UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7200
Summary Calendar

CHARLES A. MITCHELL,

Plaintiff-Appellant,

VERSUS

LIPSCOMB OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA GC91-219-B-O)

(November 3, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In this action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, Charles A. Mitchell appeals from an adverse judgment as a matter of law, following his case-in-chief. Finding no reversible error, we **AFFIRM**.

I.

Mitchell, then 54 years old, was hired by Lipscomb Oil in September 1989 and discharged less than ten months later. Lipscomb

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Oil operated 12 convenience stores in Mississippi and Arkansas and hired Mitchell to be retail operations manager for its stores. Mitchell was responsible for their satisfactory retail performance[2] and directly supervised four stores. The others were directly supervised by Ken Anderson, then age 39, and Jamie Lipscomb, then age 20. Jamie Lipscomb's father, Jim Lipscomb, owned and was president of Lipscomb Oil. When Mitchell was hired, his superiors in the company were Rick McCourt, the Executive Vice President of Lipscomb Oil, and Jim Lipscomb.

In his earlier employment with Dodge Stores, Mitchell had used certain convenience-store management policies. One was described by Mitchell as a "sit on" policy; he went to a problem store and stayed there, without attending to other stores, until the problems at the store were resolved.

Shortly after Mitchell started working for Lipscomb Oil, he began "sitting on" one of the four stores for which he was directly responsible. McCourt and Jim Lipscomb, however, told Mitchell not to do so, because Lipscomb Oil did not have enough personnel to take over Mitchell's duties at other stores while he "sat on" one. In addition to being dissatisfied with Mitchell's attempts to "sit on" the stores, Mitchell's supervisors had problems with the four stores for which he was directly responsible. These problems included inventory shortages and "lost cash" in excess of accepted industry levels, and increased overtime. In many cases, these

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[2] The "retail performance" aspect of the convenience stores' business refers to their sales of merchandise other than gasoline and other automotive products, such as beer, cigarettes and food.

problems worsened after Mitchell was hired. He ascribed these problems in part to not being allowed to "sit on" the stores.

After being discharged in July 1990, Mitchell promptly filed an age discrimination charge with the Equal Employment Opportunity Commission, stating: "I believe I was discriminated against because of my age (55), since ... I was replaced by a younger person."[3]

Mitchell later filed more detailed statements in support of his EEOC claim; however, he did not allege that Lipscomb Oil employees had made any age-related comments to him. After the EEOC issued a no-cause determination in March 1991, Mitchell filed suit that September. A bench trial took place on February 11-12, 1993.

At trial, Mitchell testified that McCourt had made age-related comments to him about twice a month. He explained that this information was not included in his EEOC charge, affidavit, or supporting documents because Mitchell was not "an expert in law" and was filing the EEOC charge "on [his] own".

The only witness who supported Mitchell's testimony regarding age-related statements was Barbara Dillard, also a former Lipscomb Oil employee, and a friend of Mitchell's. Dillard testified that McCourt had, on several occasions, made such remarks to Mitchell. Dillard earlier had submitted a statement to the EEOC, however, in which she described one incident, without mention of any age-

[3] It was later stipulated that Mitchell was not replaced; his duties were reassigned to existing employees. His position (retail operations manager) was abolished. Anderson and Jackie Ables (who had been hired primarily to replace Lipscomb's son Jamie) took over management of the four stores for which Mitchell had been directly responsible.

related comment. And, in a conversation with Lipscomb Oil's counsel less than two weeks prior to trial, Dillard said nothing about such remarks. Dillard's explanation for the inconsistency was that she had not realized that she was talking to Lipscomb Oil's counsel.

Jim Lipscomb, called as an adverse witness, testified that Mitchell had been fired for unsatisfactory performance. Shortly after Lipscomb testified, Mitchell rested his case-in-chief. On Lipscomb Oil's motions for judgment as a matter of law[4] and attorney's fees, the court granted the former.[5]

II.

In challenging the judgment as a matter of law, Mitchell raises numerous issues; several concern evidentiary rulings, and the rest primarily concern whether the district court properly characterized the elements of a *prima facie* case for age discrimination.

A.

We review evidentiary rulings for abuse of discretion and reverse such rulings only where they affect a substantial right of the complaining party. *E.g.*, ***Southern Pacific Transp. Co. v. Chabert***, 973 F.2d 441, 448 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1585 (1993); *see also* Fed. R. Evid. 103(a), Fed. R. Civ. P. 61. For a bench trial, the district judge is entitled to

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[4] Fed. R. Civ. P. 50(a).

[5] The court took the fee request under advisement, and ultimately denied it.

even greater latitude in such rulings. ***Chabert***, 973 F.2d at 448; *see also* ***Polythane Sys., Inc. v. Marina Ventures Int'l Ltd.***, 993 F.2d 1201 (5th Cir. 1993).

Mitchell asserts, first, that the district court improperly denied him a right to put on "rebuttal evidence" regarding Jim Lipscomb's testimony. But, Lipscomb was called *by Mitchell* as an adverse witness; Mitchell exercised the opportunity to attempt to impeach Lipscomb's testimony and to respond to Lipscomb Oil's direct examination of Jim Lipscomb.

Mitchell essentially seems to be complaining that he was not allowed to reopen his case after he rested. But, rebuttal evidence "is not to be used as a continuation of the case-in-chief". ***Cates v. Sears, Roebuck & Co.***, 928 F.2d 679, 685 (5th Cir. 1991). We find no abuse of discretion in the district court not allowing Mitchell to reopen.

Mitchell also contends that the district court erred in not permitting him to depose his pre-Lipscomb Oil employer in order to demonstrate primarily Mitchell's previous satisfactory job performance. The court did not abuse its discretion. It considered a detailed offer of proof, and determined correctly that the deposition testimony would be irrelevant.

Finally, Mitchell contends that the district court erred by granting Lipscomb Oil's motion *in limine* to exclude evidence on conditions of employment.[6] This argument misrepresents the

[6] No motion *in limine* appears in the record. Mitchell seems to have confused Lipscomb Oil's motion to *dismiss* these claims with its motion *in limine* to exclude the proposed deposition testimony,

district court's actions. It properly *dismissed* those elements of the complaint dealing with *failure to promote*, because the plaintiff did not raise them before the EEOC. The court, construing Mitchell's EEOC charge liberally, found that it did not allege failure to promote, only discharge as a result of age. And, generally, we will consider only those grounds in an employment discrimination case that were timely raised in the administrative process. *See generally* ***Anderson v. Lewis Rail Serv. Co.***, 868 F.2d 774 (5th Cir. 1989); ***Hornsby v. Conoco, Inc.***, 777 F.2d 243, 247 (5th Cir. 1985); ***Sanchez v. Standard Brands, Inc.***, 431 F.2d 455 (5th Cir. 1970).

Mitchell also misconstrues the court's decision by stating that it concerned the exclusion of evidence of the conditions of Mitchell's employment. Mitchell was never denied the right to put on such proof as it related to his claim. Indeed, he presented extensive evidence regarding those conditions; the court simply held that this evidence did not present a case of age discrimination.

B.

Next, we consider the district court holding that Mitchell did not present a *prima facie* case. Essentially, Mitchell contends that the court erred in defining the elements of the *prima facie*

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discussed *supra*. And, even if this issue also can be characterized as the court's granting a motion *in limine*. Mitchell made no offer of proof on failure to promote. Therefore, we review the exclusion only for plain error, Fed. R. Evid. 103(a)(2), and find none.

case under the ADEA, and then found, erroneously, that Mitchell had not proved several of them.

In reviewing judgments as a matter of law, we consider

> all 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.

Hornsby, 777 F.2d at 245 (quoting ***Boeing Co. v. Shipman***, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

The elements of a *prima facie* case under the ADEA are:

> [A] plaintiff must prove that he was discharged; was qualified for the position; was within the protected class at the time of the discharge; was replaced by someone outside the protected class, or by someone younger, *or show otherwise that his discharge was because of his age*.

Id. at 246 (citing ***Elliott v. Group Medical & Surgical Serv.***, 714 F.2d 556, 564 n. 9 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984)) (emphasis added). If the plaintiff succeeds in establishing this *prima facie* case, the burden of production shifts to the employer to show a legitimate, nondiscriminatory reason for the discharge. ***Bienkowski v. American Airlines, Inc.***, 851 F.2d 1503, 1505-06 (5th Cir. 1988). The plaintiff must then prove that those reasons are simply pretexts for discrimination. ***Id.*** at 1506. The plaintiff may do so either by showing that the defendant was more likely motivated by a discriminatory purpose than by the one stated; or by showing that the defendant's stated reason is not credible. ***Id.***, *citing* ***Texas Dept. of Community Affairs v. Burdine***,

450 U.S. 248, 253-56 (1981). An employee's subjective belief that she was discharged as a result of age discrimination does not provide enough evidence to withstand a motion for judgment as a matter of law "in the face of proof showing an adequate non-discriminatory" reason for discharging her. ***Hornsby***, 777 F.2d at 246.

1.

In applying these standards, we find no reversible error. The district court did err in holding that Mitchell had not made out a *prima facie* case simply because he had not been replaced. The court defined the fourth element of the *prima facie* case to be only that Mitchell "was replaced by someone outside the protected class, that is, someone under forty." And, it used this definition in holding that Mitchell had not made a *prima facie* case, because "element number four, that is, that the plaintiff must be replaced by someone outside the protected class, ha[d] not been proven."

We agree with Mitchell that he could have presented a *prima facie* case, without showing that he was replaced, if he had proved otherwise that he was discharged because of his age. *See*, *e.g.*, ***Bienkowski***, 851 F.2d at 1505-06 (citing ***Elliott***, 714 F.2d at 565). As hereinafter discussed, however, we find that this error does not warrant reversal.

2.

Mitchell also contends that the district court erred in finding that Mitchell was not "qualified" for his position, for purposes of satisfying the third element of his *prima facie* case.

The court found that Mitchell was not "qualified to do" the type of work required of him because he "insist[ed] on implementing policies contrary to [Lipscomb Oil's] policies". Again, we agree that this mischaracterizes the elements of the *prima facie* case. "Qualified," in this context, means only that Mitchell needed to show that he "continued to possess the necessary qualifications for his job at the time of the adverse action," *i.e.*, at the time he was discharged.[7] ***Bienkowski***, 851 F.2d at 1506. In this respect, it does not mean that Mitchell must have been performing at a level that met Lipscomb's legitimate expectations. *See* ***id.*** at 1505 (citations omitted). As to this element, the finding that Mitchell was not qualified, if based on a perception that he was not performing as Lipscomb expected, was error. Again, however, it was not reversible error.

3.

The errors discussed *supra* do not require reversal, because the district court explicitly found that, *even assuming* Mitchell presented a *prima facie* case, he did not meet his burden of showing that Lipscomb's asserted nondiscriminatory reasons for discharging him were pretextual. As discussed hereinafter, we agree with this determination.

The district court, in granting the motion to dismiss, made a conclusion as to the ultimate issue presented by the case: *i.e.*,

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[7] Ordinarily, a plaintiff remains "qualified" if he has not "suffered physical disability or loss of a necessary professional license or some other occurrence that render[s] him unfit for the position for which he was hired." ***Bienkowski***, 851 F.2d at 1506 n. 3.

that Mitchell was discharged because of his inadequate performance, not because of his age. The court, first of all, was not convinced that any age-discriminatory behavior occurred. Mitchell's only allegations concerning discrimination (other than the bald fact of his discharge) were that his supervisor, McCourt, had made age-discriminatory remarks to him. In this regard, the only evidence presented, other than Mitchell's testimony, was Dillard's. And, the court found Dillard's testimony regarding the alleged statements "whol[l]y incredible". It noted that Mitchell was hired when he was "in his mid fifties ... and he was terminated -- still in his mid fifties", only nine months later. The court found it "inconceivable ... that a man in his mid fifties would be hired and terminated nine months later because of his age. If the defendant practiced age discrimination, it would never have hired [Mitchell]."

Further, the court found that any statements that McCourt could have made would not have had any effect on Mitchell's discharge. The court found that the decision to terminate Mitchell was made by Jim Lipscomb alone, without any consultation with McCourt. Thus, the court found that "... any [age-related] statements, ... if they were made, which the evidence does not convince the Court that they were, had no bearing and no place in the decision to terminate [Mitchell]".

By contrast, the court found that Lipscomb's testimony showed a non-age-related reason for termination:

> The testimony was, and the Court finds it wholly credible, that Mr. Lipscomb decided to fire Mr.

> Mitchell because the figures, the sales figures had not improved any since Mr. Mitchell had come to work there and in some instances they had deteriorated. Whether that was a good decision or a bad decision is irrelevant.... The court is simply concerned as to whether or not that was the reason for the firing, as opposed to a firing because of age, and the Court is convinced that it was....

Considering the evidence in the light most favorable to Mitchell, a reasonable trier of fact could not have concluded that age discrimination motivated the decision to discharge him. The judgment as a matter of law was correct.

III.

Pursuant to the foregoing, the judgment is

AFFIRMED.