

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1616  
Summary Calendar

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ANDY JAMES GILLILAN,

Plaintiff-Appellee,

VERSUS

TECCOR ELECTRONICS, INC.,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:92-CV-0208-P)

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(March 31, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

The district court, presumably because it did not have the benefit of St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), erroneously suggested to the jury that an employer is deemed to have engaged in age discrimination merely if the jury disbelieves the employer's explanation for the firing of an employee.

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Gillilan, a facilities manager at Teccor, was demoted to quality control manager in 1989 and fired five months later. He filed suit against Teccor, alleging that he was dismissed because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.<sup>1</sup> Over Teccor's objection, the court submitted the following instruction to the jury:

To prevail on his age discrimination claim, therefore, Mr. Gillilan must prove that his age was a determining factor in Teccor's decision to terminate his employment.

. . .

Mr. Gillilan is entitled to prove, if he can, that the reasons stated by Teccor for its decision to terminate his employment were not its true reasons but were instead pretextual, to cover up age discrimination prohibited by the ADEA. He may do this in either of two ways: (1) directly, by persuading you that a discriminatory reason more likely than not motivated Teccor, or (2) indirectly, by showing that Teccor's explanation is not credible or believable. If he succeeds in proving to you that Teccor's stated reasons for terminating his employment were pretextual, you may infer that Teccor was motivated by discriminatory reasons and intended to discriminate against Mr. Gillilan because of his age. The reason is that we know from experience that more often than not, people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for an employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based its decisions on an impermissible consideration such as age. [First emphasis added.]

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<sup>1</sup> Gillilan also alleged that his firing violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001-1461, and constituted intentional and negligent infliction of emotional distress. Gillilan abandoned his negligent infliction claim before trial. The jury rejected Gillilan's intentional infliction claim. By separate order, the court rejected Gillilan's ERISA claim.

The jury answered yes to the question, "Do you find by a preponderance of the evidence that age was a determining factor in the Defendant's decision to terminate Plaintiff's employment with Defendant?" In accordance with the verdict, the district court awarded damages against Teccor.

On appeal, Teccor claims that the jury instructions were erroneous and that the district court erred by admitting certain evidence regarding a Teccor memorandum that described Gillilan's job deficiencies. Specifically, the district court admitted into evidence a computer printout showing that the "file creation date" of the Teccor memorandum was after Gillilan's firing. A Teccor employee, Rusk, testified about the meaning of the file creation date.

## II.

In St. Mary's Honor Ctr., the Court held that a plaintiff has not proven discrimination merely because the factfinder has found that the employer's proffered reasons for termination were a pretext. The Court said that

nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. at 2751. Although St. Mary's was a title VII case involving race discrimination, this court has adopted the St. Mary's framework in ADEA cases. Bodenheimer v. PPG Indus., 5 F.3d 955, 957 n. 4 (5th Cir. 1993).

The jury instructions, taken as a whole, do not comport with St. Mary's. The district court was correct in instructing that Gillilan must prove that age was a determining factor in his termination. The court was also correct in instructing that the jury may infer discrimination if it disbelieved Teccor's explanation for the termination. St. Mary's, 113 S. Ct. at 2749.

The district court erred, though, when it instructed that when all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based its decision on an impermissible consideration such as age.

This instruction would have led the jury to believe that if an employer cannot provide legitimate reasons for termination, it has engaged in age discrimination "more likely than not." Because a plaintiff who proves a claim "more likely than not" would satisfy the preponderance-of-evidence standard, the jury well may have incorrectly reasoned that Teccor's proffered explanations were a pretext, that rejection of Teccor's proffered explanations meant that "more likely than not" Teccor had discriminated against Gillilan, and that therefore Gillilan had established by a preponderance of the evidence that Teccor had engaged in age discrimination.

Viewing the jury charge as a whole, we conclude that the charge misled the jury as to the substantive law. See Martin v. Thomas, 973 F.2d 449, 454 (5th Cir. 1992). On the evidentiary issue, we conclude that the district court did not abuse its discretion in deciding that the jury should be able to see the

evidence in question. The defendant had every opportunity to develop, through cross-examination or otherwise, the significance of the file creation date.

The judgment is VACATED and REMANDED for further appropriate proceedings.