UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7638

(Summary Calendar)

WILLIAM R. HOGE, JR.,

Plaintiff-Appellant,

versus

HARRIS COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91-l940)

(February 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

William Hoge appeals summary judgment of his age discrimination claim against Harris County, Texas. Hoge brought suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.,* claiming that the Harris County refused to hire him as an assistant district attorney ("ADA") because of his age. Finding no genuine issue of material fact regarding whether

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Harris County's proffered, nondiscriminatory reasons were a pretext for discrimination, we affirm.

Hoge was 57 years old when he applied for an ADA position with Harris County. After he was denied the position, Hoge filed an ADEA claim against Harris County, alleging that he was the victim of intentional age discrimination. In its motion for summary judgment, Harris County stated that it had denied Hoge an ADA position because Hoge had not practiced law for almost ten years, had not engaged in any activity to maintain his legal skills, and gave unsatisfactory answers to questions posed to him during his interview. The district court granted Harris County's motion for summary judgment, from which Hoge filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "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). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54.

While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

Where no direct evidence of age discrimination exists, as is the case here, a three-step analysis applies. *See, e.g., Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955, 957 (5th Cir. 1993); *Moore v. Eli Lilly & Co.,* 990 F.2d 812, 815 (5th Cir.), *cert. denied,* 114 S. Ct. 467 (1993). To establish a prima facie case of discrimination in hiring, the plaintiff must show that (1) he is a member of a protected group; (2) he applied for an open position with the employer; (3) he was qualified for that position when he applied; (4) he was not selected for the position; and (5) after the employer declined to hire the plaintiff, the position was filled by someone outside the protected class or otherwise not considered because of age. *See, e.g., Lindsey v. Prive Corp.*, 987 F.2d 324, 326-27 (5th Cir. 1993). If the plaintiff establishes a prima facie case, then the burden of production falls on the employer to articulate a legitimate, non-discriminatory reason for its action. If the employer meets its burden of production, then the plaintiff must show, by a preponderance of the evidence, that the employer's reasons were a pretext for discrimination))i.e., "that the employer's reasons were not the true reason for the

employment decision *and* that unlawful discrimination was." *Bodenheimer,* 5 F.3d at 957 (citing *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742, 2747 (1993)). The plaintiff retains at all times the "ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination." *St. Mary's,* 113 S. Ct. at 2747-48 (attribution omitted).

After an employer has offered legitimate, nondiscriminatory reasons for its decision, the plaintiff, to survive summary judgment, need only produce evidence to create a genuine issue of material fact concerning pretext.[1] *Moore,* 990 F.2d at 815. "[T]he plaintiff must do more than cast doubt on whether the employer had just cause for its decision; he or she must show that a reasonable factfinder could conclude that the employer's reason is unworthy of credence." *Id.* at 815-16 (attribution omitted). "Specifically, there must be some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for just cause to people over 40." *Id.* (attribution omitted).

Harris County offered the following non-discriminatory reasons for not hiring Hoge as an ADA: (1) that Hoge had not practiced law for over ten years; (2) that Hoge had not engaged in any activity to maintain his legal skills; and (3) that Hoge gave unsatisfactory

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[1] "A dispute about a material fact is `genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer,* 5 F.3d at 956.

answers to questions posed to him during his interview.[2] Because those proffered reasons were legitimate and nondiscriminatory, they satisfied Harris County's burden of production. Consequently, to survive summary judgment, Hoge had to tender factual evidence that "would lead a jury to reasonably conclude that [Harris County's] reasons [were] a pretext for age discrimination." *Bodenheimer,* 5 F.3d at 958 (citing Fed. R. Civ. P. 56(c); *St. Mary's,* 113 S. Ct. at 2747). In opposing summary judgment, Hoge relied primarily on two statistics regarding the hiring of ADAs in Harris County.[3] The first demonstrated that out of the 26 persons interviewed by Hoge's interviewer, only 3 were above 40 years of age, and none of those 3 received a second interview. The second statistic demonstrated that out of 100 people actually hired as ADAs, only 4 were over 40 years of age. This statistical evidence alone could not lead a reasonable jury to find that Harris County's reasons for not hiring Hoge were false and that age discrimination was the real reason.[4] Hoge has therefore failed to demonstrate a genuine issue of material fact regarding whether Harris County's proffered reasons were pretexts for age discrimination.

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[2] We assume for purposes of this opinion only that Hoge established a prima facie case of age discrimination.

[3] Hoge's other summary judgment evidence))e.g., those actually hired possessing law review experience))clearly do not reveal a genuine issue of material fact regarding whether Hoge was a victim of intentional age discrimination, and therefore do not merit discussion.

[4] Hoge's use of statistics to show pretext ignores the fact, judicially-noticed by the district court, that most of the applicants for ADA positions are below 40. Hoge does not dispute this fact.

Accordingly, the district court's summary judgment is AFFIRMED. Harris County's request for sanctions is DENIED.