IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM S. TERRY,

Plaintiff,

v. **Case No. 2:09-CV-624**
MAGISTRATE JUDGE KING

UNITED STATES ENRICHMENT CORP., *et al.,*

Defendants.

OPINION AND ORDER

This matter is before the Court, with consent of the parties pursuant to 28 U.S.C. § 636(c), for consideration of the Defendants' *Motion for Summary Judgment*, Doc. Nos. 24 and 25, and on Defendants' *Motion to Strike*, Doc. No. 39. For the reasons that follow, the *Motion to Strike* is denied and the *Motion for Summary Judgment* is granted. .

I.

Plaintiff William S. Terry ["Plaintiff"] brings this action asserting claims of age discrimination under the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 621, *et seq.*, and Ohio law, R.C. § 4112.14, against his former employer United States Enrichment Corporation and USEC, Inc. Plaintiff also asserts claims for negligent and intentional infliction of emotional distress; breach of employment contract; and violation of Ohio's public policy. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 1367.

Plaintiff was employed at the Defendants' plant from approximately August 1974

until his employment was terminated on July 15, 2005. *Deposition of William Terry* [hereinafter "*Plaintiff's Depo.*"], Doc. No. 29, at 7. Although he worked in different capacities at the plant, from 1993 until his termination Plaintiff worked as a laboratory technician in the Applied Nuclear Technology Department. *Id.*, at 7-11.

In this capacity, Plaintiff's job required, *inter alia*, measuring the "assay"[1] of cylinders of uranium hexafluoride. *Id.* In order to obtain the measurement, a "Mobile Enrichment Meter" ["MEM"] unit was utilized.[2] The assigned lab technician must perform five steps in order to obtain the measurement: (1) create a database for each cylinder to be measured; (2) perform an initial quality control measurement using a known "standard;" (3) engage the MEM unit for a minimum period of time to ensure accurate reading; (4) observe the MEM unit in operation to assure that sufficient voltage is reaching the unit; and (5) provide a final quality control check using another known standard after the cylinder at issue is measured. *See* Exhibit C at §§ 8.4-8.8; *Plaintiff's Depo.*, at 24-28.

On deposition, Plaintiff testified that he used the MEM unit on a daily basis for approximately seven years. *Plaintiff's Depo.*, at 15-16. He was familiar with the MEM procedure and understood how to apply it. *Id.* From September 2004 to May 2005, however, no cylinders were received at Defendants' plant; the MEM unit sat idle during that period of time. *Deposition of Dewey Cordle*, at 113 [hereinafter "*Cordle Depo.*"]; *Deposition of Johnny Rexroad*, at 24 [hereinafter "*Rexroad Depo.*"].

It is Defendants' contention that, on June 27, 2005, Plaintiff fabricated the measurement

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[1]"Assay" in this context refers to the U-235 isotopic content.

[2]The MEM unit is comprised of several component parts, including a laptop computer. *See MEM Procedure*, attached as Exhibit C to *Defendants' Motion for Summary Judgment.*

results of a cylinder. It is undisputed that, as Plaintiff utilized the MEM unit on this date, it "crashed," *i.e.*, the high voltage input necessary to obtain the measurement failed. *Plaintiff's Depo.*, at 38, 45. However, according to Plaintiff, the computer registered a reading prior to the failure, which Plaintiff transcribed on the required form. *Id.* at 38, 44, 47. Plaintiff reported that reading to Dewey Cordle, his supervisor. *Id.* at 47-48. Plaintiff testified on deposition that he "couldn't get the system back up so I reported it- [t]old the supervisors that the high voltage - [h]ad problems with it, but I did get a result." *Id.*, at 38. Plaintiff disputes Defendants' contention that he "fabricated" the measurement result. *Id.*, at 65.

Cordle reviewed the reported result and concluded that Plaintiff had "made up" the reading. *Cordle Depo.*, at 73. Cordle reached this conclusion because there was no database file created to achieve the reading; the "spectra" file was "flat" and no quality control checks had been performed. *Id.*, at 54, 58, 60, 65-68, 70, 72-76. On deposition, Plaintiff could not recall whether a database had been created or whether the spectra achieved a measurement. *Plaintiff's Depo.*, at 49-50, 52-53.

Plaintiff was questioned about the result and was given two weeks off work while the matter was investigated. *Id.*, at 54-55, 59-60. That investigation was conducted by Kim Lassiter, Director of Human Resources. *Deposition of Kim Lassiter,* at 8, 25 [hereinafter "*Lassiter Depo*."]. Lassiter questioned Plaintiff's managers and supervisors and consulted "subject matter experts." *Id.* at 26, 30. According to Lassiter, even if the MEM unit had not been working properly, it would not have produced a reading such as the one reported by Plaintiff. *Id.,* at 26-27. In Lassiter's view, "[Plaintiff] attempted to take a reading, got no reading, which would have meant he would have had to run the test all over again, and . . . rather

than run the test over again, [Plaintiff] falsified the conclusions." *Id.*, at 28.

One of the subject matter experts consulted during the investigation was Richard Mayer, a former engineer for Defendants. On deposition, Mayer testified that it was impossible for Plaintiff to have obtained the reading reported "[b]ecause the system has to analyze the spectrum that is on the disk and that spectrum that was on the disk could not give that number." *Deposition of Richard Mayer*, at 71 [hereinafter "*Mayer Depo*."]. Mayer testified that "it was obvious looking at the spectrum that the high voltage had shut itself off. The spectrum was very distorted and I didn't feel that you could have gotten any result from it . . . ." *Id.*, at 45. In furtherance of the investigation, Mayer used "two different pieces of software to get it to give that number and it did not." *Id.*, at 71.

During the investigation, Cordle reviewed various other measurements obtained by Plaintiff during the month of June 2005 and concluded that there had been other violations of the MEM procedure. *Cordle Depo.*, at 32-33. In particular, on June 20 and 23, "there was no data base file on the computer . . . and there was no cylinder files for what [Plaintiff] said he measured." *Id.* at 32-33, 87-88. Plaintiff responds that the issues raised by Cordle reflect measurements taken by Plaintiff in an attempt to "check" the functioning of the MEM system. Plaintiff testified on deposition that he would "measur[e] a cylinder that [he] knew was good and what we had recently received . . . for [his] own purposes only." *Plaintiff's Depo.*, at 35. Nevertheless, Defendants maintain that such actions violated MEM procedure.

Plaintiff's employment was terminated following the two-week investigation based upon his alleged "failure to report when there was a problem with the instrument" and falsification of test results. *Lassiter Depo.*, at 33, 37, 44, 61. Plaintiff points out that the MEM unit was the

only one at the plant and was actually comprised of two original MEM machines built by Defendants. *See Mayer Depo.*, at 20. Mayer acknowledged on deposition that the MEM unit was experiencing a problem with the "high voltage multichannel analyzer" at the time Plaintiff's employment was terminated. *Id.*, at 24. According to Mayer, just before Plaintiff used the machine, technicians tried to fix it and "clean things up as best [we] could" but the unit would "occasionally . . . still kick out . . . ." *Id.*, at 24-25. Mayer also testified that, "[i]mmediately" after Plaintiff's termination, the unit continued to experience a "high voltage kicking out at least once [a day]." *Id.*, at 25. Within "a couple weeks," of Plaintiff's termination, it was determined that a new high voltage analyzer was necessary. *Id.*, at 25-26. Indeed, Johnny Rexroad, who operated the MEM unit after Plaintiff's termination, testified on deposition that he had experienced problems with the MEM unit "right after [Plaintiff] got fired." *Rexroad Depo.*, at 96.

