UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CARL GROENEWEGEN,	:	NO. 1:08-CV-00885
Plaintiff,	:	
v.	:	**OPINION AND ORDER**
JOHNSONDIVERSY, INC.,	:	
Defendant.	:	

This matter is before the Court on Defendant's Motion for Summary Judgment (doc. 23), Plaintiff's Response in Opposition (doc. 33), and Defendant's Reply (doc. 35). For the reasons indicated herein, the Court DENIES Defendant's motion.

I. Background

Plaintiff, an employee of Defendant for over twenty-five years, alleges that Defendant terminated him in 2008 due to his age, 52, and in retaliation for his having delivered a statement to Defendant's human resources department expressing concern he was being targeted for termination due to his age (doc. 33). Defendant contends it terminated Plaintiff for insubordination and for failing to report a safety incident to his supervisor while he was on a performance improvement plan (doc. 23). The general facts of this matter follow:

Defendant JohnsonDiversey Inc., ("JDI"), produces and sells commercial cleaning products and services, with a facility in Sharonville, Ohio (doc. 33). The facility during the relevant

time-frame consisted of two divisions with separate business operations, the "Food and Beverage side," and the "Dubois" side (Id.). In 2008 Plaintiff worked as Defendant JDI's Food and Beverage "Platform Leader" in charge of managing the "Closure project," a technology JDI marketed using chlorine dioxide gas for disinfection and sanitation in the food and beverage industry (Id.)[1].

On April 4, 2008, a former JDI employee, Jeff Berresford, left Plaintiff a voice message requesting a meeting to present a new technology Berresford thought might be of interest to JDI (Id.). After Plaintiff had circulated an email asking his colleagues whether they would be interested in meeting with Berresford, one email recipient responded that some employees might be hesitant to meet with Berresford in person (Id.). As a result of such response, Plaintiff called his supervisor Cindy Baerman to ask if JDI had a "policy" against Berresford returning to the facility (Id.). Baerman responded that although there was no policy, Plaintiff could put Berresford in touch with the JDI employee in Wisconsin who had responsibility for evaluating new technologies, and that Plaintiff could meet Berresford for lunch off-site (Id.).

[1]Because chlorine dioxide gas can be fatal at high levels, "Closure" involves safety risks. JDI promoted "Closure" as a safe application with the tagline, "safe, secure, and simple" (doc. 23).

Unbeknownst to Plaintiff, JDI had terminated Berresford in 2005 for having submitting a fraudulent expense report, allegedly to obtain money he needed after a cocaine binge, and for having hard-core pornography on his company-issued computer (doc. 23). In fact, due to safety concerns, when Baerman terminated Berresford, she deliberately did so off-site (Id.). However, unbeknownst to Baerman, Berresford had been on-site at JDI numerous times following his termination, principally to pick up his mail for some six months (doc. 33).

According to Plaintiff, he intended to meet Berresford for lunch on April 17, 2008 for lunch off-site in accordance with Baerman's directive (Id.). However, Plaintiff learned that Berresford had contacted another JDI employee—-on the DuBois side of the facility-- Bill Frisz, who obtained permission from his superior for an onsite meeting on April 17 on the DuBois side (Id.). Plaintiff claims that on such date he went to meet Berresford to take him off-site to lunch, while Berresford's meeting with Frisz continued (Id.). According to Plaintiff, he therefore sat in on the meeting until it concluded, then observed a demonstration by Berresford in the Food and Beverage lab, after which he took Berresford out to lunch (Id.).

When Baerman learned that Berresford had been on-site with Plaintiff, she viewed it as direct insubordination in view of her order to Plaintiff not to meet with Berresford on-site (doc.

23). She considered terminating Plaintiff, but instead, in May 2008, put Plaintiff on a performance improvement plan ("PIP") (Id.). Under such plan, Plaintiff was required to keep her informed about all matters related to the Closure Project that he managed (Id.).

In response to Baerman's actions, which Plaintiff viewed as overblown in the light of his long history with the company and positive evaluations, in early June 2008, Plaintiff sent a draft letter and later an amended letter to his human resources manager, Dana Bryan (doc. 33). In the amended letter Plaintiff expressed his concern that the Berreford incident was "a tactic to 'create' a 'cause' for dismissal. . .[as his] current income level and [his] age would make [him] vulnerable" (Id.).

On June 2, 2008, a JDI customer Case Farms reported back to Plaintiff that it experienced a leak of chlorous acid (Id.). Later, on June 6, 2008, Plaintiff learned that two Case Farms employees had to seek medical attention after exposure to chlorine dioxide gas (Id.). Although Plaintiff mentioned the chlorous acid leak at Case Farms and the presence of chlorine dioxide gas in written reports, such reports to Baerman did not indicate that two Case Farms employees had sought emergency medical attention (Id.). According to Plaintiff he mentioned this fact in June 12, 2008 meeting at which Baerman was present, but she left early and missed his disclosure (Id.). As such, he indicates he asked another

employee, Anil Sharma, to convey such information to Baerman (Id.). Plaintiff indicates Sharma, who directly reported to Baerman, told Plaintiff he would tell Baerman the next day about the Case Farms employees (Id.). However, Sharma did not communicate about the issue with Baerman for four days (Id.).

On June 16, Baerman responded to Sharma that she heard of the incident third-hand, but was wondering when Plaintiff would tell her about it (doc. 23). In her view, Plaintiff was hiding the information from her, and this served as a basis for his termination, as his PIP required that Plaintiff keep Baerman informed about all matters related to the Closure Project (Id.). After Plaintiff returned from his vacation on June 30, 2008, Baerman terminated his employment (Id.). According to Defendant, JDI replaced Plaintiff with Chris Brink, age 46, and six out of seven of Baerman's directly reporting employees were over the age of 40 (Id.). Ultimately, Defendant also terminated Baerman, in October 2008 (Id.).

On December 23, 2008, Plaintiff filed his Complaint in this matter bringing state claims for age discrimination and retaliation as well as a claim for violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (doc. 1). Defendant filed its motion for summary judgment on March 1, 2010, contending the Court should dismiss all of Plaintiff's claims as there is no genuine dispute of material fact and it is entitled to

judgment as a matter of law (doc. 23). In his briefing, Plaintiff concedes summary judgment on his ERISA claim, such that only the age discrimination and retaliation claims are now at issue (doc. 33).

II. Applicable Legal Standard

Although a grant of summary judgment is not a substitute for trial, it is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; see also, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993); Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs., 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). In reviewing the instant motion, "this Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Patton v. Bearden, 8 F.3d 343, 346 (6th Cir. 1993), quoting in part Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986) (internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the

movant and the non-movant are well settled. First, "a party seeking summary judgment ... bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact [.]" Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); see also LaPointe, 8 F.3d at 378; Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir. 1992); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. See Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A., 12 F.3d 1382, 1389 (6th Cir. 1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. See Celotex, 477 U.S. at 317; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). As the "requirement [of the Rule] is that there be no genuine issue of material fact," an "alleged factual dispute between the parties" as to some ancillary matter "will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-248 (emphasis added);

see generally Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir. 1989). Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 252; see also Gregory v. Hunt, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 339-340 (6th Cir. 1993); see also Celotex, 477 U.S. at 324; Guarino, 980 F.2d at 405.

Although the non-movant need not cite specific page numbers of the record in support of its claims or defenses, "the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." Guarino, 980 F.2d at 405, quoting Inter-Royal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989) (internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. See McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 (6th Cir. 1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. See Matsushita Elec. Indus. Co.

v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); United States v. Diebold, Inc., 369 U.S. 654 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. See Adams v. Metiva, 31 F.3d 375, 378 (6th Cir. 1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. See Matsushita, 475 U.S. at 587. The fact that the non-moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. See Guarino, 980 F.2d at 410; Carver v. Bunch, 946 F.2d 451, 454-455 (6th Cir. 1991).

III. Analysis

At the August 10, 2010 hearing it became clear to the Court that genuine issues of material fact exist as to whether Plaintiff's termination was the result of retaliation for his having expressed concerns to human resources about age discrimination, and as to whether he was dismissed because of his age. Taking all inferences in the light most favorable to the non-moving party, as the Court is required to do upon a summary judgment motion, Matsushita Elec. Indus. Co., 475 U.S. 574, 587, the Court concludes a reasonable jury could find that Defendant retaliated against Plaintiff for his protected activity and/or dismissed him, a long-term employee with good performance reviews,

based on his age.

A. Defendant's Motion for Summary Judgment (doc. 23)

Defendant argues in its motion that Plaintiff lacks a prima facie case of federal or state law age discrimination with regard to his PIP, because it was not a materially adverse employment action, and the record lacks evidence of any similarly-situated younger employee who received more favorable treatment (doc. 23). Defendant argues the only other employees that met with Berresford were both over forty, neither received an instruction not to do so, nor did they report to Baerman, Plaintiff's supervisor, who was also over forty (Id.). Under these facts, Defendant contends, Plaintiff has failed to show any similarly-situated younger employees were treated differently (Id.).

Defendant next argues that its legitimate non-discriminatory reasons for disciplining Plaintiff stand unrebutted in the record (Id.). Defendant contends the legitimate reasons for the PIP are stated within the PIP: that Plaintiff improperly met with Berresford on-site after having been instructed not to do so (Id.). Moreover, Defendant argues that Plaintiff cannot show pretext, because so long as Baerman honestly believed the reasons for the PIP, then her proffered reasons have a basis in fact, motivated her actions, and were sufficient to motivate her actions (Id.). Defendant contends there is no dispute as to the fact that Baerman asked Plaintiff not to meet with Berresford on-site and

that Plaintiff nonetheless did so, showing the reasons for the PIP had a basis in fact (Id.).

Defendant next argues Plaintiff has no viable claim for discriminatory discharge because he was not really replaced, but rather another employee, Chris Brink, 46, took on project management duties for Closure in addition to Brink's other duties (Id. Citing Grosjean v. First Energy Corp., 349 F.3d 332, 335-36 (6th Cir. 2003)(the assumption of duties of an employee does not necessarily constitute replacement, rather, an employee is replaced when another is hired or reassigned to perform the employee's duties)). Defendant further argues that Plaintiff fails to demonstrate that its legitimate, nondiscriminatory reasons for his termination were a pretext for discrimination (Id.). In Defendant's view, Plaintiff knew his PIP required him to keep Baerman informed of all developments related to the Closure project, but failed to do so when he failed to timely report that two Case Farms employees needed medical attention after an accident with the product (Id.). Defendant argues that Plaintiff conceded in his deposition that Baerman had an honest belief that he should have reported to her about the Case Farms employees, and that he admitted he missed opportunities to do so (Id.). As such, Defendant contends there is no dispute that it had a legitimate non-discriminatory justification for Plaintiff's termination (Id.).

As for Plaintiff's retaliation claim, Defendant argues

Plaintiff has not proffered direct evidence of retaliation, and therefore he must come forward with circumstantial evidence (Id.). To make a prima facie case, Plaintiff must show 1) he engaged in protected activity, 2) the activity was known to Defendant, 3) Plaintiff was subjected to a material adverse action, and 4) there was a causal connection between the protected activity and the adverse action (Id. citing Harris v. Metropolitan Gov't of Nashville and Davidson County, Tenn., 2010 WL 393374, at *7 (6th Cir. 2010)). Defendant argues only Plaintiff's amended statement that he had placed in his file after the PIP could constitute his protected activity, but such statement is far too vague to constitute opposition to an unlawful employment practice (Id.). Moreover, contends Defendant, Baerman, who made the termination decision, did not know about the amended statement at the time she made such decision (Id.). Finally, Defendant argues the record refutes any causal connection between Plaintiff's amended statement and his termination, and he cannot show the proffered reasons for his termination are pretext for retaliation (Id.).

B. Plaintiff's Response

Plaintiff contends that he can establish a prima facie case of retaliation because there is no dispute that just weeks prior to his termination he delivered his amended statement to human resources in which he expressed his concern he was being targeted for termination due to his age (doc. 33). Plaintiff

contends that though Baerman claims not to have known about the statement, she was not the sole decision maker, as human resources had to partner with managers in making disciplinary decisions (Id.). In Plaintiff's view, therefore, it is clear from the record that the decision-makers knew of his protected activity prior to his termination, and a jury would not be required to believe Defendant's claim that the decision-makers were unaware of the protected activity (Id.). Plaintiff further contends Defendant has not been able to establish that he lacked a good faith belief he was being targeted for termination because of his age (Id.).

As for the causal connection between the adverse action and his protected activity, Plaintiff argues the close temporal proximity between his complaint of discrimination and his termination is sufficient to allow a jury to infer causation (Id.). Plaintiff further challenges Defendant's proffered reasons for his termination as pretext, because he contends his meeting with Berresford was insufficient to warrant a PIP, as there was no policy that Berresford could not come on site, and in fact, Berresford had been on site numerous times after Berresford's termination (Id.). In fact, Plaintiff contends that Defendant took steps to alert a receptionist about specific former employees banned from the worksite, but never took this step with regard to Berresford (Id.).

Plaintiff further argues that the Case Farms incident is

only pretext for his termination because in reality he did report the incident, and attempted to convey the information that Case Farms employees sought medical attention in a meeting, but Baerman left the meeting early (Id.). For this reason, he asked Sharma to tell Baerman, but according to Plaintiff, Sharma waited for four days to tell Baerman, even though he had told Plaintiff he would tell her the next day (Id.).

As for his age discrimination claim, Plaintiff contends he can establish a prima facie case (Id.). Plaintiff argues Defendant only disputes whether he can show he was treated differently than someone outside the protected class (Id.). Plaintiff contends numerous other JDI employees knew about the Case Farms incident, did not report it, and were not disciplined in any way (Id.). Specifically, Plaintiff notes that Sharma was 38 years old, and a direct report to Baerman (Id.).

C. Defendant's Reply

Defendant replies that Plaintiff has no valid proof that the PIP resulted from his age (doc. 35). Defendant argues the PIP resulted from his meeting with Berresford, and no one else was put on a PIP for meeting with Berresford, because no one else received direction not to meet with Berresford (Id.). In Defendant's view the undisputed facts show it legitimately disciplined Plaintiff by issuing the PIP, and Plaintiff cannot challenge the PIP as pretext for age discrimination, because the PIP had a basis in fact and

Baerman's reasons were sufficient to support the PIP (Id.). Moreover, Defendant argues Plaintiff lacks any competent evidence that Baerman's stated reasons for the PIP did not motivate the PIP (Id.). Although Defendant indicates Plaintiff may believe the PIP was unfair, it argues it is not for the Court to second-guess its judgment that Plaintiff's insubordination warranted corrective action (Id. citing Rowan v. Lockheed Martin Energy Sys. Inc., 360 F.3d 544, 550 (6th Cir. 2004)(a Plaintiff may not simply substitute his judgment for the Defendant to establish pretext)).

Defendant next attacks Plaintiff's retaliation claim, arguing there is an absence of proof that JDI replaced him with someone substantially younger (Id.). Defendant reiterates its view that it did not replace Plaintiff, but that a similarly-situated employee, Chris Brink, who is 46 years old, assumed Plaintiff's duties (Id.). Defendant further argues that Plaintiff cannot show it treated a similarly-situated younger employee more favorably, as no other employee was on a PIP that required reporting of all information regarding the Closure project (Id.).

Defendant also contends that the facts show that the human resources manager Dana Bryan was not aware of the content in Plaintiff's amended statement, and that she testified even had she known what Plaintiff had written she would would not have understood Plaintiff's words as a claim of age discrimination (Id.). Defendant argues the only evidence Plaintiff has of

causation is temporal proximity of his termination to his filing of the amended statement, but timing alone cannot establish causation (Id.).

D. Discussion

The Court finds well-taken Plaintiff's position, articulated at the hearing, that this case is about credibility, which is in the province of the jury. Adams v. Metiva, 31 F.3d 375, 378 (6th Cir. 1994). Plaintiff was employed by Defendant for more than twenty-six years, and then, as he approached retirement, was placed on a performance improvement plan over conduct that could be viewed as meriting a mere warning. A jury might agree with Plaintiff that he saw the response as overblown, and therefore that he went to human resources and alerted it to the possibility of age discrimination. A jury might view his complaint as adequate to put Defendant on notice that he felt his job was at risk due to his age. Shortly thereafter, he was fired, for failing to disclose an event that he arguably disclosed in written reports, and about which he asked another employee to inform his supervisor. Under these circumstances, a jury might choose to believe Plaintiff's view of the facts over that of Defendant. Should they so believe, Plaintiff could prevail on either or both of his claims.

The Court, as it alluded at the hearing, finds Plaintiff's age discrimination thin, in that he is claiming that he was treated differently than Anil Sharma, who was neither on a PIP,

nor did he manage the Closure Project. However, Sharma was age 38, he similarly failed to timely communicate the information regarding Case Farms to Baerman, but Sharma was not fired. The Court finds Plaintiff's position well-taken that because Defendant claims his termination was based on a failure to disclose, a jury might find dubious the fact that Sharma also failed to disclose the Case Farms incident in a timely fashion, and Sharma did not lose his job. As such, the Court finds that Plaintiff has a viable claim for age discrimination.

IV. Conclusion

Having reviewed this matter, the Court concludes that credibility issues and determinations of fact place this case in the province of a jury. As such, the Court finds it cannot grant summary judgment to Defendant as a matter of law. Fed. R. Civ. P. 56. Accordingly, the Court DENIES Defendant's Motion for Summary Judgment (doc. 23), SETS the final pretrial conference for 2:00 P.M. on January 13, 2011, and the four-day jury trial for February 22, 2011.

SO ORDERED.

Dated: November 5, 2010

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge