IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5449

Summary Calendar

JEAN WILSON,,

Plaintiff-Appellant,

v.

CENTRAL FREIGHT LINES,
INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(2:91-CV-172)

(June 21, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Jean Wilson brought claims against Central Freight Lines, Inc., (Central) for age discrimination pursuant to 29 U.S.C. § 621 et seq. and for intentional infliction of emotional distress. The district court granted summary judgment for Central. Wilson appeals. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

In 1972, Wilson began working for Central, a state-wide trucking company headquartered in Waco, Texas, as an officer clerk at its Longview, Texas, terminal. Subsequently, Wilson became a cashier, and in 1976 Wilson was promoted to the position of office manager at the Longview terminal. As office manager, Wilson's job duties included supervision of clerical employees, preparation of credit union forms, personnel duties, assisting in the preparation of insurance forms, preparing new employee forms and termination notices, and filling in for office personnel during their lunch breaks or vacations.

Because of declining business conditions, according to Central, Wilson's position as office manager of the Longview terminal was eliminated. Central contends that when Wilson originally assumed her position of office manager in 1976 she supervised up to eleven employees. However, by August of 1990, Wilson supervised only three full-time clerical employees and one part-time employee at the Longview terminal. In response to its declining level of business, Central attempted to restructure and streamline its operations. As part of this plan, Wilson's position of office manager of the Longview terminal was eliminated. Wilson was fifty-eight years old when she was terminated.

Wilson then filed suit in federal district court alleging that age was a determining factor in Central's decision to fire her. Wilson also asserted a pendent state law claim for

intentional infliction of emotional distress. Central moved for summary judgment on Wilson's claim of age discrimination and on her claim for intentional infliction of emotional distress.[1] The district court granted Central's motion.

In relation to Wilson's age discrimination claim, the district court determined that the case was a reduction in force case. The district court noted that in order for Wilson to succeed on her reduction in force case, she must establish the following prima facie elements: (1) that she was within the protected age group and that she has been adversely affected, (2) that she was qualified to assume another position at the time of the discharge or demotion, and (3) that the employer intended to discriminate against her. The district court stated that the third factor was the disputed factor. In an attempt to establish the third factor of her prima facie case, Wilson had submitted two types of evidence. First, Wilson asserted that Central's past policy of dealing with business declines demonstrated that it had discriminated against her on the basis of her age. Specifically, Wilson asserted that Central's past policy concerning business declines was to lay off employees based on

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[1] In her reply to Central's motion for summary judgment, Wilson failed to address Central's assertion that she could not establish a genuine issue of material fact concerning her claim for intentional infliction of emotional distress. Because the district court determined that there was no evidence to indicate any extreme or outrageous behavior on the part of Central, the district court granted Central's motion for summary judgment with regard to this claim. Wilson does not address her claim for intentional infliction of emotional distress on appeal. Therefore, Wilson has waived any argument concerning the propriety of the district court's determination.

seniority. According to Wilson, this policy was implemented by laying off the employee with less seniority while the employee with more seniority was "rolled back" into the less senior employee's position. Pursuant to this policy, Wilson asserts that she should have been "rolled back" into the cashier position at the Longview terminal. Second, Wilson offered statistical analysis from Dr. Sandra McCune, an assistant professor in secondary education, who stated that Central's 1990 termination decisions were not age neutral and adversely affected employees forty years or older.

The district court determined that Wilson's evidence concerning Central's past policy of rolling back a senior employee into a junior employee's position did not create a genuine issue of material fact as to whether Central discriminated against Wilson. The court pointed to the deposition of Weldon Mangham, former terminal manager of the Longview terminal, who stated that while layoffs were based on seniority, Wilson was not laid off; her position was eliminated, and, thus, she was not subject to the "roll back" policy. Further, Thomas Clowe, Jr., President and CEO of Central, stated that Central's "roll back" policy applied only to hourly employees and not to management and salaried employees.

In order to refute Central's contention that its "roll back" policy did not apply to her, Wilson presented evidence to the district court that Central had transferred two other salaried or managerial employees to hourly positions. This evidence

demonstrated that several months after Wilson was fired, two salaried and/or managerial employees were transferred instead of terminated as Wilson was. The district court did not find Wilson's evidence concerning the transfer of other employees relevant to whether Wilson was discriminated against because the other transfers occurred several months after her termination and occurred pursuant to a "transfer policy," which Central asserted was implemented subsequent to Wilson's termination, not a "roll back" policy. The district court further stated that it was not persuaded that Central's failure to fire the current cashier and replace her with Wilson created an issue of material fact concerning whether Central discriminated against her.

The district court also dismissed Dr. McCune's conclusion, based on her statistical analysis, that Central's 1990 termination decisions were not age neutral. The district court concluded that Dr. McCune's analysis did not reveal a bias against employees over the age of forty. According to the district court, Dr. McCune's statistical analysis was not helpful because there is no comparison to the total number of employees terminated as a result of Central's reduction in force.

After reviewing the two types of evidence offered by Wilson, the district court concluded that Wilson had failed to establish a prima facie case of age discrimination. The district court then addressed, even though it acknowledged that it was unnecessary, Central's argument that summary judgment was appropriate because Wilson had not established that Central's

proffered non-discriminatory reason for firing her was only a pretext for age discrimination. Because Wilson submitted essentially the same evidence to rebut Central's non-discriminatory reason for terminating Wilson as she did to establish her prima facie case, the district court determined that Wilson had not refuted Central's non-discriminatory reason for firing her.

After the district court entered judgment against her, Wilson filed a motion for a new trial. Central opposed the motion; Wilson filed a reply to Central's response. In her reply, Wilson included an affidavit not previously presented to the district court. Further, in a supplemental reply to Central's response, Wilson included two more affidavits not previously presented to the district court. At the hearing on Wilson's motion for a new trial, Wilson submitted three more previously unsubmitted affidavits. The district court granted Central's motion to strike the affidavits filed during the hearing. In its order denying Wilson's motion for a new trial, the district court determined that Wilson had not made a proper showing in order to reopen the case on the basis of new evidence. The court noted that Wilson provided no explanation concerning why she was unable to timely submit this evidence. The district court stated that this information was available before it granted Central's motion for summary judgment; the court further concluded that even if it were to consider the evidence, it would still conclude that there was not a genuine issue of material

fact concerning whether Central had discriminated against Wilson on the basis of her age.

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). First, we consult the applicable law to ascertain the material factual issues. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1486). Summary judgment is proper "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 judgment as a matter of law." FED. R. CIV. P. 56(c). In the instant case, the question before us is whether the evidence in the summary judgment record establishes a material issue of fact concerning whether Central discriminated against Wilson on the basis of her age. See Armstrong v. City of Dallas, 997 F.2d 62, 66 (5th Cir. 1993).

III. DISCUSSION

A. Evidentiary Requirements

Because age discrimination is often a difficult proposition to prove, the Supreme Court has established a procedure which allocates the burden of production and establishes an order for the presentation of proof in discrimination cases. Under the McDonnell Douglas test,[2] the plaintiff must first establish a prima facie case of age discrimination. To establish a prima facie case of age discrimination in a reduction in force case, the plaintiff must establish that: (1) she was discharged; (2) she was qualified to assume another position at the time of her discharge; (3) she was within the protected class at the time of discharge; and (4) the employer intended to discriminate in reaching the decision at issue. Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d 633, 642 (5th Cir. 1985). The last element of the prima facie case can be established by evidence leading the factfinder "to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." Id. The establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. Thus, the establishment of a prima facie case places upon the

[2] McDonnell Douglas is a Title VII case; however, the Fifth Circuit has adopted its test for use in ADEA cases. See Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 n.4 (5th Cir. 1993).

defendant the burden of producing an explanation to rebut the prima facie case. Although the McDonnell Douglas presumption shifts the burden of production to the defendant, the ultimate burden of persuasion always remains with the plaintiff. Once the employer satisfies its burden of production, the presumption disappears, and the plaintiff then has "the full and fair opportunity to demonstrate" that the proffered reason was not the true reason for her discharge and that age was.

B. Proof of Discriminatory Intent

We note initially that it is well settled in this circuit that the correctness of a district court's grant of summary judgment may not be determined on the basis of evidentiary material first put of record after the summary judgment is granted. E.g., Savers Fed. Savings & Loan Ass'n, 888 F.2d 1497, 1501 n.4 (5th Cir. 1989). Therefore, we will not consider any of the evidence which Wilson submitted after the district court's grant of summary judgment in favor of Central. Further, because Wilson does not brief the issue of whether the district court improperly decided not to reopen the summary judgment record and consider her new evidence, she has waived that issue on appeal. Morrison v. City of Baton Rouge, 761 F.2d 242, 244 (5th Cir. 1985).

In the instant case, Central asserts that Wilson was not discriminated against; rather, Central asserts that Wilson was terminated because of adverse economic conditions. See Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 119 (5th Cir. 1993)

(termination based on adverse economic conditions is a legitimate non-discriminatory basis for terminating employee). Because we are reviewing the granting of a summary judgment, we must determine whether Wilson has created a genuine issue of material fact as to whether Central discriminated against her on the basis of her age. In her response to Central's motion for summary judgment, Wilson asserted that the following evidence created a genuine issue of material fact: (1) Wilson asserted that after she was terminated her job duties were absorbed by younger employees,[3] (2) Wilson asserted that Central violated its "roll back" policy, (3) Wilson asserted that Central's contention that it never rolled back managerial/salaried employees to hourly positions is contradicted by the company's actions with regard to two other employees, and finally (4) Wilson asserted that statistical evidence established that Central discriminated against her on the basis of her age.

As we emphasized in Bodenheimer, the Supreme Court in St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), established that the plaintiff must do more then merely assert evidence negating an employer's defense; rather, the employee must

[3] In its memorandum opinion, the district court noted that Wilson did "not allege that new employees were hired to assume her duties. Nor does she allege that the employees who assumed her duties were less qualified than she." On appeal, Wilson attempts to assert that Central was forced to hire a younger employee because the other employees at the Longview terminal were unable to complete all of her previous duties by themselves. However, this evidence concerning the new hire was only brought out in the evidence which Wilson attempted to introduce subsequent to the district court's decision to grant summary judgment for Central. Therefore, we will not consider it.

introduce evidence demonstrating that the employer's proffered reasons were a pretext for age discrimination. Bodenheimer, 5 F.3d at 958-59 & n.8; see also Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 298 n.22 (5th Cir. 1994). In this case, we do not believe that Wilson has established a genuine issue of material fact that she was discriminated against because of her age. Wilson's evidence concerning the two other employees that were transferred does create a fact issue concerning whether Central's position that it never "rolled back" or transferred salaried employees was necessarily correct. However, because there is no evidence concerning the age of these two employees, the evidence is not particularly probative of whether Central discriminated against Wilson on the account of her age.

We further conclude that the statistical analysis offered by Dr. McCune does not help Wilson establish a genuine issue of material fact. Dr. McCune conducted two different comparisons to analyze whether Central's reduction in force actions in 1990 were age neutral. First, Dr. McCune took the number of employees involuntarily terminated in 1990 and divided the employees into two separate categories. In the first category were employees involuntary terminated based on a reduction in force or end of assignment; in the second category were employees terminated based on the employee's behavior or health. Dr. McCune further divided the employees into two age groupings, i.e., over and under forty. Thus, for example, Dr. McCune's table set forth the total number of employees over forty terminated as a result of

the reduction in force or end of assignment. Dr. McCune determined that 52.83% of all of the over forty employees terminated in 1990 were terminated pursuant to Central's reduction in force or end of assignment. Also, Dr. McCune determined that 26.74% of all of the under forty employees terminated in 1990 were terminated pursuant to Central's reduction in force or end of assignment. Dr. McCune concluded that "there exists a significant difference between the proportion of employees age 40 years or older involuntarily terminated as a reduction in force or end of assignment [by Central] in 1990 and the proportion of employees under age 40 involuntarily terminated as a reduction in force or end of assignment."

Dr. McCune's next comparison further subdivided the employees terminated pursuant to Central's reduction in force into the categories of (1) full-time employees and/or employees with at least ten years experience and (2) extra or part-time employees with less than ten years of service. Dr. McCune determined that 67.86% of the over forty employees terminated by Central as a reduction in force or end of assignment were full-time employees or employees with ten years or more of service. Dr. McCune also determined that 20% of the under forty employees terminated by Central as a reduction in force or end of assignment were full-time employees or employees with ten years or more of service. According to Dr. McCune,

> there exists a significant difference between the proportion of employees age 40 years who were full time employees or

> employees with 10 years or more of service that were involuntarily terminated as a reduction in force or end of assignment [by Central] and the proportion of employees under age 40 who were full time employees or employees with 10 years or more of service that were involuntarily terminated as a reduction in force or end of assignment [by Central].

The district court determined that Dr. McCune's statistical analysis did not create a genuine issue of material fact as to whether Wilson was terminated by Central on the account of Wilson's age. First, the district court noted that Dr. McCune had conceded that 64.1% of the <u>total number of employees discharged</u> as a result of the reduction in force were <u>under forty</u>. Employees under forty represented 58% of the total workforce. The court noted that these numbers did not reveal any bias or discrimination against employees over forty; rather, if anything, the numbers indicated a bias against employees under the age of forty.

The district court then specifically addressed the comparisons utilized by Dr. McCune to reach her conclusions. Concerning Dr. McCune's first comparison, the district court stated that it failed

> to see the relevance of Dr. McCune's percentages and resulting conclusion because there is no comparison to the total number of employees terminated as a result of the [reduction in force]. . . . The Court finds that Dr. McCune's comparisons of termination reasons within age groups are not helpful in determining whether employees over age forty were disproportionately affected.

Similarly, the district court did not find Dr. McCune's second comparison to be persuasive because the court believed that Dr. McCune had arbitrarily classified employees according to their

years of employment and part-time or full-time status with Central. The district court believed that these classifications skewed the statistical analysis.

We agree with the district court that Dr. McCune's statistical analysis did not create a genuine issue of material fact regarding whether Central discriminated against Wilson on the basis of her age. We note that particularly in age discrimination cases statistics are easily manipulated and may be deceptive. See Walther v. Lone Star Gas Co., 952 F.2d 119, 124 (5th Cir. 1992). The fact that statistics may be deceptive in an age discrimination case is easily demonstrated in this case. The same numbers which Dr. McCune utilized in determining that Central's 1991 reduction in force decisions were not age neutral also demonstrate that of the employees terminated in 1991 pursuant to Central's reduction in force 64.1% were under forty while under forty employees represented only 58% of the total work force. While we are unwilling to say that Dr. McCune's statistical analysis is not probative at all as to Central's motivation in terminating Wilson, we do not believe that the statistical evidence would be sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. Therefore, we conclude that the evidence which Wilson states supports her claim is insufficient for a reasonable jury to return a verdict for her as a matter of law. Thus, we conclude that the district court did not err in granting Central's motion for summary judgment.

IV.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment on Wilson's claims of age discrimination and intentional infliction of emotional distress.