IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10579
Summary Calendar

CAROL PLANT,

Plaintiff-Appellant,

versus

VOUGHT AIRCRAFT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(3:93-CV-1665-G)

(November 30, 1994)

Before Judges KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I

During November 1992, the defendant, Vought Aircraft Company ("Vought"), laid off Carol Plant, the plaintiff. At the time of her termination, Plant was forty-six years old and had been employed with Vought for more than twenty years. She began working

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

for Vought as a clerk typist in November 1966 and was promoted to several different positions over the years. In early 1990, Vought temporarily transferred Plant to a secretarial pool and then to an engineering planning associate position, where she remained until she was laid off. Only one other employee, M. E. McCauley, was employed in the same position as Plant at the time she was laid off. McCauley is a female who is older than Plant.

Vought alleged that it was forced to reduce its work force due to a decrease in the demand for the commercial and military aircraft it manufactured. Vought's company directives state that it is to consider certain criteria--performance, seniority, and critical skills--when determining which employees will be laid off. Vought's policies provide for consideration of seniority as the controlling factor only when an employee's performance and critical skills are essentially equal to those of employees in the same classification. Furthermore, the policies state that Vought is to attempt to find the employee another position prior to being laid off.

After comparing the criteria listed in the company directives, Vought found that McCauley outranked Plant in performance and critical skills, making Plant's seniority irrelevant. As a result of the company downsizing, Vought contended that locating a position for which Plant was qualified was impossible. Because she ranked lower than McCauley pursuant to the company directives, Plant was laid off. At approximately the same time Plant was laid

off, James Hendricks, one of Plant's younger, male co-workers, was awarded a position in the scheduling department. Many years earlier, Plant had worked in the scheduling department.

Plant filed this suit against Vought in the United States District Court for the Northern District of Texas. Plant alleged that she was wrongfully terminated (1) under Title VII of the Civil Rights Act of 1964 on the basis of her gender; (2) under the Age Discrimination in Employment Act ("ADEA") on the basis of her age; and (3) under the Employee Retirement Income Security Act ("ERISA") with the specific intent to deprive her of early retirement benefits. The court granted Vought's motion for summary judgment and dismissed Plant's complaint after finding Plant failed to demonstrate a genuine issue of material fact with regards to either her Title VII, ADEA, or ERISA claims. The court assumed, without deciding, that Plant established a prima facie case under Title VII and the ADEA. The court held, however, that she failed to show that Vought's legitimate, non-discriminatory reason for terminating Plant--company downsizing--was a mere pretext for discrimination. With respect to her ERISA claim, the court determined that Plant did not demonstrate, as she must, that Vought specifically intended to violate ERISA when it terminated her.

On appeal, Plant argues first that Vought's asserted reasons for her termination are a mere pretext for sex and age discrimination in violation of Title VII and the ADEA. Secondly,

Plant argues that Vought terminated her with the specific intent to deprive her of early retirement benefits.

II

We review a grant of summary judgment de novo, applying the same standard used by the district court. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, we examine evidence presented to determine 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). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). We must review "the facts drawing all inferences most favorable to the party opposing the motion." Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994).

A

(1)

We have adopted the same procedural structure for approaching a claim under the ADEA as that used for a claim under Title VII. See Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 & n.4 (adopting "procedural roadmap" used in Title VII cases in ADEA cases). The Supreme Court established this procedure to allocate

the burden of production and provide for the order of presentation of proof. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2746 (1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). First, the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. St. Mary's Honor Ctr., 113 S.Ct. at 2747. This creates a presumption that the employer unlawfully discriminated against the employee. Id. The defendant employer must then rebut this presumption by showing a legitimate, nondiscriminatory reason for the employee's termination.[1] Id. After the employer has met its burden of production, the plaintiff's burden of persuasion arises and the employee must prove that the employer's reasons were merely pretexts for the suffered discrimination. Id. The employee must prove that the employer's reasons were not the true reasons for the termination and that unlawful discrimination was. Bodenheimer, 5 F.3d at 957. The employee can prove that the reason asserted by the employer is pretext "either by showing: (1) that a discriminatory reason more likely motivated the defendant or (2) that the defendant's reason is unworthy of credence." Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441, 1450 (5th Cir. 1992)

[1]Only the burden of production shifts to the defendant, not the burden of persuasion. St. Mary's Honor Ctr., 113 S.Ct. at 2747. The burden of persuading the trier of fact that the employer illegally discriminated against the employee remains on the plaintiff. Id.

(citing Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981)).

(2)

Essentially the same elements necessary to maintain a Title VII action are required in an ADEA claim. Frazier v. Garrison Indep. Sch. Dist., 980 F.2d 1514, 1527 (5th Cir. 1993). For this reason we will consider these claims together. "It is relatively easy both for a plaintiff to establish a prima facie case and for a defendant to articulate a legitimate, non-discriminatory reason for his decision." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 811 (5th Cir. 1991). We agree with the district court that Plant failed to submit factual evidence that would lead a reasonable jury to conclude that Vought's reasons are a pretext for discrimination. Bodenheimer, 5 F.3d at 958; see Burdine, 450 U.S. at 256, 101 S.Ct. 1095 (stating plaintiff need not prove pretext to overcome motion for summary judgment, but must demonstrate genuine issue of material fact regarding pretext). Consequently, we need not decide whether Plant has established a prima facie case of

discrimination under either Title VII or the ADEA.[2] Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441, 1450 (5th Cir. 1992).

As a legitimate, non-discriminatory reason, Vought asserted that it was experiencing a business downturn due to the decrease in aircraft orders, resulting in a number of layoffs. Consequently, Vought argued that because Plant was not qualified to fill any remaining position, she was laid off. We find Vought's alleged reasons for terminating Plant to be legitimate and non-discriminatory. See Hanchey v. Energas Co., 925 F.2d 96, 97 (5th Cir. 1990) (finding legitimate a reduction-in-force leading to the elimination of the plaintiff's position); Amburgey, 936 F.2d at 808-09, 813 (finding legitimate explanation of termination that employee was not qualified for any position within company).

Plant argued, however, that Vought's reasons for terminating her rather than either leaving her in the remaining position given to McCauley, transferring her to the scheduling position given to

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[2]Under Title VII, the plaintiff must prove a prima facie case of discrimination by showing (1) the plaintiff is a member of a protected group; (2) the plaintiff was qualified for the job that was held; (3) the plaintiff was discharged; and (4) after the employer discharged the plaintiff, the employer filled the position with a person who is not a member of a protected group. Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992). To prove a prima facie case of age discrimination under the ADEA, the plaintiff must show that he (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; (4) was replaced by someone outside the protected class, or (5) by someone younger, or (6) show otherwise that his discharge was because of his age. Hornsby v. Conoco, Inc., 777 F.2d 243, 246 (5th Cir. 1985) (citing Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 565 (5th Cir. 1983)).

Hendricks or transferring her into the secretarial pool, were a mere pretext for discrimination.[3] In determining which employees are to be laid off, Vought considers an employee's "performance, seniority and critical skills," pursuant to a specific procedure set forth in its company policies. Seniority is the governing factor only when the employee's performance and critical skills are essentially equal to those of other employees in the same classification. Vought then used these factors to rank the employees in the Employee Ranking Charts and terminated the lowest scoring employee. Vought's termination policy provided, however, that prior to terminating an employee, the company would first attempt to find the employee another position. In short, Plant alleged that Vought discriminated against her by terminating her employment with the company rather than placing her in another position for which she was qualified, as provided in the company's policies.

Plant made several, unconvincing arguments that Vought's reasons for her termination were a mere pretext for discrimination. She principally argued that Vought's failure to follow its termination policy proved pretext. Plant contended that because her performance and critical skills were essentially equal to those of McCauley and Hendricks, her seniority entitled her to either co-

[3]Plant concedes, in her brief to this court, that "Vought has in fact articulated a legitimate, non-discriminatory reason by stating [she] was terminated because of a reduction in force," but argues that this reason is a pretext for discrimination.

worker's job.[4] Plant argues only that because she received the same numerical rating as both McCauley and Hendricks on the past two evaluations,[5] they must have rendered essentially equivalent performances. Vought introduced evidence that Plant was ranked lower on the stacking report than McCauley because her performance evaluations reflected negative marks in communication skills and attendance. To the contrary, McCauley's evaluations exhibited only positive remarks concerning her increased responsibility and ability to perform her job. Vought also submitted evidence showing that Hendricks was classified in a higher "labor grade"[6] than Plant and that the scheduling job given to Hendricks required the skills of a person in this higher "labor grade." Additionally, Plant argues that she had essentially equivalent "critical skills" as those of Hendricks and McCauley because she held at one time, the same position as both Hendricks and McCauley. We find, however, the simple fact that two employees work in the same position does not necessarily mean that they possess the same critical skills. Plant failed to produce any evidence proving this allegation. Consequently, a consideration of Plant's seniority in comparison to

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[4]Plant, undoubtedly, had more seniority than either McCauley or Hendricks at the time of her termination.

[5]All three employees were given class three ratings on their past evaluations.

[6]When an employee is rated a higher labor grade than another, he is expected to meet a higher level of performance and accordingly receives a higher level of pay.

McCauley and Hendricks to determine who to terminate was, thus, unnecessary. Plant has failed to prove that she was qualified for either McCauley's or Hendricks' job and thus that Vought failed to follow its termination policy in terminating her. She has therefore failed to prove that Vought's reasons for terminating her were pretexts for age and sex discrimination. Plant also contended that Vought failed to follow its termination policy by refusing to give her a position for which she was qualified in the secretarial pool. Plant argued that during her previous position in the typing pool, she had learned many of the software packages that she would use as a secretary.[7] This showed only that Plant could possibly perform the job of a secretary, but failed to show that Vought's asserted reasons for terminating Plant were a pretext for discrimination. Solely because Plant was arguably capable of performing the tasks of a secretary, does not lead to the conclusion that unless Vought transferred Plant to this pool, it was discriminating against her on the basis of sex or age.

Additionally, Plant contended that Vought's use of Employee Ranking Charts, which contained categories for age, gender, and race, was direct evidence of discrimination. We disagree. Inclusion of these categories together with the other essential criteria listed in the company policies, does not alone raise a

[7]Vought, however, summarized Plant's former effort in the secretarial pool by stating, "Plant did not have the computer skills necessary to work as a secretary, she did not learn those skills, nor did she have the attitude necessary to learn the job."

genuine issue of material fact with regard to pretext. In fact, however, McCauley, who was older than Plant, was included on the ranking charts, but nevertheless was retained with the company. Finally, Plant argued that since she made statements two years ago to the effect that she would be one to file a complaint with the EEOC, her yearly evaluations changed. Plant has supported this allegation with no evidence and has shown no connection between this event, which occurred two years ago, and her layoff. This allegation alone does not prove pretext.

In short, Plant has made only unsupported allegations. She contended basically that because she was qualified for some position with Vought, then her termination must necessarily be discriminatory, and any reason to the contrary asserted by Vought must be a pretext for this discrimination. Vought is free, however, to replace Plant with anyone it feels would better perform the job, even though Plant's performance may be adequate. Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983). In sum, Plant has failed to produce sufficient evidence to raise a genuine issue of material fact as to whether Vought's reasons are pretexts for sex and age discrimination.

B

Plant next contends that she was terminated with the specific intent to deprive her of early retirement benefits in violation of section 510 of ERISA. This provision makes it unlawful

> for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan,..., or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Employee Retirement Income Security Act, § 501, 29 U.S.C. § 1140 (1985). To recover under section 510 of ERISA, the plaintiff need not show that "the sole reason for his termination was to interfere with pension rights," but must show that the employer had a "specific intent to violate ERISA." Clark v. Resistoflex Co., 854 F.2d 762, 770 (5th Cir. 1988); see Unida v. Levi Strauss & Co., 986 F.2d 970, 979-80 (5th Cir. 1993) (finding well-settled within this circuit that plaintiff must show employer's specific intent to interfere with pension benefits). Without this required showing of intent, summary judgment is appropriate in favor of the employer. Simmons v. Willcox, 911 F.2d 1077, 1082 (5th Cir. 1990).

Vought offered its employees an early retirement program entitled the "magic 85" program.[8] It is undisputed that Plant would have become eligible under this early retirement program if she remained employed until January 1, 2001 or approximately seven additional years from the time of her termination with Vought. Under the general retirement plan, Plant will become eligible for benefits at age sixty-five. Plant deduces, therefore, that

[8]Under the "magic 85" program, an employee may begin receiving early retirement benefits when he reaches age fifty-five and the total of his age plus his years of seniority is at least eighty-five.

Vought's actions were motivated by a specific desire to prevent her from becoming eligible for early retirement.

To support its motion for summary judgment, Vought asserted that the reason it terminated Plant was the business downturn due to the unexpected decrease in aircraft orders and Plant's low rank among the other employees. As the non-moving party, Plant was entitled to have all reasonable inferences drawn in her favor. Richoux v. Armstrong Cork Corp., 777 F.2d 296, 297 (5th Cir. 1985). These inferences "must be rational and reasonable, not idle, speculative, or conjectural." Unida, 986 F.2d at 980 (quoting Richoux, 777 F.2d at 297). To refute Vought's motion for summary judgment, Plant asserted before the district court essentially the same arguments made to prove Vought's reasons for terminating her were pretexts for discrimination in violation of Title VII and the ADEA.[9] She additionally presented evidence that the employee ranking charts contained each employee's age and seniority, allowing Vought to easily determine an employee's time remaining with the company to qualify for the "magic 85" program. Thus, Plant argued that the sole existence of this information on the charts created a genuine issue of material fact regarding Vought's motivation.

[9]We find these arguments unconvincing to prove Vought's intent here under her ERISA claim for the same reasons we gave above when argued to prove pretext.

We find unpersuasive Plant's attempts to create a genuine issue of material fact through either the same arguments used to prove Vought's pretextual reasons or the inclusion of age and seniority on the ranking charts. Plant has failed to point to specific facts supporting the inference that Vought specifically intended to interfere with her rights to qualify for early retirement. See Perdue v. Burger King Corp., 7 F.3d 1251, 1255 (5th Cir. 1993) (finding that claim under section 510 failed without specific facts indicating intent to interfere). All the evidence presented by Plant draws, only speculatively, the conclusion that Vought's motion in terminating Plant was to interfere with her pension rights. This is not sufficient to defeat Vought's motion for summary judgment. We AFFIRM the decision of the district court dismissing Plant's claim of violation of ERISA.

III

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.