IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUIS E. NUNEZ, MD, Plaintiff, v.	: : : :	CIVIL ACTION
TEMPLE PROFESSIONAL ASSOCIATES, et al., Defendants.	: : :	NO. 03-CV-6226

MEMORANDUM

LEGROME D. DAVIS, J. FEBRUARY 22, 2005

Presently before the Court is the Motion for Summary Judgment filed by Defendants Temple Professional Associates, Temple Physicians, Inc., and Temple University Health System Inc. on August 2, 2004 (Defs.' Mot., Doc. No. 7), the Cross-Motion for Summary Judgment filed by Plaintiff Luis E. Nunez on August 23, 2004 (Pl.'s Cross-Mot., Doc. No. 8), and the Brief in Opposition to Plaintiff's Cross-Motion for Summary Judgment on All Claims in Plaintiff's Complaint filed by the Defendants on September 17, 2004 (Defs.' Opp'n, Doc. No. 12).

For the reasons that follow, it is hereby ORDERED that Defendants' Motion is GRANTED with respect to Counts III and IV and DENIED with respect to Counts I and II. Plaintiff's Cross-Motion is therefore DISMISSED as moot with respect to Counts III and IV. Plaintiff's Cross-Motion is DENIED with respect to Counts I and II.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The following facts are uncontroverted. Plaintiff Luis E. Nunez, M.D. is currently 67 years old. Pl. Depo. at 7. His employment relationship with the Defendants began in October 2001, at which time he was hired to provide services at the Comprehensive Health Center

("CHC") at the Episcopal Campus of Temple University Hospital. Specifically, Defendants hired Plaintiff to cover for David Stricklan, M.D. when Dr. Stricklan was absent from CHC. Defs.' Mot. at 4-5; Pl.'s Cross-Mot. at 5. On December 6, 2001, Plaintiff and Defendant entered into a part-time employment agreement, which provided that Plaintiff would work thirty-two (32) to forty (40) hours per week for Defendant Temple Professional Associates ("TPA"),[1] performing "the full range of professional services customarily performed by physicians engaged in the practice of general and family medicine." Pl.'s Cross-Mot at Ex. A. The contract was printed on letterhead bearing the names of both Defendant Temple University Health System ("TUHS") and Defendant TPA. Id. The contract stated that Plaintiff would be employed by Defendant TPA. Id. The impetus for this formal contractual arrangement was the permanent departure of Dr. Stricklan from CHC and the immediate need for a bilingual physician to take over Dr. Stricklan's patient schedule. Defs.' Mot. at 5.

Plaintiff provided services at CHC pursuant to this contract until March 2002, when Defendants hired Gladys Fion, M.D. who is approximately 30 years old, to fill Dr. Stricklan's former position at CHC on a full-time basis. Def.'s Mot. at 6; Pl.'s Cross-Mot. at 7, n.10. That same month, Defendants transferred Plaintiff to another practice, Temple Community Medical Center ("TCMC"), where a family practice position had opened up due to the retirement of Martin Munoz, M.D. Def.'s Mot. at 7; Pl.'s Cross-Mot. at 7-8. Plaintiff filled this position pursuant to his December 2001 contract until July 1, 2002, at which time Defendants notified Plaintiff that his last day would be July 2, 2002. In his termination notice, Defendants

[1] As of July 2003, TPA no longer exists as a separate entity. During the course of Plaintiff's employment, Defendants maintain that he became an employee of Temple Physicians, Inc. ("TPI"). Defs.' Mot. at 3, n.3.

communicated to Plaintiff that he would be paid until August 24, 2002, as Defendants interpreted his contract to require 30 days notice before cessation of pay. Def.'s Mot. at 8; Pl.'s Cross-Mot. at 8-9. Plaintiff's termination was precipitated by Defendants' hiring of Daniel Hernandez, M.D., who had recently completed a residency in family practice, to fill the position vacated by Dr. Munoz on a full-time basis. Def.'s Mot. at 8. At the time of his termination, Plaintiff was 66 years old.

On or about September 22, 2002, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission. On or about August 27, 2003, the EEOC issued a Notice of Right to Sue. Plaintiff timely filed suit in this Court on October 28, 2003, alleging age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. ("ADEA") and the Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq*. ("PHRA"). In addition, Plaintiff also alleges that Defendants' actions constitute a breach of contract under Pennsylvania common law and a violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq*. ("ERISA").

II. STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material," and a fact is considered to be material if "its existence or nonexistence might affect the outcome of the suit

under the applicable law." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. CLAIMS AGAINST TEMPLE UNIVERSITY HOSPITAL SYSTEM

Defendants argue that TUHS is entitled to summary judgment on all claims against it, as Plaintiff has not established an employment relationship with that entity. Defs.' Mot. at 3. n.3. Defs.' Opp'n at 16. Plaintiff answers that TUHS is a proper defendant in this case pursuant to Pennsylvania agency law and the "integrated enterprise" test articulated by federal courts in dealing with cases where both a parent and a subsidiary are named defendants in an ADEA case. Pl.'s Cross-Mot. at 36-37.

The "integrated enterprise" test was developed by courts to help resolve cases in which a plaintiff attempts to hold two corporations liable as a single employer for violations of a statute prohibiting discrimination in employment. See Gorman v. Imperial Metal & Chemical Co., 1999 WL 124463, *3 (E.D. Pa. 1999). Under this test, a court considers the following characteristics

of the parent and subsidiary corporations: (1) the interrelation of operations, (2) common management, (3) common control of labor relations, and (4) common ownership or financial control. Id. (citing Kames v. Summit Stainless, Inc., 586 F. Supp. 324. 327 (E.D. Pa. 1984)). No singular factor is controlling. Id.

The Court finds that, as a matter of law, TUHS was Plaintiff's employer for purposes of the ADEA and PHRA. The employment contract entered into by Plaintiff and TPA, as well as the letter informing him of his termination, at which time Defendant claims Plaintiff was an employee of TPI, was printed on TUHS stationary. Pl.'s Cross-Mot. at Ex. A; Ex. D. The employment contracts signed by Drs. Fion and Hernandez were entered into between those doctors and TPA, which is defined in those contracts as "a Pennsylvania nonprofit corporation formed for the purpose of providing physician services to patients and to provide services to the Temple University Health System, Inc. and its affiliated hospitals." Id. at Ex. E; Ex. F. In his deposition testimony, Mr. James Larson, the current Chief Operating Officer of TPI, testified that TUHS handles all human resource needs for TPI and TPA. Larson Depo. at 81-82; Mankin Depo. at 201 ("Personnel is a department that we don't staff. We buy that service from [TUHS]."). This is confirmed, in part, by a printout from "Temple University Hospital" detailing Plaintiff's work history with Defendants; the printout contains a weekly summary of the number of hours worked, the hourly rate at which he was paid, and his gross weekly pay. Pl.'s Cross-Mot. at Ex. Q. Moreover, Dr. Eric Mankin, the current CEO of TPI, testified at his deposition that he also served on the senior management of TUHS Leadership and that he spent a "fair amount of [his] time at the TUHS Center campus." Mankin Depo. at 6. Makin also testified that management of TPA and TPI reported to management of TUHS and that the TUHS Board

oversaw and continues to oversee the business operations of TPI. Mankin Depo. at 10. Given the interrelated operations, common management, and common control of labor relations that exist between TPA, TPI, and TUHS, the Court finds that TUHS is a proper defendant in this matter.

IV. ADEA AND PHRA CLAIMS

Plaintiff alleges that Defendants impermissibly terminated his employment based on his age. The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or 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." 29 U.S.C. § 623(a)(1). A plaintiff who alleges disparate treatment must show that "the protected trait (under the ADEA, age) actually motivated the employer's decision." Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 141 (2000) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). A plaintiff therefore bears the burden of proving by a preponderance of the evidence that age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." Id.

