IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1588

Summary Calendar

ALVIS T. CLEVELAND,

Plaintiff-Appellant,

versus

PRESTIGE FORD,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-0016-R)

(December 9, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Prestige Ford hired Alvis T. Cleveland to sell used cars in October 1989 and discharged him almost a year later. At the time of his discharge he was sixty-two years old. He sued Prestige in 1992, alleging that his discharge violated the ADEA. The district court granted summary judgment for Prestige and we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court correctly held that Prestige advanced a legitimate, nondiscriminatory reason for its discharge of Cleveland. See Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089, 1094-95 (1981); Thornbrough v. Columbus & Greenvile R.R., 760 F.2d 633, 640 (5th Cir. 1985). In July or August of 1990, general manager Randall Reed informed his salespeople that he expected an average performance level of ten cars sold in August and September. By Cleveland's own admission, he failed to meet that standard, selling seven in August and fewer in September. Compared to other salespersons, Cleveland had the lowest car sales for the month of August and either the lowest or second-lowest for the month of September. This shortfall serves as adequate justification for Cleveland's discharge. See Guthrie v. Tifco Indus., 941 F.2d 374, 378-79 (5th Cir. 1991), cert. denied, 112 S.Ct. 1267 (1992); Thornbrough, 760 F.2d at 647 (both stating that "[t]he ADEA was not intended to be a vehicle for judicial second-guessing of business decisions"). See also McDaniel v. Temple Indep. School Dist., 770 F.2d 1340, 1348 (5th Cir. 1985).

The district court also correctly found that Cleveland did not raise fact issues as to whether this rationale was pretextual. The basic problem with Cleveland's claim is that the same general manager, Randall Reed, authorized both Cleveland's hiring and discharge. The argument that a manager who hired Cleveland at sixty-one then decided to discriminate against him upon his reaching sixty-two is a strained one. See, e.g., Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174 (8th Cir. 1992); Proud v. Stone,

945 F.2d 796, 797-98 (4th Cir. 1991); White v. Mississippi State Oil & Gas Board, 650 F.2d 540, 544 (5th Cir. Unit A May 1981). We find no allegations about pretext that overcome that basic weakness.

Cleveland makes three basic arguments about the pretextual nature of Prestige's rationale. He first contends that Prestige applied the minimum disparately, retaining younger workers who did not reach the minimum while discharging all ADEA-protected workers who fell short. The burden of persuasion on this contention falls on him. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747-48 (1993); Laurence v. Chevron, U.S.A., Inc., 885 F.2d 280, 283 (5th Cir. 1989). This burden requires him to produce supporting facts when Prestige questioned the existence of a nonperforming younger worker. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986). Cleveland offers only a statement by a fellow salesman that Bill Mentzel, a younger salesman, sold fewer than ten cars in September. This statement does not show that Mentzel's average for August and September fell beneath the minimum. In fact, the sales records used by Cleveland's expert show that Mentzel sold over ten cars in August, highlighting the statement's lack of probative value. Cleveland's evidence does not create a fact issue on this contention.

Cleveland next argues that he was a competent salesman with a higher monthly sales average than some workers not discharged, and that the manager established the minimum as a performance goal rather than a condition for continued employment. Both arguments

address the wisdom of Prestige's discharge criteria rather than the validity of the criteria it chose to use. Neither creates a fact issue on the issue of pretext.

Finally, Cleveland cites remarks allegedly made by managers about older workers as evidence of pretext. Two of those statements involve recollections of remarks made at a meeting. Absent some indication of who made the remarks, they failed to qualify as admissions by a party-opponent under Federal Rule of Evidence 801(d)(2). See Zaken v. Boerer, 964 F.2d 1319, 1324 (2d Cir.), cert. denied, 113 S.Ct. 467 (1992); Cedack v. Hamiltonian Fed. Sav. & Loan, 551 F.2d 1136, 1138 (8th Cir. 1977); cf. Davis v. Mobil Oil Expl. & Prod. Southeast, Inc., 864 F.2d 1171, 1174 (5th Cir. 1989) (describing the indicia of reliability necessary for such a recollection to become admissible). The other statement he cites was made when the general sales manager said to "watch out" because "[t]he old guys, A.T. Cleveland and Robert Bell, they may come out of the woodwork for this bonus." This remark, insofar as it is at all negative about older workers, is too vague to prove that Prestige's rationale was pretextual. See Guthrie, 941 F.2d at 378-79.

AFFIRMED