

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

STEVEN D. COX,

Plaintiff,

vs.

INFOMAX OFFICE SYSTEMS, INC.,

Defendant.

No. 4:07-cv-0457-JAJ

ORDER

This matter comes before the court pursuant Defendant Infomax Office Systems' ("Infomax") September 5, 2008, motion for summary judgment (dkt. 12). Plaintiff Steven D. Cox resisted Defendant's motion and filed a brief in support of his resistance on October 7, 2008 (dkt. 18). Cox did not resist Defendant's motion for summary judgment as to his claim of disability discrimination under the Americans with Disabilities Act, as well as his wage claim under Iowa Code 91A; Cox only resisted summary judgment on his age discrimination claim. The defendant filed its reply brief on October 28, 2008 (dkt. 24). For the following reasons, the court grants Defendant's motion for summary judgment on all claims.

A. PROCEDURAL HISTORY

On September 18, 2007 (dkt. 1-2), Plaintiff Steven D. Cox filed suit against his former employer, Infomax Office Systems, Inc., in Iowa state court. On October 4, 2007, Defendant Infomax removed the case to federal court (dkt. 1). Cox claims that his employment was terminated because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. and the Iowa Civil Rights Act, Iowa Code § 216. He alleges damages that include lost wages, benefits, liquidated damages, compensatory damages, and emotional distress damages. Cox also initially made a claim for that he was discriminated against because of his actual or perceived disability but has since abandoned that claim.

B. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. HDC Medical, Inc., v. Minntech Corp., 474 F.3d 543, 546 (8th Cir. 2007) (citation omitted); see also Kountze ex rel. Hitichcock Foundation v. Gaines, 536 F.3d 813, 817 (8th Cir. 2008) (“[S]ummary judgment is appropriate where the pleadings, discovery materials, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law.”).

Once the movant has properly supported its motion, the nonmovant “may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). “[A]n issue of material fact is genuine if the evidence is sufficient to allow a reasonable jury verdict for the nonmoving party.” Great Plains Real Estate Development, L.L.C. v. Union Central Life Ins. et al., 536 F.3d 939, 944 (8th Cir. 2008) (citation omitted). “A genuine issue of fact is material if it ‘might affect the outcome of the suit under the governing law.’” Saffels v. Rice, 40 F.3d 1546, 1550 (8th Cir. 1994) (citation omitted). The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). “[A]lthough [the non-moving party] does not have to provide direct proof that genuine issues of fact exist for trial, the facts and circumstances that she [or he] relies ‘upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion.’” Taylor v. White, 321 F.3d 710, 715 (8th Cir. 2003) (citation omitted). The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Sprenger, 253 F.3d at 1110.

C. STATEMENT OF MATERIAL FACTS¹

1. Facts Related to Cox's Performance

Cox began working at Infomax Systems in January 1980 as a sales representative, selling a variety of products for the company. In 2001, Cox was promoted to Vice President of Marketing for the Graphics and Mailing Divisions of the company. Cox's responsibilities included managing sales personnel for the products division, supervising the overall sales of the mailing division and serving on the "Senior Management Team."

Sometime in 2005, possibly as earlier as 2004, Steve Jacobs, owner and manager of Infomax Systems, expressed concerns about the performance of the mailing division. Both Jacobs and Cox agreed that the Mailing Division's sales were too low and that specific employees were not performing well. The parties had several conversations about the division's performance throughout 2005.

At the end of 2005 or beginning of 2006, Jacobs informed Cox that the mailing division was "not performing at a profitable level." (See Cox Depo. at 47). Cox and Jacobs discussed several options: (1) eliminating the mailing division, (2) selling Infomax altogether, or (3) eliminating Cox's position, giving him a severance package that would be the equivalent of his base salary in 2005, which was over \$100,000. Cox wanted to continue working so he and Jacobs renegotiated his salary to \$90,000 and adjusted the mailing/graphics division's budget in an attempt to make the division profitable. Cox and Jacobs set a sales goal for the mailing/graphics division of \$1.8 million. To achieve that sales goal, the graphics division was expected to contribute \$600,000 in sales and the mailing division was expected to account for the remaining \$1.2 million of sales.

The parties disagree as to whether Cox agreed with the reasonableness of these sales goals. Cox contends that he told Jacobs at the time the goal was set that a 300% increase

¹ The facts in this section are either undisputed by the parties or, if disputed in good faith, taken in a light most favorable to Cox as the nonmoving party.

in sales was unrealistic and unattainable. Cox claims that he agreed with the sales goal only in order to keep his job. Defendant contends that Cox did not communicate the unreasonableness of the sales goal until August of 2006.

By August 2006, sales were well under the \$1.8 million goal. However, Cox states that the mailing division was performing “substantially better than the year before.” (Dkt. 18-5 at para. 9). In 2005, the mailing division had earned \$386,634 in sales revenue. By September 2006, the mailing division had already earned \$319,965 in sales revenue with more than three months left in the year. Cox contends that the graphics department, which he oversaw, was operating at a forty percent profit. Defendant asserts, however, that according to Infomax’s Chief Financial Officer, Jim Reisner, the Mailing Division was losing money by not generating enough revenue to cover its costs. The mailing division had achieved a sales revenue of \$319,965 but its sales revenue goal for August 2006 was \$850,000.

On September 21, 2006, Jacobs terminated Cox’s employment with Infomax. Jacobs’ asserted reason was Cox’s poor performance; specifically, his inability to reach sales goals. A week later, on September 28, 2006, Cox sent an e-mail to Jacobs regarding his termination, stating, “[T]hat was obviously a business decision you choose to make.” (Cox Depo. 84-85).

In July 2007, InfoMax sold the mailing division.

2. Facts Related to Cox’s Age Discrimination Claim

In 2005, Jacobs hired Jim Reisner as the company’s new Chief Financial Officer (“CFO”). Cox claims that this change in management changed the atmosphere of the company. “It appeared to me that he didn’t really want to listen to those of us who were in the senior management team.” (Cox Depo. at 16-17; Pl. App. at 4).

Cox alleges that in 2005, it became clear that Jacobs wanted to get rid of the older employees and replace them with younger employees. Cox felt that Jacobs also stopped listening to the eight-member senior management team, all of whom were over forty.

Cox also points to several comments that Jacobs made about the aging of the workforce. “[Jacobs] would make these comments from time to time, little snide remarks about, ‘Well, we are not getting any younger around here and everybody is getting older and it’s costing us more to pay for insurance.’” (Cox Depo. at 106; Pl. App. at 27). “In general [Jacobs] would make comments about the aging of our workforce. We are all getting older.” (Cox Depo. at 115; Pl. App. at 29). Cox believes that Jacobs’ attitude giving preference to younger employees was evinced in conversations he had with Jacobs about a co-worker, Dean Jess.

[I]n discussions about individual employee performance and specifically relating to Dean Jess, there were a number of times when [Jacobs] would make comments to me, ‘Well, like do you really think he has it in him? Do you think he has the fire in him? He’s not a young guy anymore.’

I wasn’t sure that wasn’t a surrogate comment about myself, but he certainly had an attitude in terms of I guess being concerned about the aging of our workforce. So I think overall he saw opportunities to let me go so that he could bring somebody new in.

(Cox Depo. at 106; Pl. App. at 27).

By 2006, three of the members of the senior management team were no longer working at Infomax; two retired and Cox was terminated. One of the retirees, Jerry Frederick, was replaced by a younger employee.

D. ANALYSIS

Cox alleges age discrimination in violation of the federal Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 623(a) (2007) and Iowa Code § 216.6 (2007). The ADEA makes it unlawful for employers to discriminate on the basis of an individual’s age if the individual is over 40 years old. 29 U.S.C. §§ 623(a)(1), 631(a). Similarly, Iowa Code § 216.6 prohibits employers from discharging any employee because of his age. Iowa Code § 216.6(1)(a) (2007).

Cox presents no direct evidence of age discrimination and thus the three-step McDonnell Douglas burden-shifting analysis applies. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this analysis:

Plaintiff must first establish a prima facie case of age discrimination. If the plaintiff makes a prima facie showing, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge. If the defendant meets this burden, the plaintiff must prove that the defendant's reason is merely a pretext for unlawful discrimination.

Regel v. K-Mart Corp., 190 F.3d 876 (8th Cir. 1999). The court applies the same analysis to Cox's age discrimination claim under Iowa law. Id. (citing Sievers v. Iowa Mut. Ins. Co., 581 N.W.2d 633, 635, 638-39 (Iowa 1998)); see also Weddum v. Davenport Comm. School Dist., 750 N.W.2d 114, 118 (Iowa 2008).

1. Prima Facie Case

To establish a *prima facie* case of age discrimination under the ADEA, the plaintiff must show:

(1) [H]e was a member of a protected group, i.e., at least 40 years of age, (2) he was qualified for his position, (3) that he was constructively discharged, and (4) he was replaced by a person not in the protected class, or similarly situated employees who were not members of the protected class were treated more favorably.

Tatom v. Georgia-Pacific Corp., 228 F.3d 926, 931 (8th Cir. 2000). In cases such as this one where the plaintiff is discharged but not replaced – known as “reduction-in-force” (“RIF”) cases – the plaintiff must show “some additional evidence that age was a factor in the employers action.” Ward v. Int'l Paper Co., 509 F.3d 457 (8th Cir. 2007). “The ‘additional showing’ inquiry is not identical to the inquiry into pretext. . . . The only question is whether the circumstances are such that, in the absence of an explanation from the defendant, a fact finder may reasonably infer intentional discrimination.” Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 778-79 (8th Cir. 1995). The “additional

showing” inquiry is not intended to be a “significant hurdle” in establishing a *prima facie* case. Yates v. Rexton, Inc., 267 F.3d 793, 799 (8th Cir. 2001).

The parties agree that Cox meets the first and third prong of the *prima facie* case – he was terminated in September 2006 and was fifty-eight years old at the time of termination. The defendant argues, however, that Plaintiff does not meet the second and fourth elements of the *prima facie* case.

The defendant contends that Cox fails the second prong because he was unqualified for his position, arguing that Cox did not meet Infomax’s performance expectations. The question at the *prima facie* case level, however, is not whether the plaintiff performed to the employer’s expectations but whether he was “otherwise qualified for the position he held.” Riley v. Lance, Inc., 518 F.3d 996, 1000 (8th Cir. 2008) (citing Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142 (2000)). “Under the qualification prong, a ‘plaintiff must show only that he possesses the basic skills necessary for the performance of the job,’ not that he was doing it satisfactorily.” McGinnis v. Union Pac. R.R., 496 F.3d 868, 874 n.2 (8th Cir. 2007) (quoting Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 92 (2d Cir. 2001)). To require a greater showing would “collapse[] the *prima facie* case into the McDonnell Douglas framework.” McGinnis, 496 F.3d at 874 n.2.

Applying the “otherwise qualified” standard, Cox meets his burden for step two of the *prima facie* case based on his long work history at Infomax. See Riley, 518 F.3d at 1000 (“Since he had been performing the DAM job successfully for years, he met the requirement of the *prima facie* case.”); McGinnis, 496 F.3d at 875-76 (Plaintiff was qualified because he worked for his employer “for approximately twenty-eight years”). At the time of discharge in September 2006, Cox had worked for Infomax for over twenty-six years. He had worked in the position of Vice President of the Graphics and Mailing Divisions for five years. He thus meets the second prong of the *prima facie* case, establishing that “he possesses the basic skills necessary for the performance of the job.”

Slattery, 248 F.3d at 92. The court will not analyze at this stage whether Cox met Jacobs' sales expectations.

The defendant also argues that Cox does not satisfy the fourth prong of the *prima facie* case. In the fourth step, where a plaintiff has not been replaced by a younger worker, he must present some evidence of age discrimination. Id. "The ADEA does not require every plaintiff in a protected age group be allowed a trial simply because he was discharged during a reduction-in-force." Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1165-66 (8th Cir. 1985). The plaintiff may meet this burden by producing either statistical evidence or circumstantial evidence "such as comments and practices that suggest a preference for younger employees." Chambers v. Metro. Prop. & Cas. Ins. Co., 351 F.3d 848, 856 (8th Cir. 2003).

Cox has presented circumstantial evidence in support of his claim. This evidence includes comments made by Jacobs about the aging workforce, the price of healthcare and his general attitude of preferring younger workers. Evidence of ageist remarks, made by a decisionmaker and contemporaneous to a plaintiff's termination, may be sufficient to sustain a claim of age discrimination. Wittenburg v. Am. Express Fin. Advisors, Inc., 464 F.3d 831, 837 (8th Cir. 2006) (Looking at the following factors to determine whether remarks evince age discrimination: "(1) whether the statements were made by employees who took part in the decision or influenced the decision to terminate the plaintiff; (2) the time gap between when the statements were made and the date of termination; and (3) 'whether the statement itself' is 'an exhibition of discriminatory animus' or merely an 'opinion that such animus might exist.'").

The court finds the link between Jacobs' comments and Cox's termination tenuous as Cox has not presented evidence of whether the comments were contemporaneous with the termination. Further, the comments appear to general comments about the aging workforce and not specific, discriminatory comments towards Cox. However, establishing a *prima facie* case is not intended to be an onerous bar to an employment discrimination

case. The court will assume that Plaintiff has met this burden so as to avoid collapsing the *McDonnell-Douglas* framework. The court will conduct a more thorough analysis of Plaintiff's evidence in step three, when analyzing whether Defendant's reasons are pretextual.

2. Legitimate, Non-Discriminatory Reason for Termination

Once Cox establishes a *prima facie* case of discrimination, as he has done here, the burden shifts to the defendant to rebut the presumption of discrimination with a non-discriminatory explanation for termination. *McDonnell Douglas*, 411 U.S. at 802. This is a burden of production, not of persuasion. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000). Defendant must produce admissible evidence that supports its non-discriminatory reason for termination. *Id.* If the defendant employer is able to rebut the presumption, "the presumption disappears, and 'the sole remaining issue is discrimination *vel non.*'" *Gross v. FBL Fin. Servs.*, 526 F.3d 356, 359 (8th Cir. 2008) (quoting *Reeves*, 530 U.S. at 143).

Here, Defendant states that Cox was terminated "based upon Plaintiff's failing leadership over a failing division." (Def. Br. at 18). Defendant's reason is supported by the following undisputed facts: Jacobs made Cox aware of his concern about Cox's division at least a year prior to his termination, sometime in 2005. Jacobs again informed Cox of his concerns at the end of 2005 or beginning of 2006. At that time, Jacobs suggested dramatic changes such as the elimination of Cox's position or selling off the entire mailing/graphics division, making Cox aware that dramatic changes needed to be made for his position to survive. At the time, Cox asked to stay on and agreed to a sales goal that would make the division profitable. The parties dispute the point at which Cox expressed his concern that the sales goal was unattainable. However, by September 2006, when Jacobs realized that Cox was not going to achieve the sales goal, he terminated Cox's employment. Viewing these events as a whole, the undisputed facts show that Cox was at the helm of a failing division. The division was so unprofitable that less than a year after Cox's termination, they eliminated the mailing and graphics division. Jacobs gave

Cox an opportunity to make the division more profitable, but Cox was only marginally able to do so. Jacobs' expectations were clear and Cox did not meet them. The proffered reason for termination is therefore legitimate and non-discriminatory.

3. Pretext for Discriminatory Motive

Now that the defendant has presented a legitimate, non-discriminatory reason for termination, "any presumption of discrimination drops out of the picture." Bogren v. Minnesota, 236 F.3d 399, 404 (8th Cir. 2000). The burden now shifts back to Cox to prove that Defendant's motive is a pretext for a discriminatory motive. Id. Cox "can avoid summary judgment if the evidence creates (1) a fact issue as to whether [the defendant's] proffered reason is pretextual and (2) a reasonable inference that age was a determinative factor in his termination." Carraher v. Target Corp., 503 F.3d 714, 717 (8th Cir. 2007). To do this, Cox must present some evidence beyond the evidence put forth in step four of his *prima facie* case. "[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves, 530 U.S. at 147-48.

Cox submits the following evidence to show pretext: (1) Jacobs' general comments about the aging workforce; (2) Jacobs' comments about the rising cost of healthcare; (3) Jacobs' comments about Cox's co-worker; (4) Jacobs' shift in attitude regarding the senior management team; (5) the change in the composition of the senior management team; and (5) the fact that Cox's sales were higher than the year prior, yet he was allegedly underperforming.

Comments About the Aging Workforce and Rising Cost of Insurance. Cox alleges that Jacobs made comments about the aging workforce, "little snide remarks about, 'Well, we are not getting any younger around here and everybody is getting older and it's costing us more to pay for insurance.'" (Cox Depo. at 106; Pl. App. at 27). "In general [Jacobs] would make comments about the aging of our workforce. We are all getting older." (Cox Depo. at 115; Pl. App. at 29).

The court finds these comments insufficient to sustain an ADEA claim. General comments about the aging workforce are not the sort of discriminatory comments that give rise to an ADEA claim. Here, Cox has shown no connection between Jacobs' comments and any sort of discriminatory animus; the comments were neutral as to age. Mere comments about the aging of the workforce do not implicate the sort of stereotypes that the ADEA was designed to address – stereotypes that “productivity and competence decline with old age.” Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993). “[N]ot every prejudiced remark made at work supports an inference of illegal employment discrimination. We have carefully distinguished between comments which demonstrate a discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions, from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process.” Rivers-Frison v. Southeast Mo. Community Treatment Ctr., 133 F.3d 616, 619 (8th Cir. 1998) (internal citations omitted). Here, while Jacobs was a decisionmaker, his comments do not cast significant doubt on the legitimacy of his concerns over Cox's inability to perform up to the level necessary to save the business.

Cox further believes that Jacobs wanted to get rid of the people with higher salaries. In his deposition, Cox explained that when Jacobs became sole owner of the company in 2005, he increased the company's revenue goals and wanted to bring down costs. Cox stated, “I think that Mr. Jacobs wanted to eliminate my position so he could eliminate my salary and henceforth reach his goal or improve his bottom line because of that, and in my mind that's wage discrimination and wage discrimination is age discrimination.” (Cox Depo. 105; Pl. App. 24).

Cox's assertion that his position was eliminated because of his high salary also does not implicate a claim for age discrimination. “[E]mployment decisions motivated by factors other than age (such as salary, seniority, or retirement eligibility), even when such factors

correlate with age, do not constitute age discrimination.” EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 952-53 (8th Cir. 1999).

Jacobs’ comments regarding the rising cost of healthcare due to the age of employees also does not evince a discriminatory motive. See Underwood v. Monroe Mfg., L.L.C., 434 F.Supp.2d 680, 684 (S.D. 2006) (“Hansen’s statement to Swift explaining the reason for the high health insurance costs . . . can be relegating to the dustbin of stray remarks . . . indeed remarks which in themselves betray no age-based animus.”).

Last, Cox has failed to produce evidence that the statements were close in time to Cox’s termination. Cox does not indicate the time period in which the comments were made. Such statements must be made within one year to be temporally proximate. See Simmons v. Oce-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) (“Because none of these remarks occurred within one year of [the plaintiff’s] termination . . . they do not create a triable issue on the question of pretext.”). Here, Cox said that things began to change around the time that Jacobs hired a new CFO in 2005. Jacobs terminated Cox in September 2006. On this record, it is speculative as to whether the comments were made within one year of his termination.

Comments about Cox’s Co-Worker. Cox submits evidence of comments that Jacobs made about Cox’s co-worker, Dean Jess:

[I]n discussions about individual employee performance and specifically relating to Dean Jess, there were a number of times when [Jacobs] would make comments to me, ‘Well, like do you really think he has it in him? Do you think he has the fire in him? He’s not a young guy anymore.’

I wasn’t sure that wasn’t a surrogate comment about myself, but he certainly had an attitude in terms of I guess being concerned about the aging of our workforce. So I think overall he saw opportunities to let me go so that he could bring somebody new in.

(Cox Depo. at 106; Pl. App. at 27).

“‘Stray remarks’ standing alone do not give rise to an inference of discrimination. But, neither are they irrelevant. . . . When combined with other evidence, stray remarks constitute circumstantial evidence that . . . may give rise to a reasonable inference of age

discrimination.” Fitzgerald v. Action, Inc., 521 F.3d 867, 877 (8th Cir. 2008) (internal citations omitted). Here, all Cox has shown is that Jacobs’ made a stray remark about another employee. Having already discounted much of Cox’s other evidence, this evidence also does not raise an inference of age discrimination. Cox does not connect the stray remarks about his co-worker to his termination. See Ramlet, 507 F.3d at 1153 (“[T]he plaintiff has not demonstrated a specific link between the comments and his termination. The comments were not related to the decisional process . . .”).

Composition of the Senior Management Team. Cox submits evidence that three of the nine members of the senior management team were terminated sometime during 2005 and 2006. The court finds this evidence does not create a triable issue. First, two of those three members of the senior management team were not terminated, they retired. Second, five of the eight members of the senior management team were not terminated, even though they were over the age of forty. The court therefore does not find significant that three members of the team left the company during this time period.

Cox’s Improved Performance. Last, Cox presents evidence that the (1) graphics division’s sales were above its projected sales and (2) the mailing division sales were above the sales from the previous year. He argues that his improved sales are evidence of pretext. The court disagrees. While the graphics division was doing well, the mailing division’s sales were well below the goal Jacobs set for 2006. It is not the role of the court to decide whether those sales goals were realistic or whether it was a smart business decision to terminate Cox, “except to the extent that those judgments involve intentional discrimination.” Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8thCir. 1995) (“[T]he employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or the fairness of the business judgments made by employers . . .”). Evidence of marginal success is not enough to show a pretext for intentional discrimination.

For the above reasons, Cox has not carried his burden of showing a genuine issue of material fact as to pretext. Therefore, his ADEA claim cannot be sustained.

Upon the foregoing, it is ordered that Defendant's Motion for Summary Judgment (Dkt. 12) is:

GRANTED on Plaintiff's age discrimination claim pursuant to the ADEA, 29 U.S.C. § 621 et seq., and Iowa Code § 216;

GRANTED on Plaintiff's claim under the Americans with Disabilities Act;

GRANTED on Plaintiff's claim under Iowa Code 91A.

This matter is dismissed. The Clerk shall enter judgment for the Defendant.

DATED this 16th day of January, 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA