IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1641
Summary Calendar

GEORGE DAVID ATKINS,

Plaintiff-Appellant,

versus

COLTEC INDUSTRIES, INC., further known as Colt Industries, Inc. and STEMCO, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas
(3:92-CV-443-G)

(August 18, 1994)

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

PER CURIAM:*

George David Atkins sued Coltec Industries, Inc. and Stemco, Inc. arguing that he was discharged from his employment on account of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1985 & Supp. 1994). Following a jury verdict in Atkins's favor, the district court granted a judgment as

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

a matter of law in favor of the defendants. Atkins appeals this judgment. Because the evidence presented at trial overwhelmingly demonstrates that the defendants did not discriminate against Atkins on the basis of age, we affirm.

I

In July 1989, Stemco Instruments hired Atkins as their Director of Marketing and Sales. Stemco Instruments produced and sold the "AutoCoach," an on-board computer for commercial trucks that records activities while driving to help decrease costs associated with operations. Stemco marketed the AutoCoach through two separate avenues: it was sold directly to end users, and it was supplied to distributors who, through their own direct sales staff, sold the product to end users. Atkins, who had experience with computers and computer sales, was hired to generate an overall marketing strategy and to strengthen and improve the existing sales force. According to Atkins, he spent the majority of his time--eighty-five to ninety percent--working with Stemco's direct sales staff, providing, for example, instruction on selling techniques, and teaching time management skills.

Although the AutoCoach line had good potential, at the time Atkins was hired Stemco was experiencing severe financial troubles. In 1988, the company sustained a net loss of over $1.8 million, and in 1989 it lost almost $3.1 million. In early 1990, Paul Norton, formerly the president of Stemco Truck Products Division, assumed control of Stemco Instruments. The problems faced by Stemco

Instruments were two-fold. First, the product contained some serious defects that would take time to cure. Because of the defects, customers were making a large number of warranty claims, and these claims contributed to Stemco's second major problem--$5 million in losses over two years. After consulting with his superiors, Norton determined that Stemco, first and foremost, needed to remedy the product defects. While Stemco's engineering department worked to cure the defects, Norton concluded that it would be unwise to continue selling a defective product to new customers. However, existing customers--many of whom were experiencing difficulties with the AutoCoach--would continue to require some servicing in order to protect Stemco's reputation. Once the defects in the AutoCoach had been corrected, Stemco would then focus its efforts on sales and marketing to new customers.

To effect his strategy, Norton, with the approval of his supervisor John Guffey, terminated approximately twenty-seven of Stemco's forty employees on February 14, 1990. First, Norton terminated Stemco's Vice President and General Manager, whom Norton considered to be largely responsible for Stemco's troubles. He then dismissed the entire sales force, including Atkins, because direct sales of the AutoCoach had been indefinitely suspended; Norton, however, would continue to maintain an open line of communications to existing distributors. He discharged the financial department, concluding that it would be more economical to have the financial reporting completed by Stemco's parent

company's financial department. Norton also released the manufacturing department's support staff, keeping only those assemblers who were responsible for assembling the AutoCoach. Norton also moved the manufacturing operations from its own building across town to share an affiliated company's facilities. Norton made further staff reductions in the engineering department, keeping only those engineers who Norton thought were most qualified to correct the existing problems, and who could help existing customers with their problems.

Almost immediately after Norton terminated the entire sales staff, the new Vice President and General Manager suggested that Norton rehire one member of the sales staff, Chris Johns. Johns, who previously had worked at one of Stemco's distributors selling the AutoCoach line and other similar products, had been hired by Atkins to communicate between Stemco and its network of distributors. According to the new vice president, Johns should be retained because Stemco needed at least one person to continue servicing the distributors. Norton agreed, and rehired and reinstated Johns in his former position.

II

Atkins later sued Stemco and Coltec, claiming that Stemco violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1985 & Supp. 1994) (referred to hereafter as the "ADEA"),

when it discharged him.[1] The case was tried to a jury, during which Atkins presented only two witnesses--himself and Paul Norton. After deliberations, the jury concluded that Stemco had discriminated against Atkins on the basis of age in violation of the ADEA, and awarded $91,000 in damages. The district court, however, entered a judgment as a matter of law in favor of the defendants, stating that the evidence so strongly and overwhelmingly favored the defendants that a reasonable fact-finder could not find for Atkins. Atkins appeals this judgment.

III

Atkins contends that the district court erroneously disregarded a valid jury verdict in his favor when it entered judgment as a matter of law in favor of the defendants pursuant to Federal Rule of Civil Procedure 50(a). As we have noted many times before, when reviewing the entry of a judgment as a matter of law,

> the Court should consider all of the evidence--not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)(en banc).

[1]The questions presented to the jury in the charge clearly indicate that Atkins tried the case as an improper discharge--not a failure to rehire. To support his contention, however, he argued at trial and on appeal that because of age discrimination the younger Chris Johns was rehired for the job he, Atkins, claims should have been his.

In an age discrimination case, the plaintiff ultimately bears the burden of persuading the trier of fact that the defendant intentionally discriminated on the basis of age. St. Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993); Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 118 (5th Cir. 1993). In the absence of direct evidence of discrimination, the plaintiff must produce sufficient evidence to make out a prima facie case. Id. Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision that adversely affected the plaintiff. See, e.g., Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 811 (5th Cir. 1991). After an employer provides nondiscriminatory reasons for the employment decision, the burden of production shifts back to the plaintiff to prove that the reasons articulated by the employer are not the true reasons for the employment decision, but instead are pretexts to disguise unlawful discrimination. Id. A plaintiff may demonstrate pretext directly by showing that a discriminatory motive likely motivated the employer, or indirectly by showing that the employer's explanation is not credible. Id. at 813. Merely demonstrating that the employer's proffered reasons were pretextual, however, will not alone establish age discrimination; "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's Honor Ctr. v. Hicks,

113 S.Ct. at 2747; see also Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993) ("To prevail ultimately, the plaintiff must prove, through a preponderance of the evidence, that the employer's reasons were not the true reason for the employment decision and that unlawful discrimination was.").

When a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the case is unimportant. Molnar v. Ebasco Constructors, Inc., 986 F.2d at 118. We focus our inquiry on whether the record contains evidence upon which a reasonable trier of fact could have concluded as the jury did. Id.; Walther v. Lone Star Gas Co., 952 F.2d 119, 122-23 (5th Cir. 1992). Thus, like the district court, we assume that Atkins established a prima facie case. Likewise, Stemco rebutted that inference by providing a legitimate nondiscriminatory reason for Atkins's discharge--that is, restructuring because of the company's poor performance reflected by its increasing financial losses over a two-year period. The burden of production then shifted back to Atkins to demonstrate pretext. In this fully tried case, however, we are not now concerned with burden shifting. Our job is to determine whether the record before us contains evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of his age when it discharged him.

IV

Atkins argued that Stemco discharged him because of his age, based on the following evidence: first, Atkins was better qualified than Johns, the younger employee who was rehired as the manager of Stemco's sales to distributor; second, statistical evidence demonstrated that younger employees fared better in Stemco's reduction-in-force than older employees; and finally, John Guffey, a Vice President of Colt Industries, Stemco's parent company, told Atkins that getting rid of older workers was a good way to reduce costs. When all the evidence presented at trial is considered, however, we hold that a reasonable fact finder could not find that Stemco discharged Atkins on account of his age.

A

First, Atkins argues that a reasonable jury could conclude that age was a determining factor in Stemco's decision to terminate him because Chris Johns, a younger employee, was rehired to continue working as the manager of sales to distributors. The determinative issue in this case is not who was better qualified to perform Johns's duties; those basic determinations are left to the sound business discretion of the company involved, and we should not and will not second guess those decisions. See Walther v. Lone Star Gas Co., 952 F.2d at 123 ("The ADEA was not intended to be a vehicle for judicial second guessing of business decisions, nor was it intended to transform the courts into personnel managers."). If, however, the evidence shows that the plaintiff is clearly

better qualified than the retained employee, the fact-finder may use this fact in concluding that the employer's articulated reason for termination of the older and better qualified employee is only a pretextual reason for age discrimination. Id.

In this case, however, Atkins never argued that he was "clearly better qualified" than Johns--he argued only that Johns was younger and less experienced. The undisputed evidence revealed that prior to joining Stemco, Atkins knew nothing about Stemco or the AutoCoach product line, and that he had never worked for a distributor in the trucking industry. Atkins's expertise rested in the area of managing direct sales forces and generating marketing strategies. Johns, by contrast, had five years of experience working for a major distributor, selling the AutoCoach product line and other similar products. As a result of this work, Johns had a detailed knowledge of the product line and a thorough understanding of the needs of distributors. Moreover, Johns, who at age forty-one was only six years younger than Atkins, was a member of the same protected class of which Atkins was a member; clearly, this age difference is less probative of a discriminatory motive than a wide disparity in age. Thus, Stemco's decision to rehire Johns does not support Atkins's age discrimination claim.

B

Next, Atkins presented statistical evidence to demonstrate that Stemco's reduction-in-forces was biased against older workers. Specifically, he produced evidence that prior to the layoff, forty

percent of the forty Stemco employees were over age forty. After the layoff, only thirteen percent of the remaining employees were over forty. Additionally, Atkins's statistics stated that the average age of the employees who were released was forty-one, while the average age of the group retained was thirty-three.

As the United States Supreme Court has warned, statistics "come in infinite variety" and that "their usefulness depends on all of the surrounding facts and circumstances." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). We have previously noted that statistics may be deceptive, "[p]articularly in age discrimination cases where innumerable groupings of employees are possible according to ages and divisions within the corporate structure." Walther v. Lone Star Gas Co., 952 F.2d at 124.

In this case, the district court correctly noted that Atkins's statistical evidence was inconclusive where entire divisions of workers were terminated. Where entire divisions are terminated, the fact that statistics reveal that those terminated tended to be employees in the protected class does not lead to the conclusion that the company selectively weeded out older employees while retaining younger employees. Moreover, the fact that Atkins was hired at virtually the same age at which he was fired indicates that Stemco did not have a general aversion to workers who were over forty. We agree with the district courts holding that "[o]n the basis of the statistical comparisons presented here, it was not

possible for a reasonable jury to conclude that age was a factor in Stemco's decision to eliminate its sales force."

C

Finally, Atkins argues that a statement allegedly made by John Guffey, a Vice President of Stemco's parent company, is evidence of Stemco's discriminatory intent. Sometime before the mass layoff, Atkins and two other Stemco employees were considering an employee buy out of Stemco. In pursuit of that goal, Atkins and two other individuals, met with Guffey two or three weeks before the layoff to discuss the proposed buy out. At trial, Atkins testified that Guffey told them that one of the best ways to reduce a negative cash flow "was to reduce head count, because that's your most expensive thing, and the best way to do that, get rid of your older workers because they cost the most because they had the highest benefits, most wages." Atkins also testified that Guffey boasted of effectively employing such methods in the past.

An examination of Guffey's statement leads to the conclusion that it is not necessarily probative of an intent to discriminate on the basis of an employee's age. Guffey stated in essence that a company can reduce a negative cash flow by eliminating <u>costly</u> older workers. It does not follow, however, that if an employee is simply older he is more expensive to retain than a younger employee; instead, the cost determinative issue is whether the employee has acquired seniority, and the increased salary and benefits that accompany seniority. Senior workers--who admittedly

are also typically older--usually have acquired higher salaries and fringe benefits simply because they have worked for the company for an extended period of time. Thus, terminating senior workers who have acquired the high salaries and expensive benefits, while retaining non-senior workers, would improve a company's negative cash flow. We have held, however, that in the final analysis seniority and age discrimination are wholly unrelated. Williams v. General Motors Corp., 656 F.2d 120, 130 n.17 (5th Cir. Unit B 1981), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); see also Hamilton v. Grocers Supply Co., 986 F.2d 97, 99 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 2929, 124 L.Ed.2d 679 (1993) and ___ U.S. ___, 114 S.Ct. 77, 126 L.Ed.2d 45 (1993); Amburgey v. Corhart Refractories Corp., 936 F.2d at 813 n.38. Furthermore, Guffey's statement is not probative of age discrimination in this case because Atkins was not a senior employee. Instead, Atkins had been hired only six months prior to the layoff. Finally, any generally incriminating statement loses much of its weight when we have determined that there were objective and undeniable economic justifications for the layoff, that Atkins was not clearly better qualified than the rehired employee, that Atkins was hired only six months earlier at approximately the same age, and that the rehired employee was himself only a few years younger and also within the protected class.

V

After considering all of the evidence presented at trial, we agree with the district court and conclude that the facts and inferences point so strongly and overwhelmingly in favor of Stemco that reasonable jurors could not arrive at a contrary verdict. Consequently, the judgment of the district court is

A F F I R M E D.