IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BARBARA ORTH, Plaintiff, vs. RETAIL ACQUISITION AND DEVELOPMENT, INC., a/k/a INTERSTATE ALL BATTERY CENTER, Defendant.	**No. 4:04-cv-40187-JEG** **O R D E R**

This matter is before the Court on Defendant's Motion for Summary Judgment. John Haraldson represents Plaintiff Barbara Orth ("Orth"); Kerrie Murphy and Lora McCollom represent Defendant Retail Acquisition and Development, Inc., a/k/a Interstate All Battery Center ("RAD"). The parties have not requested a hearing, and the Court finds oral argument unnecessary. The matter is fully submitted and ready for disposition.

SUMMARY OF MATERIAL FACTS

Defendant RAD is a wholly-owned subsidiary of Interstate Battery Systems International. From their Des Moines location, RAD sells retail battery franchises, trains retail store personnel, and performs telephone sales ("telesales"), procurement, and distribution functions. During 2000-2001, James Goodman ("Goodman") was the General Manager of RAD.

Plaintiff Orth worked for RAD from November 2000 until June 14, 2002, when her employment was terminated. She was 52 years old when she ceased employment with RAD.

Orth's first position was in the telesales "kickoff" area, which was designed to support and generate business for new RAD franchisees. During this time Joann Lloyd ("Lloyd") was Orth's supervisor. In the spring of 2001, Dan Stevenson ("Stevenson"), the Training Manager, hired Orth as a trainer. Orth asserts Lloyd was upset by this move because she considered Orth her best production employee and did not want to lose her to the training department.

The training process in the telesales area included classroom training and a hands-on training area called "the bullpen". As a trainer, Orth was responsible for initial product training for new hires, and she assisted Stevenson in modifying the training program. In addition, Orth shadowed Mary Jo Lineberry ("Lineberry"), another trainer, to learn the new hire training process in the kickoff and telesales area. Orth took an illness-related leave of absence from April to August of 2001. About the time Orth returned, Lineberry was moved to a different position for performance reasons. Orth became Training Manager and assumed Lineberry's training duties and management of the "bullpen" training area. Part of Orth's Training Manager position involved trying to improve several areas of poor performance in the department. She developed a training system called "Best Business Practices" that is still used by RAD today. Orth's changes resulted in departmental savings of near $400,000, and she received a raise.

On February 27, 2002, Stevenson gave Orth a favorable performance review, which rated her as meeting expectations. Goodman claims this review was a parting gift from Stevenson, who anticipated leaving the company shortly thereafter. Stevenson denies this. Goodman further claims that he and Stevenson discussed concerns about Orth's performance as a trainer, which Stevenson also denies.

In their depositions, Goodman and Sales Manager Brian Weber ("Weber") claim they received complaints from three telesales supervisors (Connie Moore, Joann Lloyd, and Rhonda Bustead) about Orth's abilities as a trainer. See discussion infra p. 4. Stevenson, however, said he did not recall any trainees complaining about Orth's performance, and Orth's evidence includes affidavits of Corwin Boeding ("Boeding"), a former RAD employee who was a trainer in 2002, and Terrie Munoz-Vejar ("Munoz"), a former RAD employee who attended one of Orth's sessions, who both vouch for Orth's skills as a trainer.

Before Stevenson left RAD, he attempted to fill a vacant trainer position. After interviewing Boeding and two external candidates, Stevenson recommended hiring Boeding. Goodman wanted Stevenson to interview Heather Swanson ("Swanson"), who was an eCommerce manager at RAD and in her early thirties at the time. Stevenson did not think Swanson possessed the necessary skills for the position, but Goodman told him Swanson would bring "young blood" and "fresh ideas" to the department and made a comment about Orth being an "old bird". According to Stevenson, Goodman said Swanson would "offset" the "old bird" Orth, but Goodman

denies this. During this conversation, Goodman mentioned nothing about terminating Orth. The briefs are unclear about what came of this position, but it appears Boeding was chosen for the position over Swanson. The parties do not indicate Boeding's age at this time.

