IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY ANN TOWNSEND,

OPINION AND ORDER

Plaintiff,

04-C-563-C

v.

WEYERHAEUSER COMPANY,

Defendant.

- -

In April 2003, Weyerhaeuser Company implemented a reduction in force at its paper mill in Rothschild, Wisconsin. Plaintiff Mary Ann Townsend, who had served as an administrative assistant at the mill for more than a decade, was one of eight employees who were discharged. In this civil action for injunctive and monetary relief, plaintiff contends that defendant terminated her because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Jurisdiction is present. 28 U.S.C. § 1331.

This case is before the court on defendant's motion for summary judgment. Defendant is entitled to summary judgment on plaintiff's disparate treatment claim because plaintiff has produced no direct evidence that she was terminated because of her age and because plaintiff has failed to make out a prima facie case of discrimination under the

McDonnell Douglas burden-shifting method of proof. Assuming plaintiff had made out a prima facie case, she has presented no evidence from which a reasonable jury could infer that defendant's stated reasons for her termination were pretextual. Defendant is entitled to summary judgment on plaintiff's disparate impact claim because plaintiff has presented no statistical evidence in support of her claim, offering instead generalizations and speculation unconnected to the facts of this case.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Mary Ann Townsend was born on April 21, 1944. On February 6, 1989, she was hired by defendant Weyerhaeuser Company as a clerk in the Converting Unit at defendant's mill in Rothschild, Wisconsin. Defendant is an international forest products company headquartered in Federal Way, Washington that employs approximately 55,000 persons in 18 countries around the world. At all relevant times, defendant has employed between 375 and 475 persons at its fully integrated pulp and paper mill in Rothschild. Defendant manufactures fine paper and converts it into high-end printing papers at the mill. Before April 2003, the manufacturing sector of the mill consisted of four units: Paper,

Utilities, Converting and Pulp/Wood. The following units existed at the mill outside the manufacturing sector: Engineering, Purchasing, Maintenance, Finance, Information Technology, Safety, and Environmental/Human Resources.

B. Plaintiff's Work History at Weyerhaeuser

Plaintiff began working in the Converting Unit at the Rothschild mill in February 1989. In November of that year, she began to report to Sam Turner, the leader of the Converting Unit. In addition to her duties as a clerk, plaintiff filled in periodically for the clerk in the Paper Unit between 1989–1996. At some point during the 1990s, plaintiff's job title changed from clerk to administrative assistant. In this capacity, plaintiff's duties included scheduling work hours for 160 union employees each week during summer months and 140 union employees each week during non-summer months.

In 1999, plaintiff had heart surgery and was on medical leave for approximately three months. A few months after plaintiff returned from medical leave, she began reporting to Dianne Halcin, who had replaced Sam Turner as leader of the Converting Unit. Plaintiff's duties remained unchanged.

At some point in 2000, plaintiff missed a week of work for medical reasons. Upon her return to work, Halcin told plaintiff that Halcin would be assuming responsibility for some accounting work that plaintiff had done previously because she believed she was better

able to do the work. (Halcin is an accountant by degree and training.) This news upset plaintiff because she did not understand why this change was necessary. She complained about Halcin's actions to Barb May, defendant's Human Resources Manager. May suggested that plaintiff take a few days to calm down and asked plaintiff whether she would like to transfer to another unit. Plaintiff did not want to work for Halcin any longer although she was willing to do so. May arranged for plaintiff to work in the Personnel and Accounting departments on a temporary basis.

On September 18, 2000, plaintiff transferred to the Maintenance Unit temporarily to replace Theresa Rossenbach as administrative assistant to unit leader Dave May. After Rossenbach returned to her position around January 1, 2002, plaintiff transferred to the Utility/Environmental Unit as an administrative assistant. In this unit, plaintiff reported to unit leader Terry Charles and supervisor Dave Faucett. Shortly after plaintiff transferred to the Utility/Environment Unit, Rossenbach left her position and the administrative assistant position in the Maintenance Unit became vacant. Plaintiff did the work and vacation scheduling for employees in the Maintenance Unit from the time of Rossenbach's departure until July 2002.

On July 26, 2002, plaintiff took another medical leave to have open heart surgery for the second time. During plaintiff's absence, two temporary workers filled in for her. Plaintiff returned to work on a part-time basis in November 2002 and resumed a full-time

schedule in December 2002.

Plaintiff never received a negative performance review during the fourteen years and four months that she worked for defendant at the Rothschild plant.

C. Weyerhaeuser's Reorganization and Reduction in Force

In an effort to reduce costs, defendant did not fill 15 salaried positions that became vacant at the Rothschild mill between 2000 and 2002. In December 2002, Scott Mosher, who was employed as the manager of the Rothschild mill, decided to reduce the remaining salaried workforce of 84 employees by 10 and reorganize the organizational structure of the mill in order to remain competitive. At this time, 67 of the 84 salaried employees at the mill were at least 40 years old. The reorganization and reduction in force was implemented by a ten-member leadership team consisting of Mosher, Dave May, Barb May, Terry Charles and the following unit leaders: Mary Krueger (Finance), Jim Archambault (Paper), Mathew Fischer (Converting), Jim Freiberg (Pulp/Wood), Tim Huftel (Safety/Security) and Jim Visintainer (Engineering).

The leadership team met on eight to twelve separate occasions between late December 2002 and February 2003 to determine how to restructure units and positions to most efficiently support the smaller organization that would remain after the reduction in force. They formulated job descriptions and expectations for the new positions and identified key

competencies that employees would need in the restructured organization, including safety, leadership, flexibility and results orientation, as well as technical competencies that were specific to each position.

On March 4, 2003, Mosher issued a memorandum to all salaried employees announcing that defendant would hold a meeting to discuss the planned reorganization the following day. Mosher and Barb May conducted the meetings with all salaried employees, including plaintiff. Mosher explained that defendant planned to eliminate 9 or 10 salaried positions and that a corresponding number of employees would be losing their jobs. He reviewed the business reasons for the reduction and described the new organizational structure in which the Maintenance and Safety Units would share an administrative assistant, the duties of the Utilities Unit would be absorbed by the Pulp/Wood Unit and the Environmental Unit would become the Regulatory Affairs group. May explained the process and timetable for the reorganization and informed the employees of the steps they would be expected to take. Additionally, she stated that an employee whose position was set to be eliminated or who would be displaced would be considered for any available position in the mill for which he or she was qualified and expressed interest. Mosher distributed another memorandum to the salaried employees after the meeting that contained a summary of the information presented at the meeting.

May sent an email to the salaried employees after the meeting describing the new

positions that would be available after the reorganization, including the administrative assistant positions. All salaried employees, including plaintiff, were asked to complete a short biography form and indicate the positions in which they were interested. Plaintiff completed the biography form and the interest discussion form, stating that she was "qualified for all Administrative Assistant jobs, as well as any accounting jobs" and that her "interest would be in any of the aforementioned areas."

After completing the forms, each salaried employee had a brief meeting with Mosher, Barb May or Terry Charles in March 2003 to allow the leadership team to determine the employee's interest in the new organization positions. Plaintiff met with Barb May and stated that she was a fast learner and would be interested in any available position. All unit leaders evaluated the skills and performance of each salaried employee under their supervision in accordance with the universal key competencies and the specific technical competencies the leadership team had identified for each position in the new organization. Generally, employees were evaluated on a scale from 1 (lowest) to 5 (highest) in the areas of safety, leadership/people (including flexibility), results orientation and technical competencies.

D. The Administrative Assistant Positions

Before the April 2003 reorganization, the names and birth dates of the administrative

assistants at the Rothschild mill were as follows. Becky Coushman (June 20, 1974) was a level 30 administrative assistant in the Engineering Unit. Julie Eron (February 24, 1971) was a level 27 administrative assistant in the Converting Unit. Sandy Hanson (June 26, 1947) was a level 27 administrative assistant in the Safety Unit. Juliane Hinner (February 2, 1953) was a level 30 administrative assistant in the Pulp/Wood Unit. Sharron Morgan (November 22, 1954) was a level 27 administrative assistant in the Paper Unit. Plaintiff Mary Ann Townsend (April 22, 1944) was a level 27 administrative assistant in the Utilities/Environmental Unit. The administrative assistant position in the Maintenance/Quality department was vacant. Before the reorganization, the following Units had the following number of employees: Converting – 150; Paper – 112; Pulp/Wood – 90; Maintenance/Quality – 50; Utilities/Environmental – 18-20.

Unit leaders on the leadership team evaluated the administrative assistant who reported to them. No unit leader administered an objective test involving keyboarding, scheduling, computer program knowledge, computer operations or other administrative skills to the candidates for the new administrative assistant positions. After the evaluations were completed, the unit leaders met to share their ratings. Each leader explained the basis for his or her evaluation and other unit leaders, especially those who had worked with the employee in the past, could comment on the preliminary ratings if they disagreed with them. The unit leaders discussed the ratings and adjusted them until they all agreed on a final

rating for each candidate. This ensured that the unit leaders were using the same standards for all administrative assistants. The ratings in the four key competency areas were averaged for each administrative assistant to produce a final overall rating. The final ratings for the six incumbent administrative assistants were as follows: Becky Coushman – 4.0; Julie Eron – 4.0; Sandy Hanson – 2.5; Julianne Hinner – 4.0; Sharron Morgan – 2.75; plaintiff Mary Ann Townsend – 2.5.

After determining the final ratings, the leadership team held several meetings to determine who would receive the new positions in the streamlined workforce. Generally, the team started with the highest level positions and worked down to the lowest level positions, in effect implementing a "cascading" reduction in force. If an employee was displaced, he would be considered for any available position for which he was qualified and had expressed interest.

After the reorganization, the number of administrative assistant positions would fall from seven to five. One administrative assistant would be assigned to each of the Engineering, Converting, Utilities/Pulp/Wood, and Paper Units and the Safety and Maintenance/Quality Units would share an administrative assistant. The leadership team decided first who would be assigned to the Utilities/Pulp/Wood Unit, which would be a combination of the Utilities/Environmental and Pulp/Wood Units. Team members considered Hinner and plaintiff for the job because they had served in that capacity in the

parent units. The team selected Hinner over plaintiff because she had a higher competency rating and level (30 vs. 27) than plaintiff. In addition, Hinner had been the administrative assistant for a larger unit than plaintiff for two and a half years and she had experience as an administrative assistant in the Safety and Human Resource Units. The supervisors under which Hinner had worked considered her an excellent employee the leadership team believed her more capable of taking on new challenges and an increased workload with little supervision.

The leadership team determined next that Coushman and Eron would remain in their respective positions as administrative assistants for the Engineering and Converting Units because they had high competency ratings and because the team saw no reason to displace them. The team selected Colleen Jozwiak for the administrative assistant position in the Paper Unit. Jozwiak's level 33 position had been eliminated previously and she had expressed interest in the administrative assistant position in the Paper Unit. Jozwiak was born on September 21, 1973. Dave May evaluated Jozwiak in the key competencies for the administrative assistant position and she received a final overall rating of 3.5. Although Jozwiak had no prior experience as an administrative assistant, she was selected for the position in the Paper Unit because she had come from a higher level position and because her competency rating exceeded that of Sharron Morgan, who currently occupied the position, as well as those of plaintiff and Sandy Hanson. In addition, Jozwiak had worked

in and with the Paper Unit previously and she understood union contracts and scheduling issues well because she had been an hourly union employee with defendant. She had excellent rapport with the hourly employees in the Paper Unit.

Finally, the leadership team filled the administrative assistant position for the Safety and Maintenance/Quality Units. The team considered the incumbent, Sandy Hanson, as well as plaintiff, Sharron Morgan and Gail Rusinek. Rusinek had been displaced from her level 27 position, expressed an interest in an administrative assistant position and received a final overall rating of 2.5. Because the ratings of the candidates were so close (Hanson – 2.5, plaintiff – 2.5, Morgan – 2.75 and Rusinek – 2.5), the team discussed the competencies of each individual. First, the team eliminated Hanson and Rusinek because neither was as capable as Morgan or plaintiff and neither met the needs for the position. Next, they discussed and rated the strengths and weaknesses of Morgan and plaintiff. Morgan received a higher overall assessment but because the ratings were close, the team decided that Dave May, Jim Visitanier and Tom Huftel should do another analysis of Morgan and plaintiff, rating each of them in nine categories: education, computer skills, SAP [a computer software program] knowledge, results orientation, adaptability, crew scheduling, confidentiality, quantity of work and quality of work.

May and Visitainer rated plaintiff and Morgan separately. May gave Morgan a rating of 30 with six "plus" marks and gave plaintiff a rating of 27 with three "plus" marks.

Visitainer gave Morgan a rating of 7 and gave plaintiff a rating of 4. Huftel agreed with the these ratings. May and Visitainer presented their ratings to the rest of the leadership team and stated that, although they believed either candidate could handle the position, they were in agreement that Morgan had the edge over plaintiff and should be selected. The rest of the leadership team agreed to give the position to Morgan. Although plaintiff had expressed interest in an accounting position, there were no such positions available for which she was qualified.

The ages of defendant's employees were never discussed during leadership team meetings and the leadership team did not consider any employee's seniority or age in deciding which positions would be eliminated and who would be selected to fill the positions after the reorganization, including the administrative assistant positions.

E. Aftermath

On April 9, 2003, plaintiff met with Barb May and Terry Charles, who informed her that her position had been eliminated and that her employment would be terminated. Plaintiff chose to have her unused vacation and personal holidays paid to her in a lump sum so that her official last day of employment was June 19, 2003. Had she remained employed until February 8, 2004, she would have completed fifteen years of service with defendant.

In addition to plaintiff, seven other individuals were terminated as a result of

defendant's reduction in force. Their names and dates of birth are as follows: Sandy Hanson (June 26, 1947); Gail Rusinek (April 17, 1955); John Anderson (December 30, 1946); Woodrow Gerrow (November 9, 1945); Rosalie Lombard (September 8, 1949); Tressie Menning (July 5, 1965); Carlos Salazar (October 20, 1944). In addition, three employees retired around the time of the layoffs and defendant chose not to fill their positions. Thus, defendant eliminated eleven positions in all, one more than initially intended.

Plaintiff filed a complaint with the Equal Employment Opportunity Commission on June 19, 2003 alleging that she had been terminated on the basis of her age. The EEOC issued a dismissal and notice of rights letter on May 18, 2004.

OPINION

The Age Discrimination in Employment Act makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623. A recent decision by the United States Supreme Court makes clear that an employer may be held liable for violating the ADEA under both disparate treatment and disparate impact theories of liability. Smith v. City of Jackson, 125 S. Ct. 1536 (2005). In her brief in response to defendant's motion for summary judgment, plaintiff argues that defendant is liable under disparate treatment and

disparate impact theories. In its reply brief, defendant makes the half-hearted argument that plaintiff should not be allowed to raise a disparate impact claim at this stage of the litigation because she did not plead a disparate impact theory in her complaint and she has not requested leave to amend her complaint to add a disparate impact claim. However, it is well-established that a plaintiff does not have to assert legal theories in a complaint. McCullah v. Gadert, 344 F.3d 655, 659 (7th Cir. 2003). Moreover, defendant has included a section in its reply brief that addresses the arguments presented by plaintiff under the disparate impact theory. Because defendant does not argue that it was unable to fully respond to plaintiff's arguments, I will consider plaintiff's disparate impact claim.

A. Disparate Treatment

A plaintiff bringing a disparate treatment claim under the ADEA may attempt to prove his case directly or through the burden-shifting method first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Olson v. Northern FS, Inc., 387 F.3d 632 (7th Cir. 2004). Under either the direct or indirect method, plaintiff must prove that her age played a role in defendant's decision making process and was determinative in the outcome. Schuster v. Lucent Technologies, Inc., 327 F.3d 569, 573 (7th Cir. 2003). Summary judgment is inappropriate if plaintiff offers evidence from which an inference of discrimination may be drawn. Miller v. Borden, Inc.,

168 F.3d 308, 312 (7th Cir. 1999). In this case, the parties have presented arguments under both methods of proof. I will address each in turn.

1. Direct method

Under the direct method of proof, plaintiff must present direct evidence (an acknowledgment of discriminatory intent by defendant), Gusewelle v. City of Wood River, 374 F.3d 569, 574 (7th Cir. 2004), or construct a "convincing mosaic" of circumstantial evidence that provides the basis for an inference of intentional discrimination, Cerutti v. BASF Corp., 349 F.3d 1055, 1061 (7th Cir. 2003). Plaintiff concedes that the record contains no "smoking guns," which I construe to be an admission that she does not have any direct evidence of discrimination. Plt.'s Br., dkt. #16, at 3. However, she contends that circumstantial evidence of discrimination exists.

The Court of Appeals for the Seventh Circuit has identified three different types of circumstantial evidence that may show intentional discrimination. Troupe v. May Dept. Stores Co., 20 F.3d 734, 736 (7th Cir. 1994). "The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group and other bits and pieces from which an inference of discriminatory intent might be drawn." Id. The second type of evidence is that which shows the systematically better treatment of employees similarly situated to the plaintiff other than

in the forbidden characteristic. Id. The third type of evidence is that which shows the plaintiff was qualified for the job but was "passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." Id. Regardless of the form it takes, circumstantial evidence must "point directly to a discriminatory reason for the employer's action." Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003).

Plaintiff contends that the decision to terminate her employment was suspiciously timed because it was made a mere eight months before she would have reached fifteen years of service with defendant. She notes that she had heart surgeries in 1999 and 2002 and contends that after reaching fifteen years of service, defendant would have had to pay at least half her health insurance premiums for the rest of her life. I am unable to consider this argument because plaintiff did not properly propose findings of fact regarding defendant's obligations relative to her health insurance premiums. As defendant noted in objecting to plaintiff's proposed findings, plaintiff did not support her proposals regarding defendant's obligation to pay specific percentages of her health insurance premiums with citations to admissible evidence in the record. In fact, plaintiff did not provide any citation to support these proposed findings. This court's Procedure to be Followed on Motions for Summary Judgment I.B.2 provides that each proposed finding of fact "must be followed by a reference

to evidence supporting the proposed fact" and warns litigants that the court will not consider proposed facts that do not have proper citations when deciding the motion. Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Judge Barbara B. Crabb ¶ 2. When a party fails to comply with a district court's summary judgment procedures, the proper response is to disregard the nonconforming submissions. Ziliak v. AstraZeneca LP, 324 F.3d 518 (7th Cir. 2003). Therefore, I will not consider plaintiff's suspicious timing argument. (Even if I were to consider plaintiff's argument on its merits, it is foreclosed by the Supreme Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993), which holds that an employer's decision to discharge an older employee shortly before his entitlement to certain benefits vests does not constitute disparate treatment under the ADEA.)

Plaintiff argues next that defendant engaged in systematically better treatment of younger but otherwise similarly situated employees. She notes that three of the five administrative assistants after the reorganization were under the age of 40 (Coushman (28), Eron (32) and Jozwiak (29)), while the two oldest administrative assistants before the reorganization, plaintiff (58) and Hanson (55), were not retained. In addition, she argues that seven of the eight employees who were terminated as a result of the reduction in force were at least 48 years old.

Taking the latter point first, the fact that seven of the eight terminated employees

were over the age of 40 does not, by itself, constitute circumstantial evidence that plaintiff was terminated because of her age. In Radue v. Kimberly-Clark Corp., 219 F.3d 612, 616 (7th Cir. 2000), the court noted that statistics "can only show a relationship between an employer's decisions and the affected employees' traits; they do not show causation." To support an inference of discriminatory motive, statistics must be supported by other probative evidence. In this case, plaintiff points to no other evidence in the record that shows that the leadership team decided not to retain her or any of the other terminated employees because of their age. Koski v. Standex International Corp., 307 F.3d 672, 679 (7th Cir. 2002) (former employee could not defeat summary judgment by showing only that majority of terminated employees were over 40). Given that 67 of the 84 employees at the Rothschild mill (80%) were at least 40 years old at the time of the reduction in force, it is not surprising that almost all of the terminated employees fell into that class as well. Moreover, it is undisputed that the leadership team did not consider the ages of defendant's employees in deciding who would be retained after the reorganization. "Standing virtually alone, as they are in this case, statistics cannot establish a case of individual disparate treatment." Gilty v. Village of Oak Park, 919 F.2d 1247, 1253 n.8 (7th Cir. 1990).

(Plaintiff's attempt to dispute defendant's proposed finding that the leadership team did not consider the ages of defendant's employees in deciding who would be retained after the reorganization fails for two reasons. First, the substance of plaintiff's response to the

proposed finding does not comply with this court's summary judgment procedure. Plaintiff's response to the proposed finding reads as follows: "Dispute. Reassert response to paragraph 60 above." To properly dispute a proposed finding, the non-movant must propose an alternate version of the fact and cite to evidence which supports that version. Procedure II.D.2. Plaintiff's response fails to comply with this requirement. Second, the substance of plaintiff's response to defendant's proposed finding ¶ 60 does not place into dispute the substance of defendant's proposed finding regarding the motives of the leadership team.)

Plaintiff argues that she was similarly situated to the five individuals who were retained as administrative assistants. To prove substantial similarity in a reduction in force case, a plaintiff must show that she possessed "analogous attributes, experience, education, and qualifications relevant to the positions sought." Radue, 219 F.3d at 618. In an age discrimination case, the plaintiff does not need to show that the retained employees were outside the class of persons protected by the ADEA; instead, she must show only that the retained employees were "substantially younger" than her. Balderston v. Fairbanks Morse Engine Div. of Coltec Industries, 328 F.3d 309, 321 (7th Cir. 2003). "Substantially younger" in this context requires at least a ten-year age difference. Fisher v. Wayne Dalton, 139 F.3d 1137, 1141 (7th Cir. 1998).

It is undisputed that four of the five employees who were given administrative assistant positions after the reduction in force, Coushman, Eron, Jozwiak and Morgan, are

substantially younger than plaintiff. Juliane Hinner, the fifth retained employee, was only eight years younger than plaintiff at the time of the reduction in force. Thus, Hinner was not substantially younger than plaintiff. However, "[i]n cases where the disparity is less [than ten years], the plaintiff still may present a triable claim if she directs the court to evidence that her employer considered her age to be significant." Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893 (7th Cir. 1997). This evidence is likely to be direct evidence. Id. Because plaintiff has not submitted any direct evidence that defendant considered plaintiff's age to be significant, I will focus on the four substantially younger employees only.

The undisputed facts indicate that Coushman, Eron, Morgan and plaintiff each served as an administrative assistant before the reorganization. Although the women worked in different units at the mill, it is reasonable to infer that their job duties were similar. In this respect, one could conclude that they were similarly situated. But this superficial similarity will not support an inference of discrimination in light of the fact that plaintiff's final rating after the evaluation process was lower than each of the four substantially younger employees retained by defendant. Plaintiff received a rating of 2.5, while Coushman and Eron received ratings of 4.0 and Morgan received a rating of 2.75. Each individual's rating was the average of separate ratings on a scale from 1 to 5 in the areas of safety, leadership, results orientation and technical competencies.

Plaintiff attacks these ratings by arguing that they were not based on objective factors.

She contends that none of the unit leaders who evaluated the candidates for the administrative assistant positions measured their abilities in the areas of scheduling, computer operations and program knowledge and other administrative skills. First, the record indicates that the one of the criteria used to evaluate the candidates was their competency in the technical or specific aspects of the administrative assistant position. Second, an employer does not violate the ADEA merely because it evaluates employees based on subjective criteria. Weihaupt v. American Medical Association, 874 F.2d 419, 429 (7th Cir. 1989). Indeed, the Court of Appeals for the Seventh Circuit has recognized that evaluations made by supervisory employees are often critical in hiring and firing decisions. Millbrook v. IBP, Inc., 280 F.3d 1169, 1176 (7th Cir. 2002) (citing Denney v. City of Albany, 247 F.3d 1172, 1186 (11th Cir. 2001)). An employee may be able to raise an inference of discrimination by presenting evidence suggesting that the subjective criteria used to evaluate candidates were a mask for discrimination, Sattar v. Motorola, Inc., 138 F.3d 1164, 1170 (7th Cir. 1998), but plaintiff has presented no such evidence. She has not presented evidence suggesting that the individual who evaluated her held any animus towards her. (In fact, she has not identified the individual who evaluated her.) Moreover, the candidates for the administrative assistant positions were evaluated according to age-neutral criteria and it is undisputed that the candidates' age did not factor into the leadership team's decision making process.

The remainder of plaintiff's arguments regarding the "similarly situated" inquiry are misdirected. Plaintiff highlights the differences between herself and the other candidates in an apparent attempt to demonstrate that she was more qualified than each of them. For example, plaintiff notes that Jozwiak had no experience as an administrative assistant at the time of the reduction in force. Plaintiff implies that she had more experience as an administrative assistant (eleven years in the Converting Unit, where she was responsible for scheduling between 140 and 160 employees, plus one year in the Maintenance Unit) than Coushman, Eron or Morgan. To the extent these arguments are aimed at showing that the leadership team erred in not retaining her, they are irrelevant because federal courts do not sit as super-personnel departments to reexamine the adequacy or correctness of an employer's hiring and firing decisions. Gusewelle, 374 F.3d at 576; Applebaum v. Milwaukee Metropolitan Sewerage Dist., 340 F.3d 573, 579 (7th Cir. 2003). This court's only concern is whether defendant terminated plaintiff's employment because of her age. To the extent plaintiff's arguments regarding her allegedly superior qualifications are aimed at supporting a showing of discrimination, they fail to do so because plaintiff has not shown that she was superior to the other candidates with respect to the criteria used by the leadership team in evaluating the candidates. As defendant notes, there is no evidence that an administrative assistant's sole function was to schedule employees or that experience in scheduling employees was a factor considered by the leadership team. Dft.'s Reply Br., dkt.

#19, at 3–4.

In sum, plaintiff has presented no direct or circumstantial evidence from which a reasonable jury could infer that she was victim of age discrimination. I will now consider the parties' arguments under the indirect or burden-shifting approach.

2. Indirect method

Under the indirect method of proving unlawful discrimination, plaintiff has the initial burden to establish a prima facie case of discrimination. Ransom v. CSC Consulting, Inc., 217 F.3d 467, 470 (7th Cir. 2000). If plaintiff makes out a prima facie case, she is entitled to "a presumption that the employer unlawfully discriminated against the employee." EEOC v. Our Lady of the Resurrection Medical Center, 77 F.3d 145, 148 (7th Cir. 1996) (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)). Once plaintiff has met his burden, defendant has the burden of rebutting the presumption by coming forward with a legitimate nondiscriminatory reason for the discharge. Pitasi v. Gartner Group, Inc., 184 F.3d 709, 716 (7th Cir. 1999). If defendant satisfies this standard, plaintiff must demonstrate that there is a genuine issue of material fact whether the defendant's stated reason for plaintiff's termination is pretextual in order to defeat a motion for summary judgment. Hudson v. Chicago Transit Authority, 375 F.3d 552, 561 (7th Cir. 2004). Although the burden of production shifts under the indirect method, the

ultimate burden of persuasion rests remains with plaintiff. Pitasi, 184 F.3d at 716.

To make out a prima facie case in a typical reduction-in-force context, plaintiff must show that (1) she was in the protected age class (40 to 70 years of age); (2) she was meeting her employer's legitimate expectations; (3) she was discharged; and (4) similarly situated but substantially younger employees were treated more favorably. Cianci v. Pettibone Corp., 152 F.3d 723, 728 (7th Cir. 1998); see also Bellaver v. Quanex Corp., 200 F.3d 485, 493-94 (7th Cir. 2000). However, in the present case, the Utilities/Environmental Unit in which plaintiff worked was merged with the Pulp/Wood Unit under the terms of the reorganization. One administrative assistant served this new combined unit. Thus, this case resembles a "mini-RIF" case in which an employee is terminated and remaining employees absorb her job duties. Krchnavy v. Limagrain Genetics Corp., 294 F.3d 871, 876 (7th Cir. 2002). In this situation, a plaintiff need not prove the fourth prong of the traditional prima facie case; instead, she must show that her duties were absorbed by employees outside the protected class. Id.

Neither party disputes that plaintiff has satisfied the first three prongs of the prima facie case. However, plaintiff is unable to show that the employee who absorbed her job duties, Juliane Hinner, was outside the protected class because Hinner was 50 years old at the time of the reorganization. Therefore, plaintiff has failed to make out a prima facie case of discrimination.

Assuming plaintiff had made out a prima facie case, defendant would still be entitled to summary judgment on his disparate treatment claim because it produced two legitimate, nondiscriminatory reasons for plaintiff's termination and plaintiff has not raised a genuine issue of material fact that these reasons are pretextual. In this case, Scott Mosher, the manager of the Rothschild mill, decided to eliminate ten salaried positions from the mill's workforce and reorganize several units at the mill in an effort to reduce costs and maintain the mill's competitiveness. Pursuant to this reorganization, plaintiff's administrative assistant position in the Utilities/Environmental Unit was merged with the administrative assistant position in the Pulp/Wood Unit. Defendant's second reason for not retaining plaintiff is that the other candidates for the five administrative assistant positions had superior qualifications. These reasons are sufficient to satisfy defendant's burden and shift the onus back to plaintiff to raise an issue regarding pretext. Rummery v. Illinois Bell Telephone Co., 250 F.3d 553, 556 (7th Cir. 2001) (citing Jackson v. E.J. Brach Corp., 176 F.3d 971, 983 (7th Cir. 1999) (reduction in force is legitimate nondiscriminatory reason for termination)); see generally Timm v. Mead Corp., 32 F.3d 273, 275 (7th Cir. 1994) (legitimate nondiscriminatory reason need only be nondiscriminatory and sufficient to justify challenged action).

Pretext means more than just a decision made in error or in bad judgment; it means a lie or a phony reason for the action. Wolf v. Buss (America), Inc., 77 F.3d 914, 919 (7th

Cir. 1996). The issue is not whether the employer's evaluation of the employee was correct but whether it was honestly believed. Zaccagnini v. Charles Levy Circulating Co., 338 F.3d 672, 676 (7th Cir. 2003); Olsen v. Marshal & Ilsley Corp., 267 F.3d 597, 602 (7th Cir. 2001). The employer's explanation can be "foolish or trivial or even baseless" so long as the employer honestly believed in the reasons it offered for the adverse employment action. Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997). In the context of a reduction in force, a plaintiff can show pretext by demonstrating that the reduction was an excuse to get rid of workers protected by the ADEA. Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1012 (7th Cir. 2000). Alternately, "a plaintiff may show pretext by demonstrating that the specific reasons given for including her in the reduction were pretextual." Id. at 1012-13. A plaintiff can prove pretext through direct evidence that shows that an employer is lying or through indirect evidence that shows that the employer's reasons are not factually supported, were not the real reason for the adverse action or were not sufficient to prompt the adverse action. Zaccagnini v. Charles Levy Circulating Co., 338 F.3d 672, 676 (7th Cir. 2003); Vukadinovich v. Board of School Trustees of North Newton School Corp., 278 F.3d 693, 699-700 (7th Cir. 2002).

Plaintiff contends that it has shown that the reduction in force was merely an excuse to eliminate older workers because defendant has produced no "hard data" to substantiate its claim that the reduction was necessary. Plt.'s Br., dkt. #16, at 10. Specifically, plaintiff

points to the lack of evidence that the mill was losing money or its share of the relevant market. However, it is not defendant's burden to back up its decision to reduce its workforce. It is *plaintiff's* burden to adduce evidence suggesting that the reduction in force was a smoke screen for unlawful discrimination. E.g., Krchnavy, 294 F.3d at 876 (citations and quotations omitted) ("To show pretext in a RIF case, *an employee* must establish that an improper motive tipped the balance in favor of discharge."). Moreover, plaintiff did not dispute defendant's proposed finding of fact ¶ 20, which provides in part that "[f]or competitive reasons both internal and external to the Rothschild mill, Vice President and Mill Manager Scott Mosher decision in December 2002 that to remain competitive in the market, it was necessary to reduce the remaining salaried workforce of 84 employees by approximately 10 employees and reorganize the organizational structure of the mill." In sum, there is no evidence from which a reasonable jury could conclude that defendant's decision to reduce its workforce was merely an excuse to eliminate older employees.

Nor has plaintiff presented evidence sufficient to allow a jury to conclude that the reasons presented by defendant with respect to her termination were pretextual. Plaintiff repeats her argument that the subjective evaluations used by the leadership team were discriminatory, but as I have already explained, this argument is a non-starter. Defendant notes correctly that there is no evidence in the record suggesting that the leadership team did not honestly believe that Hinner, Coushman, Eron, Jozwiak and Morgan were more qualified

than plaintiff. Nor is there any evidence to suggest that that the final overall rating given to plaintiff was not factually supported or that it failed to account for plaintiff's termination. In any event, even if plaintiff had shown that her qualifications were equivalent to those of the other candidates, she would still not raise an issue of fact regarding pretext. Millbrook, 280 F.3d at 1180 (quoting Deines v. Texas Dept. of Protective and Regulatory Services, 164 F.3d 277, 279 (5th Cir. 1999) ("where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext 'unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.'")

When an employer decides to reduce its workforce, the ADEA does not require it to find new positions for each affected employee who happens to be over 40 years old. Taylor v. Canteen Corp., 69 F.3d 773, 780 (7th Cir. 1995). Rather, the statute requires that the employer provide the same transfer opportUnities to young and old workers alike. Radue, 219 F.3d at 615. The undisputed facts indicate that defendant afforded plaintiff the same consideration as each of the other candidates for the administrative assistant positions. Therefore, defendant is entitled to summary judgment on plaintiff's disparate treatment claim.

B. Disparate Impact

In Smith v. City of Jackson, 125 S. Ct. 1536, 1540 (2005), the Supreme Court held that the ADEA authorizes recovery under a disparate impact theory of liability. Disparate impact claims do not require evidence of an employer's subjective intent to discriminate. Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 646 (1989). Disparate impact is based on the notion that policies or practices that are neutral on their face but discriminatory in effect violate anti-discrimination statutes. Teamsters v. United States, 431 U.S. 324, 349 (1977). To establish a prima facie case of disparate impact, a plaintiff must "isolate and identify a specific employment practice that is allegedly responsible for any observed statistical disparities," Cerutti, 349 F.3d at 1067, and "establish a causal connection between the employment practice and the statistical disparity, offering statistical evidence of a kind and degree sufficient to show that the practice in question has cause the exclusion of applicants for jobs or promotion because of their membership in a protected group, Bennett v. Roberts, 295 F.3d 687, 697 (7th Cir. 2002) (citations and quotations omitted).

Plaintiff argues first that because older workers normally have higher salaries and health care costs than younger workers, a "plan to reduce costs by eliminating job positions and reducing the workforce is inherently discriminatory against older workers." Plt.'s Br., dkt. #16, at 8. Plaintiff appears to be arguing that a reduction in force will always have a disparate impact on older workers because, on the whole, they have higher salaries and

health care costs than their younger counterparts. Thus, an employer looking to reduce costs will get rid of older workers because that course of action will result in greater savings to the employer. This argument is insufficient to state a prima facie case of disparate impact because plaintiff has failed to isolate a specific practice within defendant's reorganization process that caused a disparate impact. Moreover, assuming that reductions in force result in disproportionate numbers of over-40 employees being terminated, an employer would not incur liability under the ADEA as a matter of course. In Smith, 125 S. Ct. at 1543-44, the Court noted that disparate impact liability under the ADEA is narrower than under other discrimination statutes such as Title VII because of the "RFOA provision" in the ADEA, which exempts an employer from liability for any prohibited action "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Certainly, an employer that decides to terminate an employee to relieve itself of the burden of that employee's high salary or health care costs has based its decision on "reasonable factors" other than the employee's age.

Plaintiff's second argument is that older workers are "more likely [to] have technical skills that are more developed than younger employees," and that defendant's "total lack of objective skill evaluation for the administrative assistant positions rendered the strongest attributes of employees like [plaintiff] a second consideration." Plt.'s Br., dkt. #16, at 9. Again, this argument is nothing more than speculation because she has not introduced any

evidence suggesting that the employees who were terminated by defendant had stronger technical skills than the retained employees. More broadly, plaintiff has not introduced any statistical evidence showing that employees over the age of 40 were adversely affected by the reduction in force and that the cause of this adverse impact was defendant's reliance on "non-technical, subjective competencies" instead of objectively measurable skills. The fact that 7 of the 8 employees who lost their jobs were over 40 years old adds nothing to plaintiff's case because she has not introduced any statistical analysis of the salaried workforce at the Rothschild mill that would indicate a statistically significant disparity in the number of employees over 40 who were terminated in relation to the entire salaried workforce. Therefore, plaintiff has failed to establish a prima facie case of disparate impact discrimination and defendant is entitled to summary judgment on this claim.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Weyerhaeuser Company is GRANTED as to plaintiff Mary Ann Townsend's claims of disparate treatment and disparate impact under the Age Discrimination in Employment Act.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 13th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge