IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RONALD PLUMER,

Plaintiff,

v.

DANE COUNTY,

Defendant.

OPINION and ORDER

02-C-527-C

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This is a civil action for monetary and injunctive relief brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 623-634. Plaintiff Ronald Plumer contends that defendant Dane County discriminated against him on the basis of his age when it transferred him and assigned his duties to younger employees. Subject matter jurisdiction is present under 28 U.S.C. § 1331.

The case is presently before the court on defendant's motion for summary judgment and plaintiff's motion to strike an affidavit defendant filed in support of its summary judgment motion. Because I conclude that the affidavit that is the subject of plaintiff's motion to strike is competent evidence, the motion to strike will be denied. Because I conclude that plaintiff has failed to produce evidence sufficient to allow a rational jury to

find that he suffered a materially adverse employment action or that defendant's reasons for transferring him were a pretext for age discrimination, I will grant defendant's motion for summary judgment.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

At all times relevant to this lawsuit, plaintiff was 55 years old and defendant was plaintiff's employer. Plaintiff began his employment with defendant in 1977 as a budget analyst. Defendant promoted plaintiff to the position of internal auditor in 1984. In 1990, defendant promoted plaintiff again, this time to budget manager in the Office of Management and Budget, part of defendant's Department of Administration. Plaintiff has performed satisfactorily throughout the course of his employment with defendant.

Dennis Strachota is the former director of the Department of Administration. In March 2001, Strachota proposed a reorganization of the department. Around this time, employee duties and responsibilities in the Department of Administration were reorganized and reassigned. On March 12, 2001, Strachota informed plaintiff that his position in the department would be eliminated as part of the reorganization and that he would be terminated. Plaintiff protested and he was not fired. As part of the reorganization, the

budget and purchasing managers' duties were to be transferred to the department's controller, defendant's chief financial officer. However, around this time the controller retired and the duties that were to be transferred to that office were reassigned throughout the department. From March 12, 2001, until mid-May 2001, Strachota took over management of the budget staff, a task formerly performed by plaintiff. The remainder of plaintiff's job duties were distributed to two employees, William Franz and Travis Myren, who are both younger than 40. Plaintiff was transferred to defendant's Parks Department on or about May 15, 2001. In September 2001, plaintiff was assigned to the Department of Human Services. In November 2001, plaintiff was transferred back to the Parks Department to continue the work that he had started there in May 2001. Plaintiff did not have any supervisory responsibility upon his return to the Parks Department. On January 14, 2002, plaintiff was transferred from the Parks Department back to the Department of Administration to serve as the department's interim manager of the facilities management division. During his time as interim manager, plaintiff was not involved in hiring, firing, direct oversight or interaction with staff. His primary assignment was to identify tasks previously belonging to Frank Alfano, the recently retired manager of the division, and to delegate the tasks to permanent staff.

Early in February 2002, Bonnie Hammersley was the acting director of the Department of Administration. Before that she was the department's assistant director. In

February 2002, Hammersley assigned plaintiff to defendant's Department of Human Services again, where he has worked ever since. Plaintiff has retained the salary and benefits he received as defendant's budget manager. Plaintiff's current job title is "Fiscal Analyst / Acting Fiscal Services Manager" and he currently performs the duties of the Human Services Department's fiscal services manager. The Human Services Department's fiscal services division is responsible for developing and implementing the department's budget, which accounts for more than half of defendant's $396 million budget. In his current position, plaintiff supervises eight fiscal services division employees, one of whom supervises an additional five employees. Plaintiff has no assurance that he will be appointed permanently to the position of fiscal services manager or that he will not be replaced, although defendant's current budget has no funding for a replacement.

OPINION

The Age Discrimination in Employment Act makes it unlawful for an employer "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). This protection extends to employees who are at least 40 years old. See 29 U.S.C. § 631(a). To succeed on an ADEA claim, a "plaintiff's age must have 'actually played a role in [the employer's decision making]

process and had a determinative influence on the outcome." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000) (citations omitted).

A plaintiff may prove age discrimination by either presenting direct evidence that age was the determining factor in the allegedly discriminatory employment decision or by setting forth a prima facie case under the McDonnell Douglas, 411 U.S. 792 (1973), burden-shifting framework. See Reeves, 530 U.S. at 142 (noting that McDonnell Douglas framework applies in ADEA cases when parties do not dispute it); Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997). Plaintiff has no direct evidence of defendant's alleged discriminatory intent. Therefore, he must proceed according to the McDonnell Douglas burden-shifting framework.