Where a plaintiff's case is based principally on circumstantial evidence of discrimination, the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the appropriate framework for analysis of both ADEA and PHRA claims: (1) Plaintiff must establish a *prima facie* case by a preponderance of the evidence; (2) Defendant then must produce a legitimate nondiscriminatory reason for the adverse employment decision; and (3) Plaintiff must demonstrate by a preponderance of the evidence that Defendant's stated reason is a mere pretext for illegal discrimination. Id. at 802 & n.13; Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403,

410 (3d Cir. 1999); Allegheny Housing Authority v. Commonwealth of Pennsylvania PHRC, 532 A.2d 315, 316-18 (Pa. 1987) (adopting the McDonnell Douglas Corp. framework for analysis of PHRA claims). Though the burden of production shifts between the parties, the burden of persuasion as to whether the employer-defendant's actions were motivated by age rests with the plaintiff at all times. Gray v. York Newspapers, 957 F.2d 1070, 1078 (3d Cir. 1992) (citation omitted).

A. Prima Facie Case

Plaintiff claims that Defendants impermissibly discriminated against him on the basis of his age by replacing him at CHC with Dr. Fion and by replacing him at TCMC with Dr. Hernandez. Pl. Compl. at ¶ 46a. Defendants claim that Plaintiff has not made out a prima facie case, as he has not shown that he was qualified to hold either the position at CHC or TCMC on a full-time basis. Defs.' Mot. at 13.

To make out a prima facie case of discrimination, Plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) despite his qualifications, he suffered some form of adverse employment action; and (4) the adverse employment action took place under circumstances that give rise to an inference of unlawful discrimination. See Jones, 198 F.3d at 411; Waldron v. SL Indus., Inc., 56 F.3d 491, 494 (3d Cir.1995); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 356-57 (3d Cir.1999). Defendants do not dispute that Plaintiff was in the protected class, that he suffered an adverse employment action, or that Drs. Fion and Hernandez are sufficiently younger than Plaintiff.[2] The crux of whether Plaintiff can

[2] Courts within the Third Circuit have consistently held that the satisfaction of the fourth element of a prima facie case requires proof of an age difference of at least seven years. See, e.g., Fakete v. Aetna, Inc., 152 F. Supp.2d 722, 735 (E.D. Pa.2001) ("For satisfaction of the

make out a *prima facie* case in the instant ADEA claim is whether Plaintiff was qualified to fill the full-time positions that were ultimately given to Doctors Fion and Herndandez.

As a threshold issue, Defendant's claim that Plaintiff was not qualified because he lacked board eligibility/certification is more properly considered during the pretext stage of the Court's analysis. In EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000), the Tenth Circuit declined to allow a defendant to use its legitimate non-discriminatory reason as a barrier to a plaintiff's establishment of a *prima facie* case, as it found that "to hold otherwise would be tantamount to collapsing the first and second stages of the McDonnell Douglas analysis and would deny a plaintiff the opportunity to demonstrate that the defendant's explanation for the adverse employment action is pretextual." Id. at 1193. The Court finds this reasoning to be persuasive and will therefore not consider Defendant's lack of board eligibility/certification to be an impediment to his showing of a *prima facie* case of age discrimination.

Plaintiff has produced evidence sufficient to make a *prima facie* case that he was qualified for full-time employment with Defendants. A plaintiff can satisfy his burden at the prima facie stage by introducing some credible evidence that he possesses the objective qualifications necessary to perform the job sought. See, e.g., EEOC, 220 F.3d at 1193-94

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fourth element, courts generally require proof that the plaintiff was replaced by a person who is younger than he by at least seven years."); Gutknecht v. SmithKline Beecham Clinical Labs., 950 F.Supp. 667, 672 (E.D. Pa.1996) ("It is generally accepted that when the difference in age between the fired employee and his or her replacement is fewer than five or six years, the replacement is not considered 'sufficiently younger,' and thus no prima facie case is made."). In the instant case, Dr. Fion is approximately 30 years old and Dr. Hernandez has only recently completed his residency program, which indicates that he is much younger than a physician with the educational and practical experience of Plaintiff. Defendant has produced no evidence to the contrary.

(citations omitted). Plaintiff has had significant medical training and practice as a surgeon and family practice physician. With respect to his formal educational training, Plaintiff has offered uncontroverted evidence that he (1) completed a residency in cardio-thorasic surgery at Hahnemann University from 1957 to 1961, which included a year specializing in the field of cardiology, (2) that he had an internship in medicine at Albert Einstein Medical Center in or about 1962, (3) that he completed a fellowship in pulmonary physiology in or about 1963, and that (4) he completed a residency in general surgery from 1966 to 1970, which included some pediatrics training.[3]

In addition, Plaintiff's practical work experience is substantial. Plaintiff was the Chief of Cardio-Thorasic Surgery at Dos de Mayo Hospital for approximately one year in or around 1961, a cardio-thorasic surgeon for one year at Einstein from 1965 to 1966, an emergency room physician at Frankfort Hospital from 1971 to 1973, and a general surgeon for almost twenty years from 1973 to 1992. Beginning in 1976, Plaintiff also maintained his own internal/family medicine practice; he practiced family medicine exclusively after he ceased his general surgery activities in 1992. In 1994, Plaintiff began to supplement his private practice by working as a family practice physician for Lehigh Physicians, Inc. at two of its clinics, including one at Episcopal Hospital. Plaintiff began to exclusively work at his private practice again in 1998 when Defendant Temple University Health System, Inc. acquired Episcopal Hospital, but not Lehigh Physicians, which subsequently dissolved. Defs.' Mot. at 3.

[3] In the interim years between his fellowship and general surgery residency, Plaintiff took graduate courses at Drexel University in Biomedical Engineering.

Beyond his educational and practical experience, the record reflects that Plaintiff was also bilingual, a skill that Defendants considered essential to work in the community care facilities that Plaintiff staffed for them, as the communities those clinics serviced were largely Spanish-speaking. Mankin Depo. at 98. In addition, Defendants do not argue that Plaintiff was not a competent employee. Dr. Mankin, in his deposition testimony, stated that he could not recall receiving any complaints about Plaintiff's performance at any point during his tenure at Defendants' facilities. Mankin Depo. at 140.

Given Plaintiff's extensive *curriculum vitae* and his unblemished work record while in the employ of the Defendants, the Court finds that Plaintiff has sufficiently shown that he was qualified for a permanent physician position and therefore has carried his burden of establishing a *prima facie* case of age discrimination.

B. Defendant's Legitimate, Nondiscriminatory Reason

Once Plaintiff establishes a prima facie case, "'[t]he burden of production (but not the burden of persuasion) shifts to the defendant, who must then offer evidence that is sufficient, if believed, to support a finding that the defendant had a legitimate, nondiscriminatory reason for the [adverse employment decision].'" Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231, 235 (3d Cir. 1999) (quoting Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3rd Cir.1997); see also Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3rd.Cir. 1998).

Defendants have stated that the reason they chose to exercise their option to terminate Plaintiff under their interpretation of his employment contract rather than retaining him on a full-time basis was his lack of Board eligibility and/or Board certification. Def.'s Mot. at 14. As such, the burden shifts to Plaintiff to show that this reasons was pretextual.

C. Pretext

Once a Defendant produces a non-discriminatory reason for the adverse employment decision, the burden shifts back to the Plaintiff, who must submit evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997); Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Pretext is not demonstrated by showing simply that the employer was mistaken. Sempier v. Johnson & Higgins, 45 F.3d 724, 731 (3d Cir. 1995) (citing Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3d Cir.1992), cert. denied, 510 U.S. 826 (1993)). Instead, the Court examines the record for "evidence of inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons." Id. (citing Josey v. John R. Hollinsworth Corp., 996 F.2d 632, 638 (3d Cir.1993)).

Under the first prong of the disjunctive test articulated above, a plaintiff-employee can defeat a defendant-employer's motion for summary judgment by directly or circumstantially discrediting the employer's proffered reason. In Fuentes v. Perskie, the Third Circuit explained that

> to discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.

Fuentes, 32 F.3d at 765.

The Court finds that a reasonable trier of fact could rationally disbelieve that Defendants terminated Plaintiff because he was not Board certified or Board eligible. A proper beginning for a discussion of the Defendants' alleged policy is the definition of the terms "Board certified" and "Board eligible." Board certification is a process by which a physician becomes credentialed as a specialist in his or her chosen field. Each medical specialty has its own Board that sets requirements for becoming certified; the American Board of Medical Specialties oversees these Member Boards in their awards of certification. See Pl.'s Cross-Mot. at Ex. J (American Board of Medical Specialties website); Ex. K (American Board of Family Practice website and certification requirements); Ex. L (American Board of Internal Medicine website and certification requirements). As opposed to the clear status of a physician who is Board certified, the status of a physician who is merely "board eligible" is more ambiguous. The American Board of Medical Specialities has published the following explanation of that term:

> The specific term "board eligible" has been given such diverse meanings by different agencies that it has lost its usefulness as an indicator of a physician's progress toward certification by a specialty board. Furthermore, because some candidates have used the term year after year while making no perceptible progress toward certification, it has sometimes been accepted improperly as a permanent alternative to certification. The requirements for admission to the certification process change from time to time, making the term "board eligible" equally susceptible to changes in meaning. For these reasons, the ABMS recommends to its Member Boards that the use of the term "board eligible" be disavowed.

Pl.'s Cross-Mot. at Ex. J. Dr. Mankin testified that he understood that a physician who is "Board eligible" is "a physician . . . who qualifies to sit for Board certification. . . [I]n every case that I am aware of, [it] refers to physicians who have successfully completed an accredited residency in

their specialty of choice, such that they're able to sit for the written or oral exam." Makin Depo. at 30-31.

Dr. Mankin is responsible for the hiring and firing of the physicians who staff the 32 sites managed by TPI. Defs.' Mot. at 3. Dr. Mankin testified that there was a requirement that any physician hired without a substantial practice of their own be Board eligible or Board certified "in an appropriate speciality conducive to the care of the patients [they] were expected to provide services for." Mankin Depo. at 19-20. Mankin testified that he had personally employed his policy in requiring candidates to be Board certified or Board eligible in making physician personnel decisions since 1996. Mankin Depo. at 20. Dr. Mankin estimates that, in the past two years, Board eligible or Board certified physicians have made up approximately 91 percent of all physicians employed by TPI. Mankin Depo. at 22. He explained that his reason for implementing this policy was "to have the highest quality and best-trained group of physicians caring for [Defendants'] patients" that he could find. Mankin Depo. at 30.

Plaintiff first argues that Defendants never actually had any formal policy in place that required physicians to be Board certified or Board eligible. The testimony of high-ranking employees of Defendants and a review of its internal documents does not conclusively disprove Plaintiff's assertion. Mr. Larson described the policy as "informal" and testified that Dr. Mankin had told the Board of Directors that it was his goal to have as close to 100 percent Board certified doctors as possible. Larson Depo. at 38. He further stated that he knew of "no written documents . . . no written policies" that memorialized this physician employment requirement, a statement that is uncontested by Dr. Mankin. Larson Depo. at 38; Mankin Depo. at 20-21. Moreover, the Temple University Hospital, Inc. Bylaws of the Professional Medical Staff detail

the qualifications necessary to be a member of that organization's medical staff in some capacity. The qualifications for physicians, podiatrists and dentists include being professionally competent and licensed in the Commonwealth of Pennsylvania. Pl.'s Cross-Mot. at Ex. I, p.6. The very next sentence in the Bylaws states that "other health care practitioners must also be licensed in the Commonwealth of Pennsylvania *and/or certified by their speciality*." Id. (emphasis added). The absence of a certification requirement in the sentence describing physician qualifications, as opposed to those for other health care providers, lends credence to Plaintiff's contention that Board certification was not an objective qualification actually required by Defendants.

Plaintiff's contention that the policy was an informal preference rather than an objective policy is bolstered by the inconsistency of Defendants' application of the Board certification/eligibility requirement. The record reveals that while some physicians were required to be Board certified or merely Board eligible, some were absolutely required to be Board certified, while still others were apparently not required to be either. In their motion for summary judgment, Defendants state that Dr. Mankin did not require some physicians to be board certified/eligible, namely those that had an appropriate amount of "training, experience, and the substantial financial success of their private practices." Defs.' Mot. at 11. One example of this practice is Dr. Munoz, who remained with Defendants until his retirement in his mid-70s, and who was neither Board certified or eligible. Mankin Depo. at 26-27. In another case, Dr. Mankin communicated to Dr. Stricklan that he needed to become Board certified to remain in his position as a full-time physician, despite the fact that he was already Board eligible and therefore

objectively qualified under Defendants' articulated policy.[4] See Mankin Depo. at 96. Moreover, a reasonable trier of fact could look beyond these two specific examples to the fact that Defendants made exceptions to the alleged overall policy amounting to ten percent of their employed physicians and could rationally disbelieve that Defendants were even-handedly requiring that full-time physicians be Board certified/eligible.

While the Court agrees with Defendants that not every employment policy needs to be reduced to writing to be a legitimate, non-discriminatory basis for making employment decisions, it believes that this particular policy's lack of documentation, combined with its uneven application, raises a permissible and reasonable inference that the policy was not the true reason that Plaintiff's employment with Defendants was terminated. As a reasonable trier of fact could rationally conclude that Defendants were using the Board certification policy as a pretext for impermissible discrimination, Plaintiff's ADEA and PHRA claims survive Defendant's motion for summary judgment.

The Court does not believe, however, that summary judgment is in Plaintiff's favor is appropriate on Plaintiff's ADEA and PHRA claims. While Plaintiff has met his burden of casting doubt upon Defendants' proffered reason for terminating him, the Court finds that he has not produced evidence such that no reasonable jury could find that Defendants acted with discriminatory intent as a matter of law. Because a material question of fact exists as to whether Defendants' actions constituted improper discrimination on the basis of Plaintiff's age, the Court will deny Plaintiff's cross-motion for summary judgment on his ADEA and PHRA claims.

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[4] It is worth noting here that Dr. Stricklan was, by Defendants' own admission, 44 years old at the time of his departure, which would place him in the protected class with Plaintiff. Defs.' Opp'n at 13.

V. BREACH OF CONTRACT CLAIM

In Count III of the Complaint, Plaintiff alleges that Defendants' termination of him without cause and in bad faith constituted a material breach of his employment agreement, entitling him to damages therefrom. Pl.'s Compl. at ¶¶ 66-67. Defendants assert that they are entitled to summary judgment on Plaintiff's contract claim as they notified Plaintiff of his separation from their employment in accordance with the terms of his contract and compensated him accordingly. Defs.' Mot. at 18.

Two sections of the employment contract between the parties are at issue here. Paragraph 1 states that "The effective date of this arrangement shall be January 2, 2002, and shall continue in effect for a period of one (1) year until January 1, 2003." Pl.'s Cross-Mot. at Ex. A. Paragraph 11 reads "Your part time employment shall continue for a period of one (1) year unless terminated earlier. Either party may terminate this arrangement at any time by providing a thirty (30) day notice to the other party." Id. The parties have conflicting interpretations as to how these two paragraphs define the term of Plaintiff's employment. These conflicting interpretations lead Plaintiff to conclude that he had a one-year employment contract with Defendants, which could only be terminated for good cause. Pl.'s Cross-Mot. at 10. For their part, Defendants characterize the contract as providing them with the ability to terminate Plaintiff without cause, so long as the thirty day notice provision is satisfied.

The Court believes that neither Defendants' nor Plaintiff's interpretation of the contract language and that interpretation's legal ramifications are entirely correct. "The presumption under Pennsylvania law is that all employment is at-will, and, therefore, an employee may be discharged for any reason or no reason." Luteran v. Loral Fairchild Corp., 688 A.2d 211, 214

(Pa. Super. 1997) (citing Scott v. Extracorporeal, Inc., 376 Pa.. Super. 90, 545 A.2d 334 (1988)). Therefore, no cause of action lies against an employer for the termination of an at-will employee. Id. In order to rebut the presumption of at-will employment, a party must establish that one of the following is present: "(1) an agreement for a definite duration; (2) an agreement specifying that the employee will be discharged for just cause only; (3) sufficient additional consideration; or (4) an applicable recognized public policy exception." Janis v. AMP, Inc., 856 A.2d 140, 144 (Pa. Super. 2004) (citing Rapagnani v. The Judas Company, 736 A.2d 666, 669 (Pa. Super. 1999)). See also Luteran, 688 A.2d at 214 (citation omitted). A presumption of at-will employment applies to an employment agreement that lacks a definite term of employment,. Id (citing Rapagnani, 736 A.2d at 670). If a term of employment does exist, an employer may not terminate an employee for the duration of that term in the absence of just cause. Green v. Oliver Realty, Inc., 526 A.2d 1192 (Pa. Super. 1987). The party asserting that good cause is required bears the burden of showing, by a preponderance of the evidence, that the employment contract was for a definite time. Id. at 1196.

The Court finds that Plaintiff's employment contract contained an agreement for a definite duration of time, overcoming the presumption of at-will employment. In Schecter v. Watkins, 395 A.2d 585 (Pa. Super. 1990), the Superior Court of Pennsylvania examined an employment contract between an physician and a medical corporation that contained language virtually identical to that in Paragraph 11 of the instant contract. The contract in that case stated that "The term of this Agreement shall be one (1) year from the date set forth unless either party shall give ninety (90) day notice of their intention to terminate the agreement prior to the end of the term." Id. at 587. The Court found that the contract expressly limited the employer's ability

to discharge its employees and set forth the conditions under which those employees could be terminated. In the instant case, the contract expressly provides for a one year term of employment with thirty days notice required for termination of the agreement by either party. As the Third Circuit has noted in its examination of Pennsylvania contract law, "the requirement of notice is antithetical to the very definition of employment at-will." Carlson v. Arnot-Odgen Memorial Hospital, 918 F.2d 411, 414 (3d Cir. 1990) (citations omitted). The Court finds that there is no question of fact as to whether the contract at hand contains a definite term of employment.

Plaintiff has shown that his contract did not create an at-will employment situation; however, the Court finds that no reasonable trier of fact could conclude that Defendants are in breach of that agreement. The Schecter court noted that even though the contract contained a term of employment, it also expressly provided that either party could terminate the agreement without a required showing of cause. Schecter, 395 A.2d at 590. The Court declined to impose a good cause requirement on the contract in the face of explicit language permitting termination and setting forth procedures for that action.[5] As such, because the plaintiff in Schecter did not allege that he was not given the requisite ninety days notice, the lower court's judgment in favor

[5] The Third Circuit reached a similar conclusion using an alternative analysis in Carlson v. Arnot-Odgen Memorial Hospital, in which the court considered a contract in which either party could terminate the employment relationship by giving the other party ninety days notice. The Third Circuit concluded that the notice provision overcame the presumption of at-will employment by creating a contract with a term of at least ninety days. The defendant-hospital's failure to provide the appropriate notice in Carlson resulted in its liability for a breach of a ninety day contract. Carlson, 918 F.2d at 414-15.

of the defendant-employer was upheld. Id. The contract here contains the exact language of the contract in that case, though the number of days notice required is slightly different. Plaintiff was terminated on July 2, 2002 and Defendants continued to compensate him until August 24, 2002, well beyond the thirty days required by the contract. Plaintiff does not allege that the contract itself is not the result of a bargained-for exchange. As such, the Court finds that summary judgment in favor of Defendants is appropriate on the breach of contract claim.

VI. ERISA CLAIM

Count IV of Plaintiff's Complaint asserts that Defendants deliberately misclassified Plaintiff as a part-time employee in order to avoid paying him benefits that he was entitled to under ERISA. Pl.'s Compl. at ¶¶ 68-70. Defendants assert that summary judgment is appropriate on this claim as a matter of law, as there is no cause of action under ERISA for misclassification. Def.'s Opp'n at 18. Defendants also claim that, even if there were a cause of action under ERISA for misclassification, Plaintiff has failed to exhaust his administrative remedies. Id.

In his complaint, Plaintiff does not mention under which section of ERISA his claim is brought. In his cross-motion for summary judgment, he cites 29 U.S.C. § 1132(a)(1)(B), which states that:

> A civil action may be brought
> (1) by a participant or beneficiary
> . . .
> (A) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to further benefits under the term of terms of the plan.

29 U.S.C. § 1132(a)(1)(B).

The Court finds that Plaintiff has not come forward with any evidence that would allow his claim to survive summary judgment. Specifically, Plaintiff has not produced any evidence that (1) Defendants offered a benefits plan covered by ERISA; (2) that he was a "participant" of that plan, as defined at 29 U.S.C. § 1002,[6] or (3) that he exhausted his administrative remedies under that plan or that an exception to the exhaustion requirement is warranted because resort to the administrative process is futile.[7] See Weldon v. Kraft, Inc., 896 F.2d 793, 800 (3d Cir.1990) ("Except in limited circumstances . . . a federal court will not entertain an ERISA claim unless the plaintiff has exhausted the remedies available under the plan.") (citing Wolf v. Nat'l Shopmen Pension Fund, 728 F.2d 182, 185 (3d Cir.1984)); Berger v. Edgewater Steel Co., 911 F.2d 911, 916 (3d Cir.1990) (recognizing an exception to the exhaustion rule for futility); Harrow v. Prudential Ins. Co. of America, 279 F.3d 244, 249 (3d Cir. 2002) (requiring a "clear and positive showing of futility."). As Plaintiff has not come forth with evidence of the most basic elements of his ERISA claim, the Court accordingly grants summary judgment to the Defendants.

VII. CONCLUSION

An appropriate Order follows.

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[6] Participant is defined as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(2)(B)(7).

[7] Plaintiff's claim that he has somehow attempted to exhaust his ERISA claim by filing a claim with the EEOC that he was denied full-time benefits is insufficient to create a material issue of fact on this matter. The exhaustion requirement clearly relates to the administrative process set up by the plan itself and no other administrative process.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUIS E. NUNEZ, MD,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
	:	
TEMPLE PROFESSIONAL	:	NO. 03-CV-6226
ASSOCIATES, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 22nd day of February, 2005, it is hereby ORDERED that the Motion for Summary Judgment filed by Defendants Temple Professional Associates, Temple Physicians, Inc., and Temple University Health System Inc. on August 2, 2004 (Defs.' Mot., Doc. No. 7) is GRANTED in part and DENIED in part. Defendants' Motion is GRANTED with respect to Counts III and IV and DENIED with respect to Counts I and II.

It is further ORDERED that the Cross-Motion for Summary Judgment filed by Plaintiff Luis E. Nunez on August 23, 2004 (Pl.'s Cross-Mot., Doc. No. 8) is DISMISSED in part and DENIED in part. Plaintiff's Cross-Motion is DISMISSED as moot with respect to Counts III and IV and DENIED with respect to Counts I and II.

BY THE COURT:

/s/
Legrome D. Davis, J.