**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-3525

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MICHAEL J. MARTIN,

Plaintiff-Appellant,

VERSUS

PINKERTON INC.

and

CORPORATE REALTY, INC.,

Defendants-Appellees.

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MICHAEL J. MARTIN,

Plaintiff-Appellant,

VERSUS

UNITED STATE DEPARTMENT OF JUSTICE

and

UNITED STATES MARSHAL'S SERVICE,
Eastern District of Louisiana,

Defendants-Appellees.

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Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-92-3056-J c/w 92-3585-J)

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(March 2, 1994)

Before WOOD[*], SMITH, and DUHÉ, Circuit Judges.

Jerry E. Smith, Circuit Judge:[**]

Michael J. Martin appeals the district court's dismissal of his claim that he was denied employment in retaliation for filing an age discrimination claim. Finding no error, we affirm.

I.

In 1990, Pinkerton, Inc., had a contract with the United States Marshal's Office whereby it furnished Court Security Officers ("CSO") to the Marshal's Office for the United States District Court for the Eastern District of Louisiana. Although the CSO's were Pinkerton employees, the Marshal's Office interviewed applicants and participated in the hiring decisions.

The contract required that CSO applicants meet certain minimum standards. Pinkerton would perform a preliminary background check on all applicants who appeared to meet the minimum requirements. When CSO positions became available, Pinkerton would forward the applications of qualified applicants to Chief Deputy Marshal Catalano.

Catalano interviewed the CSO applicants sent by Pinkerton, and the Marshal's Office performed a second, more thorough and involved

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[*] Circuit Judge of the Seventh Circuit, sitting by designation.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

background check. Catalano recommended to Pinkerton whom to hire for the available CSO positions. Pinkerton's hiring decisions were based upon Catalano's recommendations.

Upon receipt of Martin's application, Pinkerton conducted a preliminary background check to verify the information in his application. As part of the preliminary background check, a Pinkerton employee contacted employees at Corporate Realty, Inc. (previously Westminster Management Corporation), Martin's previous employer. Martin received positive recommendations, and no one at Corporate Realty mentioned an age discrimination suit that Martin had filed against it.

Several months later, three CSO positions became available, and Catalano asked Pinkerton to provide candidates for the position. Catalano interviewed Martin and informed him that the Marshal's Office would need to conduct a thorough background check at that time. During the interview, Martin volunteered to Catalano that he had filed an age discrimination lawsuit against Corporate Realty and perjury charges against five of the witnesses in that case. Corporate Realty was contacted during the background check but would only comment that it "would give out no information on [Martin] because it was afraid [Martin] would sue it again."

Martin did not mention his prior EEOC charge or litigation to anyone at Pinkerton, and Pinkerton had no knowledge of his age discrimination claim against Corporate Realty until after the hiring decisions were made. Catalano also assured Martin that the prior age discrimination lawsuit and the perjury charges would not

be taken into consideration in making his hiring decisions.

Shortly after the applicants interviewed with Catalano, they went to the Pinkerton office to fill out forms and complete paperwork. No applicants were hired at that time. Nor could any have been hired at that time, as Catalano had not given Pinkerton his hiring recommendations.

In June 1991, Catalano chose three people to fill the available CSO positions, and Martin was not among those selected. Those chosen by Catalano and hired by Pinkerton had 23 years, 27 years, and 17 years of law enforcement experience. Martin, by contrast, had only six years of law enforcement experience, all many years earlier. At the time of the hiring, Pinkerton still did not know about Martin's earlier age discrimination claim. About one month later, Martin was informed that he was not chosen for a CSO position.

Martin filed suit in September 1992, contending that Pinkerton and Corporate Realty retaliated against him in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. His case was consolidated with a claim against the Marshal's Service in which he alleged that it retaliated against him in violation of the ADEA based upon Pinkerton's failure to hire him.

The claims against Corporate Realty were dismissed in December for failure to state a claim under FED. R. CIV. P. 12(b)(6). In June 1993, the court granted summary judgment in favor of Pinkerton and the Marshal's Service because Martin had failed to present evidence sufficient to carry his burden of establishing the

causation element of a prima facie case.

II.

As a threshold matter, we address Corporate Realty's motion to dismiss Martin's appeal for want of jurisdiction. In December 1992, the district court entered a minute entry dismissing Martin's claim against Corporate Realty. In June 1993, the district court entered judgment against Martin on his claims against Pinkerton and the Marshal's Service. In its notice of appeal, Martin indicated only that he was appealing the June order; he made no mention of the December entry. Corporate Realty contends that the failure to appeal the December entry deprives this court of jurisdiction.

The June judgment did not mention Corporate Realty by name. Nonetheless, it served as a final judgment for both defendants in that case: Corporate Realty and Pinkerton. The earlier December Minute Entry dismissing Corporate Realty as a defendant was merged into the June judgment. Appeal from final judgment brings up all previous orders for review. See Dickison v. Auto Center Mfg. Co., 733 F.2d 1092, 1102 (5th Cir. 1983).

Moreover, Martin fully briefed his appeal against Corporate Realty, indicating his intent to appeal the dismissal of his claim against Corporate Realty. See Friou v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991). Thus, we deny Corporate Realty's motion to dismiss and will consider the merits of the case.

III.

We review a grant of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

We begin our determination by consulting the applicable substantive law to determine what facts and issues are material. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. Id. If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327.

To prevail in an employment discrimination suit, the plaintiff must first prove a prima facie case of age discrimination. If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for its employment decision. If the employer meets this burden of

production, the plaintiff must prove by a preponderance of the evidence that the defendant's articulated reason is a pretext masking the real reason for the employer's decision. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747-50 (1993).

In order to prove a prima facie case against Pinkerton and the Marshal's Service for retaliation under the ADEA, Martin must establish (1) that he engaged in activity protected by the ADEA, (2) that an adverse employment decision occurred, and (3) that there was a causal connection between his participation in the protected activity and the adverse employment decision. Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 298 (5th Cir. 1994).

Pinkerton concedes that Martin can satisfy the first two elements of the prima facie case. To prove a causal link between his age discrimination lawsuit against his former employer and Pinkerton's failure to hire him, Martin must establish that "but for" the prior lawsuit, he would have been hired. Shirley v. Chrysler First, Inc., 970 F.2d 39, 43 (5th Cir. 1992). Martin has proffered no evidence that reasonably could prove this element of his claim.

Martin contends that a causal connection can be drawn from the timing and sequence of the refusal to hire after the prior age discrimination suit became known. But Pinkerton did not even know of Martin's prior litigation when the decision not to hire him was made. Thus, this case is distinguishable from McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1984), where even though the defendants did not know the purpose behind the EEOC's

investigations on the plaintiff's behalf, they knew that an investigation was transpiring. Absent any indication that Pinkerton was aware of Martin's previous litigation, the coincidental timing cannot sustain a prima facie case.

As to Catalano and the Marshal's Service, Martin has proffered no evidence demonstrating that he would have been hired but for discrimination. Catalano has advanced a legitimate non-discriminatory reason for not recommending that Pinkerton offer plaintiff a CSO position. Although Martin may have met the minimum qualifications for a CSO position, he was not among the most qualified. Those hired had 20, 27, and 17 years of law enforcement experience, respectively. By contrast, Martin had only six years of law enforcement experience, approximately 20 years before seeking this position. Martin has presented no evidence that he was among the most qualified applicants; thus, summary judgment was appropriate. See Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 985 (10th Cir. 1991).

Martin also contends that the use of "irregular procedures" can support an inference of discrimination. See Walker v. Pettit Constr. Corp., 605 F.2d 128, 131 (4th Cir.), modified on other grounds sub nom. Frith v. Eastern Air Lines, 611 F.2d 950 (4th Cir. 1979). He does not identify any specific "irregular procedures" that could reasonably support an inference of discrimination, however. Catalano interviewed all applicants and made hiring recommendations on that basis. Thus, Martin cannot show that any procedures were applied to him that were not applied to other

applicants.

IV.

The district court also did not err in dismissing, under FED. R. CIV. P. 12(b)(6), Martin's claim against Corporate Realty for allegedly retaliating against him for filing his earlier age discrimination lawsuit. Dismissal for failure to state a claim is proper when the plaintiff is entitled to no relief under any state of facts. Kugler v. Helfant, 421 U.S. 117, 125 n.5 (1982).

Martin contends that Corporate Realty retaliated against him for filing his age discrimination suit by telling Catalano that it would give out no information on Martin because it was afraid Martin would sue it again. But Martin had already informed Catalano of the information during his interview, and thus the alleged retaliatory statement by Corporate Realty conveyed information already provided by Martin to Catalano. Because Martin had already volunteered the information, Corporate Realty's statement could not have caused him damage. Failing to demonstrate causation, Martin's case against Corporate Realty is doomed.

AFFIRMED.