

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3287

(Summary Calendar)

EDWIN H. SBISA,

Plaintiff-Appellant,

versus

ALFALFA VIDEO INCORPORATED,
A Subsidiary of Super Club
Retail Entertainment Corp.,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
CA 92 2059 E

September 2, 1993

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

EMILIO M. GARZA, Circuit Judge:*

Edwin Sbisa appeals summary judgment of his Age Discrimination in Employment Act ("ADEA") claim against Alfalfa Video Inc. ("Alfalfa"). Because Sbisa cannot show the existence of a genuine issue as to whether Alfalfa's reasons for discharging him were a pretext for age discrimination, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Sbisa worked for Alfalfa as a store manager for one of Alfalfa's retail outlets. On April 7, 1992, Alfalfa discharged Sbisa, citing Sbisa's refusal to follow procedures relating to night bank deposits and Sbisa's past performance problems.¹ Sbisa brought suit under the ADEA, claiming that Alfalfa's stated reasons for discharge were a pretext for age discrimination. The district court granted Alfalfa's motion for summary judgment, finding that Sbisa had "fail[ed] to produce any evidence demonstrating that defendant's reasons for his termination were a pretext for age discrimination." Record on Appeal at 9. Sbisa filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54.

¹ Sbisa was forty-three years old when initially hired. At the time of discharge, he was forty-five years old. See Record on Appeal at 110.

While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

To sustain his ADEA claim, Sbisa has the initial burden of demonstrating a prima facie case of age discrimination. See *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (5th Cir. 1988) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S. Ct. 1089, 1094-95, 67 L. Ed. 2d 207 (1981)). Assuming that Sbisa makes a prima facie case,² the burden falls on Alfalfa to show a legitimate, non-discriminatory reason for the disparate treatment of Sbisa. See *id.* at 1505. The parties do not dispute that Alfalfa makes this showing; rather, they dispute whether Sbisa sustains his burden of showing a genuine issue as to whether Alfalfa's stated reasons were a pretext for age discrimination. See *id.*

After sifting through the summary judgment record, we conclude that Sbisa has not substantiated his bare allegation that Alfalfa's stated reasons for discharging him were a pretext for age

² The district court made no explicit finding as to whether Sbisa stated a prima facie case. See *id.* at 5 ("The controversy here is not so much as whether plaintiff established a *prima facie* case, which is arguable though questionable, but whether defendant has articulated a legitimate non-discriminatory reason for plaintiff's discharge.").

discrimination. At most, Sbisa's evidence shows that Alfalfa's decision was unjustified. The evidence does not establish, however, the requisite nexus between Alfalfa's actions and Sbisa's age. See *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir. 1993) ("A discharge may well be unfair or even unlawful yet not be evidence of age bias under the ADEA. To make out an ADEA claim, the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age.").³

Accordingly, the district court's judgment is AFFIRMED.

³ We need not address Sbisa's argument that he was treated differently than a younger Alfalfa employee (Carl Rooney), because Sbisa argues this point for the first time on appeal. See *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990) (stating that "issues raised for the first time on appeal `are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" (attribution omitted)). Even were we to decide the issue, the record indicates that Sbisa and Rooney were not similarly situated; consequently, any differential treatment by Alfalfa is irrelevant to a showing of discriminatory intent. See Record on Appeal at 81, 172 (showing, for example, that Rooney was an Assistant Manager under the supervision of Sbisa); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991) (stating that a plaintiff claiming disparate treatment must show that his employer gave preferential treatment to a younger employee under nearly identical circumstances).