At the time of his termination from employment, Plaintiff was the only person responsible for operating the MEM system at Defendants' plant. *Plaintiff's Depo.,* at 18. On deposition, Cordle testified that, from 1999-2005, Plaintiff logged nearly every reading obtained using the MEM unit. *Cordle Depo.*, at 26-27. Plaintiff alleges that, following his termination, he was replaced by Johnny Rexroad, a younger, lower salaried employee. Plaintiff was 49 years of age at the time his employment was terminated and he had worked 28 years for Defendants. Plaintiff would have qualified for early retirement had he worked an additional four months, to age 50. Had Plaintiff worked to age 53, he would have been entitled to immediate payment of pension benefits. *Deposition of Debra Brown*, at 11-12, 31. According to Plaintiff, his termination "saved [Defendants] $168,480 in pension benefits that [he] would have been eligible

to receive between the ages of 53 to 65." *Plaintiff's Memorandum contra,* Doc. No. 27, at 13.

Defendants moved for summary judgment on Plaintiff's claims. The Court granted Plaintiff's request to conduct additional discovery pursuant to Fed. R. Civ. P. 56(d) in connection with Plaintiff's request for the production of records, if any, regarding repairs to the MEM unit. *Opinion and Order,* Doc. No. 37. Defendants thereafter produced "additional records created by the MEM operators that describe the repeated malfunctioning of the MEM." *Supplemental Memorandum contra,* Doc. No. 38, at 17. According to Plaintiff, however, those records "shed no light on the technical cause of the malfunctioning and the maintenance and repair work that was done." *Id.*, at 17-18. Plaintiff maintains that raw data records as to the functioning of the MEM unit existed at one time and, to the extent that such records no longer exist, the destruction of those documents was a consequence of spoliation by Defendants. The Court will address this argument, *infra*, in the context of resolving Defendants' *Motion for Summary Judgment*.

II.

The standard for summary judgment is well established. This standard is found in Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). In making this determination, the evidence "must be viewed in the light most favorable" to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, 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). However, summary judgment is appropriate if the opposing party "fails to make a 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 Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The "mere existence of a scintilla of evidence in support of the [opposing party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252.

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record which demonstrate "the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56(e)). "Once the moving party has proved that no material facts exist, the non-moving party must do more than raise a metaphysical or conjectural doubt about issues requiring resolution at trial." *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

III.

A. Plaintiff's Claims for Age Discrimination under the ADEA and Ohio law.

Standard

Plaintiff's claims of age discrimination are brought pursuant to both the ADEA, 29 U.S.C. § 623(a), and the Ohio Revised Code, § 4112.02. Since the analysis of a claim under

Ohio law mirrors analysis under the ADEA, the Court will address the claims concurrently. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 357 (6th Cir. 1998) ("[u]nder Ohio law, the elements and burden of proof in a state age discrimination claim parallel the ADEA analysis") (citations omitted).

In order to succeed on his claim of age discrimination, Plaintiff must present either direct or circumstantial evidence of discrimination. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). In this case, Plaintiff bases his claim on circumstantial evidence of age discrimination. This claim is therefore appropriately analyzed using the familiar burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that analysis, a plaintiff must first establish a *prima facie* case of discrimination by showing: (1) that he is a member of a protected class, *i.e.*, that he is at least forty years of age; (2) that he was subject to an adverse employment action, in this case, the termination of his employment; (3) that he was qualified for the position; and (4) that he was replaced by someone outside the protected class or was treated differently than a similarly situated non-protected employee. *Badertscher v. Procter & Gamble Mfg. Co.*, 405 Fed. Appx. 996, 997 (6th Cir. 2011). Should the plaintiff establish a *prima facie* case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory explanation for the employee's discharge from employment. If such an explanation is advanced, the burden of proof thereupon returns to the plaintiff to show that the reason offered by the employer was a mere pretext for actual unlawful discrimination. *Mitchell v. Vanderbilt University*, 389 F.3d 177, 181 (6th Cir. 2004), citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Pretext may be established in one of three ways: (1) the stated reason offered by the

employer for the adverse employment action has no basis in fact; (2) the stated reason is insufficient to motivate the defendant employer's decision; or (3) the stated reason did not actually motivate the decision. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). The first two methods of establishing pretext essentially attack the credibility of the employer's proffered reason. *Id.* The third method admits that the articulated reason could have motivated the employer but argues that an illegal reason is more likely than the proffered reason to have actually motivated the employer. *Id.*

