

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2876

ALCUIN MITCHELL,
Appellant

v.

UNIVERSITY OF PITTSBURGH

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-19-cv-00525)
District Judge: Honorable W. Scott Hardy

Submitted Under Third Circuit L.A.R. 34.1(a)
September 19, 2023

Before: RESTREPO, McKEE, and RENDELL, *Circuit Judges*

(Opinion filed: December 12, 2023)

OPINION*

McKEE, *Circuit Judge*.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Alcuin Mitchell appeals the District Court’s grant of summary judgment in favor of his former employer, the University of Pittsburgh, on his claims that his demotion from sergeant to patrolman violated the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act. For the reasons that follow, we will affirm the District Court.¹

I.

The Amended Complaint contains two Counts: (I) age discrimination under the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 621 *et seq.*; and (II) age discrimination under the Pennsylvania Human Relations Act (“PHRA”), 43 P.S. § 951 *et seq.*

The District Court granted the University’s Motion for Summary Judgment, denied Mitchell’s Motion to Supplement the Record, and entered a Final Judgment Order. This appeal followed.

“We exercise plenary review over the grant or denial of summary judgment and apply the same standard the district court should have applied.”² Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”³ When reviewing an order granting summary judgment, we view the evidence in the light most favorable to the nonmoving party.⁴

¹ We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

² *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 309 (3d Cir. 2018).

³ Fed. R. Civ. P. 56(a).

⁴ *Willis v. UPMC Children’s Hosp. of Pittsburgh*, 808 F.3d 638, 643 (3d Cir. 2015).

II.

Under the ADEA, it is unlawful for an employer to “discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”⁵ As the provisions of the PHRA and ADEA are “analogous,” we apply the same analysis.⁶ To prove discrimination under the ADEA, “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”⁷

A plaintiff can establish a claim of discrimination under the ADEA or PHRA by presenting either direct or circumstantial evidence.⁸ “[E]vidence is not direct where the trier of fact must *infer* the discrimination on the basis of age from an employer’s remarks.”⁹ When there is no direct evidence of discrimination, a plaintiff can rely on circumstantial evidence to make out a claim under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).¹⁰

Under the *McDonnell Douglas* framework, a plaintiff must establish a *prima facie* case of age discrimination by presenting evidence that: (1) he is forty years of age or older; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) the action occurred under circumstances that support an inference of

⁵ 29 U.S.C. § 623(a)(1).

⁶ *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 644 n.5 (3d Cir. 1998).

⁷ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

⁸ *Duffy v. Paper Magic Grp., Inc.*, 265 F.3d 163, 167 (3d Cir. 2001).

⁹ *Torre v. Casio, Inc.*, 42 F.3d 825, 829 (3d Cir. 1994).

¹⁰ *Willis*, 808 F.3d at 644.

discrimination such as replacement by a younger employee.¹¹ After the plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the employer to offer a legitimate nondiscriminatory reason for its action.¹² If the employer offers a nondiscriminatory justification for the adverse employment action, then the burden shifts back to the plaintiff to show that this reason was pretext for discrimination.¹³

Mitchell contends that he presented direct evidence of discrimination, and the District Court erroneously applied the *McDonnell Douglas* framework. Alternatively, he argues that the District Court erred by holding that his claims could not succeed under the burden-shifting framework.

“Direct evidence of discrimination would be evidence which, if believed, would prove the existence of the fact [in issue] *without inference or presumption*.”¹⁴ The only “direct evidence” Mitchell offered to the District Court was that Chief James Loftus handed him a copy of the collective bargaining agreement when he was demoted and told him that he could “take advantage of retirement.”¹⁵ Mitchell argues that this “evidence leads not only to a ‘*ready logical inference*’ of bias, but also to a ‘*rational presumption*’ that Loftus acted upon this age-related bias when he demoted Sergeant Mitchell.”¹⁶ The

¹¹ *Id.* at 644–45.

¹² *Id.* at 644.

¹³ *Id.*

¹⁴ *Torre*, 42 F.3d at 829 (quoting *Earley v. Champion Int’l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990)).

¹⁵ App. 13 (internal quotation marks omitted); Opening Br. 27 n.7.

¹⁶ Opening Br. 27 n.7.

District Court rightly found that Loftus’s suggestion that Mitchell consider retirement was not direct evidence of age discrimination.

The District Court concluded that there was a legitimate reason for Loftus’s remark: the retirement provision of the collective bargaining agreement that would cover Mitchell after his demotion had changed since he had last been covered by it. Informing Mitchell of his retirement options was not direct evidence of discrimination because this single instance of communicating relevant information to an employee did not show without inference or presumption that age discrimination was the but-for cause of Mitchell’s demotion from sergeant to patrolman. Accordingly, the District Court appropriately applied the *McDonnell Douglas* burden-shifting framework to assess the probative value of this evidence.

Under the *McDonnell Douglas* framework, the District Court correctly found that Mitchell had not established the fourth element of a *prima facie* case of discrimination—that a younger employee replaced him thus creating an inference of discrimination. Mitchell argues that Loftus replaced him with 30-year-old Officer Brooke Riley and that she was promoted to sergeant after he was demoted. However, the University responds, without contradiction by Mitchell, that “Sergeant” was merely a broad classification within the Department. The University notes that Mitchell was a “senior Sergeant and Shift Supervisor of the Day Shift” when demoted, and that his performance reviews were governed by that assignment rather than his general classification of sergeant.¹⁷

¹⁷ Answering Br. 17.

Therefore, Mitchell's evidence did not establish that Riley replaced him or otherwise subsumed his duties. The only evidence Mitchell offered to that effect was his own declaration that he was "replaced by patrol officer Brooke Riley" after he was demoted.¹⁸ However, Mitchell did not depose Riley. Nor did Mitchell question Loftus about Riley's role during Loftus's deposition.

Mitchell's own declaration only establishes his "understanding from speaking with Officer Riley."¹⁹ The District Court noted that Mitchell's declaration, was not based on his personal knowledge as required by Rule 56(c)(4).²⁰ Rather it was based upon Riley's statements, and is therefore inadmissible hearsay.²¹ Moreover, the declaration does not provide relevant details such as the date of Riley's promotion, her duties, or her subsequent assignment within the Department.

The District Court explained that Mitchell's ability to make out his prima facie case was severely limited by his choice during discovery not to depose Riley or question Loftus about her position or duties at the time of her promotion. Because Mitchell presented no evidence that Riley directly replaced him or subsumed his duties, the

¹⁸ App. 317. On appeal, Mitchell argues that an organizational chart provides additional evidence. However, the District Court denied Mitchell's Motion to Supplement the Record, which included this organizational chart. Because Mitchell does not challenge the denial of that motion on appeal, we cannot consider the organizational chart. Moreover, even if we could consider it, we agree with the District Court's conclusion that the organizational chart does not establish that Riley replaced Mitchell or subsumed his duties.

¹⁹ App. 317.

²⁰ See Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge [and] set out facts that would be admissible in evidence . . .").

²¹ See Fed. R. Evid. 801.

District Court correctly found that Mitchell could not satisfy the fourth element of the prima facie case.²²

III.

For the foregoing reasons, we will affirm the District Court's order granting the University of Pittsburgh's motion for summary judgment.

²² Because Mitchell did not establish his prima facie case, we need not address whether Mitchell also failed to establish pretext. We note, however, that the District Court carefully and thoroughly explained why Mitchell did not meet his burden of showing pretext.