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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael J. Wehrli,)	No. CV-12-1309-PHX-DKD
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
Tempe Union High School District, et al.,)	
)	
Defendants.)	
)	

Pending before the Court is Defendant Tempe Union High School District’s (TUSD) Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 on Plaintiff Michael J. Wehrli’s age discrimination claim (Doc. 45). Wehrli claims that TUSD discriminated against him on the basis of age in violation of Title VII, the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1). The parties have agreed to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). The Court concludes that Wehrli has failed to establish a *prima facie* case of discrimination under the *McDonnell Douglas* standard, and therefore grants Defendant’s Motion for Summary Judgment.

I. BACKGROUND

Wehrli was born on July 13, 1942 (Doc. 46, DSOF ¶ 1). He was hired by TUSD in 1977 to teach high school English at Corona del Sol High School (*Id.*, ¶ 2). In early 2009, when Wehrli was age 66, he received an unfavorable performance evaluation which led to his placement on a performance growth plan (*Id.*, Exh 2:B-C). Wehrli alleged that the evaluation was based on age discrimination and pursued TUSD’s grievance process (*Id.*, Exh 3:B). After

1 the Governing Board decided not to hear Wehrli's grievance, Wehrli requested to be released
2 from his contract for the 2009-2010 school year and elected to retire (*Id.*, Exh 3, ¶¶ 14, 17; Exh
3 L).

4 A. The Short Form Evaluation

5 The Arizona Department of Education has specific curriculum requirements, and TUSD
6 has developed curriculum maps to ensure that its courses meet these requirements (DSOF, Exh
7 2, ¶ 6). All teachers are required to follow the curriculum maps, and evaluators use these maps
8 in their determinations of teacher competency (*Id.*, ¶¶ 6-7). The first step of the evaluation
9 process is the short form evaluation, which includes a 20-minute observation and a post-
10 conference (*Id.*, Exh 2:A at 6). If the short form evaluation indicates that the teacher meets
11 expectations, then the process is complete (*Id.*, Exh 2, ¶ 4). If not, then the process proceeds
12 to the long form evaluation, which includes an observation of an entire classroom period, a post-
13 conference, and a professional growth plan (*Id.*, Exh 2:A at 5).

14 On January 9, 2009, Susan Edwards, principal of Corona del Sol High School, performed
15 Wehrli's short form evaluation (*Id.*, Exh 2, ¶¶ 2, 7). The evaluation indicated deficiencies in
16 planning instruction to meet objectives; utilizing effective instructional strategies; presenting
17 subject matter in a clear, logical way; providing a positive learning environment; and complying
18 with Arizona statutes and District policies (*Id.*). On February 6, 2009, Edwards discussed
19 Wehrli's performance with him (*Id.*, ¶ 8).

20 Wehrli's previous evaluators had made similar indications about his performance, though
21 the evaluations were not as severe and did not result in placement on a professional growth plan
22 (*Id.*, Exh 3:E). Throughout his decades of teaching, previous evaluators recommended less
23 lecturing, more graded assignments and written feedback, better organization and preparation,
24 following the department curriculum guidelines, refraining from using inappropriate language,
25 and discontinuing use of handwritten handouts (*Id.*).

1 B. The Long Form Evaluation

2 The 2009 short form evaluation led to the long form evaluation, which showed
3 deficiencies in utilizing effective instructional strategies; presenting subject matter in a clear,
4 precise, logical and coherent way; and planning instruction to meet objectives (DSOF, Exh 2,
5 ¶ 8). Edwards prepared a professional growth plan, and on February 18, 2009, she discussed
6 it with Wehrli (*Id.*, ¶¶ 9-10). The professional growth plan included requirements that Wehrli
7 begin to use organized lesson plans, post grades online, use acceptable and clear communication
8 with students, and increase student interaction (*Id.*, Exh 2:C).

9 In accordance with TUSD policy, the unfavorable evaluation also put Wehrli on
10 Preliminary Notice of Inadequate Classroom Performance, informing him that he had 85
11 instructional days to remedy his deficiencies (Exh 2, ¶¶ 11-12; Exh 2:D). Wehrli returned a
12 written response to the evaluation to TUSD (Exh 2, ¶ 10). In the written response, Wehrli stated
13 that the evaluation discriminated against him because of his age. In support of this allegation,
14 he noted that practices he used when he began teaching thirty years ago, such as handwritten
15 handouts and certain research paper assignments, are now unacceptable (Exh 3:C). Wehrli's
16 four-page "Teacher Response" included the statements, "Are you kidding me?", "Get Real!",
17 and his descriptions of the professional growth plan as "moronic" and "pathetic" (Exh 3:C).
18 Though Wehrli's response denied the need for improvement, he acknowledged in his deposition
19 that he had not been doing many of the duties that Edwards detailed in the professional growth
20 plan (Exh 1:21-23, 42-47). He also started to comply with the performance improvement plan
21 following his post-conference with Edwards, (*Id.*, 42:18-47:11). Wehrli was offered and
22 accepted a contract to continue teaching at Corona del Sol for the following year (DSOF, ¶ 31).

23 C. The Grievance Process

24 On April 21, 2009, in addition to his written response, Wehrli also submitted a formal
25 grievance (DSOF, Exh 2, ¶ 13). In the grievance, Wehrli alleged that the performance
26 evaluation was based on age discrimination because he had never before received three
27 "Improvement Required" designations and that the evaluation was intended to create a hostile
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1 work environment (*Id.*, Exh 3:C). TUSD alleges that a grievance was not the proper avenue for
2 an age discrimination claim (*Id.*, Exh 3, ¶ 8). TUSD Policy GBA states that TUSD prohibits
3 discrimination based on age and other protected categories, but policy GBA-R procedures only
4 cover gender, race, color, religion, national origin, or disability; age is not included (*Id.*, Exh
5 3:D).

6 The first step of the grievance procedure is presented to the first level administrator or
7 supervisor, who in this case was Edwards (*Id.*, Exh 3:B). On May 1, Edwards responded to
8 Wehrli's grievance, finding that it was without merit, but she did not directly address the issue
9 of age discrimination (*Id.*, Exh 3:F). Edwards' response was not returned until after the TUSD
10 deadline (*Id.*, Exh 3:H). Wehrli pursued the grievance to the second step, which went to Steve
11 Adolph, TUSD Superintendent (*Id.*). On May 27, Adolph responded and did directly address
12 Wehrli's accusation of age discrimination, but still found that his grievance was without merit
13 (*Id.*). Wehrli then pursued the grievance to the final step with the Governing Board (*Id.*, Exh
14 3:I). The Governing Board scheduled a time to address Wehrli's grievance on their June 17,
15 2009 agenda (*Id.*, Exh 3:J). However, at the meeting, Wehrli was told that the board would not
16 address his grievance because Edwards had persuaded them that it might interfere with their
17 ability to address his performance in the future if necessary (*Id.*, Exh 3, ¶ 14).

18 When Wehrli first filed his grievance, Janet Seegren, the Assistant Superintendent of
19 Human Resources for TUSD, conducted an investigation (*Id.*, ¶ 7). She found that Edwards had
20 properly followed the evaluation process, that eight teachers had received preliminary notices
21 of inadequacy of classroom performance and four were under the age of 40, and that no age
22 discrimination had occurred (*Id.*, ¶¶ 9-11). The day after the Governing Board refused to see
23 Wehrli, Seegren sent him a letter informing him that she would be serving as the Compliance
24 Officer and requested an interview (*Id.*, ¶ 15). Wehrli did not respond (*Id.*).

25 On June 22, 2009, Wehrli submitted a letter to the Governing Board requesting a release
26 from his contract so that he could retire, which was approved (*Id.*, Exh 3:L).

1 **II. SUMMARY JUDGMENT**

2 A. Legal Standard

3 TUSD contends that Wehrli has failed to establish a *prima facie* case of discrimination
4 by either direct or circumstantial evidence. For TUSD to prevail on its Motion for Summary
5 Judgment, it must show that there are no genuine issues of material fact and that it is entitled
6 to judgment as a matter of law. Fed. R. Civ. P. 56(c). A material fact is one “that might affect
7 the outcome of the suit under the governing law. . . .” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
8 242, 248 (1986). A dispute is genuine “if the evidence is such that a reasonable jury could
9 return a verdict for the non-moving party.” *Id.* The court must draw all reasonable inferences
10 in favor of the non-moving party. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

11 Wehrli’s complaint arises under the Age Discrimination in Employment Act (ADEA),
12 29 U.S.C. § 621 et seq. A plaintiff can demonstrate impermissible discrimination by presenting
13 direct evidence of discrimination or by presenting circumstantial evidence which satisfies the
14 burden-shifting test set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Plaintiff
15 appears to concede that there is no direct evidence of discrimination by his argument in his
16 Response that he has satisfied the test set forth in *McDonnell Douglas*.¹ Under *McDonnell*
17 *Douglas*, Wehrli must first establish a *prima facie* case of discrimination. *Id.* at 802. In
18 particular, he must show that (1) he belongs to a protected class, (2) he suffered an adverse
19 employment action, (3) he was performing his job satisfactorily, and (4) he was either replaced
20 by a substantially younger employee with equal or inferior qualifications or he was discharged
21 under circumstances otherwise “giving rise to an inference of age discrimination.” *Diaz v.*

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24 ¹ The Court sustains Defendant’s Foundation Objections (Doc. 54 at ¶ 49) to Plaintiff’s
25 Affidavit of Carol Payant with respect to ¶¶ 14,16 of her Affidavit. No foundation exists given
26 that the declarant “retired [from the school district] in 2001 and taught 2/5 time another five
27 years.” Affidavit of Carol Payant , ¶2 (Doc. 51-1). Her foundation for any personal knowledge
28 thus concluded in 2006 and Plaintiff alleges that he “was subjected in 2009 to age
discrimination.” Affidavit of Michael J. Wehrli, ¶ 1 (Doc. 52-1).

1 *Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1207 (9th Cir. 2008) (quoting *Coleman v.*
2 *Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000)).

3 If Wehrli succeeds in establishing a *prima facie* case, the burden of production shifts to
4 TUSD to articulate a legitimate, nondiscriminatory reason for the adverse employment action.
5 *Aragon v. Republic Silver State Disposal*, 292 F.3d 654, 658 (9th Cir. 2002) (quoting *McDonnell*
6 *Douglas*, 411 U.S. at 802 (1973)). If TUSD states a legitimate, nondiscriminatory reason,
7 Wehrli must demonstrate that TUSD’s articulated reason is a pretext for unlawful discrimination
8 by “either directly persuading the court that a discriminatory reason more likely motivated the
9 employer or indirectly by showing that the employer’s proffered explanation is unworthy of
10 credence.” *Aragon*, 292 F.3d at 658-59 (quoting *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115,
11 1124 (9th Cir. 2000)). However, Wehrli’s evidence must be both specific and substantial to
12 overcome the legitimate reasons put forth by TUSD. *Id.* at 659. If Wehrli demonstrates pretext,
13 “then the burden-shifting framework disappears, and the only remaining issue is ‘discrimination
14 vel non.’” *Id.* (quoting *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000)).

15 1. Wehrli Belonged to a Protected Class.

16 The ADEA protects individuals who are at least 40 years of age. 29 U.S.C. § 631.
17 Wehrli was born on July 13, 1942 (DSOF, ¶ 1). The alleged adverse employment action took
18 place in the spring and early summer of 2009, at which time Wehrli was 66 years old (*Id.*, ¶¶
19 9-30). Therefore, Wehrli is a member of a protected class.

20 2. Whether Wehrli Suffered an Adverse Employment Action.

21 Defendant’s Motion for Summary Judgment contends that Plaintiff fails to establish a
22 *prima facie* case given that he did not experience an adverse employment action. Plaintiff
23 counters that the negative evaluation and performance plan were adverse employment actions.
24 Defendant argues that the Ninth Circuit has not determined that such actions constitute an
25 adverse employment action. The Supreme Court has defined an adverse employment action as
26 “a significant change in employment status such as hiring, firing, failing to promote,
27 reassignment with significantly different responsibilities, or a decision causing a significant
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1 change in benefits.” *Burlington Industries v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 2268
2 (1998). Plaintiff alleged no such adverse actions here. However, the Ninth Circuit has
3 “define[d] ‘adverse employment action’ broadly.” *Fonseca v. Sysco Food Services of Arizona,*
4 *Inc.*, 374 F.3d 840, 847 (9th Cir. 2004). The Circuit has further stated that “undeserved
5 performance ratings” can constitute adverse employment action. However, the cases applying
6 this proposition concern *retaliation* claims which connote a different meaning² than the meaning
7 in the *prima facie* analysis applied here in a case alleging age discrimination. *Yartzoff v.*
8 *Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *Brooks v. City of San Mateo*, 229 F.3d 917, 928-
9 29 (9th Cir. 2000). *But see Kortan v. California Youth Authority*, 217 F.3d 1104, 1112-13 (9th
10 Cir. 2000) and *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002) where mediocre
11 employment evaluations in the absence of additional tangible change in conditions of
12 employment did not constitute adverse employment action.

13 While the Ninth Circuit has not specifically addressed whether a performance plan can
14 constitute an adverse employment action, other circuits have concluded that such plans are not
15 sufficient to satisfy a plaintiff’s *prima facie* burden. *Haynes v. Level 3 Communications, LLC*,
16 456 F.3d 1215, 1224 (7th Cir. 2006) (“Most courts that have considered whether a [performance
17 improvement plan], standing alone, is an adverse employment action have found it is not.”)
18 (citing *Givens v. Cingular Wireless*, 396 F.3d 998 (8th Cir. 2005), *Taylor v. Small*, 350 F.3d
19 1286,1293 (D.C. Cir. 2003), and *Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir. 2002)). The
20 Court finds the other circuits’ holdings to be consistent with the Supreme Court’s definition of
21 an adverse employment action. Plaintiff’s performance plan did not result in an adverse
22 employment action “such as hiring, firing, failing to promote, reassignment with significantly
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24 ² The *prima facie* elements of a retaliation claim are: 1) the employee’s involvement in
25 a protected activity; 2) an adverse employment action; and 3) a casual link between the two.
26 *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002). In the retaliation
27 context, an adverse employment action is “any adverse treatment that is based on a retaliatory
28 motive and is reasonably likely to deter the charging party or others from engaging in protected
activity.” *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000).

1 different responsibilities, or a decision causing a significant change in benefits.” *Burlington*
2 *Industries*, 524 U.S. at 761, 118 S.Ct. at 2268. Indeed, Plaintiff was offered a renewal of his
3 employment contract for the following year notwithstanding the existence of his performance
4 plan.

5 Wehrli contends that he was constructively terminated by the failure of the Governing
6 Board to consider his grievance. Wehrli states in his Response that “[w]hile plaintiff was
7 offered a new contract for the coming year, to not have his administrative claim reviewed which
8 would have had the effect of setting aside the adverse evaluation regardless of the reasons why,
9 and leave him working under the disability of an unresolved adverse evaluation would be
10 professionally oppressive.” Response at pp. 7-9 (Doc. 51).

11 According to the Ninth Circuit:

12 ‘constructive discharge occurs when the working conditions
13 deteriorate, as a result of discrimination, to the point that they
14 become sufficiently extraordinary and egregious to overcome the
15 normal motivation of a competent, diligent, and reasonable
16 employee to remain on the job to earn a livelihood and to serve his
17 or her employer’ We set the bar high for a claim of
constructive discharge because federal antidiscrimination policies
are better served when the employee and employer attack
discrimination within their existing employment relationship, rather
than when the employee walks away and then later litigates
whether his employment situation was tolerable.

18 *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007) (quoting *Brooks v. City of San Mateo*, 229
19 F.3d 917, 930 (9th Cir. 2000)) (citing *Thorne v. City of El Segundo*, 802 F.2d 1131, 1134 (9th Cir.
20 1986); *Tidwell v. Meyer’s Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996) (“An employee who
21 quits without giving his employer a reasonable chance to work out a problem has not been
22 constructively discharged.”).

23 Here, Wehrli contends that he did attempt to work out the problem with TUSD. He
24 started to comply with the performance improvement plan following his post-conference with
25 Edwards, (DSOF, Exh 1, 42:18-47:11); he prepared a written response to his evaluation, in
26 accordance with TUSD policy, (*Id.*, Exh 2, ¶ 10); and he submitted a grievance and attempted
27 to see it through to its final stage, where he would have addressed the Governing Board (*Id.*, ¶
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1 13; Exh 3, ¶¶ 12, 14; Exh G; Exh I). However, Wehrli contends he was prevented from
2 completing the final stage when Edwards persuaded the Governing Board not to address his
3 grievance (*Id.*, Exh 3, ¶ 14; Exh J). TUSD argues that it would have been improper for the
4 Governing Board to address the grievance and that Wehrli did not properly report his claim of
5 age discrimination. Regardless of whether Wehrli was prevented from presenting his grievance
6 to the Governing Board, it cannot be said that he has met the Ninth Circuit standard for a
7 constructive discharge, just as it cannot be said that he suffered an adverse employment action,
8 given that his contract was renewed with no change in pay or benefits, job responsibilities or
9 status. The ADEA does not create liability for employers who identify areas for improvement
10 and put in place a mechanism to accomplish this task. Whether Plaintiff thought the criticisms
11 and plan were “moronic” or “pathetic,” Plaintiff was directed to pursue this plan and he suffered
12 no adverse employment action pursuant to the plan nor a constructive discharge when he
13 requested that he be released from his contract.

14 The absence of any single element of the required *prima facie* case is sufficient grounds
15 to grant Defendant’s Motion for Summary Judgment and thus the Court need not address the
16 other elements of a *prima facie* case.

17 Because Wehrli has not established a *prima facie* case of age discrimination, steps two
18 and three of the *McDonnell Douglas* standard also need not be addressed.

19 **IT IS ORDERED GRANTING** Defendant Tempe Union High School District’s Motion
20 for Summary Judgment (Doc. 45). The Clerk is directed to enter Judgment in favor of
21 Defendants.

22 DATED this 24th day of March, 2014.

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25 _____
26 David K. Duncan
27 United States Magistrate Judge
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