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

ROBERT SNYDER	:	**CIVIL ACTION**
	:	
v.	:	
	:	
EXCLUSIVE TRANSPORTATION	:	
FOR INDUSTRY, A/K/A ETI	:	**No. 04-CV-2573**

MEMORANDUM

Padova, J. **May 17, 2005**

Plaintiff, Robert Snyder, brings this action for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). Plaintiff alleges that he was terminated from his job as a truck driver for Defendant due to his age. Before the Court is Defendant's Motion for Summary Judgment. For the reasons that follow, the Motion is denied.

I. BACKGROUND

Plaintiff was employed by Defendant as a truck driver beginning in 1990 until he was fired on August 20, 2003, shortly after his 68th birthday. Snyder was a well liked, good employee. (Bier Dep. at 29, Bray Dep. at 49, Lucy Dep. at 38, DeFrancisco Dep. at 74.) Less than three months prior to Plaintiff's firing, he engaged in a verbal exchange with Paul Bier, Defendant's Controller, regarding Plaintiff's age. On June 1, 2003, Plaintiff attended a meeting for employees held by Bier where benefit cuts were discussed. (Bier Dep. at 17, Snyder Dep. at 51.) During that meeting, Bier told employees that they needed to fill out logs

called pink sheets. (Bier Dep. at 18.) Plaintiff told Bier that, in his experience, employees sometimes have to be reminded of things. (Snyder Dep. at 52-53.) Bier responded by asking Plaintiff "how old are you?" (Id. at 53, Bier Dep. at 19.) Plaintiff answered him, but found the question demeaning, as did other employees who were present at the meeting. (Snyder Dep. at 53-58.)

Less than three months later, Plaintiff was fired pursuant to Defendant's Accident Policy, ostensibly because of two August 1, 2003 accidents. (Lucey Dep. at 47.) The Accident Policy provides that employees of Defendant are assigned points for accidents which are the driver's fault and the Policy lists the points that will be assigned for 19 types of accidents. (Def. Ex. J at 15-16.) The Accident Policy states that a driver will be terminated after receiving 9 or more points. (Id. at 15.) The Accident Policy provides that drivers may avoid acquiring points for non-injury accidents by paying for all damages out of pocket. (Id. at 16.) The Accident Policy also provides that partial points may be given for an accident when mitigating circumstances apply and that, if the driver disagrees with the point value of an accident, he or she may appeal the matter to an accident review board. (Id. at 15-16.) Plaintiff had eleven points as of January 25, 2002. (DeFrancisco Dep. at 66.) He was not fired, however, because he was a good driver, good to the customers, and in general did his job

correctly. Instead of being fired, he was counseled about his accidents. (Id. at 74-75.)

Plaintiff was involved in two accidents when he was driving a tractor-trailer for Defendant on August 1, 2003. On that day, he backed into each of a customer's two loading docks so hard that the customer complained to Bier. (Snyder Dep. at 40-43, Bier Dep. at 25.) The second time he hit a loading dock, the trailer door was knocked off. (Snyder Dep. at 42.) Plaintiff maintains that the accidents were not his fault. He contends that they were caused by mechanical problems with the tractor-trailer he was driving that day, problems which he had brought to the attention of Defendant through daily vehicle condition reports ("DVCRs") prior to August 1, 2003. (Id. at 40-42.) For two or three months prior to the August 1,2003 accidents, Plaintiff stated in his DVCRs that "the tractor would not back up properly, it would jerk, jump and lurch." (Id. at 40.) In the first August 1, 2003 accident, "the tractor lurched so hard that it banged against the dock real hard." (Id. at 41.) In the second August 1, 2003 accident, the tractor was "lurching and jumping" as Plaintiff backed to the other loading dock, and, before he reached the dock "the door flipped open, and [he] hit the building with the door, and the door was broken off." (Id. at 41-42.) Plaintiff states that the trailer door did not have proper latching equipment, but was held shut by a wire hookup made by a mechanic employed by Defendant. (Id. at 42, 46.) Joseph

DeFrancisco, a manager for Defendant, investigated the August 1, 2003 accidents and decided how many points would be assessed for those accidents. (DeFrancisco Dep. at 16, 88-90.) As part of his investigation, he spoke with Plaintiff and Plaintiff told him that the accidents were caused by mechanical problems with the tractor-trailer. (Id. at 19-24.) DeFrancisco assessed Plaintiff three points for the first accident and no points for the second accident. (Id. at 31.) Plaintiff offered to pay for the damage caused by these accidents, but was not permitted to do so. (Snyder Dep. at 45.)

Bier, DeFrancisco, Mark Bray, who was Operations Manager for Defendant, and James Lucey, Chief Operating Officer of Defendant participated in the decision to fire Plaintiff. (Bier Dep. at 33-34.) He was fired because he exceeded the maximum number of points under the Accident Policy. (Lucey Dep. at 28.) After Plaintiff was fired, Lucey called him and told him that he had the right to appeal; however, he chose not to do so. (Id. at 33-34.) The first tractor-trailer driver who was hired by Defendant after Plaintiff's firing was in his 20s or 30s. (DeFrancisco Dep. at 52-53.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion, and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

III. DISCUSSION

"The ADEA makes it unlawful, *inter alia*, for an employer to fire a person who is at least forty years old because of his or her age." Fakete v. Aetna, Inc., 308 F.3d 335, 337 (3d Cir. 2002) (citing 29 U.S.C. §§ 623(a), 631(a)). In order to succeed on his claim that he was fired in violation of the ADEA, Plaintiff must establish that his age "actually motivated" and "had a determinative influence on" Defendant's decision to fire him. Id. (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). Plaintiff can meet his burden of proving discrimination either through direct evidence, in accordance with Justice O'Connor's controlling opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), or by "presenting indirect evidence of discrimination that satisfies the familiar three-step framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)." Id. at 337-38 (footnotes and citation omitted).

If the plaintiff in a direct evidence case presents "'direct evidence' that his age was a substantial factor in the decision to fire him, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have fired the plaintiff even if it had not considered his age." Id. at 338 (citations omitted). "Direct evidence" is evidence which would "allow the jury to find that 'the decision makers placed substantial negative reliance on [the plaintiff's age] in reaching

their decision' to fire him." Id. (quoting Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998)) (additional citations omitted). Direct evidence includes "'statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus of the type complained of in the suit,' even if the statements are not made at the same time as the adverse employment decision, and thus constitute only circumstantial evidence" that the adverse employment decision was substantially motivated by age discrimination. Id. at 339 (quoting Hook v. Ernst & Young, 28 F.3d 366, 374 (3d Cir. 1994)). "Statements made by non-decision makers or by a decision maker unrelated to the decisional process itself are *not* direct evidence." Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 513 (3d Cir. 2004) (citing Price Waterhouse, 490 U.S. at 277) (emphasis in original).

A plaintiff in an indirect evidence case brought under McDonnell Douglas must initially establish the elements of a prima facie case of discrimination. Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000) (citations omitted). He must show: "(1) [he] is a member of a protected class, (2) [he] was qualified for the position, (3) [he] was ultimately discharged, and (4) the position was ultimately filled by a person not of the protected class." Sheridan v. E.I. DuPuont de Nemours and Co., 100 F.3d 1061, 1066 n.5 (3d Cir. 1996). If he is able to establish a prima

facie case of discrimination, the burden of production then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for his discharge. McDonnell Douglas, 411 U.S. at 802. "This burden is one of production, not persuasion; it can involve no credibility assessment." Reeves, 530 U.S. at 142 (citation omitted). If Defendant is able to meet this "relatively light burden," the burden of production then returns to Plaintiff. "who must show by a preponderance of the evidence that the employer's explanation is pretextual." Fuentes v. Perksie, 32 F.3d 759, 763 (3d Cir. 1993). Plaintiff must submit evidence "from which a factfinder 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." Fuentes, 32 F.3d at 764. "To discredit the employer's articulated reason, the plaintiff need not produce evidence that necessarily leads to the conclusion that the employer acted for discriminatory reasons, nor produce additional evidence beyond [his] prima facie case." Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998) (citations omitted). The plaintiff can meet his burden by pointing to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the proffered

nondiscriminatory reason did not actually motivate the employer's action." Id. (citing Fuentes, 32 F.3d at 764-45, internal quotation marks omitted).

The Court has examined the evidence submitted in connection with this Motion under the McDonnell Douglas three-step framework.[1] Defendant concedes that Plaintiff has made out a prima facie case of age discrimination. (Def. Mem. at 5.) Plaintiff was over 40 at the time he was fired and, therefore, was a member of the protected class, was qualified for the job, was terminated, and was replaced by drivers of various ages, including two new hires who were both under 40. (Def. Mem. at 5, DeFransisco Dep. at 52-53.) Defendant argues, however, that it is entitled to summary judgment because it had a legitimate, nondiscriminatory, reason for firing Plaintiff. Defendant maintains that Plaintiff was legitimately fired pursuant to its Accident Policy for accumulating too many accident points. Defendant has submitted evidence that its Accident Policy requires termination of a driver who accumulates more than nine accident

[1]Plaintiff contends that the statement made by Bier regarding Plaintiff's age during the June 1, 2003 employee meeting constitutes direct evidence of age discrimination under Price Waterhouse. Defendant argues that it is entitled to summary judgment under either the Price Waterhouse or McDonnell Douglas framework. As the Court has determined that Plaintiff's claim of age discrimination survives summary judgment under the McDonnell Douglas three-step framework, the Court need not determine, at this time, whether the evidence also supports a direct evidence claim. The Court will determine, at the close of Plaintiff's evidence at trial, whether this case will go to the jury under a direct evidence theory.

points and that Plaintiff had more than nine accident points at the time he was fired. (Def. Ex. J at 15-16, DeFrancisco Dep. at 66, 89-90.) Defendant has also submitted evidence that on August 1, 2003, approximately three weeks before Plaintiff was fired, he had two accidents while driving a tractor-trailer for Defendant, resulting in three accident points. (Id. at 89-90.) Defendant has submitted additional evidence that the decision makers who chose to fire Plaintiff did so because he exceeded the maximum number of points under the accident policy. (Lucey Dep. at 28.)

Plaintiff maintains that the Motion should be denied because there is evidence from which a jury could determine that Defendant's stated reason for Plaintiff's firing is pretextual and that Plaintiff was fired as a result of age discrimination. Plaintiff points to evidence on the record that the decision makers who agreed to fire Plaintiff as a result of the August 1, 2003 accidents were aware of his age and were also aware that those accidents were not his fault, and that they were caused by mechanical problems with the tractor-trailer.[2] (Snyder Dep. at 40-42.) Plaintiff also relies on evidence that, under the Accident

[2]Defendant asserts, in its Reply Memorandum, that there is evidence on the record that the mechanical problem causing the truck to lurch and jump in reverse was fixed prior to August 1, 2003. (Reply at 3-4.) There is no evidence, however, that the trailer door, which was held on with wire, was fixed prior to the accident. (Snyder Dep. at 40-42.) Whether or not the truck had been fixed prior to the accident and was not, therefore, the actual cause of the August 1, 2003 accidents, is a disputed issue of fact which the Court cannot determine on a Motion for Summary Judgment.

Policy, he should have been permitted to pay for the damage caused by the August 1, 2003 accidents, and thereby avoid the additional accident points which purportedly led to his dismissal, but Defendant would not permit him to pay for the damage. (DeFrancisco Dep. at 45.) Plaintiff further points out that the Accident Policy was not uniformly enforced. He states that he had more than nine points in 2002, but was not fired at that time. (DeFrancisco Dep. at 66, 74.) Plaintiff also notes that another, younger, employee of Defendant had more than nine points under the Accident Policy, but was not fired. (Bier Dep. at 22-23.)

Viewing the evidence in the light most favorable to Plaintiff, the Court concludes that there is evidence on the record of this Motion from which a jury could determine that Defendant's legitimate, nondiscriminatory, reason for firing Plaintiff did not actually motivate its action. Simpson, 142 F.3d at 644. Consequently, the Court finds that there is a genuine issue of material fact for trial regarding whether Plaintiff was fired for legitimate, nondiscriminatory, reasons.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is denied. An appropriate Order follows.

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O R D E R

AND NOW, this 17th day of May, 2005, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 12), and the papers filed in connection therewith, and of Defendant's Motion for Leave to File Reply Brief (Docket No. 19) , **IT IS HEREBY ORDERED** as follows:

1. Defendant's Motion for Leave to File a Reply Brief (Docket No. 19) is **GRANTED**. **IT IS FURTHER ORDERED** that the Clerk shall enter the Reply Brief attached to said Motion on the Docket.
2. Defendant's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.