UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7770
Summary Calendar

GILBERTO GARCIA,

Plaintiff-Appellant,

VERSUS

PEPSI BOTTLING GROUP,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(B 88 CV 158)

August 27, 1993

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Gilberto Garcia (Garcia) sued his former employer, Pepsi Bottling Group (Pepsi), after he was terminated for altering invoices. The district court entered summary judgment against Garcia, concluding that his claims of age discrimination and intentional infliction of emotional distress were unfounded. We affirm.

I.

Garcia was employed as a route salesman by Pepsi. Appellant,

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

on his own time and of his own initiative, would purchase Pepsi products from the large discount stores and later resell these same products to the smaller retailers on his route. Because the larger stores were able to purchase Pepsi products at discounted prices, Garcia was able to turn a profit when he resold the merchandise. He was terminated after he admitted to falsifying some of the invoices he turned into his employer.

Appellant then sued Pepsi, alleging claims of age discrimination[2] and intentional infliction of emotional distress. Appellee moved for summary judgment, which the district court granted. The court concluded that Garcia's claims were unfounded; Pepsi had a legitimate basis for firing Appellant, and there was no competent evidence that this was a pretextual reason for age discrimination. The court also concluded that there was no evidence that Pepsi's conduct was outrageous. Consequently, Appellant's claim for intentional infliction of emotional distress was dismissed as well.

II.

In reviewing a grant of summary judgment, we apply the same

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[2] Nowhere in his complaint does Garcia cite to the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., or its Texas counter part, the Texas Commission on Human Rights Act (TCHRA), Tex. Rev. Civ. Stat. Ann. art. 5221k et seq. Nevertheless, because both parties have briefed this issue, and due to the plenary nature of review on summary judgments, we address the age discrimination claim.

We note that the analysis applied to the ADEA is similar to that used in TCHRA cases. Compare Thornbrough v. Columbus & G. R. Co., 760 F.2d 633, 638-39 (5th Cir. 1985) with Lakeway Land Co. v. Kizer, 796 S.W.2d 820, 822-23 (Tex. Civ. App. -- Austin 1990, writ denied).

standard of review applied by the district court. See Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). Summary judgment is appropriate only if, when viewed in the light most favorable to the nonmoving party, the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

III.

To prove a prima facie case of age discrimination, the plaintiff must show: (1) he is a member of the protected class; (2) discharged; (3) qualified for position; and (4) replaced by a younger employee. See Thornbrough v. Columbus & G. R. Co., 760 F.2d 633, 639 (5th Cir. 1985); Lakeway Land Co. v. Kizer, 796 S.W.2d 820, 822-23 (Tex. Civ. App. -- Austin 1990, writ denied). Our review of the record evidence indicates that Appellant cannot make out this prima facie case.

First and foremost, Appellant candidly admitted to falsifying invoices. Garcia's practice of self-dealing, regardless of his motivation, amounted to theft from his employer. This is sufficient to support the conclusion that he was not qualified for his position. See e.g. Slaughter v. Allstate Ins. Co., 803 F.2d 857, 860 (5th Cir. 1986) (insurance agent terminated for submitting false claim for damages to his home).

Assuming arguendo that Appellant could conceivably state a prima facie case, it is clear that Appellee articulated a

legitimate, nondiscriminatory reason for its actions. Appellant could overcome this showing by proffering evidence that the reason given was pretextual. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Towards this end, Appellant did introduce affidavits from three former Pepsi employees. R. 26-32. The affidavit of Gregorio Barrone typifies this evidence:

> I was told by other Pepsi employees that Pepsi was attempting to recruit young college students to take our places, that Pepsi was looking to bring in young college educated people who could "grow up with the company."

R. 28.

Such evidence, if it were to overcome its hearsay nature, is at best speculative: "Testimony based on conjecture alone is insufficient to raise an issue as to the existence of the alleged policy [of age discrimination]." Slaughter, 803 F.2d at 860. Moreover, Appellee presented evidence that younger employees who were caught stealing were also terminated. See R. 124, 148, 170. This belies Appellant's contention that his termination was motivated by impermissible reasons. Cf. R. 180 (EEOC report, stating there was no evidence that age was a motivating factor in the termination decision).

IV.

Appellant also presented a claim for the intentional infliction of emotional distress. The district court held that Garcia could not state a claim for intentional infliction of emotional distress because there was no evidence that Appellee's conduct was "outrageous." See Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1375 (5th Cir. 1992) (to prevail on such a

claim, defendant's conduct must be "extreme and outrageous"). We agree.

Appellant admitted to falsifying invoices in order to conceal his self-dealing. Appellee, upon learning of this deceit, fired Garcia. This action was commensurate with the admitted misconduct, as set forth in the company's employee handbook. R. 39.[3] Appellee's actions were not outrageous, and cannot support a claim of intentional infliction of emotional distress. See, e.g., Dean v. Ford Motor Credit Co., 885 F.2d 300 (5th Cir. 1989) (supervisor planted checks on employee in attempt to implicate her in theft); Mitre v. Brooks Fashion Stores, Inc., 840 S.W.2d 612 (Tex. Civ. App. -- Corpus Christi 1992, writ denied) (mall security distributed fliers with plaintiffs' pictures, incorrectly identifying them as counterfeiters).

V.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[3] The Pepsi employees' handbook states, in pertinent part:

> Some actions are so dangerous, improper or illegal that immediate action must be taken .... The following are examples of actions which are prohibited and which may cause immediate separation from employment with the Company:
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> THEFT from the Company, a fellow employee, or any of the Company's customers, irrespective of value.
>
> * * * *
>
> MISREPRESENTATION OF FACTS or FALSIFICATION of Company records ....

R. 39.