Stevenson left RAD on March 3, 2002.[1] Shortly thereafter, the company moved retail training responsibilities to the Dallas home office. As a result, the training department in the Des Moines office focused on training the telesales reps, and new training materials and procedures were needed. As part of this change, and in the absence of Stevenson, Orth now reported to Weber, the newly-hired Sales Manager, who was in his early thirties. Weber put Orth in charge of restructuring the training program, while Lloyd assumed management of the bullpen.

Goodman and Weber claim several telesales supervisors (Connie Moore, Joann Lloyd, and Rhonda Bustead) expressed reservations about Orth's qualifications for the training restructuring task, because of the inadequate training she had provided the new hires as Training Manager. Orth denies such complaints occurred and asserts that they are mere hearsay. In addition, Orth offers affidavits of Boeding and Munoz, as well as Stevenson's deposition, all attesting to her competence as a trainer.

One of Weber's first assignments to Orth was the "experimental" creation of a new training module for the telesales representatives, including written documentation

[1] After Stevenson left RAD, he and Orth developed a personal relationship, and Orth frequently consulted him about her current projects at RAD.

of company training procedure and booklets to measure training progress. This required skills Orth was unfamiliar with, including certain computer software skills like Microsoft Word and Excel. Orth prepared a draft document on alkaline battery product training that contained errors. Weber asked that the errors be corrected and a clean copy provided to him. The second copy Orth provided contained at least some of the same errors and prompted Weber to issue a formal written discipline to Orth. On at least one occasion, Weber complained of Orth missing a deadline.[2] Weber admits he put together documentation with the express purpose of documenting decisions made about Orth.

Weber says he considered Orth's work in her new task of revamping the training materials seriously deficient, and in June 2002 he recommended to Goodman that Orth be terminated. While Weber had the ability to terminate Orth as his direct report, Goodman was consulted because Weber was a new employee. Goodman agreed with Weber's suggestion to terminate Orth and testified that he did not contemplate terminating Orth until Weber approached him about it. However, Orth claims Goodman wanted to replace "old birds" like her with younger female employees.

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[2] In Plaintiff's Statement of Facts, Orth denies Weber ever complained to her about the timeliness of her work but admits in Plaintiff's Response to Defendant's Statement of Facts that on one occasion such a complaint occurred. However, the accompanying record cite is to a page of Orth's deposition where she denies any communication was made to her about the timeliness of her work. Defendant claims several such complaints occurred. Orth's disciplinary action report, provided in the record, suggests Orth's timeliness issues on the draft document may have consisted of turning in work at 9:00 a.m. instead of 8:30 a.m.

On June 14, 2002, Goodman and Weber met with Orth to terminate her employment. Goodman did most of the talking. Under Orth's version of this meeting, Goodman told her she was terminated because her position was being eliminated and did not mention any alleged performance deficiencies. In addition, Orth claims Weber said he had always been satisfied with her work and offered to act as a reference for her.

RAD claims Orth was told her position was no longer needed, it "would not be the position the company would go forward with," and that she was not capable of doing the job the company needed. Weber denies saying he was satisfied with Orth's work and also denies that he offered to act as a reference.

Swanson became Training Manager in July 2002 after working within RAD as an account manager and eCommerce manager. At the time she was in her early thirties. Goodman claims Swanson did not discuss the training position with him or Weber until after Orth was terminated; however, Goodman did suggest Swanson revise her resumé to highlight her training skills. Goodman made this suggestion at approximately the time she was hired as Training Manager, although it is not clear to what extent this might have occurred before Orth was terminated. Weber had no direct input on the hiring of Swanson as Training Manager and did not interview her.

After Stevenson left RAD, he was again retained to do some consulting work. Three hours of that consulting involved meeting with Swanson in her new role as Training Manager. According to Stevenson, Swanson appeared overwhelmed and did

not evince any desire for her new job. Swanson denies that she was unprepared for or unmotivated toward the Training Manager position.

Orth claims the circumstances of her termination constitute a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621.[3] Orth had obtained a Notice of Right-to-Sue from the EEOC on December 3, 2003. Orth originally filed a Petition in the Iowa District Court for Polk County, but RAD removed the case on April 1, 2004, under this Court's federal question jurisdiction pursuant to 28 U.S.C. § 1331.

In her Complaint,[4] Orth asserts that RAD terminated her employment on the basis of her age, 52 at the time, and not her performance. In support thereof, Orth claims she was given inconsistent reasons for her termination, including that her position was eliminated when in fact a younger person replaced her, and that Goodman made derogatory ageist comments and anecdotal remarks showing a preference for younger employees. Orth claims she has been injured in the form of past and future lost income and benefits. By way of relief, Orth asks this Court for the remedies of reinstatement, back pay, make-whole pay, attorney fees, and costs.

In its Answer filed April 1, 2004, RAD denies the substance of Orth's complaints and asserts that Orth's termination was supported by legitimate business reasons,

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[3] The briefs of both sides argue a claim under the Iowa Civil Rights Act; however, no such claim has been pled.

[4] The Amended and Substituted Petition, filed in Iowa District Court March 18, 2004.

namely her unsatisfactory performance. RAD further asserts that any improper remarks bore no relation, temporal or causal, to the employment decision. RAD moved for summary judgment on May 2, 2005. Orth filed a resistance to that motion on June 29, 2005, which prompted a July 14 reply from RAD.

From the briefs accompanying the aforementioned motions, it can be discerned that the gist of Goodman's alleged ageist comments was a habit of referring to Orth and other middle-aged female employees (primarily Lloyd and Moore) as "old birds". He told Stevenson to "find a way to communicate with the old birds upstairs," and Orth overheard a conversation in which Goodman referred to herself, Lloyd, and Moore as "old birds." In addition, Stevenson claims to have overheard Goodman discussing the termination of Lloyd (in her fifties at the time) and referring to her as an "old bird" although neither Lloyd nor Moore was ever terminated. At the time of Orth's termination, she had worked for RAD for one and one-half years; Lloyd and Moore had each worked there in excess of 15 years.

Goodman admits he made the "old bird" comments, although he denies that the phrase carried any discriminatory connotation. He claims he used the phrases "old bird" and "old dog" to refer to employees who worked for RAD prior to its acquisition by Interstate Battery. However, in Goodman's deposition he states that the acquisition was in 1999, and Orth did not commence employment with RAD until 2000. Stevenson also asserts that Goodman flirted with and exhibited preferential treatment toward several young female RAD employees, including Swanson. Orth contends that

Goodman's comments and preference for young female employees prove that her termination was a result of her age and that allegations of her poor performance were merely pretext.

APPLICABLE LAW AND DISCUSSION

I. Standard for Motion for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is proper "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 judgement as a matter of law." Fed. R. Civ. P. 56(c). A summary judgement motion should be interpreted by the trial court to dispose of factually unsupported claims and defenses. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Therefore, the trial judge is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Id. However, the Court is bound to view the facts in the light most favorable to the nonmoving party and to give that party the benefit of any reasonable factual inferences. E.g., Girten v. McRentals, Inc., 337 F.3d 979, 983 (8th Cir. 2003).

While the moving party must initially make a showing of the basis for its motion and the portions of the record that support the party's assertion that there is no issue of material fact, the moving party is not required by Rule 56 to support its motion with

affidavits or other similar materials negating the opponent's claim. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323).

When the moving party has carried its initial burden, the nonmoving party must proffer specific facts demonstrating the existence of a genuine issue for trial and may not rely on mere allegations. Vaughn v. Roadway Express, Inc., 164 F.3d 1087, 1089 (8th Cir. 1998) (citing Celotex, 477 U.S. at 324). The nonmoving party must make a satisfactory showing on every element of its case for which it has the burden of proof at trial. Wilson v. Sw. Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); see also Celotex, 477 U.S. at 322. "[T]o survive the defendant's motion, [the plaintiff] need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson, 477 U.S. at 257.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. It is thus the task of the trial court to "assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." Hartnagel, 953 F.2d at 396 (citing Celotex, 477 U.S. at 322).

In the Eighth Circuit, motions for summary judgment in employment discrimination cases are to be carefully scrutinized, due to the "inherently factual nature of the inquiry and the factual standards set forth by Congress." Henderson v. Ford Motor Co., 403 F.3d 1026, 1032 (8th Cir. 2005) (citing Anderson, 477 U.S. at 255). The Court of Appeals has held that "summary judgment should seldom be used in employment-

discrimination cases." Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir.1994) (citing Johnson v. Minn. Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991)). However, when there is no dispute of fact and the plaintiff "fail[s] to produce evidence allowing a reasonable inference that [a discriminatory factor] was a determinative factor" in the decision to terminate, then summary judgment is appropriate. Mayer v. Nextel W. Corp., 318 F.3d 803, 810-11 (8th Cir. 2003).

II. ADEA Claim

There are two ways for the Plaintiff to prove intentional age discrimination. "When a plaintiff puts forth direct evidence that an illegal criterion, such as age, was used in the employer's decision to terminate the plaintiff," the standards enunciated in Price Waterhouse v. Hopkins (as modified by § 42 U.S.C. § 2000e-2(m)) apply. Fast v. S. Union Co., 149 F.3d 885, 889 (8th Cir. 1998). In the absence of direct evidence, the applicable standard is the burden-shifting paradigm created in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

1. Price Waterhouse Analysis

Under the modified Price Waterhouse standard, a defendant is liable for discrimination if the plaintiff submits direct evidence that an employer acted with a discriminatory motive: "proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine . . . only the appropriate

remedy." Fast, 149 F.3d at 889 (quoting Wolff v. Brown, 128 F.3d 682, 684 (8th Cir. 1997) (citations omitted)).

"Direct evidence is that which demonstrates a specific link between the challenged employment action and the alleged animus." Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 835 (8th Cir. 2000). The Eighth Circuit Court of Appeals has further construed direct evidence as "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that [a discriminatory] attitude was more likely than not a motivating factor in the employer's decision." Browning v. President Riverboat Casino-Mo., Inc., 139 F.3d 631, 634-35 (8th Cir. 1998) (citations omitted).

The distinction between direct and indirect evidence is partially determined by whether the comments "demonstrate a discriminatory animus in the decisional process" or are simply stray remarks. Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1157 (8th Cir. 1999). Such stray remarks do not constitute direct evidence; likewise, statements of nondecisionmakers or statements of decisionmakers that do not relate to the decisionmaking process are also not direct evidence. Browning, 139 F.3d at 635.

Orth claims she has provided direct evidence and urges the Court to employ the Price Waterhouse mixed motive analysis. Orth further asserts that, even in the absence of direct evidence, the Supreme Court's holding in Desert Palace, Inc. v. Costa requires

the Court to apply the Price Waterhouse standard. In Desert Palace, the Court determined that a plaintiff is not required to produce direct evidence of discrimination to obtain a mixed motive (i.e., Price Waterhouse) jury instruction in a Title VII case. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

The Eighth Circuit has clearly distinguished between the jury instruction question presented in Desert Palace and analysis of a summary judgment motion, holding that Desert Palace had no impact on Eighth Circuit summary judgment precedent. See Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004). "Desert Palace is applicable to post-trial jury instructions, and not to the analysis performed at summary judgment . . . any language in Desert Palace that may seem to point to a change in the McDonnell Douglas framework refers only to the traditional understanding that direct evidence . . . is another method of defeating a defendant's summary judgment motion." Torlowei v. Target, 401 F.3d 933, 934 (8th Cir. 2005) (citing Griffith, 387 F.3d at 735-36).[5] The Court of Appeals recently reaffirmed that holding, deeming the issue "already

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[5] In Griffith, the Eighth Circuit further clarified the distinction between the jury instruction issue in Desert Palace and summary judgment motions:

> Desert Palace involved the post-trial issue of when the trial court should give a "mixed motive" jury instruction under 1991 Title VII amendments codified at 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The Court's opinion did not even cite McDonnell Douglas, much less discuss how those statutes impact our prior summary judgment decisions. While in general the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, Reeves v. Sanderson Plumbing

addressed and resolved . . . that 'evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues.'" Johnson v. AT&T Corp., No. 04-2305, 2005 WL 2138808, at *3 n.4 (8th Cir. Sept. 7, 2005) (quoting Griffith, 387 F.3d at 735).

