IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10200
Summary Calendar

PERCY DUPUIS,

Plaintiff-Appellant,

versus

DON SNELL BUICK, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1220-H)

(September 28, 1994)

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

Per curiam[1]:

Appellant, Percy Dupuis (Dupuis) sued his former employer, Appellee, Don Snell Buick, Inc. claiming that he was discharged in violation of the Age Discrimination in Employment Act (ADEA). Appellee moved for summary judgment, which the trial court granted. Dupuis appeals, arguing that Defendant-Appellee failed to articulate a legitimate non-discriminatory reason for terminating Dupuis, and that the summary judgment evidence raised a genuine

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

issue of material fact regarding whether age was a motivating factor in Appellee's decision to terminate Dupuis' employment. We affirm.

FACTS

Don Snell Buick is a dealership that sells, leases and services automobiles. Dupuis was the dealership's service manager from March 1975 until February 1992. At the time of his termination, Dupuis was sixty years old and was receiving a salary of approximately $101,000.00 per year. His responsibilities as service manager included supervising the service department personnel, conducting customer relations, test driving customer cars, and administering the warranty contract between General Motors Corporation and the dealership.

Beginning in the mid-eighties Dupuis began to have a problem with alcohol. On several occasions, Dupuis was counseled by Don Snell, the president of the company, and by Jim Snell, the general manager regarding his drinking problem. On May 3, 1989, Don and Jim Snell met with Dupuis and gave him the option of seeking treatment or being terminated. Dupuis, pursuant to an agreement reached with his employers, was hospitalized for his drinking problem at Charter Hospital in May 1989. Don Snell Buick paid him his full salary during his treatment.

After completing treatment, Dupuis returned to work. In October 1989, Mike McCarley, Dupuis' coworker, obtained Plaintiff's release from jail. Plaintiff had been drinking at home and had

become abusive toward his wife and been arrested. On March 7, 1991, Jim Snell believed that Dupuis had been drinking on the job and confronted him. Dupuis denied having been drinking, and Snell reiterated that drinking during business hours was grounds for immediate termination.

According to Appellee, on January 27, 1992, Keith Black (Black), a District Service Manager for Buick Motor Division of General Motors Corporation, consulted with Dupuis regarding a rental car. Because Black is responsible for approving payment for warranty work performed at Don Snell Buick, it is necessary for the service department at Don Snell Buick to work with him frequently, and to maintain a good relationship. On January 31, 1992, Black reported to Jim Snell that Dupuis had been abusive and appeared drunk on January 27, 1992. Black also suggested that Dupuis had been drunk on other occasions, and Black did not want to work with Dupuis any more. Jim Snell investigated the incident, and a number of Appellee's employees confirmed that Dupuis had appeared intoxicated when he got out of his company car, and at other times during the work day on January 27, 1992.

Jim and Don Snell consulted together and decided to terminate Dupuis. On Monday, February 3, 1992, the Snells told Dupuis that his drinking was a violation of company policy and was adversely affecting Dupuis' ability to perform his job, and that he was therefore terminated.

Although Dupuis does not deny the history of his drinking problem as set out in Appellee's evidence, Dupuis denies that he

was drinking on January 27, 1992. He also denies being anything but civil to Black on that date.

STANDARD OF REVIEW

We review summary judgments *de novo*, applying the same standard as the district court. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). A court shall enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); FED. R. CIV. P. 56(c). The moving party need only point out the absence of a material fact dispute on any issue which the other party has the burden of proof. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. The non-moving party with the burden of proof on the merits must then introduce sufficient evidence to establish all essential elements of his claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The mere existence of some factual dispute between the parties is insufficient to avoid summary judgment. Rather, an issue of fact is "genuine" only if the evidence is sufficient to support a reasonable jury verdict for the Plaintiff, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, any reasonable doubts or inferences must be decided in the light most favorable to the party opposing summary judgment. *Thornbrough v. Columbus and Greenville*

R. Co., 760 F.2d 633, 640 (5th Cir. 1985).

Dupuis argues that summary judgment is "particularly inappropriate" in this employment discrimination case, because the ultimate question is the question of the employer's intent. This Court has cautioned that cases where state of mind is at issue may not be well-suited for summary judgment, *International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991), but as long as the court keeps in mind the difficulties involved in ferreting out intent, summary judgment is not precluded. See *Id.* at 1266.

LEGITIMATE NON-DISCRIMINATORY REASON

The trial court ruling that Dupuis presented a prima facie case of age discrimination is not in dispute. Dupuis was 60 years old, qualified for the job of service manager, was terminated, and was replaced by a person who was 34 years old.

Once the plaintiff has established a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for plaintiff's termination. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993).

In its motion for summary judgment, appellee articulates two reasons for terminating Dupuis: one, violation of company policy prohibiting reporting to work under the influence of alcohol; and two, violation of company policy prohibiting operating a company vehicle while under the influence of alcohol.

Dupuis concedes that on their face, these articulated reasons

appear to be legitimate non-discriminatory reasons for terminating an employee. However, he alleges that the trial court erred in holding that Appellee met its burden of production concerning these reasons. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (Defendant must set forth clearly and with reasonable specificity, through the introduction of admissible evidence, the reasons for the adverse employment action.) Dupuis alleges that the reasons articulated in Appellee's summary judgment motion are not identical to the reasons stated at the time of his termination (Dupuis was unwilling to stop drinking and was having a loss of productivity), or to the reasons stated at a Texas Employment Commission hearing (Dupuis was terminated because of the complaint by Keith Black that he was intoxicated on the job on January 27, 1992).

Dupuis argues here, as he did in the court below, that the various reasons articulated at different times are inconsistent and are evidence that the stated reasons are pretextual. The trial court rejected this argument, and so do we. The reasons stated by Appellee for Dupuis' termination are consistent and mutually reinforcing. A reasonable fact finder could not conclude that the reasons set forth by Defendant are conflicting. *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990) ("The reason given by [defendant] to [plaintiff] may indicate that the explanation was not complete, but a reasonable fact finder could not conclude that the reasons are conflicting or that they show the reasons articulated by [defendant] are unworthy of credence.")

We hold that appellee met its burden of production on the legitimate non-discriminatory reasons for Dupuis' termination.

DID THE EVIDENCE RAISE A FACT QUESTION?

A. The legal standard

Dupuis contends that the court below erred in granting summary judgment because the evidence raised genuine issues of material fact regarding whether Don Snell Buick's articulated reasons for termination are a pretext for age discrimination.

Dupuis argues that the trial court required a showing that the articulated reason was not true, plus additional evidence of age discrimination, which he refers to as a "pretext plus" requirement. He believes that was error because he was entitled under *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993) to get past summary judgment by establishing a prima facie case and calling into question the truthfulness of the articulated reason. He relies on the following language:

> The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination..[and] upon such rejection, no additional proof of discrimination is required.

St. Mary's, 113 S.Ct. at 2749 (internal quotations and citation omitted, emphasis in original).

The quoted language is helpful only when placed in the context

of the discussion that immediately follows it. The Supreme Court continued, saying that to hold that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff would disregard the fundamental principle of Rule 301 of the Federal Rules of Evidence that a presumption does not shift the burden of proof[2], and in the employment discrimination context, the plaintiff bears the ultimate burden of persuasion. *Id*. at 2749.

Once a defendant meets its burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Plaintiff must then persuade the fact finder that the reason stated by the defendant was not the true reason for the termination, and that plaintiff's age was. *St. Mary's*, 113 S.Ct. at 2747. Merely showing that the articulated reason for the termination was false is not sufficient to win as a matter of law. *St. Mary's*, 113 S.Ct. at 2748-49.

St. Mary's concerned an employment discrimination case in which the employer prevailed after a full bench trial. The question presented to this Court is what effect the *St. Mary's* decision has on a motion for summary judgment. The Fifth Circuit has recently interpreted *St. Mary's* in the summary judgment context in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993).

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[2] Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In *Bodenheimer*, the 57 year old plaintiff brought an age discrimination suit against his long-time employer. Plaintiff established a prima facie case, and defendant responded that plaintiff had been laid off in a reduction in workforce, a legitimate non-discriminatory reason for the termination. Plaintiff then submitted affidavits attempting to establish that the reduction in force was a pretext because he was better qualified than employees whom the defendant had not terminated. The Fifth Circuit concluded that the evidence submitted by the plaintiff which only attacked the employer's articulated reason for the termination was "incapable of addressing the central issue in these cases: was age a factor in the employer's decision to terminate the employee?" *Bodenheimer,* 5 F.3d at 959.

Thus, after deciding that Dupuis has established a prima facie case and after deciding that Appellee has articulated a legitimate, non-discriminatory reason, we must inquire if Dupuis has submitted summary judgment evidence capable of addressing the central issue of whether or not age was a factor in Appellee's decision. *Bodenheimer*, 5 F.3d at 959. See also *Barrow v. New Orleans S. S. Ass'n*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994) (at the summary judgment stage, "[t]o show that the defendants' proffered reason was a pretext for discrimination, however, [plaintiff] must offer evidence not only that the defendants' proffered reason was false, but also that age discrimination was the real reason for defendants' action"). If Dupuis has failed to present evidence capable of addressing Appellee's motive, then summary judgment is

appropriate.

B. Employee statements.

In his affidavit, Dupuis says that just moments after his termination he overheard some Don Snell Buick employees discussing his termination and commenting that the company wanted to replace him with someone who was younger and would work for less pay. Although Dupuis cannot definitely say who participated in the conversation, he listed seven people who he thought were present. None of the people listed was involved in the decision to terminate Plaintiff.

Plaintiff's affidavit testimony on this issue is inadmissible hearsay which may not be considered by the court in summary judgment proceedings. *Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); *Garside v. OSCO Drug, Inc.*, 895 F.2d 46, 50 (5th Cir. 1990). Further, an isolated instance of a potentially discriminatory statement made by a non-decision maker is insufficient to raise a question of material fact sufficient to defeat summary judgment. *Waggoner v. Garland, Tex.*, 987 F.2d 1160, 1166 (5th Cir. 1993). This argument fails.

C. Dupuis' denial of the January 27, 1992 incident.

Dupuis has consistently denied that he was drunk at work on January 27, 1992 or that he had an altercation with Keith Black. Assuming, without deciding, that Dupuis has introduced evidence sufficient to create a fact question as to whether or not he was drinking on January 27, 1992, that fact question is not material to the issues in this case, and so does not provide a basis for

reversing the lower court. The question before the court was Appellee's motivation for Dupuis' termination, not Dupuis' behavior. Dupuis has not called into question the fact that Don and Jim Snell received reports from Black and other employees that Dupuis had been drinking that day, they were aware of his history of drinking problems and they were motivated by their belief that on January 27, 1992 Dupuis violated company policy regarding the use of alcohol in deciding to terminate him.

D. Salary discrepancy

Dupuis alleges that the fact that he was replaced by a younger, less experienced and lower paid employee is proof of Appellee's intent to discriminate on the basis of age. However, he produced no evidence that salary considerations were a factor in the termination decision. This argument is without merit.

CONCLUSION

Dupuis failed to present summary judgment evidence that raised a genuine issue of material fact that a motivating factor for his termination was illegal age discrimination. The trial court's grant of summary judgment is AFFIRMED.