Where an employer can demonstrate an honest belief in its proffered reason for the adverse action, "the inference of pretext is not warranted." *Joostberns v. United Parcel Services, Inc.*, 166 Fed. Appx. 783, 791 (6th Cir. 2006), citing *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). In adopting the "honest belief rule," the United States Court of Appeals for the Sixth Circuit explained:

> Under the honest belief rule, an employer's proffered reason is considered honestly held where the employer can establish it "reasonably rel[ied] on particularized facts that were before it at the time the decision was made." Thereafter, the burden is on the plaintiff to demonstrate that the employer's belief was not honestly held. An employee's bare assertion that the employer's proferred reason has no basis in fact is insufficient to call an employer's honest belief into question, and fails to create a genuine issue of material fact.

Id. (internal citations omitted). The Sixth Circuit has elaborated on the issue of reasonable reliance:

> In determining whether an employer "reasonably relied on the particularized facts before it, we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." Although we will not "micro-

> manage the process used by employers in making their employment decisions," we also will not "blindly assume that an employer's description of its reasons is honest." Therefore, "[w]hen the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process 'unworthy of credence,' then any reliance placed by the employer in such a process cannot be said to be honestly held."

White v. Murray Guard, Inc., 455 F.3d 702, 708 (6th Cir. 2006), quoting *Smith*, 155 F.3d at 807-08.

Analysis

1. *Prima Facie* case

In this case, there is no dispute that Plaintiff satisfies the first three elements of his *prima facie* case. In particular, Plaintiff is a member of a protected class (over the age of forty), the termination of his employment constituted an adverse employment action and he was qualified for the position. With respect to the fourth element, however, Defendants argue that Plaintiff cannot show that he was replaced by a substantially younger individual or that he was treated differently than a similarly situated non-protected employee.

As Defendants observe, following Plaintiff's termination, the MEM unit was operated "primarily [by] Johnny Rexroad, who was an existing employee of [Defendants]." *Memorandum in Support of Motion for Summary Judgment*, Doc. No. 25, at 15. At the time of Plaintiff's termination, Rexroad was 35 years old and had been working at Defendants' plant for nine years. *See Rexroad Depo.*, at 12-13. Tony Bayes and Ted Garrett also operated the MEM unit in addition to Rexroad. *Cordle Depo.*, at 23; *Rexroad Depo.*, at 27.

Defendants argue that Plaintiff cannot establish the fourth element of his *prima facie*

case because the duty of operating the MEM unit was redistributed among several employees. Defendants rely on *Grubb v. YSK Corp.*, No. 2:08-CV-11, 2009 WL 3150344 (S.D. Ohio Sept. 30, 2009) (Watson, J.), in this regard. In *Grubb*, the plaintiff, who was 58 years old at the time he was terminated from employment, testified on deposition that he did not know who replaced him in his job duties as a shift supervisor at defendant's automobile parts manufacturing plant. Evidence established that a fellow shift supervisor absorbed plaintiff's duties for approximately six months after plaintiff's termination. There was no evidence, however, as to this individual's age. *Id.*, at *5. Under these circumstances, the Court concluded that Plaintiff had failed to establish the fourth element of a *prima facie* case of age discrimination.

In reaching this conclusion, the Court cited *Novotny v. Elsevier*, 291 Fed. Appx. 698, 702-03 (6th Cir. 2008), in which a fellow employee had assumed the plaintiff's duties in addition to his own duties. The Sixth Circuit held that "a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Id.*

This Court concludes that *Novotny* is inapposite to the facts of this case. Here, there is no evidence that Plaintiff's duties in operating the MEM unit were assumed by another employee in addition to that other employee's original duties. Furthermore, contrary to Defendants' argument, the evidence does not demonstrate that Plaintiffs' duties were redistributed among other existing employees.

In this case, Plaintiff expressly contends that he was replaced by a substantially younger employee, Johnny Rexroad, who was 35 years old at the time that he assumed Plaintiff's job duties in 2005. Rexroad testified on deposition that, prior to Plaintiff's termination, he operated

the MEM unit only when Plaintiff was absent from work. *Rexroad Depo.*, at 18. After Plaintiff's termination, Rexroad operated the MEM unit until the end of 2005, with the exception of one date. *Id.* at 26-27. From January to June 2006, Rexroad operated the MEM unit except on five dates when the unit was operated by Ted Garrett. *Id.* at 27-28. This evidence supports Plaintiff's contention that, following his termination, he was replaced by a substantially younger employee. Although Rexroad was not the only employee who operated the MEM unit following Plaintiff's termination, the evidence in this case simply does not support Defendants' argument that the work was redistributed among a number of employees. In short, the Court finds Defendants' reliance on *Grubb* misplaced. Accordingly, the Court concludes that Plaintiff has established the fourth element of a *prima facie* case of age discrimination.[3]

2. Proffered reason for adverse employment action

The burden of production now shifts to Defendants to offer a legitimate, nondiscriminatory reason for the adverse employment action. In this regard, Defendants assert that Plaintiff was terminated from employment for falsifying the MEM reading on June 27, 2005. Defendants also contend that, based on their investigation of the matter, they held an honest belief that Plaintiff had falsified the MEM reading. This articulation qualifies as a legitimate, nondiscriminatory reason for the termination of Plaintiff's employment and satisfies Defendants' burden of production. In order to succeed on his claim of discrimination, then, Plaintiff must establish that this proffered reason for his termination was merely a pretext for actual unlawful

[3]The Court notes that the United States Supreme Court has held that the burden of establishing a *prima facie* case is "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253. Furthermore, in light of the Court's finding that Plaintiff has come forward with sufficient evidence to show that he was replaced by a substantially younger employee, the Court need not address Defendants' alternative argument that Plaintiff cannot show that he was treated differently than a similarly situated employee outside the protected class.

discrimination. *See Burdine*, 450 U.S. at 453.

3. Pretext

As the Sixth Circuit has explained, "[a]t the summary judgment stage, the [pretext] issue is whether plaintiff has produced evidence from which a jury could reasonably doubt the employer's explanation." *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009). In the case presently before the Court, Plaintiff mounts an attack on the credibility of the employer's stated reason for Plaintiff's termination.

Plaintiff expressly denies that he fabricated the cylinder reading obtained from the MEM unit on June 27, 2005 and suggests that Defendants had a "motivation to distort the truth" in this regard. *Plaintiff's Memorandum contra*, Doc. No. 27, at 16. In support of this contention, Plaintiff points to the testimony of William Reep, Employee Concerns Program Manager for Defendants. Reep was involved in another investigation, "fact gathering," conducted after Plaintiff's termination and after Rexroad had also reported a problem with the MEM unit. *Deposition of William Reep*, at 21, 23 [hereinafter "*Reep Depo*."]. Rexroad had reported the problem in an email:

> On July 26, 2005 at approximately 1330, the MEM system crashed or failed to save the information. Instead of giving me a report, it gave me an error message. I contacted my immediate supervisor along with two SME, subject matter experts. I had Keith Wines, who is one of our engineers/SMEs to go with me and give his expert opinion on what happened. He said that it was the same thing that happened to [Plaintiff] except I didn't get a result and Bill did. After Keith Wines looked at the MEM system and determined it to be a computer error, Keith and I reran the measurement and the system seemed to work normal [*sic*]. It gave us a result.

Rexroad Depo., at 105-06. In investigating this incident, Reep consulted the two subject matter experts, observed Rexroad operate the MEM unit and reviewed Lassiter's documentation. *Reep*

Depo., at 21, 23. Reep ultimately concluded that there was "nothing that would cause me to recommend . . . that the decision [to terminate Plaintiff] be rescinded." *Id.*, at 24. In the incident involving Rexroad, Reep testified, it was clear that Rexroad had actually performed a measurement "because they could find the spectrum. . . ." *Id.*, at 35. In the incident involving Plaintiff, by contrast, "there was no spectrum . . . on the cylinder that [Plaintiff] said he measured." *Id.* Had there been a spectrum file on Plaintiff's cylinder, "it would have made a difference" to Reep. *Id.* at 37. However, Reep also testified that he was not aware of the extent to which the MEM unit had presented problems prior to Plaintiff's termination. *Id.*, at 38-39. Had he known the extent of those problems, he "probably would have questioned" the decision to terminate Plaintiff's employment. *Id.* at 39.

Based on this testimony, Plaintiff argues that there exists "more than adequate evidence . . . upon which a jury could rely to believe that [Defendants] . . . used a glitch in [the MEM] machinery as a pretext to falsely accuse [Plaintiff] of falsifying documents . . . ." *Plaintiff's Memorandum contra*, at 17. Plaintiff further argues that Reep's testimony also calls into question whether Defendants could have held an "honest belief" that Plaintiff falsified the MEM reading. *Plaintiff's Supplemental Memorandum contra*, Doc. No. 38, at 16.

The Court disagrees. The fact that Reep was unaware of the extent to which the MEM unit had presented problems does not give rise to a genuine issue of material fact on the issue of pretext. It is clear from Reep's testimony that the critical distinction between the incidents involving Plaintiff and Rexroad was that, in Plaintiff's case, a spectrum file could not be identified – a fact that suggested that Plaintiff had falsified his report.

Moreover, Reep's testimony also supports Defendants' assertion that they held an honest

belief in the basis for the termination of Plaintiff's employment. Plaintiff has come forward with no evidence that Defendants failed to make a reasonably informed and considered investigation and decision in connection with the termination of Plaintiff's employment. As previously noted, when an employer is able to demonstrate an "honest belief" in the proffered reason for the adverse action, "the inference of pretext is not warranted." *Joostberns v. United Parcel Services, Inc.*, 166 Fed. Appx. at 791, citing *Smith v. Chrysler Corp.*, 155 F.3d 806.

Plaintiff attempts to blame Defendants for this lack of evidence. According to Plaintiff, "records regarding the specific nature of the repair work done to the MEM, the maintenance required to be performed, the technical issues that were addressed, and the repair personnel's comments about the adequacy of repairs" would "refute [Defendants'] assertion that the MEM could not have malfunctioned in the manner described by [Plaintiff]." *Plaintiff's Supplemental Memorandum contra*, at 17. Although Defendants "produced additional records created by the MEM operators that describe the repeated malfunctioning of the MEM," those records "shed no light on the technical cause of the malfunctioning and the maintenance and repair work that was done." *Id.*, at 17-18. According to Plaintiff, records containing the specific information sought by Plaintiff existed "at one time." *Id.*, at 18. Plaintiff posits that Defendants must have destroyed those records and suggests that "the proper remedy in this case is to assess liability" against Defendants based upon spoliation of evidence. *Id.*, at 19.

Spoliation "is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 2009) (citation omitted). A federal district court may "impose many different kinds of sanctions for spoliated evidence,

including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence." *Adkins v. Wolever*, 554 F.3d 650, 653 (6th Cir. 2009) (citation omitted). A district court has broad discretion in conducting "the fact-intensive inquiry into a party's degree of fault . . . ." *Id.* As the Sixth Circuit has observed, "the authority to impose sanctions for spoliated evidence arises . . . 'from a court's inherent power to control the judicial process.'" *Id.* at 652, quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

Defendants deny spoliation or the improper destruction of records. They represent that, in response to this Court's directive, *see Opinion and Order*, Doc. No. 37, they "searched again for all records, specifically 'raw data' related to the MEM machine . . . [and] produced a CD containing approximately 1447 documents." *Defendants' Motion to Strike*, Doc. No. 39, at 5; *see also Affidavit of Pamela Jo Sprouse*, at ¶ 14, attached as Exhibit A [hereinafter "*Sprouse Affidavit*"]. Defendants represent that they have produced to Plaintiff all available maintenance and repair records related to the MEM unit. *Id.*

Defendants argue that Plaintiff's insistence that additional records regarding the MEM unit must exist is premised on a "fundamental misunderstanding of the operation of the operation of the MEM unit and/or the documents generated therefrom." *Motion to Strike*, at 8. As Defendants point out, engineer Keith Wines testified on deposition that he did not know whether records regarding the MEM's malfunction, other than the field data sheets (which Defendants have produced), exist. *Deposition of Keith Wines.*, at 67. Although Sprouse testified on deposition that certain records as to the MEM's malfunctioning could be included in "raw data," *Deposition of Pamela Jo Sprouse*, at 27, she explains in her affidavit that, at the time of her

deposition, she was unaware that "a majority of the 'raw data' . . . had been previously produced to Plaintiff." *Sprouse Affidavit*, at ¶ 15. "Other than quality control records and the 'raw data,' which have been produced, I am aware of no other 'maintenance or repair records' for the MEM unit." *Id.*, at ¶ 16.

It therefore appears that Defendants have produced to Plaintiff all maintenance and repair records for the MEM unit. Other than his own rank speculation, Plaintiff has offered no basis upon which to conclude that Defendants engaged in the improper destruction of evidence. Thus, to the extent Plaintiff seeks to impose liability on Defendants based on spoliation of evidence, Plaintiff's request is denied.

Because Defendants have articulated a legitimate, nondiscriminatory reason for the termination of Plaintiff's employment, and because Plaintiff has not established that the reason offered by Defendants was mere pretext for actual unlawful age discrimination, the Court concludes that Defendants are entitled to summary judgment on Plaintiff's federal and state law claims of age discrimination.

B. Remaining State Law Claims.

In addition to his federal and state law age discrimination claims, Plaintiff asserts claims for negligent and intentional infliction of emotional distress, breach of employment contract and violation of Ohio's public policy. The Court notes that, in opposing Defendants' *Motion for Summary Judgment*, Plaintiff makes no argument in support of the claims of breach of employment contract and violation of public policy. Thus, the Court views these claims as having been abandoned by Plaintiff. The Court now considers whether Plaintiff's claims for negligent and intentional infliction of emotional distress survive Defendants' *Motion for*

Summary Judgment.

As Defendants point out, Ohio law does not recognize a cause of action for negligent infliction of emotional distress in the employment context. *See Hatlestad v. Consolidated Rail Corp.*, 75 Ohio App.3d 184, 191 (1991). Thus, Plaintiff's claim for negligent infliction of emotional distress must necessarily fail.

Under Ohio law, liability on a claim of intentional infliction of emotional distress "has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20,* 6 Ohio St.3d 369, 374-75 (1983). Plaintiff must also show that he has suffered "serious emotional harm in order to prove a claim of intentional infliction of emotional distress." *Francis v. Gaylord Container Corp.*, 837 F.Supp. 858, 864 (S.D. Ohio 1992) (Beckwith, J.).

Plaintiff argues that the termination of his employment amounts to extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress. The Court finds the evidence in this case insufficient to support such a claim. As the Sixth Circuit has held, "an employee's termination, even if based on discrimination, does not rise to the level of 'extreme and outrageous conduct' without proof of something more. If such were not true, then every discrimination claim would simultaneously become a cause of action for the intentional infliction of emotional distress." *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 375 (6th Cir. 1999) (citation omitted).

In this case, Plaintiff has failed to establish even a claim of age discrimination, much less the "something more" required to support a claim for the intentional infliction of emotional

distress under Ohio law. Thus, the Court concludes that the Defendants are entitled to summary judgment on this claim as well.

IV.

WHEREUPON, Defendants' *Motion for Summary Judgment*, **Doc. Nos. 24 and 25**, is **GRANTED**. Defendants' *Motion to Strike*, **Doc. No. 39**, is **DENIED**. This action is **DISMISSED**.

The Clerk is **DIRECTED** to enter **FINAL JUDGMENT.**.

July 5, 2011
DATE

s/ Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE