable fact finder could rationally find the legitimate nondiscriminatory reasons for Plaintiff's termination unworthy of credence.

Third, Plaintiff asserts that the record contains contradictions regarding Defendant's reliance on Plaintiff's extremely negative attitude as the reason for his termination and basis for its legitimate business decision. (Pl.'s Mem. at 12.) Plaintiff points to allegedly false, unverified and contradictory statements set forth in Defendant's response to Plaintiff's EEOC charge, which were attributed to Patrick Horton, a former employee of Defendant. (Id.) Specifically, the EEOC response states, "Mr. Horton and Mr. LeDoux were concerned that Mr. Madonna's negative attitude would spread to the other Territory Managers and undermine their efforts to integrate the new sales force and create a motivated, dynamic sales team." (Id.) Plaintiff provides an affidavit from Mr. Horton, in which Mr. Horton stated that he was not consulted regarding the above statement nor did he believe Plaintiff displayed a negative attitude. (Id.) In addition, Plaintiff asserts that his selection to be a member of the transition team and the testimony of Ms. Yezzi, that

Plaintiff was team player and motivated to do his job, contradict Defendant's alleged legitimate business reason for his termination. (Id. at 13-14.)

This Court agrees with the argument submitted by Defendant to refute this attack on its reliance on Plaintiff's negative attitude as a legitimate business reason for his termination. Defendant never claims that either Mr. Horton or Ms. Yezzi were involved in the decision to terminate Plaintiff. Rather, Defendant states that it was a joint decision made by Mr. LeDoux and Mr. Williams. Accordingly, the opinions and observations of Mr. Horton and Ms. Yezzi are completely irrelevant and provide no valuable evidence upon which a fact finder could reasonably disbelieve Defendant's proffered legitimate reason. (Def.'s Rep. Br. at 5 - 6.)

Fourth, Plaintiff asserts that Defendant's belief that Ms. Yezzi was the superior candidate, due to her existing book of business, client contacts and product familiarity, is not supported by the record. (Pl.'s Mem. at 15.) Plaintiff complains that the sales numbers provided by Ms. Yezzi were based only on her recollection and not based on any documentation provided by Defendant. (Id.) In addition, Plaintiff argues that Ms. Yezzi had no prior experience in medical sales and inherited her book of business from her predecessor rather than establishing it on her own. (Id. at 16.)

Defendant answers this challenge by arguing that the more experienced individual is not necessarily the most qualified. (Def.'s Rep. Br. at 8.) Defendant reasserts that the undisputed evidence demonstrates that Ms. Yezzi brought with her client accounts representing annual sales of approximately $350,000.00. Further, Defendant's sales model was more in-line with the direct sales methods utilized by Ms. Yezzi rather than the methods utilized by Plaintiff. (Id. at 7.)

As stated previously, the role of this Court is not to second guess the reasonable business decisions made by Defendant. "[T]he question is not whether [Defendant] 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, 83 F.3d at 159). As such, the issue is not whether the evidence supports the business decision but, instead, whether there is evidence that a reasonable fact finder could rationally find the proffered legitimate reasons unworthy of credence. Id. at 1108 - 09 (quoting Fuentes, 32 F.3d at 765). This Court finds that the above argument improperly asks the Court to analyze the soundness of the business decision rather than provide evidence by which the fact finder could reasonably find the proffered legitimate reasons unbelievable.

Finally, Plaintiff claims Defendant's assertion that he had only one client account fails to acknowledge Mr. Mortenson's testimony regarding Plaintiff's efforts to develop the Philadelphia area. (Pl.'s Mem. at 17.) Mr. Mortenson was Plaintiff's supervisor prior to Defendant's acquisition of Imagyn. Plaintiff argues that Defendant cannot argue that his sales techniques, using third party distributers to sell the products, was contrary to its desired methods. Plaintiff asserts that Mr. Mortenson was aware of his sales techniques and never instructed Plaintiff to discontinue his use of third party distributors to sell and demonstrate the products. (Id. at 18.)

This Court again agrees with the argument and reasoning of Defendant. Mr. Mortenson was no longer Plaintiff's supervisor once the transition occurred and his approval of Plaintiff's performance predates the integration of Imagyn's sales force and Defendant's expression of dissatisfaction with not being selected for the position of Area Director. Further, this argument by Plaintiff is similar to one advanced with regard to the opinions of Mr. Horton and Ms. Yezzi. Defendant has not asserted that Mr. Mortenson was in anyway involved with the determination of

which employee should remain in the Philadelphia area. As such, Mr. Mortenson's approval of Plaintiff is irrelevant and fails to provides this Court with sufficient evidence by which the fact finder could find the proffered legitimate reasons unbelievable.

This Court finds that the Plaintiff cannot survive the instant motion for summary judgment under the first prong of the Fuentes test. Taken individually and as a whole, the asserted arguments fail to demonstrate sufficient weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendant's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence.

2. Plaintiff failed to present evidence from which the fact finder could reasonably believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of Defendant's actions.

Under the second prong of the Fuentes test, Plaintiff my survive summary judgment by presenting evidence from which the fact finder could reasonably believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of Defendant's actions. Keller, 130 F.3d at 1109. Plaintiff contends that the claim should survive summary judgment because he has provided direct evidence of age discrimination. (Pl.'s Mem. at 19.) In both Plaintiff's memorandum in response to Defendant's motion and Plaintiff's Complaint, Plaintiff purports to offer direct evidence of age based bias by attributing the following quote to Charles LeDoux, "we don't want any negative attitudes or concerns from older employees to disrupt and undermine their (Defendant's) efforts to integrate this, young, new sales force." (Pl.'s Mem. at 19, Comp. at ¶ 21.) However, when questioned as to why he believes that age was the determining factor in his termination, Plaintiff provided the following testimony:

Q: What convinces you that you were fired because of your age?

A: Basically, the whole scenario that I went through. And if you were there, and you were able to see these young, inexperienced people, and not being given the opportunity to help lead the new company with my background and experience, and having it presented itself as a whole new ball game, I felt was unjust.

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Q: So, it's your contention that the company hired you at 48 and decided to fire you or get rid of you by the time you were 49 because of your age?

A: Because of the situation, the whole new situation, the new acquisition, the new younger people. It was obvious. You had to be through the meeting to see it. Certainly wasn't handled appropriately.

Q: Other than what you have just said, is there anything more that you can explain to elucidate with regard to what occurred at the meeting that would – that gave you the sense that this was all about your age?

A: My conversations with some of the folks led to that opinion.

Q: What folks?

A: Some of the conversations that we had personally when we had personal time with meeting all the people that were there.

Q: What folks are you talking about?

A: Well, I don't remember anybody specifically. It was just the tone of the conversations that I had with everybody that was at the meeting at various times. And in particular my conversations with Charlie LeDoux, which led me to believe that he wasn't interested in having anybody that was around previous. And all of us were around previous were older then he was, and had – probably had more experience. And we felt like we were being picked on, I in particular.

Mr. LeDoux is very condescending, rude, arrogant, and you will see that in your dealings with him. He just made it seem from a position of being in that environment with those people that he wanted a young sales force.

(Def.'s Mot. for Summ. J., Ex. D at 106-108.)

When specifically questioned during the deposition as to the content of the conversation Plaintiff had with Mr. LeDoux and Mr. Williams, Plaintiff provided the following testimony:

> Q: Okay. At some point during the sales meeting in July of 2001, did you have a meeting with Charlie LeDoux where he told you that your position was eliminated?
>
> A: He told me that on the last day at 3:00 in the afternoon, pulled me out of the balance of the meeting to inform me of that.
>
> Q: Tell me what you recall about that conversation with him, who was present, and what did Charlie say?
>
> A: Frank Williams was present. They pulled me out of a meeting. I could see it coming, just like the whole tone of the meeting affecting all of the field marketing managers. I got pulled into the room, and he said, "we are terminating your position immediately."
>
> And then he talked a little bit about this young inexperienced sales force, and we don't want any – I don't remember the exact words, I wrote it down, though, when I got back to my seat – we don't want any young – negative attitudes from past representatives to affect the development of this new inexperienced sales force.

(Def.'s Mot. for Summ. J., Ex.D at 117 - 18.)

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> Q: When you say that he [Charlie LeDoux] verbally assaulted you, what were the things that he said?
>
> A: A lot of it I can't recall word-for-word what he said. A lot of it was body language and, you know, as a professional sales people, you are told to interpret body language and body signals. And it was obvious that he had a problem with me. I don't – I assume it was age-related, but he didn't get specific in that . But he's a very condescending, rude, arrogant person, and that's how I felt during our conversation, felt I – he did all the talking. I did very little.

(Def.'s Mot. for Summ. J., Ex.D at 129 - 30.)

The Court finds that the above testimony provided by Defendant fails to establish any direct evidence of age based animus. In fact, Defendant himself admitted that Mr. LeDoux never stated that his termination was based on Plaintiff's age. Plaintiff testified as follows, "I don't - I assume it was age-related, but he didn't get specific in that." (Def.'s Mot. For Summ J., Ex. D at 117 - 18). Further, Plaintiff testified that he does not remember specifically what was said at the time of his termination and that the assertions of age bias are based on his reading of Mr. LeDoux's body language. (Id. at 129 - 30.)

In addition, Plaintiff asserts that Mr. LeDoux's hiring practices directly reflect Defendant's discriminatory intent. (Pl.'s Mem. at 20.) Plaintiff cites that fifteen (15) of the seventeen (17) employees acquired from Imagyn by Defendant were under the age of forty (40). (Pl.'s Mem. at 20, Ex. 14.) However, Plaintiff fails to provide any information about the number of employees, and their ages, whom Defendant did not acquire. Similarly, Plaintiff asserts that out of twenty-two (22) Territory Managers hired after the Imagyn acquisition, twenty-one (21) were under the age of forty (40). (Id., Ex. 27.) Again, Plaintiff does not provide the Court with the entire picture. Plaintiff fails to provide any evidence as to the number of individuals over the age of forty (40) who applied for a position with Defendant but were denied. The Third Circuit has repeatedly held that evidence of alleged employment discrimination cannot be viewed in a vacuum; a plaintiff is not permitted to pick and choose those comparators who he/she believes were treated more favorably while completely ignoring a significant group of comparators who were treated equally or less favorably. Simpson, 142 F.3d at 646 - 47.

For the foregoing reasons, this Court finds that the Plaintiff cannot survive the instant motion for summary judgment under the second prong of the Fuentes test. Plaintiff has

failed to identify evidence, direct or circumstantial, in the record that allows the fact finder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

C. Price Waterhouse

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the United States Supreme Court held that the burden of persuasion shifts to the defendant employer "to show that the decision would have been the same absent discrimination" when the plaintiff "shows direct evidence that an illegitimate criterion was a substantial factor in the decision." Keller, 130 F.3d at 1113 (quoting Price Waterhouse, 490 U.S. at 276). The term "direct evidence" has been interpreted differently among the courts. Id. The Third Circuit has stated that "the term 'direct evidence' is somewhat of a misnomer, for we have held that certain *circumstantial* evidence is sufficient for a mixed motives instruction, if that evidence can 'fairly be said to directly reflect the alleged unlawful basis' for the adverse employment decision." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997)(emphasis in original).

In order to qualify for the mixed-motive analysis of Price Waterhouse, the plaintiff must clear the "high hurdle" of proving "that [the] employer acted unlawfully, and not merely on the basis of a prima facie showing." Walden, 126 F.3d at 513. Put in simpler terms, the mixed-motives analysis should be applied only "when the evidence is sufficient to permit the fact finder to infer that [a discriminatory] attitude was more likely than not a motivating factor in the employer's decision." Id. at 513 (quoting Griffiths v. CIGNA Corp., 988 F.2d 457, 470 (3d Cir. 1993)(internal quotation marks omitted)). In a concurring opinion, Justice O'Connor provided the following insight into what could constitute sufficient evidence:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decision were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiffs' burden in this regard.

Walden, 126 F.3d at 513 (quoting Price Waterhouse, 490 U.S. at 277)(internal citations omitted).

In Keller, the court stated that Keller could avoid summary judgment under the Price Waterhouse standard if, based on the "direct evidence" presented, a reasonable jury could fail to find by a preponderance that age was not a determinative factor. Since the court already determined, in the analysis under the second prong of McDonnell Douglas, that the evidence was insufficient for a reasonable jury to conclude that age was a determinative factor, there is no need to proceed under this test.

As in Keller, this Court, under the McDonnell Douglas analysis, has determined that Plaintiff failed to provide sufficient evidence upon which a reasonable jury would conclude that age was a determinative factor in Plaintiff's termination. Accordingly, this Court shall not proceed to analyze the current matter under the heightened Price Waterhouse standard.

IV. CONCLUSION

For all of the foregoing reasons, this Court grants Defendant's Motion for Summary Judgment on all remaining counts.

An order follows.

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

H. DAVID MADONNA,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 03-4289
	:	
	:	
v.	:	
	:	
CONMED CORPORATION	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 1st day of March, 2005, upon consideration of Defendant Conmed Corporation's Motion for Summary Judgment (Docket No.1 5), Plaintiff's Response thereto (Docket No.1 6), Defendant's Reply Brief (Docket No. 17), and Plaintiff's Surreply (Docket No. 18), it is hereby **ORDERED** that Defendant's Motion is **GRANTED**. Judgment is entered in favor of Defendant Conmed Corporation and against Plaintiff H. David Madonna.

This case is **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.