UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v. Case No. 01-CV-73461-DT

INCAT SYSTEMS, INC.,

Defendant.
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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending before the court is a motion for summary judgment, filed on August 22, 2002, by Defendant INCAT Systems, Inc. ("INCAT"). A hearing was held on this motion on October 30, 2002. For the reasons stated below, Defendant's motion will be granted.

I. BACKGROUND

This case was filed by Plaintiff Equal Employment Opportunity Commission ("EEOC") on behalf of Lucy O'Grady. The following facts are either uncontroverted or adopted from Plaintiff's version of the facts. Plaintiff[1] alleges that Defendant discharged her from her position as an administrative assistant because of her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

[1] "Plaintiff," for purposes of this motion, refers to both the EEOC and the employee whose interests they represent in this matter, Lucy O'Grady.

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("ADEA"). Plaintiff was discharged on April 21, 2000, and commenced this action on September 10, 2001.

Plaintiff was employed as an administrative assistant for several office managers and human resource representatives. She was 63 years old when INCAT hired her. Her tasks included: handling travel arrangements for INCAT employees, investigating the company's monthly Mastercard bills, ensuring that INCAT had adequate office supplies, and providing general support to office managers and other departments within INCAT. The only documented review of Plaintiff indicated that she was "excellent" or "above average" in performing these tasks. (Pl.'s Ex. 2 at 2.) Furthermore, Debra Fecek, a human resource coordinator at INCAT until October 1999, stated that Plaintiff was "a tremendous help to her in her department [and] was in constant demand to assist in all departments." (Pl.'s Br. at 6 (citing Fecek Aff. at ¶ 7).)

Nonetheless, Plaintiff's position was eliminated and she was discharged on April 21, 2000, with no reason (other than position elimination) given for her termination. She was 65 years old when her employment ended. It is undisputed that Plaintiff's position was eliminated along with those of two other people. (Def.'s Br. at 1.) One of the positions that was eliminated was an office manager position that was occupied by one of the managers to whom Plaintiff reported. Prior to its elimination, the position was held by a 33 year old person. (*Id.*) The other

eliminated position was an administrative assistant position that was held by the sister of Defendant's Chief Executive Officer ("CEO"). (*Id.*) Defendant points out (and Plaintiff does not contest) that the three positions remain eliminated, and the duties that arose under those positions have been redistributed to existing employees at INCAT. (*Id.*)

Plaintiff alleges that the elimination of her position was impermissibly motivated by her age. In support of this conclusion, Plaintiff first alleges that Defendant has a mandatory retirement policy. In January 2000, while retrieving documents from the company's copy and fax machines, Plaintiff found a copy of a retirement policy on INCAT stationary. The policy stated, "Other than in exceptional cases, all employees will be required to retire at the end of the month in which their 65th birthday falls, which for purposes of this document is referred to as 'the normal age of retirement.'" (Pl.'s Br. at 7.) It also said, "Employment after the normal retirement age may only be authorised by the Chief Executive Officer." (*Id.*) Defendants assert, and Plaintiff does dispute, that the mandatory retirement policy was not included in the handbook given to employees that worked for INCAT's operations in the United States--the handbook read and signed by Plaintiff. (Def.'s Br. at 2.) Instead, the policy was part of the handbook given to employees of INCAT's sister company in the United Kingdom ("U.K."). (*Id.*) Despite the absence of this policy in the U.S.

handbook, INCAT had no U.S. employees who were age 65 or older when the instant lawsuit was filed. The only other INCAT employee that was 65 years old during the duration of Plaintiff's employment was Russ Warnky, whose employment was terminated eight days after he turned 65. Defendant maintains that Warnky was discharged because of the termination of a contract with Boeing, a client of Defendant.

In support of her age discrimination suit, Plaintiff next points to certain comments made about Plaintiff's age. Ms. Fecek, a human resource coordinator at INCAT, testified that David Meyers, INCAT's Chief Financial Officer ("CFO") and Douglas Henry, INCAT's CEO, engaged in conversations in which Plaintiff's age was discussed. CEO Henry admittedly made the final decisions regarding all relevant firings.[2] There is no evidence that CFO Meyers played any role in the decision to discharge employees or eliminate positions within INCAT. On one occasion, Mr. Myers said, in reference to Plaintiff, "Why is she still working at her age? Isn't it time for her to retire?" (Fecek Dep. at 11.) Myers also asked when persons in the U.S. could collect Social Security.

Fecek further testified that Mr. Myers told her about a conversation he had with Mr. Henry where Plaintiff's age was

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[2] Henry made the final decision regarding hiring, but he consulted with two executives at Integrated Systems Technologies, Inc. ("IST"), a company with which INCAT was engaged in merger talks at the time of Plaintiff's firing.

discussed. The conversation began when Myers told Fecek that he had seen Plaintiff a number of times talking with other employees; this indicated to him that Plaintiff had too much time on her hands. Fecek responded to Myers's concerns by telling him that Plaintiff was busy at work and reminding him that she was "in an age-protected category." (Fecek Dep. at 12.) Myers then told Fecek that, in a previous conversation, Henry had said, "[G]et rid of her, that's what we have attorneys for." (*Id.*) After Myers related the story to Fecek, she told him that he couldn't say things like that and he "just smirked and the conversation went on." (*Id.*)

II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-

52 (1986). The existence of some factual dispute does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material.

III. DISCUSSION

Claims brought under the ADEA are generally analyzed under the burden-shifting framework set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). *See Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365 (6th Cir. 1999). To establish a *prima facie* case of age discrimination, the plaintiff must show that (1) she was a member of a protected class, (2) she was subjected to an adverse employment action, (3) she was qualified for the particular position, and (4) the successful applicant was a substantially younger person. *See id.* at 371. This framework is modified if the plaintiff is discharged as part of a company's reduction in workforce.[3] In such a case, the plaintiff would not be able to prove the fourth prong of the prima facie case because her position is simply eliminated and the plaintiff is never

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[3] According to the Sixth Circuit:

> A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990). Because Plaintiff has not presented evidence that she was "replaced" as defined by *Barnes*, the court will examine this case as a reduction in workforce situation.

replaced. The fourth prong, therefore, is replaced by a requirement that the plaintiff present "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiff] for discharge for impermissible reasons." *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1126 (6th Cir. 1998).

If the plaintiff establishes a *prima facie* case of age discrimination, the burden shifts to the defendant to "produce evidence of a non-discriminatory reason for its action, which will necessarily be the alleged reduction in force." *Godfredson*, 173 F.3d at 371. If the defendant successfully asserts a non-discriminatory reason for its decision, the burden then returns to the plaintiff "to demonstrate that the defendant's proffered reason is pretextual." *Id.*

A. Plaintiff's *Prima Facie* Case

For purposes of the instant motion, the court assumes that Plaintiff could establish the first three elements of a *prima facie* case. She was a member of a protected class because she was 65 years old at the time of her discharge.[4] Plaintiff was subjected to an adverse employment action because her position at INCAT was eliminated. Furthermore, the court finds that Plaintiff could establish, or at least present a triable issue of fact, that she was qualified for the position at issue in this

[4] The ADEA protects workers who are at least 40 years of age.

case. This finding is supported by the favorable documented and undocumented performance reviews Plaintiff received while working for Defendant.

The record, however, does not support Plaintiff's claim that the employer singled her out for discharge because of her age. Plaintiff attempts to demonstrate age discrimination by alleging that Defendant had a mandatory retirement policy and that top officials at INCAT made discriminatory comments regarding Plaintiff's age. The court finds, however, that these allegations are not supported by evidence and are therefore not sufficient to create a triable issue with respect to the fourth prong of Plaintiff's prima facie case.

1. Mandatory Retirement Policy

Plaintiff's allegation that Defendant has a mandatory retirement policy is not supported by evidence from which a reasonable jury could conclude that such a policy exists for U.S. employees. As described above, a foreign sister-company affiliated with INCAT has a mandatory retirement policy in its handbook given only to persons on the payroll of the sister-company's U.K. operation.[5] Plaintiff alleges that the retirement

[5] Plaintiff states in her brief that INCAT's current Chief Operating Officer ("COO") admitted that "the mandatory retirement policy [of the U.K. company] can apply to U.S. employees." This assertion mischaracterizes the deposition testimony of the COO. Regarding the subject of employees that transfer from the U.K. to the U.S., the COO was asked, "[S]o they don't have to transfer out from under the U.K. handbook necessarily either, then?," and answered, "correct." Plaintiff asserts that this statement means the mandatory retirement policy applies to employees hired by INCAT's U.S. division. The court, however, finds that the only reasonable inference that can be drawn from this testimony and from the COO's supplemental affidavit

policy is informally enforced in the U.S. even though it is not included in the U.S. employee handbook. As evidence of this, Plaintiff points out that "there was no one at INCAT age 65 or older when the case was filed." (Pl.'s Br. at 17.)

"Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Barnes*, 896 F.2d at 1466. Nonetheless, Plaintiff's assertion that INCAT had no employees over 65 years old does not show Defendant's pattern of *conduct* towards persons in the protected class. Plaintiff's allegation provides the court with nothing more than a snapshot of Defendant's workforce at the moment this action was filed. It provides no indication that older employees had been more (or less) frequently fired (or hired) or more frequently denied (or granted) promotions.[6]

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clarifying his answer, is that the COO was referring to employees that were not expected to be in the U.S. for an extended period of time and remained on the U.K. payroll. The series of questions prior to the one that Plaintiff cites indicate that the COO made a distinction between employees that were in the U.S. for an extended period of time and those that were only in the U.S. on a short-term basis. The employees who did not have to transfer from the U.K. handbook to the U.S. handbook were only those employees who were still on the U.K.'s division payroll and in the U.S. on a temporary basis.

[6] Indeed, at argument Plaintiff's counsel acknowledged to the court the existence of several INCAT employees in O'Grady's age range, one of whom remains employed at age 65. Counsel acknowledged also that there is no evidence (other than the Russ Warnky case, discussed below) of any U.S. INCAT employee being involuntarily terminated upon reaching or exceeding the age of 65. The court observes that there are only two ways of one's employment being terminated: voluntary and involuntary. If it is true, as Plaintiff alleges, that there are no INCAT employees in the U.S. over the age of 65, and if it is also true, as Plaintiff acknowledged, that there is no evidence of any other U.S. INCAT employee being involuntarily terminated upon reaching that age, the

The only *conduct* of Defendant to which Plaintiff points to in order to show that a retirement policy is informally followed at INCAT is (1) the hiring of Plaintiff when she was 63 years old and the firing of Plaintiff when she was 65 years old, and (2) the firing of Russ Warnky eight days after he turned 65. Although Warnky's termination is not at issue in this matter, evidence that he was treated unfairly because of his age might support an inference that age discrimination takes place at INCAT and could have happened in Plaintiff's case. Plaintiff, however, presents no evidence to rebut Defendant's explanation that Warnky was fired due to INCAT's loss of a major contract. There is no dispute that, prior to his discharge, Warnky was employed by INCAT, but worked exclusively on-site at Boeing's facilities in Seattle, Washington. When INCAT's contract with Boeing was terminated, Warnky's employment was terminated because the contract with Boeing was concluded and his position no longer needed. Because Plaintiff presents no facts contrary to Defendant's explanation, no reasonable inference can be drawn that age discrimination took place in Warnky's discharge. Thus, neither Plaintiff's allegation regarding the absence of workers age 65 or older nor her allegation that another employee was fired shortly after he turned 65 is enough, even considered together, to establish a reasonable inference that INCAT's U.S.

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only conclusion is that any near-or-post age 65 job terminations, aside from Warnky's, must have been voluntary (i.e. retirements).

division has a mandatory retirement policy or treats employees adversely based on their age.

2. Discriminatory Comments

Plaintiff next claims that the comments made by CFO Myers and CEO Henry are evidence of age discrimination. Myers allegedly said to INCAT's human resource coordinator, "Why is she still working at her age? Isn't it time for her to retire?" He then asked when employees in the U.S. were eligible to collect social security. Furthermore, Myers told the same human resource coordinator that Henry once said to him, "[G]et rid of [O'Grady], that's what we have attorneys for," when discussing the fact that the dismissal of Plaintiff might appear discriminatory.

The court first notes that these comments cannot be considered direct evidence of discrimination. Although "the *McDonnell Douglas* test is inapplicable when the plaintiff presents direct evidence of discrimination," *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir. 1999), evidence that would require the jury to infer a fact is not direct evidence. *See Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994). To conclude that age discrimination actually occurred, the jury would have to infer that the comments evinced discrimination. The comments are not age-discriminatory on their face and a jury would have to infer not only that the comments were hostile towards Plaintiff because of her age, but also that the comments bore some relationship to the decision to fire her.

The comments, therefore, are not direct evidence of discrimination.

Age-related comments referring to a specific worker, however, may be circumstantial evidence of age discrimination. *See Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1025 (6th Cir. 1993). "However, [the Sixth Circuit] has also held that not all age-related comments create a genuine issue of material fact necessary to survive summary judgment." *Leonard v. Twin Towers*, No. 99-4221, 2001 WL 223854, *4 (6th Cir. Mar. 1, 2001). "[I]n order for age-related comments to support a finding of intentional discrimination, there must be some connection between the discriminatory comments and the adverse employment decision." *Id.* In *Peters v. Lincoln Electric Company*, the Sixth Circuit held that:

> [S]tatements allegedly showing an employer's age bias are to be evaluated by considering four factors: (1) whether the statements were made by a decision-maker or by an agent within the scope of his employment; (2) whether the statements were related to the decision-making process; (3) whether the statements were more than merely vague, ambiguous or isolated remarks; and (4) whether they were made proximate in time to the act of termination. None of these factors is individually dispositive of age discrimination, but rather, they must be evaluated as a whole, taking all of the circumstances into account.

Peters, 285 F.3d 456, 477-78 (6th Cir. 2002) (citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325 (6th Cir. 1994)).

Considering the factors discussed in *Peters*, the court finds that the comments of Myers and Henry are insufficient to create a

genuine issue of material fact as to whether Plaintiff was discriminated against. First, there is no evidence that Myers had any role in the decision to fire Plaintiff. Myers himself did not participate in the decision to fire Plaintiff and there is no indication that he had any significant influence over Henry's discharge decisions. *See Phelps v. Jones Plastic & Engineering Corp.*, No. 00-5450, 2001 WL 1136054, *4 (6th Cir. 2001) ("In evaluating [possible age-discriminatory remarks], the applicable standard is whether [the person making the comments] acted as a decisionmaker by significantly contributing to the termination decision."). Thus, Myers's questions to human resource coordinator about retirement and social security eligibility were not made by a decisionmaker. Henry, who allegedly said that INCAT should "get rid of [O'Grady], that's what we have attorneys for" was a decisionmaker, and his statement arguably relates to the decision to fire Plaintiff and the process used to reach that decision. Despite this, Plaintiff cannot satisfy either of the final two inquiries discussed in *Peters*.

Evaluating the third prong of the *Peters* inquiry, the court finds that the questions and statements concerning Plaintiff's age were, at best, isolated and ambiguous remarks that cannot support an inference of discrimination. "Isolated and ambiguous comments 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'"

Phelps, 986 F.2d at 1025 (quoting *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989)). Myers's inquiries about Plaintiff not yet being retired and the age at which one is able to collect social security are isolated and abstract, and do not exhibit hostility towards Plaintiff because of her age. *See Gagne*, 881 F.2d at 314 (finding that the comment of Plaintiff's boss that he "needed younger blood" was too abstract to support a finding of age discrimination because the comments were isolated and ambiguous).

Although Myers's comments were in direct reference to Plaintiff, his comments do not indicate that he had any animus towards older employees. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 357 n.5, 355-56 (6th Cir. 1998) (finding that a supervisor's comment was too ambiguous and abstract to support an inference of age discrimination because the comment "reveals little about the speaker's attitude toward older employees," but finding that another supervisor's comments were not ambiguous where the remarks on their face "strongly suggest[ed] that the speaker harbors a bias against older workers."). Comments more egregious than those made by Myers have been found to be isolated and ambiguous. *See Phelps*, 986 F.2d at 1025-26 (finding that the employer's statements that the plaintiff was "too old" to continue in her position and that her fifty-fifth birthday was a cause for concern, made over six months prior to the plaintiff's discharge, were isolated and

ambiguous comments and could not support a finding of age discrimination); *King v. Buckeye Rural Electric Cooperative*, No. 99-3320, 2000 WL 491517 (6th Cir. April 20, 2000) (finding that the employer's alleged statement that he could "get a couple of [younger] people . . . to sit and answer phones for what [he was paying plaintiff]" was ambiguous at best. The statement "appears to reflect more on the cost of someone with [plaintiff's] qualifications doing a job requiring little skill and expertise, than on his age."); *Peecock v. Northwestern Nat. Ins. Group*, No. 96-4318, 1998 WL 476245 (6th Cir. Aug. 2, 1998) (finding that the employer's comments that the plaintiff was "too old" to change his management style and reference to the plaintiff as an "old fart" were isolated and ambiguous statements). Myers's comments, first, never reached the level of specificity (i.e. "too old") already found by the Sixth Circuit to be non-discriminatory and, second, are capable of multiple interpretations and, third, do not overtly signify that he harbors a negative attitude towards older employees. The court finds that they are ambiguous and irrelevant.

Henry's comment that INCAT should "get rid of her" also does not indicate that he wanted Plaintiff dismissed *because of* her age. The conversation in which Henry's comment was related to Fecek by Meyers proceeded as follows: (1) Myers told Fecek that he was concerned because, based on his observations of Plaintiff chatting with him and with other employees, she appeared to have

too much free time available; (2) Fecek explained to Myers that personal interaction with employees was necessary to complete Plaintiff's job duties, and further stated that Plaintiff was in a protected class; (3) Myers said that Henry told him, "Get rid of her, that's what we have attorneys for.").[7] (Fecek Dep. at 12.) Henry's comment, related through Meyers, indicates clearly that he wanted Plaintiff's position eliminated *despite* her protected status and shows no desire to eliminate Plaintiff's position *because* she was older. Even in a light most favorable to the Plaintiff, no reasonable juror could conclude to the contrary. Such comments as these are isolated; they are in addition ambiguous at best as to any discriminatory animus. They thus do not raise an inference that Defendant eliminated

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[7] Fecek's testimony is not inadmissible hearsay. Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay is not admissible unless it falls within an exception to the hearsay rule. Fecek's testimony arguably presents hearsay within hearsay because she testified as to what Meyers said that Henry had said. *See* Fed. R. Evid. 805. To be admissible each level of hearsay must fall within an exception to the general rule that hearsay evidence is inadmissible. *Id.* Even if Fecek's testimony meets the hearsay definition, her testimony is admissible under the exception to the hearsay rule found in Federal Rule of Evidence 801(d)(2)(D), which says that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." First, Fecek's testimony as to what Myers purportedly said falls under the Rule 801(d)(2)(D) exception. Myers made the statement while he was CFO of INCAT, the statement concerned human resources at INCAT--a matter within the scope of his employment, and the statement is now being offered against INCAT. The second level of hearsay--Myers's statement as to what Henry had said in a previous conversation--also falls within the Rule 801(d)(2)(D) exception. When Henry allegedly made the comment he was CEO of INCAT, the statement concerned employment decisions, and his comment is being offered against INCAT in this case. Thus, Fecek's testimony is not inadmissible hearsay because the exception in Federal Rule of Evidence 801(d)(2)(D) applies to both levels of hearsay present in her testimony.

Plaintiff's position because of, rather than in spite of, her age.[8]

Finally, Myers's first set of comments--the statements regarding Plaintiff's possible retirement and ability to collect social security--were made in April of 1999, approximately one year before Plaintiff was discharged. The second set of comments--Henry's statement that INCAT should "get rid of" Plaintiff and that INCAT has lawyers to handle discrimination lawsuits--were made, at the earliest, in late May of 1999, approximately eleven months prior to Plaintiff's firing. The Sixth Circuit has found that a gap of nearly a year between age-related comments and an employee's dismissal was too long to make the comments circumstantial evidence of age discrimination. *See Phelps*, 986 F.2d at 1026 ("Because [factory manager] made the statements nearly a year before the layoff, the comments were made too long before the layoff to have influenced the termination decision."); *Letcher v. Sharp Electronics Corp.*, No.

[8] Plaintiff alleges that Henry, the person who decided to eliminate Plaintiff's position, endorsed Myers's earlier comments regarding Plaintiff's retirement and social security. The doctrine of adoptive admissions, which is typically discussed in an evidentiary context, guides the court in determining whether Myers's comments were endorsed by Henry. In *United States v. Jinadu*, 98 F.3d 239, 244 (6th Cir. 1996), the Sixth Circuit explained the analysis as follows: "When a statement is offered as an adoptive admission, the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement." The only evidence of Henry's endorsement is that he once said, "Get rid of her, that's what we have attorneys for." According to Fecek's deposition, Myers told her that Henry had said this to him during an earlier conversation. The context of that conversation is unclear. Based on the record, a reasonable juror could not infer that Henry's comments showed an endorsement of Myers's earlier comments.

95-5040, 1996 WL 306553, *3 (6th Cir. June 6, 1996) (finding that manager's age-discriminatory comments made in early 1991 were not made in close temporal proximity to the plaintiff's firing in late March of 1991).

Based on the four factors used to evaluate comments allegedly demonstrating an employer's age bias, the court finds that the questions and comments of Myers and Henry are not sufficient circumstantial evidence that the elimination of Plaintiff's position was based on Plaintiff's age. Although one comment was related to the termination decision and was made by a person that had authority to make firing decisions for Defendant, the comments were ambiguous, and the comments were made almost one year prior to Plaintiff's discharge. Accordingly, the court finds the comments insufficient to create a triable issue of discrimination.

In sum, Plaintiff has provided the court with no direct, circumstantial, or statistical evidence that Defendant eliminated the position because of her age. Thus, Plaintiff cannot establish a prima facie case of age discrimination. "The guiding principle is that the evidence must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age." *Barnes*, 896 F.2d at 1466. Plaintiff has provided insufficient evidence for a reasonable jury to conclude that a mandatory retirement policy was enforced by INCAT in the U.S. or that Myers's and Henry's

comments were discriminatory or demonstrated that Plaintiff's age influenced the decision to eliminate her position. Thus, Plaintiff has not presented sufficiently probative evidence in this case to overcome summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict-'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'").

B. Plaintiff's Pretext Arguments

Even if this case had advanced to the pretext stage of the burden-shifting analysis, Plaintiff could not demonstrate pretext.[9] Plaintiff asserted in her brief that pretext could be demonstrated by Plaintiff's positive performance evaluation, Defendant's "shifting explanations" for Plaintiff's discharge, and the lack of contemporaneous documentation regarding Plaintiff's poor performance and INCAT's reduction in force. The court disagrees.

"[A] plaintiff may establish that the proffered reason was a mere pretext by showing that (1) the stated reason had no basis

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[9] The allegations that comprise Plaintiff's pretext argument do not advance her prima facie case. Plaintiff's pretext arguments merely attempt to cast doubt on Defendant's proffered non-discriminatory reason for Plaintiff's dismissal and does not constitute "evidence tending to indicate that the employer singled out [Plaintiff] for discharge for impermissible reasons." *Barnes*, 896 F.2d at 1465.

in fact; (2) the stated reason was not the actual reason; and (3) that the stated reason was insufficient to explain the defendant's action." *Logan v. Denny's, Inc.*, 259 F.3d 558, 574 (6th Cir. 2001). "A reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)).

Plaintiff's pretext allegations do not sufficiently cast doubt on Defendant's explanation for the elimination of Plaintiff's position so as to create an issue for the jury. Defendant claims that Plaintiff's position was eliminated because it was no longer needed. Defendant explains that Plaintiff's responsibilities could be assigned to existing employees at INCAT and that Defendant would realize a reduction in costs by eliminating Plaintiff's salary.

First, any positive performance evaluations that Plaintiff received are irrelevant to Defendant's decision to discharge her. If Defendant's reason for firing Plaintiff were because of her poor performance, then evidence of positive evaluations would be relevant in determining if Defendant's explanation was merely a pretext for age discrimination. Defendant's proffered reason for the dismissal, however, has nothing to do with Plaintiff's performance. According to Defendant, Plaintiff's position was unnecessary. Her performance in that position, therefore, had no

bearing on the decision to terminate her employment. Plaintiff's argument that "there was a performance element involved in the decision to terminate O'Grady" and that her prior positive performance reviews show that Defendant's decision was pretextual is untenable. Plaintiff's position was deemed unnecessary because she was observed socializing instead of working. Henry's observation that Plaintiff had "20 minutes to sit there and waste [his] time and 10 or 15 minutes to waste somebody else's time and there [was] an ongoing line of people that [were] being talked to [by Plaintiff]" reflect his concern that there was no need for Plaintiff's position because he thought she spent more time socializing than actually working. (Henry Dep. at 54-55.) Henry said his observations raised a "red flag that gee, there may be a problem here." (*Id.*) These comments do not show that Plaintiff's position was eliminated because of her performance, but rather indicate only that Henry thought that she occupied a position that may no longer be needed at INCAT. Indeed, Henry had no negative information at all about Plaintiff's job performance when she was engaged in actually performing it, and the evidence is not rebutted that her performance was highly regarded. Thus, evidence of Plaintiff's positive performance does not cast doubt on Defendant's explanation for eliminating

her position and in no way establishes that Defendant's proffered reason was merely pretextual.[10]

Plaintiff's argument that Defendant has shifted its explanation for her dismissal also is not enough to establish an issue of pretext. While it is true that "[a]n employer's changing rationale for making an adverse employment decision can be evidence of pretext," *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1167 (6th Cir. 1997), the allegedly shifting explanations must sufficiently call into question the credibility of the proponent of the statements to raise a genuine issue of fact regarding pretext. For example, pretext might be shown where an employer first explains that an employee's discharge was based on poor performance, but later says that the discharge was simply a part of a workforce reduction. In this case, however, Defendant has not offered such radically different explanations for Plaintiff's discharge. Rather, Plaintiff merely points out that Defendant stated that Plaintiff's "position was eliminated at a time when INCAT had just completed a significant merger and was attempting to cut costs by reducing unnecessary positions," (Pl.'s Position Statement at 1), but that representatives from IST, the company with which INCAT was merging, later said that the elimination of Plaintiff's position could not have been

[10] The same reasoning applies to Plaintiff's claim that the lack of contemporaneous documentation of any performance problems on her behalf raises an issue of pretext. Plaintiff's performance, whether good or bad, was not the reason given for her discharge.

contingent on the merger because the two companies were complementary and had no overlapping positions. These two statements are not incompatible, as Plaintiff characterizes them.

Defendant's original explanation does not state that Plaintiff's position was eliminated "because of" the merger, but rather states that her position was eliminated at the same time as INCAT's merger transaction. The IST representatives' statements, therefore, do not contradict Defendant's statement because they state only that the firing was not contingent on the merger. Defendant never stated that Plaintiff's discharge was contingent on the merger. Thus, there is not a contradiction between the explanations so as to create a credibility issue for the jury.

Finally, Plaintiff argues that the lack of documentation surrounding Defendant's decision to eliminate three positions raises an issue of pretext. Plaintiff cites *Dunn v. Nordstrom, Inc.*, 260 F.3d 778, 785-86 (7th Cir. 2001) for support. The court in *Nordstrom*, however, stated only that "Nordstrom's apparent inability to produce any documentary--rather than testimonial-- evidence relating to the alleged across-the-board demotion of [a category of employees in one region] is troubling because one would expect a large corporation to document the decision to demote so many employees." *Id.* at 785-86. As the court was careful to point out, *Nordstrom* involved the demotion of many employees throughout an entire region. The court found

that such a wide-scale employment decision would typically be accompanied by documentation relating to that decision and that the lack of such documentation could support a finding of pretext.

Plaintiff's situation is markedly different from the facts considered by the court in *Nordstrom* and the court's comments are uninstructive in this context. INCAT eliminated only three positions, whereas *Nordstrom* involved the demotion of a massive number of employees. Thus, INCAT's decision to eliminate a few positions does not give rise to the presumption noted in *Nordstrom*, that documentation should exist concerning such an employment decision. Further, Plaintiff has not shown that the failure to document the workforce reduction decision deviated from the normal practice of Defendant. The alleged lack of documentation here, therefore, does not support a finding of pretext in this case.

Accordingly, the court finds that there are no genuine issues of fact with respect to the fourth prong of Plaintiff's prima facie case. Plaintiff has presented insufficient facts to support the contention that her position was singled out for elimination for impermissible reasons. Moreover, even assuming she could establish a prima facie case, there is no triable issue as to pretext.

IV. CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendant's "Motion for Summary Judgment" [Dkt. # 10] is GRANTED.

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: October 31, 2002

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