

NOT FOR PUBLICATION

(Docket Entry Nos. 78, 79)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

JOHN D. RUDOLPH,

Plaintiff,

v.

Civil No. 00-190 (RBK)

ADAMAR OF NEW JERSEY, INC.  
d/b/a TROPICANA CASINO AND  
RESORT,

Defendant.

**O P I N I O N**

**KUGLER**, United States District Judge:

In this case, plaintiff John "Jack" Rudolph claims that defendant Adamar of New Jersey, Inc. d/b/a/ Tropicana Casino and Resort ("Tropicana"), his former employer, discriminated against him on the basis of his age, race, and sex when it terminated his employment as a casino pit boss in January 1999. His Second Amended Complaint alleges six counts of employment discrimination arising out of his termination:

Count I § 1981 (race);

Count II § 1983 (race and sex);

Count III New Jersey Constitution (race and sex);

Count IV NJLAD (race and sex);

Count V ADEA (age); and

Count VI NJLAD (age).

Rudolph has moved for summary judgment on Counts I, IV, V, and VI of the Second Amended Complaint.<sup>1</sup> Tropicana has cross-moved for summary judgment on Counts II, III, V, and VI of the Second Amended Complaint.<sup>2</sup>

For the reasons expressed in this Opinion, Rudolph's motion for summary judgment will be denied. Tropicana's motion for summary judgment will be granted as to Counts II and III and will be denied as to Counts V and VI. The accompanying Order shall enter today.

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<sup>1</sup> Rudolph's brief, though captioned as "Motion for Summary Judgment," addresses only Counts I, IV, V, and VI of the Second Amended Complaint. According to his Reply, "Tropicana never answered the Second Amended Complaint, and Plaintiff has not pursued [the claims in Counts II and III]."

A defendant is not required to answer a complaint before moving for summary judgment. See Fed. R. Civ. P. 56(b) ("A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.").

<sup>2</sup> Tropicana has requested summary judgment on Rudolph's "claims of age discrimination." (See Def.'s Opp. Summ. J. & Supp. Cross-Mot. Summ. J. at 42.) Although Tropicana identifies these claims in its brief as "Count V and Count IV, in part" (id.), it appears that the age discrimination claims in the Second Amended Complaint are asserted as Counts V and VI.

**FACTUAL BACKGROUND**

Jack Rudolph is a white male. He was hired by Tropicana on October 26, 1981. In 1986, he was promoted to the Pit Boss position. Rudolph was fifty-one years old when Tropicana terminated his employment in January 1999.

At the time of Rudolph's termination, New Jersey state law required Tropicana to take affirmative action to achieve certain percentages of minority and female employees. New Jersey state law contained no such requirement regarding employees under the age of 40.

Rudolph's termination was immediately preceded by internally-distributed "Under-Utilization Lists" identifying a need for more females and minorities in the Pit Boss position. His termination was immediately followed by several "EEBOP<sup>3</sup> Alerts" reminding Tropicana managers to "use every effort to attract qualified female/minority candidates" for the position.

According to Tropicana's "Self-Assessment" of October 1998, it had achieved its EEBOP percentage goal of minority employment in the "Officials and Managers" job category, which included Pit Bosses. However, Tropicana had not achieved its goal of female employment in that category.

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<sup>3</sup> Pursuant to state regulations, Tropicana had formalized its affirmative action strategy in the form of an "Equal Employment and Business Opportunity Plan," or "EEBOP."

At the time of Rudolph's termination, Tropicana had in place a "Promotion/Upward Mobility" policy, which had the stated purpose of "utilizing promotions as one of several EEBOP prescribed methods for increasing the number of qualified females and/or minorities." This policy provided that race and sex were to be considered in choosing among equally-qualified candidates for promotion.

**Employment Actions Taken by Tropicana**

Tropicana terminated the employment of five Pit Bosses in January 1999, all for "Poor Job Performance":

Joe Guarino	white	male	48
Michael Marren	white	male	62
Jack Rudolph	white	male	51
Joe Pratt	black	male	59
Eric Shendell	white	male	43

(See Console Cert. Ex. I; Saint-Antoine Cert. Ex. CC.)

Also in January 1999, Tropicana demoted several employees to Pit Boss:

Mak Chun	Asian	male	35
Kelly Clifford	white	female	40
Dennis Powers	white	male	50
Gerald Lee	Asian	male	38
Ursula Richter	white	female	63
Robert Fisher	white	male	45
Marge Bond	white	female	52

(See Console Cert. Exs. F, I; Saint-Antoine Cert. Ex. HH.)

In March 1999, Tropicana promoted several employees from Floor Person to Pit Boss:

Ken Colacurcio	white	male	45
Joseph Ponzio	white	male	39

Lisa Brooks	black	female	39
Robert Hennefer	white	male	42

(See Console Cert. Ex. I.)

In April 1999, Ken Colacurcio returned to a Floor Person position, Mak Chun resigned from his Pit Boss position, and Tropicana promoted another Floor Person to Pit Boss:

Joseph Clifford	white	male	37
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(Id.)

**Testimony of Gomes, Montagna, and Popielarski**

After hearing complaints about Tropicana's Casino Games Department, Dennis Gomes, President of Aztar Resorts, decided to conduct a series of "one-on-one" interviews with casino employees "to find out, you know, who's good, who's bad." (Gomes Dep. 21:16-22:14.) Gomes conducted these interviews along with Pamela Popielarski, President and General Manager of Tropicana.

(Popielarski Dep. 39:2.) During these "Casino Games Interviews," casino employees were asked by Gomes and Popielarski to evaluate Pit Bosses, Jade Managers, and Shift Managers ("Supervisors") on three criteria: treatment of employees, treatment of customers, and technical skills. (Id. at 45:11-14.) The employees were also asked to provide the names of those Supervisors who would be on their "dream" management team. (Id. at 48:3-5.)

Gomes testified that there was "no objective in the beginning that somebody would ultimately be terminated as a result" of the Casino Games Interviews. (Gomes Dep. 63:23-64:2.)

However, he continued, "towards the end of all of this process, . . . many discussions . . . just evolved to the point where it was understood that some people are going to have to go to make this a better, more efficient place." (Id. at 65:22-23, 79:20-23). According to Gomes, this understanding was reached through the consensus of a group that included Daniel Montagna, Tropicana's Vice President of Casino Operations; Jane Bokunewicz, Tropicana's Vice President of Administration; Popielarski; and Gomes himself. (Id. at 80:1-6.) Gomes thought that the termination of the five Pit Bosses was "probably a result" of the Casino Games Interviews. (Id. at 22:22-24.) He denied having personally made the decision to fire Rudolph in particular. (Id. at 87:3-15.)

Montagna testified that "[Gomes and Popielarski] had done the perception reviews,<sup>4</sup> they had done the [Casino Games Interviews], and at that time some people were, they were ranked and then at that time we discussed them. . . . And those five positions were eliminated, they weren't doing as great a job as the other people." (Montagna Dep. 30:24-31:10.) He believed that Gomes and Popielarski had made the final decision of whom to fire, but that he had been involved in the "conversation" and decision. (Id. at 30:18-20, 31:17-20.)

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<sup>4</sup> Tropicana's Casino Games Department had previously conducted "Employee Perception Reviews," in which Pit Bosses were rated by their subordinates, and "Management Perception Reviews," in which Pit Bosses were rated by their superiors. (Def.'s Stmt. Mat. Facts ¶¶ 9-10.)

Popielarski remembered conducting the Casino Games Interviews after Gomes told her about complaints that "the floor's not the best." (Popielarski Dep. 38:1-4.) According to Popielarski, the process of employee interviews had led to terminations in the past. (Id. at 48:19-23.)

Popielarski could not remember "exactly what happened to get to" the five pit bosses, including Rudolph, who were fired in January 1999. (Popielarski Dep. 69:1-2.) Popielarski denied having personally made the decision to fire any of the five pit bosses in particular. (Id. at 68:6-15.) She could not remember who had made the decision. (Id. at 68:16-18.)

**Rankings Chart ("Exhibit P-2")**

Jane Bokunewicz, Tropicana's Vice President of Administration, produced a rankings chart in January 1999 "to help document what decisions were made and what criteria were used." (Bokunewicz Dep. 87:13-15.)

First, Bokunewicz converted the responses collected by Popielarski during the Casino Games Interviews<sup>5</sup> into numerical

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<sup>5</sup> Popielarski recorded the following employee comments about Rudolph during the Casino Games Interviews:

- "in trouble years back - tough on help - 360 degree turn other way"
- "does minimum"
- "in Craps Pit - employees respect him"
- "rough around the edges with help - lets problem go to [sic] far - improved but still a way to go"
- "worst list"

(continued...)

values. Each Supervisor received two points for each positive comment, one point for each "no comment," and zero points for each negative comment (Id. at 115:16-18), as well as points for the number of times the Supervisor had been named to an employee's "dream" management team (Id. at 110:4-6).

Next, Bokunewicz converted other data regarding the Supervisors into numerical values. Each Supervisor received points based on his or her performance in Employee Perception Reviews (Bokunewicz Dep. 110:17), Management Perception Reviews (id. at 111:1-3), and Marketing Interviews<sup>6</sup> (id. at 112:19-22). A Supervisor lost points for every disciplinary action notice ("DAN") in his or her file. (Id. at 111:8-10.)

Bokunewicz assigned weights to each data category: 40% to "dream" management team presence; 5% each to Employee Perception Reviews, Management Perception Reviews, DAN's in file, and Marketing Interviews; and 40% to the Casino Games Interviews.

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<sup>5</sup>(...continued)

- "personality problem - can't retrain - harsh - technically good"
- "company man - just does not know how to speak to people"
- "worst list"
- "bad with employees - rude - hard on employees - not nice"
- "punched a player?"

(Dep. Ex. P-2 (Saint-Antoine Cert. Ex. GG).)

<sup>6</sup> During these interviews, employees of Tropicana's Player Development Department had been invited to comment upon the Pit Bosses. (Popielarski Dep. 61:11-14.)



(Bokunewicz Dep. 110:11, 110:18-19, 111:3, 111:11-12, 114:12-13, 116:12-13.)

Finally, Bokunewicz prepared the rankings chart ("Exhibit P-2"), which reflected the points and weight assigned to each data category and assigned an overall score to each supervisor. This overall score represented the percentage of total possible points received by that Supervisor. (Id. at 119:16-120:2.) The rankings chart was in final form as of January 13, 1999 and was intended to "document" the actions taken by Tropicana. (Id. at 50:23-24, 87:13-15.) The record contains conflicting evidence as to whether the chart was in final form when Tropicana made the decision to terminate Rudolph.

According to the rankings chart, the five Supervisors with the lowest Overall Scores were Joe Guarino, Michael Marren, Jack Rudolph, Joe Pratt, and Eric Shendell—the five Pit Bosses who were fired in January 1999.

**Testimony of Bokunewicz**

Bokunewicz testified that the Casino Games Interviews "started a reorganization process that ended up with what's documented on the chart as the final decisions based on a ranking process that included a multitude of factors." (Bokunewicz Dep. 159:5-9.) She remembered that there were "back and forth meetings" regarding who would be terminated (id. at 48:3), that "the bottom performers [had been] terminated" (id. at 49:23-24),

that "bottom performers" had been defined by the results of the Casino Games Interviews and the other factors reflected in the rankings chart (id. at 50:6-14), and that she had produced the rankings chart "to help document what decisions were made and what criteria were used" (id. at 87:13-15). She stated that the decisions had not been made prior to the completion of the rankings chart on January 13, 1999, but rather "were ongoing." (Id. at 87:16-18.)

Bokunewicz did not think that the rankings chart per se was the reason for Rudolph's termination; rather, "Rudolph was fired because a reorganization was done and it was determined that he was one of the lowest . . . performers." (Bokunewicz Dep. 159:18-21.) She remembered "looking at the bottom five and, you know, making a judgment that this is a good decision." (Id. at 182:14-16.) She thought that the people who "may have been responsible" for Rudolph's termination were "a combination of me, [Montagna], [Popielarski] or [Gomes]." (Id. at 160:24-161:2.)

#### **Statistical Evidence**

The rankings chart prepared by Bokunewicz in January 1999 demonstrates that thirty-five Supervisors (Shift Managers, Pit/Shift, and Pit Bosses, but not those in the position of Floor Person), including Rudolph, were evaluated by Tropicana for promotion or retention/termination at that time. According to the expert report submitted by Tropicana, there was no

statistically significant difference<sup>7</sup> in promotion rates based on race, gender, or age-protected status. (Siskin Report at 2.) There was also no statistically significant difference in retention/termination rates based on race, gender, or age-protected status. (Id.) Further, in "a simulation of 1,000 trials where the set of weights assigned to the various [data categories reflected in the rankings chart] were randomly determined for each trial," Rudolph was among the five lowest-ranked employees "in 988 of the 1,000 trials." (Id. at 9.)

#### **ANALYSIS**

Summary judgment is only appropriate where "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of material fact exists only if "the evidence is such that a reasonable jury could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)

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<sup>7</sup> A difference is "statistically significant" where it "is unlikely to be the result of simple random chance factors alone." (Siskin Report at 4-5.)

(quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

**Counts II and III**

Tropicana has moved for summary judgment on Counts II (§ 1983; race and sex discrimination) and III (New Jersey Constitution; race and sex discrimination) of the Second Amended Complaint. Tropicana argues that it is entitled to summary judgment on these claims because Rudolph has not established the "state action" necessary to sustain the claims.

To establish a claim for relief in a § 1983 action, a plaintiff must establish that he was deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999). To satisfy the "color-of-state-law" requirement, a plaintiff must demonstrate a constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and must also demonstrate that "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

A private party will not be held to be a state actor "unless there is a sufficiently close nexus between the State and

the challenged action of the [private] entity so that the latter may be fairly treated as that of the State itself." Am. Mfrs., 526 U.S. at 52; Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

Whether such a "close nexus" exists depends on whether the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Am. Mfrs., 526 U.S. at 52. Action taken by private entities with the mere approval or acquiescence of the State is not state action. Id.

In this case, New Jersey law required Tropicana to set goals for female and minority employment, and to produce evidence of its good faith efforts to meet those goals. Rudolph has produced no evidence that the State's involvement in the particular efforts of Tropicana to meet its employment goals, assuming his termination was indeed such an effort, went beyond "mere approval or acquiescence." Therefore, Rudolph has not established state action, and summary judgment will be granted in favor of Tropicana on Rudolph's § 1983 claim. For this same reason, summary judgment will be granted in favor of Tropicana on Rudolph's claim under the New Jersey Constitution. To the extent Rudolph's motion for summary judgment includes these claims, it will be denied.

**Counts I, IV, V, and VI**

Employment discrimination claims arising under § 1981, the ADEA, and the NJLAD are analyzed under a framework established by the Supreme Court for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). See Jones v. Sch. Dist. of Phila., 198 F.3d 403 (3d Cir. 2000) (§ 1981); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101 (3d Cir. 1997) (en banc) (ADEA); Erickson v. Marsh & McLennan Co., Inc., 117 N.J. 539 (1990) (NJLAD).

McDonnell Douglas/Burdine provides a three-step framework for evaluation of Title VII claims. "First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 252-53 (citing McDonnell Douglas, 411 U.S. at 802, 804).

**Step 1: Prima Facie Case**

In the first step of the McDonnell Douglas/Burdine framework, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. The evidence required to establish a prima facie case may differ depending on whether the plaintiff's claim arises under § 1981, the ADEA, or the NJLAD. However, for the purposes of these cross-motions for summary judgment, both parties assume that Rudolph has proved a prima facie case of discrimination on Counts I, IV, V, and VI. (See Def.'s Opp. Summ. J. & Supp. Cross-Mot. Summ. J. at 19 n.7.)

**Step 2: Legitimate Nondiscriminatory Reason**

In the second step of the McDonnell Douglas/Burdine framework, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employment action taken. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."<sup>8</sup> Burdine, 450 U.S. at 255. This evidence should "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id. at 255-56.

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<sup>8</sup> "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." Burdine, 450 U.S. at 255 n.9.

Rudolph argues that Tropicana has not satisfied its burden because "Tropicana still has not come forward with any evidence as to who made the decision to terminate Plaintiff or upon what basis he was selected for termination." (Pl.'s Reply at 4.) Tropicana contends that it has produced evidence (1) that a reduction in force ("RIF") resulted in the termination of Rudolph's employment and (2) of the reasons for Rudolph's inclusion in the RIF; therefore, Tropicana argues, it has sufficiently articulated the reasons for Rudolph's termination and thereby satisfied its burden.

This Court finds that Tropicana has met its burden of articulating a legitimate, nondiscriminatory reason for terminating Rudolph's employment. Tropicana has produced admissible evidence of a consensus decision among a group of Tropicana senior management, including Gomes, Popielarski, Bokunewicz, and Montagna, to terminate the employment of the worst-performing Pit Bosses. It has produced admissible evidence that this consensus was reached following a series of complaints from and one-on-one interviews with casino employees, and that pit boss performance was evaluated largely on the basis of these Casino Games Interviews (both employee evaluations and employee "dream teams"). It has produced admissible evidence that other data was included in the performance evaluations, including the Marketing Interviews, the Employee Perception Reviews, the



Management Perception Reviews, and the number of disciplinary notices on file for each pit boss. Tropicana has produced Exhibit P-2, the rankings chart compiled by Bokunewicz to document the reasons for the terminations, which demonstrates that Rudolph was indeed among the worst-performing Pit Bosses under that method of evaluation (even if the chart itself was not the per se reason for Rudolph's termination). In short, Tropicana has produced admissible evidence that it terminated Rudolph's employment because of a performance-based reorganization, and therefore has met its burden of articulating a legitimate, nondiscriminatory reason for its action.

Rudolph argues that the evidence produced by Tropicana is insufficient because "Tropicana still has not come forward with any evidence as to who made the decision to terminate Plaintiff or upon what basis he was selected for termination." In effect, he argues that Tropicana has not articulated a legitimate, nondiscriminatory reason for firing him because no single witness has come forward as "the" decisionmaker and because "senior management did not remember with any detail the exact decision to select a particular number of low-ranking employees for layoff." (See Def.'s Opp. Summ. J. & Supp. Cross-Mot. Summ. J. at 22 n.9.) However, as Tropicana correctly points out, "there is no legal requirement that an employer designate one person as 'the' decision-maker to satisfy its burden of

production under McDonnell Douglas." (Def.'s Mem. Further Supp. Cross-Mot. at 3.) Likewise, Rudolph cannot "equate fuzzy memories concerning one detail of a department-wide organization with a complete failure of proof by Tropicana." (Def.'s Mem. Opp. Summ. J. & Supp. Cross-Mot. Summ. J. at 22 n.9.) Tropicana has produced evidence of a consensus decision to fire the lowest-performing pit bosses, of the standards by which it measured low performance, and of Rudolph's presence among the five lowest-performing employees according to these standards. This is sufficient evidence of a legitimate, nondiscriminatory reason. Therefore, Rudolph is not entitled to summary judgment on Counts I, IV, V, and VI under a McDonnell Douglas/Burdine pretext analysis.

Rudolph argues that he is entitled to summary judgment under a mixed-motives analysis<sup>9</sup> on his claims of race and sex discrimination (Counts I and IV), even assuming that Tropicana has articulated a legitimate nondiscriminatory reason for his termination, because of the existence of the EEBOP and related policies. He argues that "it is undisputed that Tropicana had in place a policy that required illegal sex and race discrimination; it followed and effectuated that illegal policy by terminating and replacing the five Pit Bosses (including Rudolph), thereby

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<sup>9</sup> See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

increasing the number of female [sic] and minorities in the Pit Boss position." (Pl.'s Supp. Mot. Summ. J. at 33.)

However, Rudolph points to nothing in Tropicana's EEBOP, or its policies thereunder, that required Tropicana to consider race or sex in making termination decisions. There is no evidence in the record that any Tropicana managers interpreted the EEBOP in this way. Gomes testified that he instructed management that "performance goals," i.e., goals that a certain percentage of employees be minority and/or female, should have no impact on termination decisions. Although a reasonable jury might conclude that race or sex influenced the decision to terminate Rudolph, it would not be required to do so. For these reasons, there is a material issue of fact as to whether race or sex was a motivating factor in Rudolph's termination. Because there is a material issue of fact, Rudolph is not entitled to summary judgment under a Price Waterhouse mixed-motives analysis.

Because Rudolph is not entitled to summary judgment, either under a McDonnell Douglas/Burdine pretext analysis or a Price Waterhouse mixed-motives analysis, Rudolph's motion for summary judgment on Counts I, IV, V, and VI will be denied.

### **Step 3: Pretext**

The remaining issue is Tropicana's motion for summary judgment on Rudolph's age discrimination claims under the ADEA (Count V) and the NJLAD (Count VI). To defeat summary judgment

where the defendant has offered a legitimate, nondiscriminatory reason for its actions, a plaintiff "generally must submit evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994) (Title VII); see also Jones v. Sch. Dist. of Phila., 198 F.3d 403, 413 (3d Cir. 2000) (§ 1981); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1995) (en banc) (ADEA); Romano v. Brown & Williamson Tobacco Corp., 665 A.2d 1139, 1143 (N.J. Super. Ct. App. Div. 1995) (NJLAD).

Rudolph argues that this Court should not reach Step 3, because (1) Rudolph's motion for summary judgment did not address it, so the issue "does not arise directly from the substance of Plaintiff's original motion, as required by L.Civ.R. 7.1(b), App. N.B.5"; and (2) Tropicana's cross-motion "would have been outside the time limit set by the Court had it been filed independently." However, Local Civ. R. 83.2(b) permits this Court to relax any rule "if adherence would result in surprise or injustice." Given Rudolph's 14 pages of detailed opposition to Tropicana's Step 3-based argument, see Pl.'s Reply at 16-29, this Court will

exercise its discretion to entertain Tropicana's Step 3-based motion for summary judgment, to any extent such argument is outside the substance of Rudolph's original motion.

Rudolph has presented evidence sufficient to survive Tropicana's motion for summary judgment on his age discrimination claims. First, he has presented evidence (in the form of names and ages) that the employees promoted into the Pit Boss position in the months after January 1999 were significantly younger than those who were fired. Statistical evidence may be relevant to a pretext determination. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978). Tropicana's assertion that this evidence goes only to Rudolph's prima facie case is incorrect: "[A]lthough the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 143 (2000) (citations omitted). Tropicana's expert report, which concluded that there was no statistically significant difference in retention or promotion rates based on age-protected status, is insufficient to rebut Rudolph's "statistical" evidence for two reasons.

The first reason the report is insufficient is that it examined only Shift Managers, Jade Managers, and Pit Bosses; it did not include Floor Persons. The second reason is that the report examined retention and promotion rates based only on age-protected status; it did not examine the rates based on age. These omissions are relevant here because Rudolph's argument is not based solely on the fact that five Pit Bosses over 40 were fired; rather, it is based on that fact plus the fact that Tropicana filled their positions with "significantly younger" employees, mainly Floor Persons, within a short period of time.

A hypothetical illustrates the point. Suppose that all of the Pit Bosses, Shift Managers, and Jade Managers ("Supervisors") had been over the age of 40, and that half of them had been over the age of 60. Suppose further that half of the Floor Persons were over 40, and half were under 40. Now suppose that Tropicana fired all of the Supervisors over 60, and replaced them by promoting all of the Floor Persons under 40. In this hypothetical, a statistical analysis of effects on the Supervisors alone would reveal no difference in retention rates based on age-protected status because all of the Supervisors were over 40. However, there would be an obvious difference in retention rates based on age. Further, an analysis that included the Floor Persons would have revealed a difference in retention and promotion rates based on age-protected status as well as age.

Tropicana does not acknowledge the distinction between age and age-protected status in its briefs: "[T]he fact remains that the selection process was not age-biased. If it were, the terminations would have yielded a disparate impact by age."

((Def.'s Mem. Further Supp. Cross-Mot. at 13.) The expert report does not stand for the proposition that there was no age bias in the employment actions taken by Tropicana. Because of this distinction, Tropicana's expert report would not preclude a reasonable jury from viewing the evidence that Rudolph and the other fired Pit Bosses were replaced by younger employees as some proof of age discrimination.

Second, Rudolph points to the performance reviews he received as Pit Boss from 1986 through 1997, which ranged from "Above Average" to "Outstanding." Tropicana argues that Rudolph "has not demonstrated that he received annual reviews that were significantly better than those of the remaining pit bosses." However, Tropicana has likewise not demonstrated that these reviews were not significantly better than those of the remaining pit bosses. Viewed in the light most favorable to Rudolph, the performance reviews might suggest that his "performance-based" termination, grounded almost entirely on employee and management evaluations, was pretext. Cf. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3d Cir. 1995); Ezold v. Wolf, Block, Schorr & Ellis-Cohen, 983 F.2d 509 (3d Cir. 1992).

Third, Rudolph produced the deposition testimony of Kelly Clifford, the Shift Manager who was Rudolph's supervisor. Clifford did not think that Tropicana should have terminated Rudolph for performance-based reasons.

Fourth, the explanations given by Tropicana management for Rudolph's termination are, while consistent, also vague and largely free of detail. A reasonable jury might interpret this as "fuzzy memories concerning one detail of a department-wide reorganization." It might also interpret this as evidence of pretext.

For these reasons, Rudolph has produced evidence sufficient to withstand Tropicana's motion for summary judgment on his age discrimination claims. Therefore, Tropicana's motion for summary judgment on Counts V and VI will be denied.

### **Conclusion**

For the reasons expressed above, Rudolph's motion for summary judgment will be denied. Tropicana's cross-motion for summary judgment will be granted as to Counts II and III, and will be denied as to Counts V and VI. The accompanying Order shall enter today.

Dated: October 22, 2004

/s/ Robert B. Kugler  
ROBERT B. KUGLER  
United States District Judge