> Under the burden-shifting method, the plaintiff may establish a prima facie claim of age discrimination by showing that he was: (1) in a protected class; (2) performing the job satisfactorily; (3) nevertheless the subject of a materially adverse employment action; and (4) others outside of the protected class were treated more favorably.

Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992) (citation omitted). If the plaintiff succeeds in establishing a prima facie case, "the employer must articulate a lawful, non-discriminatory reason for the adverse action." Id. Once an employer has identified a non-discriminatory reason for the adverse action, "the burden shifts to [the plaintiff] to demonstrate that the proffered explanation is merely a pretext for what was actually a discriminatory motivation." Schuster v. Lucent Technologies, 327 F.3d 569, 574 (7th Cir.

2003).

Defendant has moved for summary judgment on two grounds. First, defendant maintains that plaintiff's reassignment does not amount to an materially adverse employment action within the meaning of the Act. If defendant is correct, then plaintiff has failed to make out his prima facie case. Second, even assuming plaintiff has made out his prima face case, defendant maintains that plaintiff was reassigned as part of a legitimate departmental reorganization, not because of his age.

A. Materially Adverse Employment Action

For purposes of its summary judgment motion, defendant does not dispute that plaintiff, who was 55 years old when the events at issue in this lawsuit transpired, falls within the class of employees protected by the Act. Defendant also acknowledges that plaintiff was performing his job satisfactorily and it is undisputed that some of plaintiff's duties were absorbed by significantly younger workers. The issue is whether plaintiff suffered a materially adverse employment action.

In arguing that plaintiff's employment was not adversely affected, defendant notes that plaintiff was not terminated and his salary and benefits were not reduced. However, as plaintiff argues, a materially adverse employment action can occur when "a nominally lateral transfer with no changes in financial terms significantly reduces the employee's career

prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted." Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 744 (7th Cir. 2002). Moreover, "an employer does not insulate itself from liability for discrimination simply by offering a transfer at the same salary and benefits." Flaherty v. Gas Research Institute, 31 F.3d 451, 456-57 (7th Cir. 1994). Nevertheless, a "transfer involving no reduction in pay and no more than a minor change in working conditions" is not materially adverse. Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); see also Herrnreiter, 315 F.3d at 745 (noting that "two jobs [that] were equivalent other than in idiosyncratic terms" did not justify "trundling out the heavy artillery of federal antidiscrimination law"); Flaherty, 31 F.3d at 456 ("[A]n ADEA plaintiff does not establish a prima facie case by showing only that a job transfer would cause personal inconvenience or altered job responsibilities."). Rather, the transfer must cause a "'materially significant disadvantage to [the] older employee,'" Flaherty, 31 F.3d at 456 (citation omitted), as, for instance, when a new position involves "significantly diminished material responsibilities." Crady v. Liberty National Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). "The question whether a change in an employee's job or working conditions is materially adverse, rather than essentially neutral, is one of fact . . . and so can be resolved on summary judgment only if the question is not fairly contestable." Williams, 85 F.3d at 273-74.

Even viewing the facts in the light most favorable to plaintiff, a reasonable jury could not conclude that plaintiff's transfer caused him to suffer a materially significant disadvantage in the conditions of his employment. Summary judgment is the "put up or shut up" moment in a lawsuit, see, e.g., Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003), and plaintiff is obliged at this stage to produce some evidence as to how his job responsibilities have diminished significantly such that his skills are atrophying and his career prospects have been stunted. See Herrnreiter, 315 F.3d at 744. Plaintiff has proposed no facts regarding his precise duties and responsibilities as budget manager *or* in the jobs he has held since his transfer out of the Department of Administration, making it nearly impossible to compare those positions. He has submitted an affidavit stating that his current position does not "possess the level of complexity nor importance" of his former job as budget manager and that his "career prospects have diminished greatly." See Plumer Aff., dkt. #19, at ¶¶ 29-30. Standing alone, these conclusory statements are not enough to ward off summary judgment. Plaintiff avers that at the Parks Department he did not supervise any employees or perform any "budgetary" work. See id. at ¶¶ 14-15. However, defendant has submitted a "memorandum of understanding" regarding the work plaintiff was to perform for the Parks Department. Plaintiff was required to "[a]ssist in the development of a budget profile for new fleet mgt. Program between Parks and State," "[s]et up reimbursement and tracking system for outside

grants received by Parks," "[d]evelop a simple budget monitoring system for the Department," and "[e]valuate and recommend improvements for Parks Department revenue collection." Hammersley Aff., dkt. #14, at Ex. C. Plaintiff does not explain why these tasks do not qualify as "budgetary" work. Moreover, in his current role as acting fiscal services manager for the Department of Human Services, plaintiff is involved in developing and implementing the department's budget, which accounts for more than half of defendant's $396 million overall budget. It is undisputed that in his current position, plaintiff supervises eight fiscal services division employees, one of whom supervises an additional five employees.

Plaintiff argues that "it is obvious that the Budget Manager for the County has a higher status and more responsibility and is not equivalent to being a fiscal manager for one of the County's departments." Plt.'s Resp. to Dft.'s Mot. for Summ. J., dkt. #16, at 6. However, given the dearth of facts in the record regarding plaintiff's current and former responsibilities, it is not obvious that plaintiff has suffered a materially adverse employment action. Defendant has submitted charts detailing the Department of Administration's organization when plaintiff was defendant's budget manager and after the proposed reorganization that resulted in the elimination of the budget manager position. See Hammersley Aff., dkt. #14, at Ex. D. As budget manager, it appears that plaintiff supervised 4.5 employees, whereas it is undisputed that in his current position, plaintiff supervises eight fiscal services division employees, one of whom supervises an additional five employees.

Moreover, it is unclear how responsibility for defendant's finances was divided before the reorganization between the budget manager (plaintiff's position) and the purchasing manager and the controller, defendant's chief financial officer. This means it is unclear how much control plaintiff exercised over county finances as budget manager. Plaintiff cannot ask the court to simply assume from his current and former titles that he has effectively suffered a career-threatening demotion. Finally, I note that the fact that plaintiff cycled through several positions before landing at the Department of Human Services in February 2002 is not enough to show he suffered a materially adverse employment action, as a showing that a transfer caused personal inconvenience or altered job responsibilities is insufficient. See Flaherty, 31 F.3d at 456. Given plaintiff's failure to describe in any detail his responsibilities and activities in his current and former positions, he has failed to establish that he suffered a materially adverse employment action, a key component of his prima facie case.

B. Pretext

Even assuming plaintiff could make out a prima facie case of age discrimination, I would still grant defendant's summary judgment motion. As noted earlier, under the McDonnell Douglas burden-shifting method of proof, once a plaintiff has made out a prima facie case of discrimination, "then the defendant may state one or more legitimate,

nondiscriminatory reasons for its actions, after which the plaintiff has an opportunity to show that the defendant's reasons are pretextual." Balderston v. Fairbanks Morse Engine, 328 F.3d 309, 321 (7th Cir. 2003). Viewing the record in its entirety and the facts in the light most favorable to plaintiff, I cannot find that plaintiff has shown that defendant's reorganization was a pretext for age discrimination. Before addressing the substance of the parties' arguments, however, I must address plaintiff's motion to strike the affidavit of Bonnie Hammersley, which is bound up with the issue of pretext.

1. Motion to strike

Defendant has submitted the affidavit of Bonnie Hammersley in support of its motion for summary judgment. Hammersley is the director of defendant's Department of Administration. At the time plaintiff was reassigned, Hammersley was the department's assistant director and Dennis Strachota was the director. In her affidavit, Hammersley describes the departmental reorganization that took place in March 2001 and the reasons for the reorganization. Plaintiff argues that because the proposal to reorganize the department was first raised by Strachota, Hammersley's affidavit is not based on personal knowledge and is therefore inadmissible. I disagree. As assistant director of the department, and later as director, Hammersley is qualified to describe the reorganization that took place. I understand plaintiff's real objection to be to those portions of

Hammersley's affidavit that ascribe a benign motive to defendant's decision to reorganize. See, e.g., Hammersley Aff., dkt. #14, at ¶11 ("The reassignment of finance duties through the Department of Administration was implemented to streamline procedures and increase the Department's capacity to monitor and analyze Dane County's financial position."). This is not grounds for striking the affidavit, which Hammersley attests is based on personal knowledge. Rather, plaintiff simply disputes defendant's explanation for why the department was reorganized. Plaintiff maintains the reorganization was a cover for age discrimination and defendant maintains it was intended to streamline operations. Which of these objectives is the genuine one is the ultimate question at issue in this case. Although plaintiff is entitled, indeed required, to dispute defendant's explanation, I see no reason why the assistant director of the department that was reorganized is not qualified to describe defendant's position regarding the alleged goals and results of the reorganization. Accordingly, I will deny plaintiff's motion to strike Hammersley's affidavit.

2. Defendant's reorganization

Defendant has asserted a nondiscriminatory reason for the Department of Administration's reorganization that resulted in the elimination of plaintiff's former position as budget manager. Specifically, defendant maintains that it sought to consolidate its financial functions under the county controller to eliminate management layers (specifically,

the budget manager and the purchasing manager positions), increase efficiency, streamline procedures and increase the department's ability to monitor and analyze defendant's financial position. See id. at ¶¶ 4, 5, 11. Accordingly, defendant has carried its burden to articulate a legitimate, nondiscriminatory business reason for the elimination of plaintiff's position and his transfer. See Reeves, 530 U.S. at 142 (noting that employer's burden "is one of production, not persuasion; it 'can involve no credibility assessment'") (citation omitted). The burden thus shifts back to plaintiff to show that defendant's business reason is a pretext for discrimination. "Pretext may be proven 'directly with evidence that [an] employer was more likely than not motivated by a discriminatory reason, or indirectly by evidence that the employer's explanation is not credible.'" Schuster, 327 F.3d at 574 (citation omitted). Plaintiff has no direct evidence that the reorganization was pretextual. "A plaintiff-employee may proceed indirectly by attempting to show that the employer's 'ostensible justification is unworthy of credence' through evidence 'tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the [employment action] in question, or were insufficient to motivate the discharge.'" Id. at 574-75; see also Janiuk v. TCG/Trump Co., 157 F.3d 504, 507 (7th Cir. 1998) (at summary judgment stage, plaintiff satisfies his pretext burden and thus raises material factual dispute if he "produces evidence from which a reasonable jury could conclude that the stated reason is false – in other words, that it is a phony reason"). On a motion for summary judgment,

"[w]hether a court finds sufficient evidence to create an issue of material fact depends upon the entire record." Schuster, 327 F.3d at 575.

Plaintiff has only paltry evidence to suggest that defendant's reorganization was a phony cover for age discrimination. Plaintiff contends that the fact that he was initially told that he would be terminated but was kept on when he "protested" is evidence that defendant's reorganization plan was just a cover for a failed attempt to fire him because of his age. In a similar vein, plaintiff maintains repeatedly that the reorganization "had the sole effect of pushing [him] out of the Department." Plt.'s Resp. Br., dkt. #16, at 10. Unfortunately, plaintiff failed to propose a finding of fact to this effect and cites no evidence supporting his contention. By contrast, defendant notes that the reorganization charts it has submitted show that the reorganization effected many changes, including reducing the total number of divisions within the department from three to two and shifting numerous employees into different divisions. See Hammersley Aff., dkt. #14, at Ex. D. In addition, the charts indicate that the purchasing manager's position was also eliminated. Id. Finally, plaintiff notes that the Department of Administration originally submitted its proposed reorganization plan to the county Board of Supervisors for its approval. However, because the proposal was referred to several committees, the department concluded that the reorganization would be delayed and decided to immediately implement an informal reorganization. Plaintiff argues vaguely that defendant's "failed attempt to have the County

Board of Supervisors lend credibility to the elimination of [plaintiff's] job is evidence of pretext." See Plt.'s Resp. Br., dkt. #16, at 10-11. To show pretext, however, plaintiff must present some evidence from which a reasonable jury could infer that defendant did not honestly believe the reason it gave for the adverse employment action at the time the action was taken. See Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687, 695 (7th Cir. 2000). The fact that defendant sought to implement its proposed reorganization quickly is not evidence that it was lying about the desirability of the reorganization or that its asserted goal of consolidating and streamlining its financial functions is incredible. See Konowitz, 965 F.2d at 233 (court will not second guess employer's legitimate business judgment). In the final analysis, plaintiff has produced no evidence from which a rational jury could infer that defendant was lying about its desire to streamline its financial functions. See Janiuk, 157 F.3d at 511 ("Where an employer advances specific reasons for an employment decision, rebuttal evidence should focus on those reasons."). Accordingly, I will grant defendant's motion for summary judgment.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendant Dane County is GRANTED;

2. Plaintiff Ronald Plumer's motion to strike the affidavit of Bonnie Hammersley is

DENIED;

3. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 14th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge