

EV 05-0149-C Y/H Noeth v Autozone
Judge Richard L. Young

Signed on 05/03/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

RUSSELL NOETH SR.,)	
)	
Plaintiff,)	
vs.)	NO. 3:05-cv-00149-RLY-WGH
)	
AUTOZONE DEVELOPMENT)	
CORPORATION,)	
AUTOZONE STORES, INC.,)	
AUTOZONE TEXAS, LP,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

RUSSELL NOETH SR.,)
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 Plaintiff,)
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 v.) 3:05-cv-149-RLY-WGH
)
 AUTOZONE STORES, INC.,)
 AUTOZONE DEVELOPMENT CORP., and)
 AUTOZONE TEXAS, L.P. d/b/a)
 AUTOZONE,)
)
 Defendants.)

**ENTRY ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I. Introduction

This matter is before the court on Defendants' Motion for Summary Judgment filed November 8, 2006.¹

II. Factual and Procedural Background

The facts, as viewed in the light most favorable to Plaintiff, are as follows.

A. Plaintiff's employment with AutoZone

¹Also before the court is Defendants' Motion to Strike Plaintiff's Exhibits Filed in Opposition to AutoZone's Motion for Summary Judgment filed January 5, 2007. The court has examined said motion and concludes that each of the affidavits Defendants seek to strike is a sworn affidavit in compliance with Rule 56(e) of the Federal Rules of Civil Procedure and, therefore, not subject to the requirements of 28 U.S.C. § 1746 for unsworn declarations. Additionally, Defendants' argument that two of the declarants were not properly disclosed is without merit, as they were disclosed within the proper course of the discovery process. Defendants' motion is DENIED.

Plaintiff became employed by AutoZone on November 16, 1994. (Deposition of Russell Noeth (“Plaintiff Dep.”) at 44-45). Within two months, he was promoted to the position of Parts Sales Manager (“PSM”), the lowest level management position at AutoZone. (*Id.*). During his tenure at AutoZone, Plaintiff held several positions and was promoted up the chain of command to the Store Manager position of the Vincennes store in 2001. (*Id.* at 80-81). At the time he was promoted to Store Manager, Plaintiff was 44 years old. (*Id.*).

Due to issues involving store standards and low sales, Plaintiff accepted a demotion back down to the PSM position on June 22, 2003. (*Id.* at 105-106, 108-109). At the time of his demotion, Plaintiff was transferred to the Jasper, Indiana store as a PSM. (Plaintiff Dep. at 109, 112). Plaintiff was working in the PSM position at the AutoZone store located in Jasper, Indiana at the time of his termination from AutoZone on January 10, 2005. All told, Plaintiff worked in management for AutoZone for more than ten years. (*Id.* at 47-48).

While working in the PSM position between June 2003 and January 2004, Plaintiff was directly supervised by the Assistant Store Manager, Jim Atherton (“Atherton”), and Store Manager, Rob Hollis (“Hollis”). (*Id.* at 70-71). The next level of supervisor above the Store Manager was the District Manager, Judy Bieser (“Bieser”). (*Id.* at 211-212). Above the District Manager was the Regional Office staff; the Regional Manager was Jay Campbell (“Campbell”) and the Regional Human Resources Manager was Brian Black (“Black”). (*Id.* at 69-70, 83).

Plaintiff was off of work for gall bladder and hernia surgery from August 31 until October 11, 2003, then he was off due to work-related injuries from April 8 to June 20, 2004, and from August 12 to November 4, 2004. (Plaintiff’s Aff., ¶ 23).

B. Training and AutoZone's employment policies

During the course of his employment with AutoZone, Plaintiff was provided with AutoZone's Handbook ("Handbook"). (Plaintiff Dep. at 46-47; Plaintiff Dep. Ex. 4). Plaintiff understood that, as a member of management, it was his responsibility not only to know the policies contained in the Handbook, but also to enforce the policies. (Plaintiff Dep. at 45, 47-48). Plaintiff understood that if he did not follow AutoZone's policies, he would be subject to termination. (*Id.* at 45). Also, Plaintiff understood that if he had any questions concerning the policies contained in the Handbook, he could ask a higher ranking member of management. (*Id.* at 47-48).

AutoZone's Handbook contains a Diversity Commitment policy which states that every AutoZoner is to be treated with dignity and respect regardless of race, gender, age, physical ability, sexual orientation, or any other perceived difference. (Plaintiff Dep. at 73; Handbook at 22). The Diversity Commitment policy states that "as an AutoZoner you have an obligation to report any behavior that does not support this commitment" (Handbook at 22). The Handbook also contains an Equal Employment Opportunity policy which provides that "there is equal opportunity without regard to . . . age." (*Id.* at 25). In addition to the Handbook, Plaintiff received separate diversity and harassment policies, which he signed to indicate that he read and understood them. (Plaintiff Dep. at 71-73; Plaintiff Dep. Exs. 2-3, Preventing Sexual Harassment and Diversity Mission Statement). The Handbook and policies make clear that if an employee has any question, concern, or complaint, they are to follow AutoZone's Problem Solving Procedures policy and/or call the AutoZoner Relations 1-800 hotline. (Plaintiff Dep. at 74; Handbook at 32-33). Plaintiff never utilized the

problem solving procedure or called the 1-800 hotline to lodge a complaint of discrimination. (Plaintiff Dep. at 74-75, 115-1 16, 209-210). Plaintiff testified at his deposition that he did not call the 1-800 number to complain about age discrimination since, at the time of the events, he “did not feel that way and did not give it a lot of thought.” (*Id.* at 74-75).

C. Plaintiff’s work performance

During his employment with AutoZone, Plaintiff received eleven Corrective Action Review (“CAR”) forms, which is one of AutoZone’s disciplinary procedures. (Defendants’ Motion for Summary Judgment at Ex. D). Plaintiff received one CAR in 1997, one in 1998, one in 2000, one in 2002 and one in 2003. (*Id.*). That amounted to five CARs during the first nine years of Plaintiff’s employment. Then in 2004, the year that he was terminated, Plaintiff received two CARs in March 2004; this was after he had already taken his first leave for the gall bladder and hernia surgery and immediately prior to his taking of administrative leave from April to June 2004. He then received an additional four CARs (one in June 2004, one in August 2004, one in November 2004, and one in January 2005) after he took administrative leave. (*Id.*). One of the CARs that Plaintiff received was a “serious violation” CAR on March 9, 2004, for improper cash handling procedures. The circumstances surrounding this CAR were that one of the cash drawers remained in the register when it was scheduled to be removed and counted, and the drop box containing cash and checks was left open overnight with the key in the door. (*Id.*). Plaintiff signed the CAR form indicating that he received it, and the CAR revealed that the next step for Plaintiff would be termination. (*Id.*).

Also, in September 2004, while he was on administrative leave, Plaintiff received a “needs improvement” rating on his annual performance appraisal. (Brief in Support of Motion

for Summary Judgment at Ex. E). Plaintiff did not receive this performance appraisal until after he returned from administrative leave in December 2004. The evidence indicates that this appears to be the first time the Plaintiff received such a poor annual performance appraisal in his ten years with AutoZone.

D. Plaintiff's termination from AutoZone

Plaintiff was terminated on January 10, 2005, with the stated reason being unauthorized removal of AutoZone property, unauthorized acceptance of tips, unprofessional behavior, conduct detrimental to AutoZone and AutoZone customers and loss of confidence. (Plaintiff Dep. Ex. 11). Plaintiff's termination was allegedly a result of an incident which occurred on December 31, 2004.

1. The events of December 31, 2004

On December 31, 2004, a customer named Larry Beckman ("Beckman") came into the AutoZone store at 10:00 a.m. with problems with his automobile. (Plaintiff Dep. at 126-127, 208). Plaintiff went outside to the parking lot, observed Beckman's vehicle and gave him an educated guess as to the nature of the problems, i.e., that he needed to replace the spark plugs and wires. (*Id.* at 126-127, 179-180). Plaintiff told Beckman how much the parts would cost and that, because it was very simple to change, either Beckman or his son could do the job themselves because it was easy. (*Id.* at 126-127, 179-180). Beckman told Plaintiff that he would consult with his son; at that point, Plaintiff did not sell the spark plugs to Beckman. (*Id.* at 179-180).

Beckman returned to AutoZone thirty minutes later and asked Plaintiff if he was interested in helping him because he and his son could not install the spark plugs as they were

not mechanically inclined. (*Id.* at 122-123, 181). Plaintiff testified that he did not want to do the job and that it was not customary for AutoZone employees to change spark plugs. (*Id.* at 122-123, 182, 183). According to Plaintiff, he called various auto shops to see if they could assist Beckman, however the shops were closed due to the holiday weekend or were unable to fit Beckman in. (Plaintiff Dep. at 177-179). Therefore, Plaintiff instructed Beckman to return to AutoZone at 2:00 p.m., and that he would install the spark plugs during his lunch hour. (*Id.* at 122-123). Plaintiff explained that he could not do the work at that time since there were not enough employees at AutoZone. (*Id.* at 123, 128-129).

Beckman returned around 2:00 as Plaintiff instructed. (*Id.* at 184). Plaintiff clocked out for lunch at 2:01. (*Id.* at 198-199). Plaintiff proceeded to go to work on Beckman's car in the AutoZone parking lot dressed in his AutoZone uniform. (*Id.* at 139-140). According to Plaintiff, he told his coworker, Bill Russell ("Russell"), that the customer was going to pay for the parts while he went outside with the parts. (Plaintiff Dep. at 189-191). Plaintiff went outside to install the parts and Beckman followed him and stood next to Plaintiff. Plaintiff then recommended to Beckman that he buy fuel injection cleaner to clean the system out in case there was a carbon build up. (*Id.* at 191-192). Beckman told Plaintiff that he would pay for the fuel injection cleaner when he paid for the spark plugs. (*Id.* at 191-192).

Plaintiff and Beckman returned inside the AutoZone store, got the fuel injection cleaner, and Beckman paid for the parts and cleaner all at once. (*Id.* at 193-194). While they were in line, Beckman placed a check in Plaintiff's pocket for \$20.00. (*Id.* at 120, 133-134, 194-195). Plaintiff testified that he did not consider the payment to be a "tip" or "gratuity", instead, he felt that the \$20.00 was "compensation" for working on his car during his own lunch

time, off the clock from AutoZone. (Plaintiff Dep. at 65-66, 119-120, 122-124, 133-134). Plaintiff freely accepted the check and did not attempt to return it to the customer. (*Id.* at 134-135). Plaintiff admits that at the time he did the work on the customer's car, he was in an AutoZone uniform and was on AutoZone property. (*Id.* at 122, 185-186). The customer's receipt indicates that the parts were paid for at 2:45. (Plaintiff Dep. Ex. 9). Thereafter, Plaintiff recalled getting lunch at Grandy's and eating it in his car. (Plaintiff Dep. at 199-200). He clocked back into work at 2:58. (*Id.* at 200).

2. Alleged violations of AutoZone policies

AutoZone encourages employees to go to customers' vehicles to assist them. The name for that policy is "GOTTChA," an acronym for "Go Out to The Customer's Automobile." (Handbook at 4). The policy is designed to build customer loyalty by extending the four walls of the store, helping the customers find what they really need and providing preventative maintenance through a "quick visual inspection." (Plaintiff Dep. at 116-117; Handbook at 4). The policy states: "Whether you check on a battery or help install a wiper blade, when you practice GOTTChA, you build loyal customers." (Handbook at 4). While employees are encouraged to assist customers at their automobiles and ultimately make the customers happy, employees cannot violate other AutoZone policies while doing so. (Deposition of Jay Campbell ("Campbell Dep.") at 68).

AutoZone's Handbook contains the following policy:

Although it is not all-inclusive, the following is a list of serious violations that require immediate action and may result in termination and may include investigation by management:

* * *

unauthorized possession or removal of AutoZone's or an AutoZoner's property,

* * *

unauthorized acceptance of rewards, tips, or payments of any kind for business favors.

(Plaintiff Dep. at 121-122; Handbook at 31). Additionally, the Conflicts of Interest policy in the Handbook also prohibits “accepting or requesting unauthorized gifts, tickets, entertainment, gratuities or employment from customers” (Plaintiff Dep. at 118-119; Handbook at 34). Plaintiff believed that the policy permitted employees to be paid for work they did while off the clock while prohibiting them from getting paid for assisting AutoZone customers in the parking lot while on the clock. (Plaintiff Dep. at 119-120). Finally, Plaintiff admits that he received and read AutoZone’s Code of Conduct (“Code of Conduct”), which was distributed to all management personnel in 2003. (Plaintiff Dep. at 132-133; Plaintiff Dep. Ex. 5.) The Code of Conduct states: “The following conflicts of interest are prohibited: Accepting gifts, tips or gratuities from customers.” (Plaintiff Dep. at 133; Code of Conduct at 7). Plaintiff understood the reason for AutoZone adopting these policies was that AutoZone did not want their employees to use the customers as a tool for extracurricular activities to profit personally. (Plaintiff Dep. at 135-136). Additionally, Plaintiff understood that AutoZone wanted to prevent customers from feeling uncomfortable or pressured to give a tip. (*Id.* at 136-137). Plaintiff admitted that these were reasonable goals of the company. (*Id.*).

3. The inconsistency in application of AutoZone policy

David Youngs worked for AutoZone at its Jasper, Indiana store for about ten (10) years. (Affidavit of David Youngs (“Youngs Aff.”) ¶ 2). During that period of time, he served as a PSM and as a Store Manager. (*Id.*). When Youngs held the position of Store Manager, Plaintiff worked under him as a PSM. (*Id.* ¶ 3). According to Youngs, “I, and other employees, installed parts for customers in the AutoZone parking lot, and elsewhere, prior to customers

paying for the parts. When I was a PSM, Managers asked me to do so, and as a manager, I asked employees to do so, including Russell Noeth.” (*Id.* ¶ 4; *see also* Affidavit of Rick Olsen (“Olsen Aff.”) ¶ 4; Affidavit of Brian Stinnett (“Stinnett Aff.”) ¶ 3). Indeed, taking parts out of a store to install in a customer’s car was seen as consistent with AutoZone’s GOTTCChA policy. (Youngs Aff. ¶ 5; *see also* Olsen Aff. ¶ 4 (explaining that “[i]n the spirit of GOTTCChA, on many occasions I installed batteries and other parts on customers’ cars prior to the customer’s payment for the part.”)). In keeping with the GOTTCChA spirit, on one occasion, Jim Woodall (“Woodall”), who was employed at the Washington, Indiana AutoZone store, drove his car to a customer’s stranded automobile to put a belt on. (Affidavit of Jim Woodall (“Woodall Aff.”) ¶ 4). He then learned that the customer also needed an alternator. (*Id.*). Woodall drove back to the store to get the alternator and returned to the customer’s car to install it. (*Id.*). The customer then followed Woodall back to the AutoZone location to pay for the parts. (*Id.*).

AutoZone also had a slogan: “WITTDJTJR,” which stood for “What It Takes To Do The Job Right.” (*See* Affidavit of Roy McCune (“McCune Aff.”) ¶ 3; Stinnett Aff. ¶ 4). This meant that employees were to make sure that AutoZone’s customers had everything they needed: “the right parts, products, and tools.” (McCune Aff. ¶ 3). As with the GOTTCChA policy, employees would install parts for customers in the spirit of WITTDJTJR. (*Id.* ¶ 4). Indeed, this was an almost daily occurrence. (Stinnett Aff. ¶ 5).

Store managers were obviously well aware of, and encouraged, this sort of customer service. (*See, e.g.*, Woodall Aff. ¶ 7; Olsen Aff. ¶ 5). An employee would generally tell the store manager on duty that he was going out onto the lot. (Stinnett Aff., ¶ 6). The store manager would know by this that the employee was installing a part for the customer. (*Id.*). Additionally,

district and store managers “made exceptions with [Plaintiff] to help customers and [to] do mechanical work for people,” and those same managers had no problems with Plaintiff getting paid for helping customers in this fashion. (Plaintiff Dep. at 57-58, 61).

On one occasion, a store manager instructed Youngs to take a battery from the store and drive it to a Wal-Mart parking lot to install it for a customer whose car was stranded. In fact, AutoZone employees would install parts for customers in the parking lots of nearby grocery stores and restaurants. (Youngs Aff. ¶¶ 7-8). Youngs believes that because AutoZone emphasized serving its customers, “no one ever took issue with installing parts and having the customer pay for the part after installation.” Moreover, Youngs explained that there was never a problem with a customer failing to pay for a part once it had been installed. (Youngs Aff. ¶ 6).

Throughout the ten years prior to the termination of his employment, Plaintiff had accepted money when working on customers’ cars while off the clock. (Plaintiff Dep. at 135). He was never confronted about this. (*Id.*). Rather, according to Plaintiff:

I was allowed to do this for ten years and I was asked to do it, to take money, and I was never told not to do it. I was never wrote up for . . . doing it, never counseled on it, [they never] told me this has to stop, it can’t happen in any circumstances at all. I was always asked to do it. And these people were willing to pay [me] to do it [so I could] get their car going. [I could] take it home or whatever.

(Plaintiff Dep. at 220-221).

On one occasion, Youngs approved of Plaintiff putting a transmission in a truck in the AutoZone parking lot on his own time for which Plaintiff was paid \$100. (Affidavit of Russell Noeth (“Plaintiff Aff.”) ¶ 12). Plaintiff was also paid when he installed a timing chain in the AutoZone parking lot on his own time. (*Id.*). And, Plaintiff was given compensation for doing work on an Assistant Manager’s vehicle while on the clock. (*Id.* ¶ 14).

There were occasions when Youngs contacted Plaintiff during his off time to request that he come to the store to help a customer install a part in the AutoZone parking lot. As store manager, Youngs had no problem if a customer paid some sort of gratuity or compensation to an employee who installed a part on his own time. (Youngs Aff. ¶¶ 9-10).

And, on several occasions, District Manager, Bob Cook (“Cook”), gave Plaintiff permission to take parts out of the store without a customer first paying for them. (Plaintiff Dep. at 91-92). Moreover, on more than ten occasions, Cook gave Plaintiff permission to perform mechanical work for AutoZone customers and to get paid for the work while off the clock. (*Id.* at 65-66). In fact, on one occasion, Mr. Cook went so far as to authorize Plaintiff to work on a customer’s brakes and, in exchange, allowed the customer to treat Plaintiff to breakfast while Plaintiff was actually on the clock. (*Id.* at 88).

On yet another occasion, Plaintiff installed an alternator on a customer’s car, and refused to take any pay or tip. (Plaintiff Aff. ¶ 13). Again, he installed the alternator prior to the customer’s paying for it. (*Id.*). The customer later sent Plaintiff tickets to an Indiana University basketball game and \$5 for parking, of which Youngs approved. (*Id.* at Ex. A). In October 1999, this customer also sent a letter of appreciation to AutoZone headquarters, in which he described what Plaintiff had done for him. (*Id.* at Ex. B). An AutoZone Senior Vice President, Jerry Colley (“Colley”) wrote a letter of appreciation to Plaintiff in November 1999. (*Id.* at Ex. C). Plaintiff was also commended by Youngs. (*Id.*).

Plaintiff actually received the “Extra Miler” award for customer satisfaction in December 1996 and was nominated again in August 2000 and May 2001 for the same award. These nominations and the 1996 award were for actions similar to those that Plaintiff was terminated

for. (*See* Plaintiff Aff. ¶ 19; Plaintiff Aff. Ex. D).

4. Investigation and decision to terminate Plaintiff

Atherton, the assistant store manager, reported the events of December 31, 2004, to Bieser, who, in turn, notified Black, the Regional Human Resources Manager. (Deposition of Brian Black (“Black Dep.”), at 25-26, 41). Black conducted an investigation and interviewed and took the statements of Plaintiff, as well as two AutoZone employees who were present on December 31, 2004, Bill Russell and James Bolin (“Bolin”). (*Id.* at 28-29; Black Dep. Ex. 1). Both Bolin and Russell witnessed Plaintiff working on the customer’s car in AutoZone’s parking lot; Bolin and Russell also confirmed that the spark plugs and other AutoZone products were installed on the customer’s car before they were paid for. (Black Dep. at 30; Black Dep. Ex. 1). During the investigation, Plaintiff admitted that he installed the parts before they were paid for and that “the customer willingly gave me \$10 as his appreciation.” (Black Dep. Ex. 1).

After conducting the investigation, Black faxed a copy of the statements to the AutoZoner Relations department located at AutoZone’s headquarters in Memphis, Tennessee. (Exhibit H, pp. 16, 37-38). Tim Harrison (“Harrison”), an attorney with the AutoZoner Relations department, reviewed the statements and recommended that Plaintiff be terminated for violation of company policy. (Black Dep. at 17, 39, 50, 55; Deposition of Jay Campbell (“Campbell Dep.”) at 38; Declaration of Tim Harrison (“Harrison Decl.”) ¶¶ 1, 3). Harrison determined the policy violation and the verbiage on his own. (Black Dep. at 40, 55; Harrison Decl. ¶ 3). Black communicated AutoZoner Relations department’s recommendation to Campbell, the Regional Manager, who is ultimately responsible for making the decisions regarding termination. (Black Dep. at 50; Campbell Dep. at 24, 39, 41). Campbell then reviewed the statements. (Campbell

Dep. at 39, 41). Based on the statements that were taken and Harrison's recommendation, Campbell decided that termination was in order. (*Id.* at 62).

Plaintiff was replaced by an individual named Jim Dixon ("Dixon"). (See Defendant's First Supplemental Answers to Plaintiff's First Set of Interrogatories, Interrogatory No. 16). Dixon was transferred from another AutoZone store to the Jasper, Indiana store. (*Id.*). Dixon is nearly twenty years younger than Plaintiff. (*Id.*).

E. Plaintiff's Claims

Plaintiff filed his Amended Complaint on December 12, 2005. In his Amended Complaint, Plaintiff alleged that he was the victim of discrimination because of his age in violation of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 621 et seq. (Amended Complaint ¶ 35). Plaintiff also alleged retaliation for filing a worker's compensation claim in violation of Indiana law. (*Id.* ¶ 39).

Defendants seek summary judgment on all of Plaintiff's claims. First, Defendants argue that Plaintiff's ADEA claim must be dismissed because Plaintiff cannot prove his prima facie case and because there is no evidence of pretext. Second, Defendants argue that Plaintiff's claim of retaliation for filing a worker's compensation claim fails because there were other reasons for his termination. The court disagrees and, therefore, concludes that Defendants are not entitled to judgment as a matter of law on Plaintiff's claims.

III. Legal Standard

Summary judgment must be granted "if 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 a judgment as a matter of

law.” FED. R. CIV. P. 56(c). The motion should be granted so long as no rational fact finder could return a verdict in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, a court’s ruling on a motion for summary judgment is akin to that of a directed verdict, as the question essentially for the court in both is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-252. When ruling on the motion, the court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences therefrom in that party’s favor. *Id.* at 255. If the nonmoving party bears the burden of proof on an issue at trial, that party “must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); *see also Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). Lastly, the moving party need not positively disprove the nonmovant’s case; rather, it may prevail by establishing the lack of evidentiary support for that case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

IV. Analysis

Plaintiff brought his claims alleging that Defendants’ actions (1) violated the ADEA, 29 U.S.C. § 621 *et seq*; and (2) were in retaliation for filing a worker’s compensation claim.

A. Plaintiff’s ADEA claim

Plaintiff’s Amended Complaint alleges age-based discrimination in violation of the ADEA. Under the ADEA, an employer is prohibited from discrimination in employment decisions against individuals who are forty years of age or older. 29 U.S.C. §§ 621(b), 631(a). “An ADEA plaintiff must establish that he would not have been treated adversely by his employer but for the employer’s motive to discriminate against him because of his age.” *Denisi*

v. Dominick's Finer Foods, Inc., 99 F.3d 850, 864 (7th Cir. 1996).

A plaintiff attempting to demonstrate age discrimination may do so by showing direct or indirect evidence of discrimination. *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999). As is the case here, where plaintiff does not purport to argue that there is direct evidence of discrimination, the court must examine plaintiff's claim using the burden-shifting method set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to create an inference of age discrimination. *Denisi*, 99 F.3d at 864. Under the *McDonnell-Douglas* framework, an employee must first establish a prima facie case of discrimination. *Id.* Once the employee has carried his burden of demonstrating a prima facie case, there is a presumption of discrimination, and the burden shifts to the employer who must articulate a legitimate, nondiscriminatory reason for the action. *Id.* If the employer provides such a reason, the plaintiff "must raise some doubt as to the genuineness of the given reasons for a termination." *Anderson v. Stauffer Chemical Co.*, 965 F.2d 397, 403 (7th Cir. 1992).

In an age discrimination case such as this, plaintiff establishes his prima facie case by showing that "(1) he was in the protected age group; (2) he was performing according to his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) similarly situated, substantially younger employees were treated more favorably." *Biolchini v. General Elec. Co.*, 167 F.3d 1151, 1153-54 (7th Cir. 1999). In this case, there is no dispute that Plaintiff was in the protected age group or that he suffered an adverse employment decision. The only two inquiries important to whether Plaintiff has proved his prima facie case are whether he was performing to AutoZone's legitimate expectations and whether similarly situated younger employees were treated more favorably.

The court concludes that Plaintiff was performing to AutoZone's legitimate expectations. The court must be ever mindful that, in a summary judgment setting such as this, the court must view the facts in the light most favorable to Plaintiff, including drawing any reasonable inference in his favor. Keeping that in mind, the court notes that Plaintiff has listed countless examples of instances where he removed the necessary parts to fix a customer's vehicle, permitted the customer to pay afterward, and was given some form of compensation for his efforts. Plaintiff has provided evidence from Youngs, a store manager, who also engaged in this type of practice and who approved of similar instances that Plaintiff took part in. Additionally, Plaintiff contends that Regional Manager Cook also approved of fixing automobiles before the parts were paid for and receiving some form of compensation. Plaintiff also alleges that he received an Extra Miler award followed by two additional nominations for the Extra Miler award, and a letter of appreciation from AutoZone headquarters, for the very type of behavior that led to his termination. Because this type of behavior was so pervasive within AutoZone, an inference that can be drawn is that people such as Black, Harrison, and Campbell, in upper-level management positions within AutoZone, had to have known that this type of behavior was common and that employees who had performed in this manner were not subject to discipline or termination.

In addition, part of AutoZone's espoused rationale for Plaintiff's termination was unauthorized removal of AutoZone property. However, Plaintiff has provided so many examples of situations where he fixed a customer's vehicle before the parts were paid for that a reasonable inference is that he had the implicit authority to do this. Plaintiff was employed in a managerial position, had been a store manager in the past, and had ten years of experience determining the needs of AutoZone customers. It is reasonable to infer that such an employee

could fix a customer's vehicle without hunting down the store manager on every occasion and not fear reprisal for doing so. And, in fact, Defendants admit that they did not even know whether or not Plaintiff had the authority to do this at the time they made their employment decision.² Therefore, the court is left with the inference that this really was not a terminable offense, and Plaintiff has met his burden of showing that he was performing to AutoZone's legitimate expectations.

The court also concludes that substantially younger employees were treated more favorably than Plaintiff. Plaintiff has provided evidence that at least one individual in AutoZone's Washington, Indiana store, ten individuals in AutoZone's Jasper, Indiana store, and fourteen individuals in AutoZone's Vincennes, Indiana store who were substantially younger than Plaintiff engaged in similar behavior but were not terminated. (Plaintiff Aff. ¶¶ 9, 16, 20). Also worthy of noting is the Seventh Circuit's opinion in *Olson v. Northern FS, Inc.*, which provides that:

In an attempt to better reach the ultimate question of when, as here, an employee within the protected class has been discharged and replaced, we have required that the employee show only that he was performing his job to the employer's legitimate expectations and that the employer hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age . . . was the reason for the discharge.

Olson v. Northern FS, Inc., 387 F.3d 632, 635-36 (7th Cir. 2004)(internal citations and quotations omitted). Here, Plaintiff was replaced by Dixon, an employee nearly twenty years younger than Plaintiff. In light of the Seventh Circuit's holding in *Olson* as well as the fact that

²Plaintiff maintains that he had permission to take the parts out to the AutoZone parking lot. Only five months after their employment decision did Defendants learn that Plaintiff's supervisor claimed that Plaintiff did not have authority to do this. (Black Dep. at 30-31).

Plaintiff can demonstrate that substantially younger individuals were treated more favorably, Plaintiff has demonstrated a prima facie case.

Because Plaintiff has satisfied his burden of demonstrating a prima facie case of discrimination, the burden shifts to Defendants to show a legitimate nondiscriminatory reason for his termination. Defendants' proffered rationale for terminating Plaintiff was the unauthorized removal of AutoZone property, unauthorized acceptance of tips, unprofessional behavior, conduct detrimental to AutoZone and AutoZone customers and loss of confidence. (Plaintiff Dep. Ex. 11). The court notes that, as discussed above, Defendants freely admit that they did not know that Plaintiff's removal of the spark plugs and other parts was unauthorized. (Black Dep. at 30-31). In addition, AutoZone policies only prohibit "unauthorized possession or removal of AutoZone's or an AutoZoner's property" (Handbook at 31). Defendants have provided no evidence that simply taking a spark plug into the AutoZone parking lot to place in a customer's vehicle before it is paid for constitutes a violation of this policy; the removal *must* be unauthorized. As discussed above, a jury could reasonably conclude that an employee at the managerial level such as Plaintiff, who on many of previous occasions had engaged in similar behavior, had the implicit authority to do this. Thus, because the court views the facts in the light most favorable to Plaintiff and because the court only examines the facts as they were known at the time of the employment decision, Defendants' first proffered reason for termination does not constitute a legitimate nondiscriminatory reason for termination.

Thus, the court is left with the question of whether terminating Plaintiff for being given a gift while working off the clock constitutes a legitimate nondiscriminatory reason for his termination. While the court notes that a decision to terminate Plaintiff quite possibly could

have been a “bad” and unfair decision, the court cannot say that this rationale for termination was not legitimate. The Handbook states that “unauthorized acceptance of rewards, tips, or payments of any kind for business favors” is punishable up to and including termination. (Handbook at 31). While there is a significant dispute about whether accepting a gift while doing work off the clock qualifies as a violation of this policy, Defendants contend that it did violate the policy and Plaintiff has not provided sufficient evidence to show that it was not the belief of the decision maker in this case.

By providing a legitimate nondiscriminatory reason for Plaintiff’s termination, Defendants shifted the burden back on Plaintiff to provide evidence that this reason was merely a pretext hiding Defendants’ true discriminatory intentions. One way of demonstrating pretext is to examine whether Defendants’ proffered reason is unworthy of belief. *Koski v. Standex Int’l Corp.*, 307 F.3d 672, 677 (7th Cir. 2002). Hence, “when the sincerity of an employer’s asserted reasons for discharging an employee is cast into doubt, a fact finder may reasonably infer that unlawful discrimination was the true motivation.” *Testerman v. EDS Technical Prods. Corp.*, 98 F.3d 297, 303 (7th Cir. 1996).

In this case, Plaintiff has produced adequate evidence to cast doubt on the sincerity of Defendants’ proffered rationale for his termination. First, Defendants engaged in a superficial investigation into Plaintiff’s actions, failing to inquire if he had permission to do this, if he had routinely done it in the past, or even questioning Plaintiff’s supervisors to determine if they had signed off on his actions. Next, Plaintiff has provided such a plethora of examples of others who engaged in this type of behavior that a jury could reasonably infer that AutoZone headquarters must have known that it occurred. Because Plaintiff has demonstrated: 1) that he was replaced

by a substantially younger individual; 2) that at least 25 substantially younger individuals engaged in similar behavior but were not terminated; 3) that Defendants engaged in a less than adequate investigation with regard to whether or not Plaintiff's removal of the parts was authorized; and 4) that Plaintiff was terminated, after ten years of service that included customer service awards and other nominations, for the offense of accepting a check for services he rendered while on his lunch break, the court concludes that Plaintiff has made a showing of facts from which a reasonable jury could infer pretext. Defendants' Motion for Summary Judgment on Plaintiff's ADEA claim must be DENIED.

B. Plaintiff's *Frampton* Claim

Plaintiff's second claim is that he was terminated in retaliation for filing two worker's compensation claims. Indiana follows the doctrine of employment at will, and employment is presumptively terminable at any time with or without cause so long as there is no definite or ascertainable term of employment. *Coutee v. Lafayette Neighborhood Hous. Servs., Inc.*, 792 N.E.2d 907, 911 (Ind. Ct. App. 2003). However, there are exceptions to the employment at will doctrine, one of which is a public policy exception. The Indiana Supreme Court in *Frampton* ruled that one such public policy is that an employee who is terminated for filing a worker's compensation claim may sue for damages. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

In order for Plaintiff to survive a motion for summary judgment on his retaliatory discharge claim, Plaintiff must provide evidence that either directly or indirectly raises the necessary inference of causation between Plaintiff's filing of a worker's compensation claim and the termination. This evidence can come in the form of 1) a close proximity in time or 2)

evidence that the proffered reason is a mere pretext. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1262 (Ind. Ct. App. 2002).

Here Plaintiff's evidence indicates that he received his first ever below expectations annual performance review in the midst of his second worker's compensation claim. Plaintiff also had begun to receive several CARs after his first leave for gall bladder and hernia surgery. Plaintiff returned to work for the final time in November 2004, and within a short period of time received another CAR and was terminated after the December 31 incident. Based on this evidence, a jury could reasonably believe that Plaintiff's termination was substantially close in time to the filing of his second worker's compensation claim and that Defendants were engaging in the type of case-building behavior that creates an inference that Defendants were improperly motivated. In addition to the close proximity and the case-building, the court already noted in its discussion of Plaintiff's ADEA claim that Plaintiff has provided evidence to cast doubt on the sincerity of Defendants' proffered rationale for termination. Because Plaintiff has raised the necessary inference of causation between his protected activity and the decision to terminate him, Defendants' Motion for Summary Judgment must be DENIED.

V. Conclusion

For the reasons outlined above, Defendants' Motion for Summary Judgment (Docket # 41) is **DENIED**. Defendants' Motion to Strike Plaintiff's Exhibits Filed in Opposition to AutoZone's Motion for Summary Judgment (Docket # 60) is also **DENIED**.

SO ORDERED.

Dated: May 3, 2006.

s/ *Richard L. Young*

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