Because Desert Palace does not alter the Court's analysis of the Price Waterhouse factors on a motion for summary judgment, we need only determine whether Orth has adduced direct evidence sufficient to proceed under that analytical framework, or whether the McDonnell Douglas indirect burden-shifting framework should apply.

Orth asserts that direct evidence of age-based discrimination exists in the form of Goodman's statements calling her an "old bird" and demanding that Stevenson interview Swanson for a training position because she would bring in "young blood" and "fresh ideas" to offset Orth, the "old bird." RAD denies that Goodman said Swanson

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> Products, Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L .Ed. 2d 105 (2000), the contexts of the two inquiries are significantly different. At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues. Thus, Desert Palace, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents.

Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).

would "offset" Orth, but the Court is bound to view all facts in the light most favorable to Orth. See, e.g., Girten 337 F.3d at 983.

A statement is properly considered direct evidence if it is made by a person involved in the decisionmaking process, directly reflects the alleged discriminatory attitude, and demonstrates a specific link between that attitude and the challenged employment action. See Kells, 210 F.3d at 835; Browning, 139 F.3d at 634-35. Though Weber had authority to terminate Orth and authored the disciplinary form that allegedly led to Orth's termination, Goodman was asked to approve Weber's decision and was present and did most of the talking during Orth's termination. Therefore, Goodman sufficiently participated to be considered a person involved in the decision-making process. See Bauer v. Metz Baking Co., 59 F. Supp. 2d 896, 903 (N.D. Iowa 1999) ("The court notes first that the requirement is not that the speaker or actor be *the* 'decisionmaker,' only that he or she be '*involved* in the decisionmaking process.'" (citations omitted)).

A statement directly reflects a discriminatory attitude when a factfinder could find that the alleged discriminatory attitude was "more likely than not a motivating factor in the employer's decision." Browning, 139 F.3d at 634-35. Orth has failed to demonstrate this point. Goodman referred to at least two other women as "old birds" but neither of them was terminated. In addition, assuming Goodman did want Swanson in the training department to "offset" Orth, Orth was not terminated when that position was filled. In fact, the parties' filings indicate that Boeding, not Swanson, was offered

that position. While Goodman's remarks could be considered age-based, Orth has not demonstrated a specific causal link between Goodman's statements and her termination. See also Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999) ("Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference."); Simmons v. Oce-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) ("Absent a causal link between the [derogatory] comments and the adverse employment decision, [the speaker's] derogatory language is best classified as 'statement[s] by [a] decisionmaker [ ] unrelated to the decisional process.'" (quoting Rivers-Frison v. Se. Mo. Comm. Treatment Ctr., 133 F.3d 616, 619 (8th Cir. 1998))). While the comments may provide some evidence of a discriminatory attitude and therefore may be relevant to a circumstantial analysis, the Court is not convinced they rise to the necessary level to constitute direct evidence of discrimination. Therefore, the Court will proceed under the McDonnell Douglas burden-shifting framework.

2. McDonnell Douglas Analysis

"When a plaintiff is unable to put forth direct evidence of age or sex discrimination, we apply the burden-shifting analysis of McDonnell Douglas." Breeding, 164 F.3d at 1156 (citing Fast, 149 F.3d at 890); see also Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1332 n.5 (8th Cir. 1996) (explaining that although McDonnell Douglas is a Title VII case, the analytical framework also applies to ADEA cases).

Under McDonnell Douglas, the Plaintiff must first establish a prima facie case of discrimination; the burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for the adverse employment action. Breeding, 164 F.3d at 1156. If the employer does so, the Plaintiff can still survive summary judgment by presenting sufficient evidence that the employer's reason is a pretext for discrimination. Id.; see also Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040 (8th Cir. 2005) (identifying the steps in the burden-shifting analysis).

To make out a prima facie case, Orth must show that (1) she was a member of the protected class (at least 40 years old for ADEA claims), (2) she was terminated, (3) she was meeting her employer's reasonable expectations at the time of her termination, and (4) she was replaced by someone substantially younger. Haas v. Kelly Services, Inc., 409 F.3d 1030, 1035 (8th Cir. 2005) (citing Mayer, 318 F.3d at 807)). "The burden-shifting mechanism reflects in part the expediency of having an employer explain an adverse employment action. Accordingly, a prima facie case requires only a minimal showing before shifting the burden to the employer." Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1111 (8th Cir. 2001) (citing St. Mary's Honor Ctr., 509 U.S. at 506) (other citations omitted).

RAD concedes that Orth was a member of the protected class, that she was terminated, and that she was replaced by Swanson, a substantially younger worker. Therefore, the only remaining element for Orth to prove is that she was meeting RAD's reasonable expectations at the time of her termination.

"The standard to be applied in assessing performance is not that of the ideal employee, but rather what the employer could legitimately expect." Keathley v. Ameritech Corp., 187 F.3d 915, 920 (8th Cir. 1999). Orth offers as evidence of her performance a February 27, 2002, performance review in which Stevenson rated Orth as meeting expectations. RAD claims this review was a parting gift from Stevenson, but the only evidence supporting that is a statement by Goodman in his deposition testimony. Stevenson, the author of the review, stated in his deposition that the review was a fair and accurate reflection of Orth's performance. Viewing the facts in the light most favorable to Orth, the Court at this juncture accepts Stevenson's characterization of the review for purposes of deciding the summary judgement motion.

RAD claims that after the retail training functions were transferred to Dallas in the spring of 2002, Orth's performance did not meet expectations, as evidenced by the written disciplinary form issued by Weber. However, the alleged deficiencies by Orth that led to that discipline are disputed. Orth asserts these were one-time, minor typographical errors; RAD claims the errors were serious and part of a series of performance deficiencies. It is not the function of the Court to judge the credibility of the evidence at this stage in the proceeding, and, as the nonmoving party, Orth receives the benefit of any reasonable factual inferences. In addition, until Weber became her supervisor, Orth had no record of disciplinary issues. In fact, she allegedly erased a $400,000 department deficit and received a raise. While many of the underlying facts are disputed, Orth

has at least made a "minimal showing," Sprenger, 253 F.3d at 1111, that she was meeting reasonable expectations and therefore presents a prima facie case.

"In ADEA cases, once the plaintiff succeeds in establishing a prima facie case, 'a rebuttable presumption of unlawful discrimination is created.'" Kohrt v. MidAmerican Energy Co., 364 F.3d 894, 897-98 (8th Cir. 2004) (citing Mayer, 318 F.3d at 807). As the employer, RAD then has the burden of producing a legitimate, nondiscriminatory reason for the adverse employment action. Id. "This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (citing St. Mary's Honor Ctr., 509 U.S. at 509). Both Goodman and Weber stated in their deposition that three telesales supervisors complained about Orth's performance as a trainer. RAD also presents a disciplinary action form Weber filed against Orth, and several handwritten notes alleging deficiencies in Orth's work after the training responsibilities of the Des Moines office changed. While none of the telesales managers were deposed to corroborate Weber and Orth's allegations, and Orth disputes many of the events underlying the disciplinary action, it is not the Court's position to judge the credibility or persuasive value of RAD's evidence at this stage of the proceeding. It is enough that RAD has produced evidence of a nondiscriminatory explanation for Orth's termination, and Orth appears to concede as much.

Since RAD has provided a nondiscriminatory reason for terminating Orth, the presumption of discrimination disappears, and Orth can only avoid summary judgment

by presenting evidence that "considered in its entirety, (1) creates a question of material fact as to whether the defendant's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision." Kohrt, 364 F.3d at 897-98. "In determining whether a plaintiff has met its burden with respect to pretext in a summary judgment motion, a district court is prohibited from making a credibility judgment or a factual finding from conflicting evidence." Yates v. Rexton, Inc., 267 F.3d 793, 800 (8th Cir. 2001); see also El Deeb v. Univ. of Minn., 60 F.3d 423, 430 (8th Cir. 1995).

The evidence required to prove pretext is more substantial than that required to establish a prima facie case "because unlike evidence establishing the prima facie case, evidence of pretext and discrimination is viewed in light of the employer's justification." Sprenger, 253 F.3d at 1111. When considering evidence of pretext, "our inquiry is limited to whether the employer gave an honest explanation of its behavior," not whether its action was wise, fair, or correct. McKay v. U.S. Dept. of Transp., 340 F.3d 695, 700 (8th Cir. 2003) (citing Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 973 (8th Cir. 1994)).

Orth asserts that the evidence, when viewed in the light most favorable to her, creates a question of material fact as to whether RAD's alleged justification was mere pretext. The evidence, when so viewed, establishes that Goodman flirted with and "preferred the company" of young female employees like Swanson; that Goodman said he wanted Swanson in the training department to offset an "old bird" like Orth; that

Goodman made ageist comments; and that Orth was initially told her position was eliminated when she was really replaced by Swanson.

The creation of a material fact in the first regard is questionable. At the time Goodman said he wanted Swanson in the training department to offset an "old bird" like Orth, Goodman mentioned nothing about terminating her. Although Goodman's use of the term "old bird" lacked sensitivity, and his proffered explanation for its use is marginally persuasive, the fact remains that he used that phrase to describe other employees who were not terminated. In fact, the position for which Goodman wanted Swanson hired was not offered to Swanson; it appears the position went to Boeding. Although Boeding's age is not readily discernible from the filings, he certainly was not one of the young women Goodman is alleged to prefer. Additionally, although Goodman told Swanson to revise her resume to highlight her training experience, Orth has not shown that these conversations occurred before her termination.

Much of the factual disputes in this case concern Orth's performance after she began reporting to Weber. According to the Eighth Circuit, evidence that a plaintiff was treated differently after a change in supervisors may support a reasonable inference that age motivated the difference in treatment where the plaintiff's performance was consistent throughout the relevant period and when the evidence of differential treatment is combined with the prima facie case and additional evidence that the new supervisor was "out to get" the plaintiff. Ryther v. KARE 11, 108 F.3d 832, 841 (8th Cir. 1997). While Orth's disciplinary problems only arose after she began reporting to Weber, this

was also the time the training department underwent a major change in focus. Similarly, while Orth asserts the evidence establishes that she was performing her training job at a satisfactory level, her evidence all points to the satisfactory performance of her job *before* the training restructure.

This change in her duties also makes it difficult to discern whether Orth's performance was consistent. Evidence of her performance prior to the change is favorable, but Orth admits her tasks after the restructure required skills with which she was initially unfamiliar. Orth contends her alleged errors in these tasks were merely typographical. Weber claims the errors were serious and were not corrected when requested and that assignments were late. The only evidence other than the conflicting claims of both parties is a line on Orth's disciplinary form that indicates an assignment was turned in 30 minutes late.

It is not the function of the district courts to "sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgment involve intentional discrimination." Zhuang v. Datacard Corp., 414 F.3d 849, 855 (8th Cir. 2005) (citing Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999)). Therefore, it is not for the Court to determine whether it is sound business practice to discipline or terminate an employee for typographical errors and minor tardiness. However, it is also not for the Court to make factual determinations at this stage in the proceeding. Orth admits that she made errors,

and a jury might find that RAD simply has stringent disciplinary standards. On the other hand, Orth had a prior record of acceptable performance but was not given a chance to improve after a performance issue on one assignment. A reasonable jury could infer that this was reflective of pretext, not of a deficiency in ability.

Finally, the record does not disclose evidence that Weber was "out to get" Orth. Weber wrote up the disciplinary action form and signed it, but Orth does not accuse Weber of making age-based comments. As previously discussed, Orth's accusations of inappropriate comments and favoritism are almost exclusively directed at Goodman. While Goodman and Weber did work together on the issue once Weber recommended terminating Orth, Orth has failed to make the connection between Goodman's alleged comments and favoritism and Weber's disciplinary action form leading to her termination.

Orth's next argument for pretext arises from the conflicting evidence about the reason for her termination. In Young v. Warner-Jenkinson Co., the Eighth Circuit found the plaintiff raised a genuine fact issue as to pretext when he presented evidence that he was initially told his termination was due to performance deficiencies, but defendant later claimed the termination was the result of lack of available work. Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1023 (8th Cir. 1998). Differing justifications for Plaintiff's termination are also present here. Orth claims she was told her termination was because of the elimination of her position. RAD denies such a statement was made

and asserts that Orth's poor performance was the true reason for her termination. However, RAD also admits that Swanson replaced Orth. Viewing the facts in the light most favorable to Orth, this evidence shows an "inconsistency in the reasons advanced by [the defendant]" which is "enough to create a genuine fact issue" as to pretext in the Eighth Circuit. Id. This is particularly true in the context of other evidence bearing on the issue.

Orth's evidence of pretext may be enough to pass the primary inquiry, but "evidence of pretext, standing alone, does not preclude summary judgment." Id. Orth must also surmount the second prong of the inquiry, "creat[ing] a reasonable inference that age was a determinative factor in the adverse employment decision." Kohrt, 364 F.3d at 897-98. However, when the evidence of pretext is consistent with an inference of discrimination[6] and "challenges the defendant's articulated nondiscriminatory reason, such evidence may . . . support a reasonable inference that discrimination was a motivating reason for the employer's decision." Ryther, 108 F.3d at 836.

Orth's evidence of pretext – that she was given inconsistent reasons for her termination – is consistent with an inference of discrimination. "When an employer has

[6] "[E]vidence of pretext, will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." Ryther, 108 F.3d at 837-38 & n.4 (discussing cases where plaintiff's evidence of pretext did not support an inference of age discrimination, such as where an employee was discharged for confronting the employer about legal violations; such action, although not commendable, was not a result of age discrimination).

offered different explanations for an adverse employment action and when evidence has been presented that would allow a reasonable trier of fact to disbelieve each explanation, the trier of fact may reasonably infer that the . . . true explanation is unlawful discrimination." Young, 152 F.3d at 1024. A reasonable jury could believe Orth's evidence that she was told her termination was due to the elimination of her position. Since her position was obviously not eliminated, and Goodman replaced her with a younger worker that he had previously tried to place in the training department, a reasonable jury could further disbelieve RAD's proffered justification and conclude that discriminatory animus motivated the decision.

In this case, as in many employment discrimination cases, much of the evidence is circumstantial. Further, many of the facts of this case are in dispute, and the Eighth Circuit has cautioned that "summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based," Mayer, 318 F.3d at 806. A reasonable jury could believe Orth's version of the facts. That version would permit a reasonable jury to infer that discrimination played a role in her termination. Where, as here, the resolution of the factual disputes will depend heavily on the credibility of the parties and their witnesses, the Court will allow the jury to make that determination for itself.

CONCLUSION

Orth has presented a prima facie case of age discrimination under the McDonnell Douglas framework, and RAD has proffered a legitimate nondiscriminatory reason for

her discharge. However, a reasonable jury could believe Orth's version of the events, and her evidence, if so believed, could lead a reasonable jury to infer that RAD's proffered reason for her termination is mere pretext for age discrimination. Therefore, Defendant's Motion for Summary Judgment (Clerk's No. 10) must be **denied**.

IT IS SO ORDERED.

Dated this 19th day of September, 2005.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT