UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2547

WAYNE BAYLESS,

Plaintiff-Appellee,
Cross-Appellant,

versus

DRESSER INDUSTRIES, INC.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas
(CA-H-89-283)

(December 9, 1993)

Before POLITZ, Chief Judge, REAVLEY and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Dresser Industries, Inc. appeals an adverse jury verdict and its post-judgment motions in this age discrimination suit. We affirm.

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Wayne Bayless worked for Atlas-Dresser, a division of Dresser Industries, in the capacity of "Director General Adjoint" of ALDIA, an oil company jointly owned with the Algerian government. He lost his job at age 60 when a younger employee took his position and the offer of another position in Houston, Texas did not materialize.

Bayless invoked the Age Discrimination in Employment Act[1] (ADEA). A jury returned a verdict in his favor, finding that age was a determinative factor in his termination and that Dresser's violation of the ADEA was willful. After unsuccessful post-judgment motions, Dresser timely appealed.

Analysis

Judgment as a matter of law will be granted only if the evidence, viewed in the light and with all inferences most favorable to the verdict, "point[s] so strongly and overwhelmingly in favor of [the movant] that the Court believes that reasonable [persons] could not arrive at a contrary verdict. . . ."[2] Here, however, reasonable persons could reach differing conclusions. "[I]t is the function of the jury . . . to weigh conflicting evidence and inferences, and determine the credibility of witnesses."[3] A verdict rendered in that setting must stand.

---

[1]29 U.S.C. § 621 *et seq.*

[2]**Boeing Co. v. Shipman**, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*), quoted in **MBank Houston, Nat. Ass'n v. Armco, Inc.**, 1 F.3d 1439, 1446 (5th Cir. 1993).

[3]**Id.**, 411 F.2d at 375.

There was evidence upon which the jury could have found the following scenario. John Kennedy, age 35, assumed supervision of Dresser's Algerian operations in early 1985. He came to the position with the intention of replacing Bayless even though Bayless had received satisfactory evaluations. Raymond Dickeson, a Dresser vice president and Bayless's previous supervisor, drew the assignment of easing Bayless out.

In 1984 Bayless had sought a transfer because the dusty climate appeared to be damaging his wife's eyesight. In response to his inquiries about a position in China, Dickeson told Bayless that the company no longer wanted old people. The transfer did not materialize and Julie Bayless's eye problems were resolved.

Dickeson resurrected discussion of a transfer in June 1985, suggesting to Bayless a position on the Houston Executive Sales team. Bayless agreed. The company announced Bayless's departure from his Algerian post and selected his replacement: Michael Besle, a 44-year-old engineer with limited executive experience. In reality, however, the position in Houston did not exist and the company was not in a financial position to create one. Bayless was later so informed and was offered early retirement but he insisted on an assignment. Kennedy responded by firing him. Faced with this specter, Bayless accepted a "voluntary separation."

The jury reasonably could infer from this evidence that Dresser's proffered reason for its action -- a reduction in force -- was pretextual and that the real reason for Bayless's termination was his age. Although the company presented evidence

of work force reduction, this evidence did not explain why Bayless lost his Algerian position to another employee. There was evidence of age animus: that is, that Kennedy decided Bayless needed to be replaced before he assessed his job performance, that Bayless was replaced by a younger, less qualified person, and that Dickeson had turned aside Bayless's inquiries about a transfer to China with the comment that "they don't want old people anymore." The evidence sufficiently supports the jury verdict.

Dresser invites our attention to the recent decision by the Supreme Court in **St. Mary's Honor Center v. Hicks**.[4] We find this case inapposite. It involved a race discrimination claim tried to the bench in which the trial court found that the defendant's rationale was pretextual but found no discrimination and ruled against the plaintiff. The court of appeals reversed, holding that a finding of pretext mandates a finding of discrimination. In reversing the court of appeals the Supreme Court stated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required." But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of

[4] _____ U.S. _____, 113 S.Ct. 2742, 125 L.Ed.2d 407, 61 U.S.L.W. 4782 (1993).

persuasion.[5]

In short, the plaintiff cannot prevail unless the trier of fact makes an ultimate finding of intentional discrimination. Such has always been the prevailing rubric. Disbelief of the defendant's proffered rationale together with the evidence proving the plaintiff's *prima facie* case permits such a finding but does not compel it.

Unlike **St. Mary's**, the trier of fact in the case at bar found intentional discrimination. The question before us is not whether the evidence compels such a finding, as in **St. Mary's**, but whether the evidence permits it. We are persuaded beyond peradventure that it does.

Dresser challenges the jury's finding of willfulness, contending that there was no evidence of egregious misconduct. As Dresser's counsel candidly conceded at oral argument, that contention is foreclosed by the intervening decision in **Hazen Paper Co. v. Biggins**.[6] In **Hazen Paper** the Supreme Court teaches that a showing of egregiousness is not required to establish willfulness for purposes of the ADEA; proof that the employer either knew the conduct was prohibited by statute or showed reckless disregard for that fact suffices.

Finally, Dresser contests an instruction which allowed the jury to draw adverse inferences from its failure to produce certain

---

[5]125 L.E.2d at 418-19, 61 U.S.L.W. at 4784 (internal quotations and citations omitted) (emphasis in original).

[6]_____ U.S. _____, 113 S.Ct. 1701, 123 L.Ed.2d 338, 61 U.S.L.W. 4323 (1993).

personnel records, maintaining that the instruction was misleading and prejudicial because there was no evidence that the records were pertinent to any issue in the case. At trial, however, Dresser objected to the instruction solely on the grounds that there was no evidence that the documents sought by Bayless were in fact personnel records. We find no merit in this objection.

Bayless cross-appeals the dismissal of his claim for negligent infliction of emotional distress. Dismissal was appropriate; there is no such tort under Texas law.[7]

AFFIRMED.

[7] **Boyles v. Kerr**, 855 S.W.2d 593 (Tex. 1993).