

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2605
Summary Calendar

DICK B. SIMMONS, Plaintiff-Appellant,
versus
TEXAS A & M UNIVERSITY, Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 91 3533)

(October 17, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge¹:

Appellant Dick B. Simmons ("Simmons") appeals the district court's Final Judgment that Simmons take-nothing by his suit against Appellee Texas A & M University ("TAMU") under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq. (1976) ("ADEA") for discriminatory actions taken by TAMU against older professors at TAMU. Simmons challenges the court's holding that TAMU's policy of giving newly-hired professors reduced teaching loads and raises based on performance does not constitute disparate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

treatment under the ADEA. We AFFIRM.

FACTS AND PROCEDURAL HISTORY

Simmons was hired by TAMU in September 1970, and appointed to the position of Research Engineer in the Department of Industrial Engineering in the College of Engineering. Subsequently, he was promoted to Assistant Professor in December 1970, Associate Professor in April 1971 and tenured Professor in September 1976. He currently holds the position of tenured Professor of Computer Science in the Department of Computer Science, College of Engineering.

In 1988, TAMU hired Dr. Richard A. Volz ("Volz") as Department Head of the Computer Science Department. With the permission of the University, Volz began hiring new faculty and promulgating new policies within the Computer Science Department in order to increase the amount and quality of research and teaching among the faculty. The new policies included: a "faculty qualification policy," requiring professors to meet a minimum publishing quota in order to advise graduate students; a grant of a reduced teaching load for newly-hired professors; and a merit raise system based on a professor's performance evaluation in the areas of publication, research funding, teaching and service.

On December 4, 1991, Simmons filed suit against TAMU, alleging disparate treatment under the ADEA for discriminatory actions taken by TAMU against older faculty members at the university, and for retaliation for filing his age discrimination suit. A bench trial was held before the district court on June 23, 1993. On the first

day of trial, Simmons abandoned his retaliation claim.

At the close of Simmons' case, TAMU moved for judgment as a matter of law on all of Simmons' claims. The district court granted TAMU's motion for judgment on all issues except the pay raise/merit evaluation issue. On July 7, 1993, the court entered an order adopting TAMU's Findings of Fact and Conclusions of Law. The court further found that the impact on the senior professors "did not amount to disparate treatment because the evidence shows that [Simmons] could have received a higher merit raise had he performed more favorably." On the same date, the court entered Final Judgment that Simmons take-nothing by his suit against TAMU.

DISCUSSION

In order to bring a disparate treatment claim under the ADEA, a plaintiff-employee must first establish a *prima facie* case of employment discrimination based on age by demonstrating that: 1) he is within the protected class (i.e. between the ages of 40 and 70); 2) he was comparably qualified to persons outside the protected class; and 3) he suffered adverse employment decisions not suffered by those outside the protected class. See *Laurence v. Chevron, U.S.A., Inc.*, 885 F.2d 280, 283 (5th Cir. 1989). A plaintiff who establishes a *prima facie* case creates a rebuttable presumption of intentional discrimination, shifting the burden to the employer. *Id.* The employer can rebut the presumption by articulating legitimate, non-discriminatory reasons for its actions. *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981)).

Once the employer articulates those reasons, a plaintiff may establish discrimination only by proving that the reasons are merely pretextual. *Id.*; see also *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 407 (5th Cir.), *cert. denied*, 490 U.S. 1098, 109 S.Ct. 2448, 104 L.Ed.2d 1003 (1989).

Simmons contends that he established a *prima facie* case by showing that: 1) he was over the age of 50 at the time he suffered from the adverse employment policies implemented by Volz; 2) he was tenured with more experience than most of the other professors, and therefore even more qualified than those under the age 50; and 3) he received lower merit raises, a bigger teaching load, and strict minimum publishing requirements under the faculty qualification policy, all of which were not suffered by those under the age of 50. TAMU contends, however, that Simmons was not similarly situated to professors under 50 years of age, and that he failed to produce sufficient evidence to establish that TAMU's reasons for promulgating Volz's policies were pretextual.

Our review of the district court's findings of fact is by a "clearly erroneous" standard. FED. R. CIV. P. 52(a); see also *Villar v. Crowley Maritime Corp.* 990 F.2d 1489 (5th Cir. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 690, 126 L.Ed.2d 658 (1994). We conclude that the court was not clearly erroneous in finding that Volz's policies did not amount to disparate treatment on the basis of age.

TAMU produced evidence to support its reasons for awarding Simmons a lower merit raise, imposing a heavier teaching load, and

implementing the faculty qualification policy. Simmons' merit calculation spreadsheets for the years 1988 and 1989 showed a below-average rating in publications, research funding, teaching and service. As a result of his lower performance, Simmons received a lower merit raise than those professors who maintained higher performance ratings.

A heavier teaching load was imposed on all professors who had been with TAMU for more than two or three years, so that newly-hired professors could have time to commence or transfer existing research funding to TAMU, to draft course/lecture notes for class and to allow time for transition. TAMU's policy of giving new professors a reduced teaching load was not limited to the Computer Science Department; it was university-wide. In addition, market conditions required TAMU to offer potential professors reduced teaching loads in order to hire the most qualified faculty members.

As for the faculty qualification policy, TAMU allowed Volz to promulgate the policy so that graduate students would benefit from faculty advisors who were currently involved in research themselves. The policy was created to act as an incentive for professors to participate in more research and publication. It did not take away graduate students already assigned to professors, it merely limited a professor from taking on more graduate students if the professor was not meeting the minimum research publication requirements. Newly-hired professors were exempted from the policy because they were subject to the more stringent guidelines of the tenure requirements.

Having articulated legitimate, non-discriminatory reasons for implementing Volz's policies, TAMU's burden of production shifted to Simmons to present sufficient evidence that TAMU's reasons were a pretext for age discrimination. The district court was not clearly erroneous in finding that Simmons failed to meet that burden. Our review of the evidence reveals that Simmons failed to present sufficient evidence of pretext. Instead, the record supports the court's conclusion that:

while the policy implemented by the University had a greater impact on the senior professors than the less senior professors, the basis for the disparate impact is rooted in the principal that more is expected of those who have more to give.

For example, professors with more teaching experience can carry heavier teaching loads. Simmons salary was higher than any non-tenured professor. His experience and tenure enabled him to have a more substantial effect on his salary based on his performance level. The evidence in the record supports the district court's conclusion that had Simmons performed more favorably, he would have received higher merit raises, and would not have been subject to the limitations of the faculty qualification policy.

CONCLUSION

For the reasons articulated above, the district court's judgment is AFFIRMED.