UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7310

(Summary Calendar)

WILLIAM G. PLIKUHN,

Plaintiff-Appellant,

VERSUS

CHALLENGER ELECTRICAL EQUIPMENT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:91-CV-202)

(February 4, 1994)

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

PER CURIAM:[*]

Plaintiff, William G. Plikuhn, sued Challenger Electrical Equipment Corporation ("Challenger"), alleging that that company terminated his employment because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988). The jury returned a verdict in favor of Challenger, and the district court entered judgment accordingly. Plikuhn appeals, contending that he is entitled to a new trial because the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court erroneously excluded evidence at trial. Finding no abuse of discretion, we affirm.

I

When Plikuhn was fired by Challenger in September, 1990, one of the managers primarily responsible for his termination was Michael Troy. Troy had been Plikuhn's superior at Challenger since early 1981. During that time Plikuhn worked as a personnel manager and industrial relations manager, with responsibility for personnel matters.

At trial Plikuhn offered evidence to show that Troy was biased against older workers. That evidence showed that in 1987 Troy directed Plikuhn to provide him with information on certain employees with respect to their salary, years of service, and age. Plikuhn was told that the information would be used to "effect an early retirement for those employees." The evidence further showed that, in 1989 or 1990, in response to Plikuhn's request for a promotion, Troy said "Plikuhn, you are 56 years old. You are going nowhere. You will retire out of Jackson . . . . This is pie in the sky bullshit."[1]

Plikuhn offered to testify to earlier statements by Troy indicating Troy's bias against older workers. On proffer, Plikuhn testified that in 1981 Troy refused to hire a well-qualified candidate for a job with Challenger, stating "He's 57 years old. He's too old. . . . Are you crazy? His energy level will be down.

[1] When Troy made this statement, Plikuhn was employed at challenger's facility in Jackson, Mississippi.

No, I will not recommend him." Challenger objected to the admission of this evidence, and the district court sustained the objection on the grounds that the events depicted were too remote in time from Plikuhn's termination.

Another former Challenger employee, Bob Fugate, also testified about the statements which Troy allegedly made in 1981, recalling that Troy said, "This person is too old, and I think his energy level would not be enough to get the job done." Plikuhn offered Fugate's testimony to impeach Troy after Troy testified that he had never made a hiring decision on the basis of age. Challenger objected, and the district court sustained the objection on the basis of its earlier ruling that the events depicted were too remote in time.

Finally, Plikuhn testified on proffer about a statement made by Troy in 1982. According to Plikuhn, Troy stated that Challenger's St. Louis facility would be closed down because "[a]lls we have are old people left over there." The district court sustained Challenger's objection to the admission of this evidence on the basis of remoteness in time from Plikuhn's termination.

II

Plikuhn contends that the district court committed reversible error by excluding his testimony regarding Troy's alleged age-discriminatory statements. "[W]e show considerable deference to the district court's evidentiary rulings, reviewing them only for

abuse of discretion." *Johnson v. Ford Motor Co.,* 988 F.2d 573, 578 (5th Cir. 1993).

Plikuhn argues that Troy's statements were admissible under Fed. R. Evid. 404(b) to show Troy's age-discriminatory motive in firing Plikuhn.[2] We apply a two-step test in deciding the admissibility of evidence under Rule 404(b):

> "First, it must be determined that the [evidence] is relevant to an issue other than defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet other requirements of Rule 403."[3]

Buford v. Howe, ___ F.3d ___, 1994 WL 356 (5th Cir. 1994) (quoting *United States v. Beechum,* 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979)). Remoteness in time of the events depicted by the proffered evidence is a factor to be considered in applying the second prong of that test, along with the vagueness or specificity of the proffered evidence, and the similarity of the extrinsic events to the events which form the subject matter of the litigation. *See Smith v. State Farm Fire and Casualty Co.,* 633 F.2d 401, 403-04 (5th Cir. 1980) (holding that district court properly considered these factors in excluding evidence offered

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[2] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive . . . ." Fed. R. Evid. 404(b).

[3] *See* Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

under Rule 404(b)). The weighing of these factors is entrusted to the "sound discretion" of the district court. *Id.* at 403.

The district court excluded the evidence of Troy's statements on the grounds that those statements were too far removed in time from Plikuhn's termination, and therefore were not sufficiently probative of Troy's motives in firing Plikuhn to justify admission. After thoroughly reviewing the record and the authorities submitted by Plikuhn, we are not persuaded that the district court abused its discretion. The specificity of the evidence offered by Plikuhn, as well as the age-relatedness of the comments, made by an individual instrumental in Plikuhn's termination, militated in favor of admission. However, the district court was entitled to give considerable weight to the fact that eight or nine years separated Troy's statements from Plikuhn's termination.[4] On this record we cannot say that the district court abused its discretion.

Plikuhn also contends that the district court abused its discretion by excluding Bob Fugate's testimony regarding Troy's 1981 statements, which was offered to impeach Troy after he testified that he had never made a hiring decision on the basis of age. Evidence offered for impeachment purposes, like other evidence, may be excluded on the basis of Fed. R. Evid. 403. *See Williams v. Chevron U.S.A., Inc.,* 875 F.2d 501, 504 (5th Cir. 1989) (upholding exclusion of impeachment evidence where the possibility

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[4] We are not persuaded by Plikuhn's assertion that the record reveals a "consistent course of conduct which did not diminish over time." Plikuhn does not point to any conduct by Troy between 1982 and 1987 which is indicative of age bias.

of jury confusion substantially outweighed the probative value of the evidence). The district court's decision to exclude impeachment evidence under Rule 403 is reviewed for abuse of discretion. *See id.* The district court excluded Fugate's testimony on the basis of remoteness in time from Plikuhn's termination, explicitly standing on its ruling with regard to Plikuhn's testimony about the same occurrence. For the reasons already explained, the district court did not abuse its discretion by excluding Fugate's testimony.

III

For the foregoing reasons, we **AFFIRM**.